

Dialectical Implementation of Contractual Obligation in Light of the Spread of the coronavirus COVID19 Pandemic between Force Majeure and Unforeseen: A Comparative Study

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ABSTRACT

The paper seeks to examine the situations that have arisen with the global spread of Coronavirus COVID-19 pandemic and their impact on the implementation of contractual obligations. This is in light of the fact that governments have been taking multiple measures, for instance issuing orders regarding the closure of unnecessary activities in order to mitigate the spread of coronavirus COVID-19. The fast progression of this pandemic meant that contractual parties have not been capable of being in line with the terms stipulated in the contract because of multiple factors, such as government actions, the implementation of social distancing, the lack of infrastructure in areas such as ports and terminals, or supply chain implications. Thus, legal questions emerged which will be addressed with reference to Bahraini legislation, along with the presenting of suggestions to overcome such issues using analytical method and comparative approach.

1. Introduction

The global spread of the Coronavirus COVID-19 pandemic has concerned people and merchants across the globe. In light of this critical situation, many commercial companies, whether industrial or service, as well as merchants, are faced with severe challenges in terms of continuing to work and provide services or when implementing their contractual obligations and the performance of their duties.

Consequently, the markets of the world saw the curtailing of their activities and businesses and a decrease in the size and level of services, as well as an increase in cases of stopping work altogether. This will have a negative impact on the implementation of obligations and on levels of financial liquidity, and lead to the emergence of some disputes arising from this delay or the inability to complete work by the required date. This calls for research of the legal status of companies and individuals, as well as of the employer towards its employees, the creditor towards the debtor, and the supplier towards its client when work is stopped, payments are withheld or contracts cancelled.

Freedom of contract is one of the most important principles of civil law. This principle grants individuals the right to conclude contracts freely without any fear of duress; in addition, the parties have full autonomy to incorporate any clause in the contract provided that it is legal. For this to occur, equal bargaining power and just and fair contract terms should be present.

We should note that during the latter stages of concluding a contract that the two contractors would have been in complete ignorance of what the circumstances would lead to after the outbreak of the Corona epidemic. Therefore, we have found commercial contracts that would have become difficult, costly, or even impossible to implement, other than at the time when the contract had been signed.

At the present time, the debate in the states which follow civil law was focused on classifying the Corona COVID-19 pandemic as either an unforeseen condition or force majeure; in the event of unforeseen circumstances, the pandemic would cause the parties to modify contract obligations in order to alleviate them in light of the new circumstances, but in the case of force majeure, the commercial contract would end completely due to the impossibility of implementation.

The difference between these two instances is that the unforeseen circumstances theory is used in cases that make implementing the obligation difficult or costly due to the general conditions that happened after concluding the contract without negligence from the contractor, whereas the force majeure theory means an impossible situation occurred during the implementation of the contract.

Given the difference in the effect of the Corona COVID-19 pandemic on commercial contracts according to their nature, we found labor contracts - which are considered commercial within a company, for example - and found them costly to implement due to the partial cessation of the work, but not impossible. We also found contracts for the supply of goods from affected exporting countries, and they became impossible to implement after those countries closed their borders and prevented the movement of transportation to and from them.

Classifying whether the commercial contract was affected or not by the Corona COVID-19 pandemic became the most important thing in determining the fate of the obligations of the parties, and thus each party would adhere to the theory that served its interest if the dispute was not resolved amicably or in an explicit and decisive manner.

2. Research Approach and methodology

The study aims to contribute to the literature regarding dialectical implementation of contractual obligations in light of the spread of the Coronavirus COVID-19 pandemic between force majeure and unforeseen circumstances, with specific reference to the role of lawyers and legislators in dealing with the rapidly expanding phenomenon of non-performing contracts or late performance, particularly in regard to civil contracts and commerce, with reference to the Bahrain legal system.

This research will first of all address the legal theoretical framework related to a contractual obligation, providing a doctrinal reflection secondary source. It will then compare the global legal framework with relevant national laws in Bahrain using a comparative method. In order to reach this goal, I will analyze the relevant legal texts and court decisions. The research methodology involves a thorough analysis of legislative texts, their application by courts, and a critical reflection of the positive effects of the laws in different countries in providing better protection for the contracting parties.

3. Legal qualification of the Corona COVID-19 pandemic

Since the appearance in December 2019 of a new form of coronavirus in Wuhan in China, the epidemic has spread around the world, leading the World Health Organisation to classify it as a pandemic. (WHO. 2020)

First of all, the prevailing principle in terms of responsibility is not only its emergence in terms of the violation of legal and customary principles but also the severity of its emergence and how it contrasted with the developments of concepts due to the change of time and the emergence of new behaviors. This resulted in legislators resorting to new principles or adopting exceptions to the origin of binding principles so that, appropriate to economic, social, and political transformations, this is due to considerations of justice and humanity in order to facilitate ongoing transactions and resolve disputes that may arise due to these changes. It may be the case that the law does not allow provision for some of these cases, which leaves a legislative vacuum either because it did not occur or it was postponed. From a legislative perspective, this may pose a threat to contractual security in particular, which is what happened during the corona pandemic, where states were unable to deal with the matter effectively and whose impact extended to many areas and sectors.

It is important that we understand what the corona pandemic is, so that the measurement is done on certain foundations to arrive at the proper legal adjustment, and we can solve the problems raised, especially those related to the performance of contractual obligations.

Coronaviruses are considered to be part of a large family of viruses that cause illness in living organisms. In humans, various coronaviruses are common which give rise to respiratory infections varying from the common cold to more serious diseases such as the Middle East Respiratory Syndrome (MERS) and Severe Acute Respiratory Syndrome (SARS). The most recently discovered coronavirus as the reason for causing COVID-19 has not been formally identified in humans. (WHO.2020).

Nonetheless, we know that COVID-19 is a contagious disease caused by the most recently discovered coronavirus. This new virus and disease were not common prior to its beginnings in the city of Wuhan, China, in December 2019. COVID-19 is now a pandemic impacting multiple countries worldwide. COVID-19 has more severe symptoms for elderly individuals rather than younger individuals due to their weaker immunity. Mild symptoms include aches and pains, nasal congestion, a runny nose, a sore throat and diarrhoea. Some individuals became aware of their infection with COVID-19 after being tested. However, they

did not experience any symptoms that gave an indication that they were sick and most individuals recover from this virus without needing treatment. Approximately one out of every six individuals who get infected developed serious symptoms. (WHO.2020).

On the question of whether COVID-19 has been classified as a pandemic or epidemic, we note that an epidemic is constantly spreading. New cases of the disease must significantly surpass the expected number. More widely, the term "epidemic" is utilized to describe any disease that is considered to be out of control - for instance "the opioid epidemic." An epidemic is frequently localized to a region but the amount of individuals that have been infected in that region is higher than normal. For instance, when COVID-19 was restricted to Wuhan, China, it was classed as an epidemic. The widespread prevalence of COVID19 across the globe was why it was classified as a pandemic. (Intermountainhealthcare.2020).

Covid19 has been classified as a pandemic because of its rapid spatial and temporal prevalence in the face of a lack of medical knowledge in how to deal with it. As a result, countries have taken the necessary measures to restrict its spread including precautionary measures from announcing states of national emergency and taking health measures to isolate the injured in quarantine, conducting health checks on the population, suspending international air travel to limit the spread of the virus and closing shops and restaurants.

Thanks to these measures, different sectors of the economy at the international level have been affected. The consequences of this pandemic were also reflected in the field of contract law - having a negative impact on various sectors despite the difference in levels of severity. We saw this in tourism with its multiple branches, and the repercussions of that on areas such as hotel leases, supply contracts and commercial exchanges, along with loan contracts for institutions, enterprises or Individuals. Throughout this time, opinions emerged on the legal classification of the virus between force majeure and unforeseen circumstances. Accordingly, we will address each of these theories to examine whether the Corona pandemic comes under the umbrella of force majeure or unforeseen circumstance based on the facts of each case.

3.1 Force majeure

Civil law countries treat force majeure as an excuse for nonperformance, in the absence of an express contractual clause. In other words, it is a legitimate justification for the non-performance of a contractual obligation that would have otherwise been enforceable. This is because domestic laws specify that force majeure clears the debtor of all responsibility for failure to perform.

Under the theory of force majeure, it is an accident that cannot be anticipated, and it is defined as a foreign cause beyond the parties' control, which impedes or obstructs the performance of an obligation (Annerine, 2018).

Force majeure in contract law refers to extraordinary events which prevent or impede the fulfillment of an obligation. In general, these are incidents outside the control of the parties which could not have been foreseen by the affected party at the time the contract was entered into. Some examples include natural disasters, extreme weather, acts of government, war, terrorism, protests and strikes.

However, problems arising regarding this particular concept lie not with the recognition that force majeure should excuse performance of a contract but in determining what constitutes, according to the party's intent, a force majeure which will excuse performance of the party's contractual obligations. Consequently, the question arises as to whether or not the parties to a contract would be wise to include a provision therein that would specifically excuse the performance of the contract upon the occurrence of a circumstance beyond their control. (Nicolene, 1953).

Article 165 of the Bahrain Civil Code states that "where a person proves that damages have arisen from a foreign cause beyond his control, such as force majeure, unforeseen incident or the fault of the victim or a third party, he shall not be liable for such damages, unless there is a provision to the contrary." (Article 165 of Bahrain civil code).

The article is commonly misinterpreted as describing the term force majeure. It does not. Rather, it codifies and defines the exceptions to the general rule of contractual responsibility, which uses force majeure as one of those exceptions.

Article 145 states that "a- Where the performance of an obligation in a synallagmatic contract becomes impossible due to foreign cause beyond the control of the contracting party, such obligation is extinguished, and corresponding obligations of the other party are also extinguished, and the contract is terminated ipso facto. b- Where such impossibility is partial, the creditor, as the case may be, may either invoke enforcement of the contract to the extent of such part of the obligation that can be performed or seek termination of the contract".(Article 145 of Bahrain civil code).

3.2. Conditions of force majeure

It must have been reasonably unforeseeable

To constitute force majeure and excuse loss, or explain non-performance, the incident must have been unforeseen at the time the contract was concluded. The explanation for this is that the inability of a party to defend itself contractually from a foreseeable danger is basically an acknowledgement of that risk (William Cary Wright, 2006). One of the most important conditions for force majeure is lack of expectation. It means that the act comes as a sudden and surprising effect, so that it does not leave the parties with any opportunity to confront the matter. On the other hand, if there is the possibility of expecting it, it is not considered force majeure.

However, it is necessary to take into account the fact that this virus could not have been anticipated completely due to the speed with which it appeared and its rapid spread that various countries of the world were unable to address - in a recent ruling dated 12 March 2020, the Colmar Court of Appeal qualified the COVID-19 epidemic as a force majeure event (Court of Appeal, Colmar, 12 March 2020 - n° 20/01098. In that context, the Court of Appeal held that "these exceptional circumstances, which led to the absence of Mr. Victor G. from today's hearing, constitute a force majeure event, being external, unforeseeable and irresistible, given the time-limit imposed for the ruling and the fact that, within that time-limit, it will not be possible to ascertain that there is no risk of contagion and to have an escort authorized to take Mr. G. to the hearing". The Court, being to our knowledge the first to classify the Covid-19 epidemic as a force majeure event, also took the opportunity to recall the conditions of force majeure, even though in the present case it was not invoked in connection with the contract. They stated that "whether in respect of contractual liability or tortious liability, force majeure, according to the classical definition given, is an event which is characterized by three elements: its exteriority, its unpredictability and its irresistibility, subject in contractual matters to the specific provisions of a force majeure clause".

It must be irresistible

This irresistibility must make the performance of the contract impossible and not simply more expensive or complicated. However, if it is proven that undertaking a set of measures, whether prior or subsequent to the event, was enough to cover its effects, the debtor is not facing a situation of force majeure (Abu Saad, 1983).

In this instance, a distinction must be made between the impossibility of implementation and the difficulty of implementation. At the same time, it should be noted that the contracting debtor is not entitled to fulfill his obligation, merely because it has become difficult for him in contrast with the situation that he expected, and in particular, if it becomes more costly to him, but an absolute impossibility is required, as long as the debtor has the means to fulfill his obligation, and whatever sacrifices he will incur for that, he remains bound to the implementation, because the causal relationship does not cause an interruption between the failure to implement the obligation and the damage to the creditor. However, the damage remains from the debtor not being able to fulfil his obligations, and while the contractor could not ignore this pandemic, even governments were not able to find a drug for this virus, which means that the condition of the inability to resist is also available (Bani Ahmad, 2006).

As a result of this, there is no place for debtor's error when we talk about pandemics and natural disasters as they are beyond the imaginings of human beings. However, in specific circumstances, even events which are normally deemed internal to the debtor's sphere of activity or control have been classified by courts as force majeure (France: Larroumet, supra note 12, 830).

Furthermore, force majeure clauses also preclude incidents that are "reasonably under either party's control." The "control" concept subsumes the legal issues of contractual danger presumption, predictability, legal control, real physical control, fault and negligence, and avoidance and mitigation (Philip, 2002).

the harm causing event needs to be external

It is clear that the event has to be external to the debtor. At the very least, this means that the incident has not occurred due to the debtor's fault. In other words, it is outside the debtor's operating sphere, such as God's actions or because of political authority. In view of this, and contrary to force majeure clauses, an intrinsic defect of the goods under the debtor's control usually does not count as force majeure because it is not considered outside the debtor's sphere of operation or control. (Teree & Simler, 2003).

Needless to say, the ceasing of production in different countries, lockdowns in regions with a heavy presence of industrial manufacturing and the cancellation of international transportation directly and indirectly caused the delay or failure of contract performance.

While the legal consequences of force majeure is more or less clear, the definition has never really been clarified by the law. Neither the Bahrain civil law nor contracts provide further definitions of "unforeseeable", "irresistible" and "external", the

determination of force majeure in Bahraini legal practice is left to the judge's discretion on a case by case basis, although in general this term usually includes natural disasters (such as typhoons, earthquakes, floods, etc.), social incidents (such as war and social unrest) and government actions (such as confiscation)(- Al-Hakim ,1993).

If we follow this interpretation logically, all conditions of force majeure have been fulfilled in the corona COVID-19 pandemic and are considered among the issues that fall within the core of force majeure. That is underscored by the recognition of the United Nations and the World Health Organization. (WHO,2020)

3.3 Theory of the Unforeseen

In the provisions of Bahrain civil Law, article 130 stipulates that "Where, however, a change of circumstances that was unforeseeable at the time of the conclusion of the contract renders fulfilment of the contractual obligation, though not impossible, excessively onerous for the debtor in such a way as to threaten him with exorbitant loss, the judge may, after taking into consideration the interests of both parties, reduce the excessive obligation to a reasonable level or increasing the other party's obligations. Any agreement to the contrary is void". (Article 130 of Bahrain civil law) .

It is clear from the text of the article that the Bahraini draftsmen adopted the theory of the unforeseen; this theory assumes that there is a contract that is slated to be implemented for a specific period.

The unforeseen theory requires the conditions that were associated with the conclusion of the contract change with the exceptional event occurring during its implementation leading to a defect in the economic balance of the contract, so that the debtor's implementation of his obligations becomes excessive, threatening him with heavy losses. In this case the law permits the debtor to raise the matter with the court in order to restore the economic balance of the contract by restoring the obligation to a reasonable extent which departs from the principle of the binding force of a contract whereby according to this theory the judge intervenes and modifies the contract to return the weary obligation that threatens the debtor with a heavy loss(Abdul Rahman ,1986).

3.4 Conditions for Applying Theory of the Unforeseen

According to Article 130 of the text of civil law, the judge is permitted to intervene in the contract to amend the obligations of one or both parties in order to redress the imbalance that occurred from the unforeseen conditions, but certain conditions should be met :

The Unforeseen event occurs after the conclusion of the contract and prior to its implementation

For this theory to apply, it should be connected to an exceptional event - meaning that it is rare and unusual to happen, such as war, strong floods, sudden strikes or earthquakes.

This exceptional event must occur after the contract has been concluded and prior to its implementation, but if the event occurred before the conclusion of the contract, we are not faced with an exceptional event. This opens the way to the theory of unforeseen circumstances for its application and the removal of the onerous obligation of one of the parties to the contract. Nevertheless, if the contractors knew of the exceptional accident and expected certain results and their impact on the implementation of the obligations, contrary to what the two parties are ignorant of in the exceptional event_(Abd al-Rahman. 1999).

The unforeseen incident occurs should be unforeseeable and irresistible

This would be the case in an unforeseen situation where the circumstances of the parties changed after the contract had concluded. This may occur in the circumstances that arise after the contract and before its implementation to be considered exceptional circumstances i.e. circumstances that are uncommon or unusual, as well as it being necessary that the exceptional circumstance are general enough that it includes the debtor and other people who are in the same circumstances.(Al-Thanoon & Al-Rahho , 2002).

As we have established, the exceptional event must not have been expected by the debtor at the time the deal had concluded. If an exceptional circumstance occurs and the contractors can avoid it through making a reasonable effort, there is no way for this theory to be applied. The estimate is left to the judge, because the assessment of this matter is based on an objective criterion based on the reasonable person (Abu Sad. 2011).

The Unforeseen event should make the performance of obligation excessively onerous

The unforeseen event must make the implementation of the obligation excessively onerous, so that the debtor risks a heavy loss - even though performance is not rendered impossible, but rather it is excessively onerous to the debtor, because the

impossibility of implementing the obligation will lead to its expiry according to the force majeure theory. This obligation must be determined objectively regardless of the debtor's special circumstances or his wealth, for example, when the commodity supplied by the contractor increases, he does not look at what he earned or lost in return for this contract (Al-Sarhan & Nuri, 2009).

3.5. The effect of availability of the conditions of the Theory of the Unforeseen

If the conditions stipulated by the law as stated previously regard the event as unforeseen, the judge may, according to the circumstances, return the excessive obligation to a reasonable extent so as to achieve a balance in the obligations for the benefit of the contractors. This is what was mentioned in Article 129 of the previously mentioned Bahraini Civil Code, whereby it permitted the judge, according to unforeseen circumstances, to return the excessive obligation to a reasonable extent. (Al-Sanhouri, 2004). However, the mere fact that performance has become harder to deliver than expected does not exempt the impacted party from performance.

A balance is achieved by any means the judge deems appropriate, either by reducing the excessive obligation of the debtor, and the obligation of the other creditor may increase so as to reduce the debtor's loss, and he may see suspending the execution of the contract for a certain period determined by the disappearance of the exceptional circumstance provided that it does not harm the creditor. And taking into account that the provisions of the unforeseen circumstance are provisions related to public order that individuals may not exclude or agree to implement the law of the contract in light of the existence of this unforeseen (Hussein, 2000).

The accepted legal consequence of such an event is to adapt the contract to the altered circumstances. The aim is to renegotiate and to uphold the contract, rather than suspending or terminating the obligations. The principle of changed circumstances provides the framework within which obligations can be altered. The principle itself does not directly change contractual obligations or provide an exact solution - it provides a method whereby adaptation is feasible.

4. Corona pandemic's impact on national contracts

In order to arrive at the proper legal conditioning and determine the extent of the debtor's responsibility, each case must be dealt with separately. The reason for the difference in this conditioning focuses on the circumstances - and this is what the judiciary is heading to so that the judge's discretionary power is not based solely on legislative standards and provisions, which is entirely in his hands. The surrounding circumstances such as the nature of the contract and its content of obligations and the extent of the burden beared by the debtor also need to be looked as the type of contract affects access to legal conditioning and other factors and conditions that differ from one contract to another.

From this point of view, we find when dealing with some contracts that the impact of the Corona pandemic on them differs according to their nature and the content of the contractual obligations, and therefore we need to decide whether we are dealing with unforeseen circumstances or force majeure.

Among those contracts to which the impact of the pandemic has spread to are supply contracts whose content is the obligation to transfer goods from one state to another, and if the debtor encounters a problem with transporting goods from an affected country that makes his obligation onerous, we return to the discretionary power of the judge that enables him to reduce the obligation. He can do this by ruling that importing goods from less harmful countries, while reducing the obligation, whether the goods are from these countries at very expensive prices, leads us to the theory of unforeseen conditions (Al-Sanhouri, 2004).

If implementation is impossible, thanks to such government actions as closing air, land and sea transport lines until further notice, this impairing of the implementation process and causing the contract to become impossible to fulfil means that we are in the process of force majeure. It is impossible to implement the obligation, and here the judge may see with his discretion that the conditions that occurred in this case are measured by adapting the Corona pandemic.

The provisions of force majeure differ greatly according to how the contract has been drafted, but most often they will include provisions and events to determine what constitutes force majeure. It is unlikely that most rulings of force majeure will list diseases, epidemics, or quarantine in particular, as it is most likely that their provisions will involve natural disasters, government actions, or other circumstances beyond the control of the parties.

And when we talk about the coronavirus, it is something unfamiliar as it includes a natural component and a component of government action, including precautionary decisions and quarantine. Accordingly, the provisions of force majeure in contracts must be reviewed in the event that any party invokes it. For example, it is not enough to invoke the increase in costs if it is possible to continue the shipping process through a different manufacturing facility, particularly if that requires shifts to add or payment of additional wages for additional time or expedited shipping. Here, we find that it is not impossible to implement its obligations.

In addition, employment contracts are also one of the contracts which have been affected by the outbreak of the pandemic and have raised many questions about the fate of the obligations of both the employee and the employer. What if one of them fails as a result of the circumstances of this disaster to follow government decisions, including partial or total suspension of work? Among those decisions are areas that affect the conduct of work contracts activity. Therefore, adapting this case depends on the impact of the corona pandemic and its repercussions embodied in government decisions on the obligations of the employer and employee (Hussein ,2000).

For example, if there is a possibility that a company will go bankrupt if it continues to pay the salaries of employees, and this may lead to the collapse of the company and the loss of employees as a result of this, might the company be exempt from the responsibility of paying salaries? The judge may award compensation for this, according to the circumstances.

The problem arises in determining the legal adjustment of workers' wages as a result of stopping their work according to government decisions that required a period of furlough, and here the question arises about the impact of this on wages since the employment contract is a contract that is binding on both sides. What if the employee does not meet the conditions of the contract, just as the employer does not benefit from the employee's work in order to provide him with a salary in return. The just reason is that the employer is not compelled to pay the wage to the employee. On the other hand, the employee is willing to work but there are conditions beyond his control meaning he is not able perform his work and support his family. (Alnimer , 2019)

We answer these issues by touching on two assumptions: (1) what if the Contract of Employment explicitly stipulates the obligation of the employer to pay the full fee even if a foreign circumstance occurs that prevents the employee from starting his work even for a prolonged time, (2) what if the contract does not stipulate that, and the employee is ready to work unless circumstances exist that prevent him from doing his job such as when the government requires that the business be closed.

The Bahraini legislature addressed this problem with the text of paragraph (2) of Article (43) of the Labor Law for the private sector No. 36 of 2012 by stipulating that "However, if a worker reports for duty but has been unable to do his work due to reasons beyond the control of his employer, he shall be entitled to one half of his wage".(Article 43 Bahrain labour law).

Accordingly, this article is of the opinion that if there are reasons that fall beyond the intent of the employer and prevent the worker from performing his work, then the latter is entitled to half of his wage from the employer for the period in which the business remains closed until the reason for the closure is removed, and from this point of view we find government decisions today that have required the closure of shops, and thus we can discern from the text of this article that the worker is entitled to half of their wages during the suspension period.

We turn now to leases, which also raised many problems regarding the impact of the effects of the corona pandemic on the relationship between landlord and tenant. We respond to this point by referring to the Bahraini legislations in the text of Article 38 of the property lease law which stipulates that "if a Lessee refuses to pay the rent on the due date specified in the agreement or by a decision of the Committee for two consecutive months, but the Committee shall have the right not to order eviction if the Lessee was able to prove that the delay in payment was due to a strong reason acceptable to the Committee, and that he settled the full amount of the due rents together with all the litigation expenses incurred by the Lessor up to the end of the first hearing notified to him in a correct manner, but if the Lessor refuses to pay the rent or delays payment without a reason two times throughout the duration of the agreement, the Committee shall rule to evict him".(Article 38 Bahrain lease law).

However, article 552 of the Civil Code stipulates that: "When a lease is made for a fixed period, either of the contracting parties may, if serious and unforeseen circumstances arise of such nature as to render, from the commencement of or during the lease, the performance too burdensome, seek the termination of the lease before its expiry, provided he gives notice in accordance with the time limits provided for in Article 511 and pays equitable compensation to the other party. Where it is the landlord who seeks termination of the lease, the tenant shall not be bound to return the leased property before he has been compensated or obtained adequate guarantee". (Article 552 Bahrain civil law)

In this case, the lease contracts run for a specified duration and any party requesting the termination of the contract before the expiry of its term should be aware that a fair compensation to the other party may be required. The effect of the surrounding circumstances under coronavirus makes one of the parties to this contract by law have the right to request termination, but if the request for termination was by the lessor, then the tenant is not obliged to return the lease until he receives adequate compensation or guarantee.

5. The impact of the coronavirus pandemic on international contractual obligations

Covid19 is an infectious virus that has forced many countries to mitigate and control its spread; many countries have declared health emergencies, and the World Health Organization (WHO) confirmed that it is a global pandemic. This has resulted in us facing a state of health embargo which raises various legal and economic implications. The intervention of some states to enact a set of internal procedures is not sufficient with regards to international contractual obligations since on international levels not all countries have agreed the same classification of coronavirus, but the prevailing agreement considers this pandemic as "force majeure".

Many international companies specializing in various fields such as energy, transport, international shipping, shipbuilding, aircraft and technology, as well as petroleum materials have argued that the existence of force majeure has allowed them to temporarily suspend their contractual obligations and renegotiate in accordance with the new circumstances in order to avoid delayed fines or compensation due to the delays regarding the implementation of international contracts (Ghannam , 2010).

6. The impact of coronavirus on the evidence of international trade contracts

The consideration of covid19 as force majeure should regard the problems of the debtor, and when he is in a position where he cannot meet his contractual obligations and when the conditions of force majeure are met, this causes termination of the contract by default as stipulated by the Bahraini legislator in Article 145 in Civil Law

In addition, the Emirati legislature stipulated in article (287) from the Civil Transactions Law, that "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".(article 287 Civil Transactions Law of the United Arab Emirates).

Given that covid19 is a physical fact, the debtor does not need to prove its occurrence or the date of the spread of the pandemic in practice before the subject judge, as they are fully aware of its existence. Therefore, it occupies the status of a legal text and a judge cannot excuse his ignorance of it, even though it is related to a material fact. However, there is no doubt that it has affected the regular functioning of the judiciary itself, which was the reason for the suspension and postponement of hearings, the creation of a system of permanence among the officers of the seizure officers who aimed to prevent contact and gatherings, and to prevent the spread of this virus among judges, staff, court assistants and visitors.

From this standpoint, the issue of what happens with previously concluded contracts may arise from declaring the state of quarantine and preventing movement and gatherings, whereby the contractor is unable to fulfill his obligations due to this pandemic - and the actions of the authorities from the mandatory suspension of construction contracts mean that the harmed contractor may invoke force majeure.

However, cases where contracts were concluded in light of these quarantine-related circumstances, there is no chance of invoking force majeure in the event where he is not able to implement his contractual obligation as he was aware of the surrounding facts during the time the contract was concluded (al-Awfi , 1997).

7. The impact of coronavirus on international trade contracts

When talking about the impact of the Coronavirus on international contracts we cannot ignore that there are two main levels. The first level relates to contracts concluded remotely that are of an international dimension and relate to the supply of a physical good or the performance of specific physical work, whereas the second level is contracts related to electronic commercial matters; in this aspect we are talking about some contracts that are not often affected by natural phenomena and natural disasters and the principle of force majeure as seen in the implementation of regular contracts.

8- The impact of coronavirus on the physical implementation of international contracts

The coronavirus pandemic is one of the reasons that led to the scattering of papers in the monetary and business field in general and in the framework of international contracts in particular. There is no doubt that this matter will lead to multiple disputes and conflicts between contractors especially when most countries issued decisions related to stopping the production line and contracting, which meant parties not being able to implement contracts within the time periods set for them. In addition to the temporary suspension of construction, layoffs and the temporary suspension of workers, which resulted in the failure to fulfill obligations as a result of force majeure due to decisions of the state. This matter may constitute a profound problem at the international level, especially since most international contracts are characterized by their length of time, due to an agreement between the parties, and their desire to achieve stability in their transactions as in concession contracts and supply contracts or to the nature of the contract and the magnitude of the work required to be performed, as in technology transfer contracts and contracts for the construction of prefabricated factories and international roads (Ghannam , 2010).

International contracts are the most used legal tool in the field of international financial transactions and are also utilized in the management and facilitation of cross-border trade, and these contracts do not differ from internal trade contracts in that they are both subject to the provisions of force majeure.

The nature of the international trade contract is that the contractual parties are from different countries, and the different measures adopted by each country to mitigate the spread of the pandemic makes it an obstacle to implement the contracts. Similarly, estimating the extent to which these measures are considered to be force majeure or not depends on the nature of the measures that have been taken by the state, the nature of the pandemic, the subject of the obligation, and the extent to which it is affected by these measures. If the conditions of force majeure are met then the debtor shall be exempted from his obligation. However, if its conditions are not fulfilled, the responsibility is still present and the debtor is obliged to perform his obligations or is obliged to compensate the other party for any harm. The matter is subject to the judge's discretion in the end and the debtor's ability to prove the conditions of force majeure (Al-Mousa , 2020).

However, the International GATT Agreement 1994 stipulates in article (7) the effects of the exemption from liability which includes the occurrence of natural disasters or the interruption of transport or another force majeure that greatly affects products being available for export. These principles of international contracts deal with the unification of the rules of private international law in the event of force majeure in article (6) which stipulates that the aggrieved party has the right to request negotiation with the other party to amend the terms of the contract, before the latter continues to implement the international contract. If the negotiation process fails, the only option is to rescind and terminate the contract while the damaged party maintains its right to claim compensation, and this is confirmed by many international agreements, including the Vienna Agreement 1980, whereby article (81) stipulated that by the termination of the contract, the two parties would be in a solution of obligations of the United Nations Agreement arranged by the contract without prejudice to any due compensation. Article 79/1 of the United Nations Convention on International Contracts provides similar protection provided by the provisions of force majeure and may apply to international contracts unless the application of the agreement is expressly excluded by the parties to the contract.

The condition of not anticipating and predicting the event is one of the most important conditions for force majeure and the determination whether or not the event is expected is to look at the date of concluding the contract.

9. Conclusion

I have tried to explain in this article that, as part of their preparations for coping with the consequences of the coronavirus pandemic, all companies should be cautiously considering whether they or their counterparties will be able to meet their contractual obligations. If performance may be significantly impacted, reviewing the contract terms in order to clarify the rights and responsibilities and to allow the parties to schedule the scenario accordingly is essential. Specifically, with long-standing contracting partners, companies should attempt to negotiate in a mutually satisfactory way forward that involves varying contractual obligations and exchanging publicity in a more equitable manner (in which case any changes will comply with the formalities specified by the original agreement). It is important for individuals to consider the point of departure under the contract in order to place themselves in the best position possible in any ongoing discussions and to be able to deal with any circumstances where compromise is unlikely.

Based on this idea, I invite all the businesses to adopt the following recommendations:

- 1- Check your contract signature date. If it's after the outbreak of Covid-19, then it's very unlikely that Force Majeure can be applied.
- 2- Check the Force Majeure or the unforeseen clause or in your contract. If there is such a clause, you need to comply with the terms, such as the time frame of notification, the measures that should be taken and any other terms mentioned.
- 3- Send notification to your counterpart immediately after finding yourself affected by Covid-19 and keep track of the evidence, such as the sending notice, official notice, document, policy issued by the government. Even though the outbreak first started in the middle of December 2019 in Wuhan, different government actions from various levels within China or globally were taken at different times. It's important to give immediate notice to the counterpart when the party's ability to perform is affected by the objective situation.
- 4- Start negotiating with counterparts to find measures that both parties agree in order to mitigate the loss.

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References

- [1] Abdul Rahman. G. (1986). *The economic imbalance in the contract during its implementation*. Publications of Legal Research Center.
- [2] Abu Saad. M.S. (1983). The Concept of Force Majeure. Contemporary Egypt Magazine. *The Egyptian Society for Economics Politics, Statistics and Legislation*, Volume 74, No. 394,393.
- [3] Al-Hakim. A.M, (1993). *Al Kafi in explaining the Jordanian Civil Law, the Iraqi Civil Law and the Yemeni Civil Law in Obligations and Personal Rights*. Part One, Sources of obligation. The New Printing Company.
- [4] Al-Thanoon.H.A. & Al-Rahho.M.S. (2002). *Al-Wajeez in the general theory of obligation, Sources of obligation, A Comparative Study of Islamic and Comparative Jurisprudence*. Part 01. First Edition. Wael House for Publishing and Distribution.
- [5] Abd al-Rahman. (1999). *The Mediator in the General Theory of obligation. Book One. Voluntary Resources, Contract and Single intent*. First Edition. Dar Al-Nahda Al-Arabiya.
- [6] Abu Sad. I. (2011). *Responsibility for Direct and Caused A Comparative Study of Islamic Law and Civil Law*. First Edition. Dar Al-Thaqafa for Publishing & Distribution.
- [7] Al-Sanhouri.A.B. (2004). *The mediator in explaining the civil law, part one, the theory of general obligation, sources of obligation, facility knowledge*. Dar Al-Halaby for publishing.
- [8] Al-Sarhan. A.& Khater.N.(2009). *Civil Law Explanation, Sources of Personal Rights, Obligations*. Dar Al-Thaqafa for Publishing & Distribution.
- [9] Al-Awfi.S.A.(1997). *Legal Principles in the Formulation of International Trade Contracts*. Institute of Public Administration.
- [10] Al-Mousa. A. (2020). *The extent of the Corona virus as a force majeure and its impact on local and international contracts*. Retrieved June 1, 2019, from: <https://bit.ly/3dXTIfB>.
- [11] Bani Ahmad.K. (2006). The Difference between Force Majeure and unforeseen Conditions, A Comparative Study, The Jordanian Journal in Islamic studies, 2(1) Research Retrieved April, 24,2020 ,from: <https://search.emarefa.net/ar/detail/BIM>.
- [12] William.C.W. (2006) . *Force Majeure Delays*.26 Constr. Law. 33. Bluebook 20th ed.
- [13] Hussein M.M. (2000). *Al-Wajeez in obligation Sources*. New University House.
- [14] Katsivela.M.(2007). *Contracts: Force Majeure Concept or Force Majeure Clauses?* (December 24, 2007). Uniform Law Review, Vol. 12, 2007. Retrieved March 23,2020, from SSRN: <https://ssrn.com/abstract=2889727>
- [15] Philip.L.B.(2002). *World-Wide Excuse for Contractual Non-Performance*. The Construction Super Conference, San Francisco, California.
- [16] France: TERRE / SIMLER / LEQUETIE. (2003). *supra note 10, 569 and Cass. 3' civ. (2 Apr. 2003), No. 01-17724 Legifrance. Quebec cases treat force majeure and inherent defect as separate concepts: Poissons Frais des ies Inc. v. Christian Larocque Services [2003] J.Q. no 12681 (QCCt) Quicklaw, CGU; Compagnie d'Assurances du Canada v. Guindon Desjardins [2006] J.Q. no 453 (QCSC) Quicklaw. 16.*
- [17] Ghannam.S.(2010). *The Impact of Changing Conditions on International Trade Contracts*. Fujairah National Press.
- [18] Word Health Organization. (2020). Coronavirus disease (COVID-19) pandemic. Retrieved June,4, 2020 from <https://www.who.int/emergencies/diseases/novel-coronavirus-2019>
- [19] Intermountain Health care. (2020). What's the difference between a pandemic, an epidemic, endemic, and an outbreak? Retrieved April ,15 , 2020 from <https://intermountainhealthcare.org/blogs/topics/live-well/2020/04/whats-the-difference-between-a-pandemic-an-epidemic-endemic-and-an-outbreak/>
- [20] Bahrain Decree-Law No. 19/2001 On the Issuance of the Civil Law. Retrieved February,2, 2020 from <https://www.legalaffairs.gov.bh/>
- [21] Law no. (27) of 2014 pertaining to promulgation of the property lease law and amendment 2020. Retrieved March,1,2020 from <https://www.legalaffairs.gov.bh/>
- [22] LAW NO. 36 OF 2012 promulgating the labour law for the private sector (KINGDOM OF BAHRAIN). Retrieved April,5,2020. from <https://www.legalaffairs.gov.bh/>
- [23] Federal Law No. (5) of 1985 On the Civil Transactions Law of the United Arab Emirates. Retrieved May,25, 2020. from: <https://www.wipo.int/edocs/lexdocs/laws/en/ae/ae007en.pdf>