

Challenges in Harmonization of Shariah and Civil Law: A Case Study of the United Arab Emirates

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Abstract

Law in the UAE is enacted on a tripod of three distinct legal promulgations namely Islamic law, Civil law, and international law. The convulse of these Statutory laws often differ irreconcilably in enactment, procedures, construe essence, application, and critique. The UAE like many other developed countries of the world is trying its best to harmonize different jurisdictions of laws in a single framework Unfortunately, some sectors of the society have taken this situation to work in their vital interest to fulfil ulterior motives, while some others, due to the oblivion of the UAE law get jeopardized by the same token. This negligence on the part of several people may turn costly. Hence, I as a lead author on UAE laws decided to research the entire scenario and ide certain plausible legal solutions to our valuable audience. The regulations of the UAE have drastically been amended during the current pandemic of COVID-19, enabling loads of revision to existing laws. In the methodology, three elements of the UAE Legal system were examined: the development; delivery; and evaluation and feedback. Research objectives include wider scope of engagement in different walks of life, including but not limited to the financial, commercial, banking, healthcare, and legal sectors respectively significant discussion on the impact of harmonization on all walks of life including but not limited to education, health care, employment, trading, court procedures and many more.

Keywords: Harmonization, Shariah Law, Civil Law, UAE Laws, International Law

Introduction

Challenges in harmonization of laws has taken the entire globe with a blast. The UAE like many other developed countries of the world is trying its best to curb any further spread of the novel virus. Unfortunately, some sectors of the society have taken this situation to work in their vital interest to fulfill ulterior motives, while some others, due to the oblivion of the UAE law get jeopardized by the same token. This negligence on part of several people may turn costly. Hence, I as a practicing judge on UAE laws decided to research the entire scenario and provide certain plausible legal solutions to our valuable audience. Let us examine them chronologically.

The Definition of a Force Majeure

Force Majeure is a legal terminology, defined as the “*unforeseeable circumstances that prevent someone from fulfilling a contract*”. Although a direct mention of this term does occur in the UAE Civil Code, its implementation is regulated through clauses of several articles which allude towards the functioning of Force Majeure in contractual obligations. Since the UAE Civil Law Code is based on the Civil Law, therefore the contractual obligations are defined under the French pretext of the concept of *rebus sic stantibus*, as explained in Article 1218 of the French Civil Code (amended in 2016), which further correlates with the doctrine of *Stare decisis* in the English Common Law. The Law of Frustration explained in English Common Law and Scott's law and is in implementation certainly gives credence to the application of the principle, but in practicality the legal doctrine often drags simple matters to the jurisdiction of the courts. As the UAE has been adaptive to the co-existence of mixed jurisdictions, the concept is equally derived from both roots, including the English Common Law and the French Civil Law. The roots of this regulation lay in the UAE Civil Code (Federal Law Number 5 of 1985, which) sets the principal framework of a Force Majeure event, the legal repercussions to be deduced from it. By virtue of the Rudimentary structure of the UAE Civil code, Article 273 stipulates that for an event to be qualified as a Force Majeure it should be: (a) affirmed in a bilateral agreement; and (b) makes the performance of the obligation impossible. Articles 249, 273, 287 and article 893 of the UAE Civil Code explain the enactments which may apply a Force Majeure to a contract, based upon circumstantial.ⁱ

The Implementation of a Force Majeure

Force Majeure is a legal term which is defined as “*unforeseeable circumstances that prevent someone from fulfilling a contract*”. Although a direct mention of this term does occur in the UAE Civil Code, its implementation is regulated through clauses of several articles which allude towards the functioning of Force Majeure in contractual obligations. Since the UAE Civil Law Code is based on the Civil Lawⁱⁱ, therefore the contractual obligations are defined under the French pretext of the concept of *rebus sic stantibus*, as explained in Article 1218 of the French Civil Code (amended in 2016), which further correlates with the doctrine of *Stare decisis* in the English Common Law. The Law of Frustration explained in English Common Law and Scott's law and is in implementation certainly gives credence to the application of the principle, but in practicality the legal doctrine often drags simple matters to the jurisdiction of the courts. The UAE has been adaptive to the co-existence of mixed jurisdictions, the concept is equally derived from the Shariah and the French Civil Law.ⁱⁱⁱ Articles 249, 273, 287 and article 893 of the UAE Civil Code explain the implementation of such situations which may apply a Force Majeure to the contract, when comes to implementation. These Articles give the right clue to practical situations such as construction projects, employment regulations and medical contracts. The Jurisdiction of the UAE law establishes a contractual or wrongful infringement of a legal right, as a liability on a 3D scale. The act itself, the destruction and the causal effect are the three fundamental dimensions of this nucleus, which forms the rationale of liable obligations. Albeit an intervened act is affirmed to the service provider is proven to have caused the damage rampaged through the existence of a third party, the service provider is absolved of any liability whatsoever in this regard. Article 273(2) stipulates that in cases where the force majeure event furnishes a part of the obligation, which is impossible to perform, only that part of the contract will be terminated while the other part will be effective as per the agreement. Furthermore, Article 273(2) permits the Service Provider, in respect of the change in scenario to perform his complete obligation, to terminate the entire contract by providing notice to the recipient. If a contract is terminated or suspended under the jurisdiction of either clauses of Article 273, the subscribers of the contract will revert to square one position; if through arbitration or circumstantial developments, this becomes difficult or in some cases impossible, the courts will apply compensation to the party which suffered the loss. In a typical scenario, demurrage payment by shipment in charges in trade or maritime businesses, damages

awarded to an investor by a Developer in Real Estate or in Medical liability cases, a hospital is asked to compensate a patient through the implementation of these clauses.

Although, we will be polite to a fault to evade the legal problems enfaced during such a situation, as Article 249 stipulates:

“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.”^{iv}

Indeed, Article 249 brings hope in the sense that the law does acknowledge the concept of an exceptional circumstance, but this may not allude to an epidemic or pandemic. As in the case of Insurance Laws, no insurance covers war and an insurance company will never be held accountable to claims generated through the destruction caused by a war. Yet, the UAE Legal contracts, often refer to a term known to legal lexicology as “*an act of GOD*”, as in the case of many developers, who adopt a safe policy, relinquishing any further liability beyond their scope of work. In the case of employment, unfortunately, such clauses are oblivious to any employment or labour contracts, as such situations have never affected the UAE, since 1971.^v

Our Legal aid can be useful to our audience through the exponent of another legal term known as an “*extraneous cause*”, which is stipulated in Article 287, which does recognize the calamity of a natural disaster or a force majeure to enact in the absence of a formal contract. Article 287 states:

“If a person proves that the loss arose out of an extraneous cause in which he played no part such as a natural disaster, unavoidable accident, force majeure, act of a third party, or act of the person suffering loss, he shall not be bound to make it good in the absence of a legal provision or agreement to the contrary.”^{vi}

Hence the obligor or the oblige are absolved from any further responsibility as in the case of damages, as the case scenario changes due to the circumstance evolved. Article 287 was a potential legal aid to all those investors, who suffered the turmoil of the 2008 crisis. As the situation had completely changed, many Developers and their respective investors got a bail out, but not necessarily a complete absolving from their contractual responsibilities. In Real Estate, an Amiri decree, law no. 21 of 2013 enabled both parties a finer judgement, when the projects were cancelled or they were put on hold for further investigations, and /or the investors were absolved not to pay any further for such a project.^{vii} However, an explicit example of a ratio decidendi related to Article 287 came to prominence in a 2011 case decision by the Dubai Court of Cassation. The Court invincibly promulgated unanimously, that the determination of the “extraneous cause” was at the sole prerogative of the court discretion, including but not limited to an arbitrary tribunal. The nature of the extraneous cause was determined by application of the cause-and-effect scenario by the court. Although, an Employment contract will not fall under the category of a civil contract, as the jurisdiction binding it is the UAE Labour Law 1980 and her respective amendments and modifications.^{viii}

The Real Estate Sector

The case of Real Estate is far more significantly different than any other walk of life in the UAE. Hitherto, due to the overwhelming challenges this sector has already gone through for the past decade and above, significantly qualifies real estate to be unique. Another legal clause helps motivate litigators on Real Estate Issues, unanimously known as the “*Act of God*” clause, remain as a precedent due to the continued spread of COVID-19 (Coronavirus) on all Real Estate Matters, as all realty contracts possess this clause in them.^{ix} Article 249 of the Civil Code stipulates that if exceptional circumstances of a public nature were unprecedented or unforeseen occur i.e. a force majeure, as a result of which the application of a contract becomes no-conducive for compliance, but not necessarily impossible; the Judge as per the Obiter Dictum doctrine, uses his prerogative, who authorize to lessen the obligation to a considerable degree.

The relationship regulating the contractual obligations of tenants and landlords is enacted through **Dubai by Law No. 33 of 2008** in the Emirate of Dubai. The arising rental disputes

referred to Rental Disputes Settlement Centre (“RDSC”) came into inception through the promulgation of the historic Decree No. 26 of 2013 enabling reconciliation between the tenant and the landlord through an amicable settlement further seeking an equivocal judgment issued followed by promulgation by the RDSC. According to expert analysis, Article 249 is the basis of complaints lodged at the RDSC under the purview of RERA. Hence, if due to the implementation of Ministerial Resolution 279 of 2020, a person’s income has been reduced due to the pandemic crisis of COVID-19 and the landlord does is impertinent to the cause, it is imperative for the tenant to approach the court to reach fair level arbitration on this issue and resolve the matter in favor of the plaintiff. Article 273 also helps in this regard, because it stipulates the conditions alluding to a force majeure. 273(1) stipulates that a force majeure event makes a contract impossible, all contractual obligations will stop, and the contract will be automatically terminated. Furthermore, Article 273 (2) corresponds regarding cases where the force majeure event makes only a segment of the obligations impossible to perform, and then only that section of the contract will be cancelled. The subsequent remainder holds effect. If a contract is terminated under Article 273 (1) or 273 (2), the landlord and the tenant are to revert to square one, which is considered the date of the signing of the tenancy agreement, commonly referred to as Ejari in Dubai.^x If that is impossible, damages may be awarded by way of compensation to a party that has suffered a loss because of the inability to terminate the contract amicably. The tenant secures more weightage in this regard and should be desired for clemency. RDSC will evaluate the circumstances and award the case accordingly. Generally, the arbitration takes place through a reconciliation agreement, which shall be practiced by the claimant and respondent, when an amicable settlement is achieved. The application can only be filed if the rent claim is above AED 100,000.^{xi}

The Education Sector

The lockdown has affected the academic sector a great deal, in which primary, secondary Schools, colleges and Universities alike. It is imperative to know that institutions of higher learning are already exposed to technological means to overcome this situation, but many schools do lack online services facilities to deliver lectures. Nonetheless, the Schools across the UAE, are trying their level best to accommodate the pupil’s academic needs through conducting webinars, engaging teachers through social media platforms and dedicating a

perfect schedule of activities for enhancing the students' abilities to perform well at the academic level. Nonetheless, many people thought that the lockdown would legally enable them to claim refund on school fees, this myth is not true at all. On the contrary, some schools of certain Asian curriculums thought they are no longer liable to serve the students, are also equally deplorable. The legal framework obtained through the deployment of the "Education 2020 strategy" by the Ministry of Education, clearly indicated the development of Smart learning program, new teachers' codes, licensing, and evaluations systems, as well as curriculum revision, including teaching math and science in English, are all part of the strategy. Hence, neither the Schools, and nor the Students can shy away from their obligations. It is just the mode of conduct, which albeit varied, will dictate the course of events during the current outbreak of the pandemic.

Significantly, even students with special needs and/or disabilities, will be provided fair means of gaining education as stipulated by Federal Law No. 29 of 2006. This law stands out to be the primary law in the UAE to protect the rights of people of determination. Article 12 of the law provides: the country guarantees people with special needs equal opportunities in education within all educational, vocational training, adult education and continuing education institutions in regular classes or special classes with the availability of curriculum in sign language or Braille and or any other methods as appropriate. Hence, even children, who do not meet a fitness criterion due to some reasons, are legally bound to receive education of an equal stature as any other student in the country. Hence all these arrangements should have been made, but if at all certain loopholes remain, they could be filled up with the due course of time.^{xii}

The Construction Arena

Undoubtedly, the UAE hits center stage whenever the term construction comes to discussion in global forums. At this moment in time, Dubai itself possesses 15% of the Worlds' construction equipment installed in the city. Nonetheless, since Construction always remained under the purview of International law, hence we are blessed to possess the clause 'an act of GOD' in the UAE Legal contractual agreements of the field of construction. The UAE has

witnessed phenomenal economic growth through the establishment of Freehold Realty right through an Amiri decree in 2002. By the fourth quarter of the fiscal year 2007, prices had risen to a world record 79% from the actual base price. Such profits were, indeed, a dream come true for the investors and a source of encouragement for the rest, as no other economy could bring such a fruitful result of a base investment anywhere else in the world. Hitherto, as every matter of life, has a node and an antinode to its climax, every investment is subject to a circuit-breaker, often caused due to a foreign influence in our globalized world.^{xiii}

The UAE Real Estate also became a victim of the 2008 global financial crisis, and the Markets indefinitely met a down surged bearish trend, as the collapse of Lehman Brothers in New York, caused a ripple effect around the world^{xiv}, affecting many economies in the due course of time. But unlike many other countries, the United Arab Emirates had a wonderful course of interaction with its investors. First and foremost, the UAE, did not let their investors shy away from any of these repercussions and consequently developed a developer-investor caucus, the UAE considerably putting certain measures which enabled the investor confidence glow even after a fallout on reality prices. Hence, post securing the investors through the establishment of escrow account, the Real Estate Regulatory Authority (RERA) in conjunction with the Dubai Land Department (DLD) focused on securing this caucus as an exemplary form of a public-private partnership.

Nonetheless, the legal standings on the concept of a force majeure are actually well defined in all contracts of the developers. Be it Emaar, Nakheel, Damac, HYDRA or Dubai Properties, all developers define this clause amicably in their contracts. Article 273 provide the legal framework for Force Majeure, but fortunate enough for all the investors, that the “*Act of God*” clause is explained thoroughly through the French Civil law doctrine, repeatedly applicable to disasters, accidents, earthquakes, climatic changes, volcanic eruptions, and unprecedented events which may take over the situation without consent. A pandemic is not necessarily explained in this scenario, but for this matter to commence, the doctrine of precedence will apply. A good example can be of the English Common Law jurisdictions of Asia, like the laws of Far Eastern Countries for example, the existence of a law on the handling of epidemic situations, such as the infectious diseases act of 1977 in Singapore, Malaysia's infectious disease Prevention Act 1988 and the pro infectious diseases act 2003 is proof of the legal

readiness of people to deal with emergency. In all these laws, they are comprehensive details about realty issues, like construction itself and thus these countries deal with the conditions created by the epidemic, at the level of dealing with affected areas, affected people, emergency situations etc.^{xv}

Although, Article 273 (2) alludes to arbitration and hence, if there is any facet for a renegotiation of the contract, the parties are recommended to subscribe to it immediately. But we do advise our audience, that even though a termination of the contract might be reached, the absolute liability will still cling on to the service provider, obligor, and the obligee. Hence developers might be asked to stall projects for a while, but this will be a circumstantial development. They will be obliged to develop the project once the situation goes back to normal. The investors may be issued Non-Payment orders by the court, but a force majeure in this case will be temporary. Once circumstances normalize, the legal bindings will compel all partners to a contractual agreement to complete their legal bindings.

Aviation

Another major bone of contention is the issue of airline operations. The jurisdictional body responsible for maintaining aviation rules and regulations is known as the International Air Transport Association (IATA) and International Civil Aviation Organization (ICAO). All members have affirmed a set of core principles on consumer protection that aim to strike a balance between protecting passengers while maintaining industry competitiveness and recognizing the power of the marketplace. Annexure A explains the core principles, which were developed in conjunction with the Montreal Convention 1999, and its further ratification on 31st January 2000. Nonetheless, the UAE is also amongst the 113 members who signed the MC99, as the treaty is officially referred to on official aviation forums. The UAE aviation laws are directed through the issuance of Federal Decree No. 13 of 2000, which was published in the Official Gazette on 31st January 2000. According to the Montreal convention, damages up to a maximum claim of USD \$ 6, 600/- In the event of delayed baggage airlines are liable to pay for damages of a value approximately USD \$ 1,600. However, an airline cannot be held liable for damages/delays where it took all reasonable measures to avoid such a delay or damage, or if it was impossible for the airline to take such measures.

However, the MC 99 does not recognize any force majeure instantly for pandemics. Although latest developments may apply this case scenario but, in this case, the recent paradigm shift of ICAO is a remarkable event for legal claims. Additionally, ICAO confirmed that a vast majority of the 113 members didn't notify their disapproval of its claim plan by the 30th of September 2019, hence the revised limits that were implemented from the 28th of December 2019.

Realistically speaking, the increase the claimed amounts additional compensation is available of:

1. Limiting to US\$21,642 for death/bodily injury;
2. Limiting to US\$898 for delay claims;
3. Limiting to US\$216 for baggage claims; and
4. Limiting to US\$4/kg for cargo claims, compared to the compensation primarily recoverable under MC99.

The four categories may give some credence for an international claim, but the UAE has already been softened on the plight of stranded passengers, and as of 17th of April 2020, several flights have been flying out with outbound passengers, who were stuck in the UAE. This is certainly an unprecedented situation.

Court Procedures

Members of the public can access hearings from 8.30am each day on the Dubai Courts website, under electronic services. A pass will be granted by the hearing's clerk. However, cases of sensitive nature such as family disputes are not open to the public. Earlier this month, Abu Dhabi court officials announced they would be conducting a trial by video to ensure the wheels of justice were not halted by Covid-19. Virtual courts are deployed to allow defendants to take part in proceedings while in custody. The remote litigation scheme allows hearings to take place online, with judges able to hear cases live before delivering verdicts. The hi-tech initiative is in line with the UAE government's stay-home strategy, aimed at limiting social interaction

and helping to limit infections. All parties involved in hearings – defendants, complainants, and legal counsel – can access a live video link.^{xvi}

Issuance of POA

The latest circular issued by the Notary Public in Dubai confirmed that due to COVID-19 all legalization/notarization services would cease up until late April 2020, across all branches in the UAE. Hitherto, it has been confirmed that certain Notary Public services may be conducted remotely.^{xvii}

The following Notary Services can be conducted remotely:

- i) Power of Attorney notarization.
- ii) Notarization of legal notices.
- iii) Acknowledgments.
- iv) Notarization of Local Service Agent Agreements.
- v) Notarization of Memorandums of Association and addendums thereto for civil companies.

Other services related to commercial companies' memoranda and addenda have been transferred to Dubai Economy and are no longer notarized by the Dubai Notary Public. The remote working time for the Dubai Notary Public range from 8am till 4pm Sundays to Thursday's. To enable this service requires a subscription to the UAE based communication App, BOTIM and the Notary office will contact the principal to the document through a video connection to establish identity and knowledge of the document which must be sent to the Dubai Notary Public's official email address in a pdf format with an approved reference to the remote signing on the bottom of each page. Hence, the implication of the Smart Dubai Department helped many stranded transactions in the UAE.

Virtual Labour Market

The UAE was quick to determine a remedy for remotely working employees of the labour market by issuance of the latest Ministerial Resolution No. (279) of 2020.

This Ministerial resolution ratifies Federal Law No. (1) of 1972 and the Federal Law No. (8) of 1980. The five distinct points evolving through the clauses of this resolution are as follows:

- i. Implementing the telecommuting system.
- ii. Granting the employee, a paid leave.
- iii. Granting the employee leave without pay.
- iv. Reducing the employee's wages temporarily during the period referred to.
- v. Reducing the employee's wages permanently^{xviii}

Hence, this remote transformation gave birth to another idea of the Ministerial Resolution No. (281) of 2020, which covered rules pertaining to the industrial infrastructure and labour rules for essential services. Both regulations are promulgated for the expat population of the UAE making 'work at home' regulated

How can residents comply with the various rules & regulations?

Hitherto, vast majority of the UAE residents are served a 'Stay home notice (SHN)' for efforts to curb the ongoing spread of the pandemic. These rules and regulations helped a great deal in residents been facilitated to arrange their efforts while functioning remotely. Nonetheless, the compliance of these rules and regulations should be adopted to avoid any sort of fines by the Authorities. Hence all residents have been facilitated by Government. Hence, the new version of the virtual labour market is an innovative platform for providing employment services to job seekers and companies in accordance with the artificial intelligence (AI) system, according to MOHRE. The use of AI will ease the process of matching the requirements of the jobs announced by UAE companies with the job seekers' profiles, created and uploaded on the website in an interactive manner. The virtual labour market is easy to use as it was designed in such a manner that simplifies the job seeker's journey to search for a job that suits his capabilities and skills. Similarly, if you plan to seek legal advice, your attorneys can be available via social media platforms. If you want to witness a court proceeding, then an audio-visual option is available for you via Dubai Courts Website. Furthermore, if during these times, you want to purchase or sell a commercial entity, the Dubai Department of Economic

Development will avail you of all the services and an entire transaction can be conducted online without hassle.^{xix}

What are the key considerations for application of these services?

The foremost consideration is the ongoing pandemic, and all measures are undertaken to curb the outbreak to its fullest. Nonetheless, the key considerations apart from accommodating the regular employees is also to impart it for the weak, disabled, elderly, ladies who are pregnant, school going, children and even the patients of COVID-19, who are admitted to the local facilities and been physically quarantined. Hence, it is an irony that many people did not take these measures seriously. Hence it created a chaos in the beginning, but as we have progressed through this lockdown, the audiences are more alerted to these new regulations.

Conclusion

In hindsight, Legal systems represent a complex interdependence of legal rules, institutions and concepts which generally can only be understood in relation to other rules, institutions or concepts. Law is a cognitive institution. The effectiveness of its rules is predicated on social actors' knowledge and understanding of the key elements and underlying values of the legal order. It is imperative to note that the In light of UAE courts' reticence to apply governing law clauses in which a foreign law governs the contract to a matter in which UAE courts would otherwise have jurisdiction, the parties' choice of multiple jurisdictions as both a governing law and non-exclusive jurisdiction made the outcome of the dispute more uncertain. More country-specific empirical research is necessary to determine the specific nature of legal and regulatory reforms in the legal systems where harmonization is facilitated. In the UAE, an important aspect of such research should examine the ways in which UAE courts henceforth adjudicate Islamic commercial disputes which involve international standards. We hope for a better sustainable future for all our audiences and the UAE at large.

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