

Coronavirus Pandemic Between Force Majeure And Contingency Theory in Light Of Provisions Of Jordanian Civil Code And Comparative Judicial Rulings

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Abstract

During the year 2020, the Corona epidemic invaded the world, and several countries have taken many measures to protect their citizens from this virus, Coved 19, as a result of these measures, the economic and health sector in most countries of the world was affected and also reflected on the legal centers of contractors, including utility contracts. We have in Jordan decided to announce work According to the Defense Law of 1992, a number of defense orders were issued, which led to the disruption of life as a result of the comprehensive ban measures that were imposed for a specific period of time to combat the spread of the Corona virus, and from here the legal problems related to contracts and specifically with regard to benefit contracts in terms of whether the Corona epidemic is considered a force Cairo, or is it an emergency circumstance, and this was discussed through the provisions of the Jordanian civil law and the jurisprudence of the comparative judiciary, where the research reached several conclusions, including that the Corona epidemic is considered an emergency circumstance and not force majeure and that it affected the legal centers of contractors and specifically in benefit contracts and continuous contracts.

1. Introduction

Due to the conditions and circumstances, the whole world is passing through, as a result of the spread of the Coronavirus pandemic (COVID-19), and its negative impact on all aspects of life, individuals, countries, health, education, economy and the most important the impact of the Coronavirus on the legal positions in the concluded contracts in terms of the ability of each of the contractual parties to fulfill their obligations in the contracts. Hence, several entities bound by such contracts with other parties leveled their arguments, defenses in connection with the spread of the Coronavirus, and announced that they would act in accordance with Defense Law of 1992, which is currently applicable in Jordan.

In addition, the government issued several defense orders pursuant to the Defense Law, including a curfew, which resulted in the failure to fulfill the contractual obligations set forth under the concluded contracts and seeking reasons to abandon such obligations pursuant to the provisions of the said Law and the work of the relevant legal texts related to the force majeure or are we facing the contingency theory; and this is the aim of our research as it will shed light on the judicial decisions issued in respect of the Coronavirus pandemic worldwide and the jurisprudence of the Jordanian judiciary in connection with force majeure or the contingency theory and the extent of its applicability to the Corona pandemic.

2-Literature Review (Background)

The researcher literature did not previously include the impact of the spread of Corona virus on contracts in general and utility contracts in particular due to the outbreak and spread of Corona virus Coved 19 in 2020, which prompted the researcher to write on this new topic, taking into account the legislation of some countries, including Jordan and the Jordanian civil law that It dealt with the suspended contract within its provisions and the extent of its applicability in light of the spread of Coronavirus and its impact on contractual obligations between the parties to the contract

3-Methodology

3-1: Research questions (Goals)

The importance of this study lies in the legal issues aroused in relation to the concluded contracts of all types among the contracting parties, as set forth by the Legislator in the Jordanian Civil Code, whether such contracts are employment, business or other contracts. This study will attempt to answer the following questions:

1. Is the Coronavirus pandemic deemed according to the provisions of Jordanian Civil Code, a contingency subject to the provisions of Article (205) of the Jordanian Civil Code or deemed a force majeure event subject to the provisions of Article (247) of the Jordanian Civil Code? What is the difference between a contingency and a force majeure event?
2. Are contracts of all types liable to abrogation because of the Coronavirus crisis or are they subject to the provisions of Article (205) on the contingency Theory and we leave the matter to the competent court to amend and reduce the burdensome obligation of the debtor?
3. Did the Defense Order No. (6) impact the contracts in light of these circumstances?
4. Were there any judicial rulings passed in several countries including Jordan about Coronavirus in terms of deeming it as a contingency situation or a force majeure event?
5. Is there any impact of the Coronavirus on the contractual obligations in terms of time and place?
6. Is there any impact of Coronavirus on the contractual obligations in terms of place?

3-2: Data Collection(instruments)

Definition of Force Majeure and Contingency Theory

The Jordanian Legislator, through the provisions of the Jordanian Civil Code, introduced the notions of Force Majeure and what is known as Contingency. Hence, it is possible to explore the definitions of Force Majeure and Contingency Theory in the following two sections:

Definition of Force Majeure

The Jordanian Civil Code defined Force Majeure as any event, which renders the performance of an obligation impossible. Article (247) of the Jordanian Civil Code stipulates as follows: (In bilaterally binding contracts, if any force majeure event occurs that makes the implementation of the obligation impossible, the corresponding obligation shall expire and the contract is terminated automatically meanwhile, if the impossibility is partial, the corresponding impossible part shall be expired and temporal impossibility in continuous contracts is similar to partial impossibility, and the creditor, in respect of each of them, shall terminate the contract on condition that the debtor shall be notified.)

The Jordanian Cassation Court, in its Decision No. (310/1999), explained that force majeure is a form of a foreign order which denies the cause and effect relationship between the defendant's act and the damage sustained by the plaintiff. In other words, force majeure is any external event, which is unforeseeable and unavoidable. Force majeure arises either out of the act of God such as earthquakes, thunderstorms, floods and snow storms and any human act, which renders performance of the obligation impossible.

“In bilaterally binding contracts, if any force majeure event occurs that makes the implementation of the obligation impossible, the corresponding obligation shall expire and the contract is terminated automatically meanwhile, if the impossibility is partial, the corresponding impossible part shall be expired and temporal impossibility in continuous contracts is similar to partial impossibility, and the creditor, in respect of each of them, shall terminate the contract on condition that the debtor shall be notified.”

Some Jurisprudence argued that the failure or delay by the debtor in performing its contractual obligation shall per se deemed a fault which would render the debtor liable and such liability would not be avoided unless failure in performance was proven to be attributable to an external reason which is beyond the debtor's reasonable control such as a sudden event, force majeure, a fault committed by a third party or another contractor. In addition, whenever a force majeure event exists and meets the requirements thereof as set forth in the Law, the result would be attributable to force majeure and there would be no cause and effect relationship between the force majeure event and the fault will be proven and no liability will be assumed for the fault unless his fault is a crime.

Definition of Contingency

To learn about the Contingency Theory, the Jordanian Legislator has touched on it in Article (205) of the Jordanian Civil Code, stipulating the following: (If general exceptional events occur, which were unforeseeable, and result in rendering the contractual obligation burdensome, if not impossible, for the debtor and threatens such debtor of a considerable loss, the Court may, depending on the circumstances and after balancing between the interests of both parties, amend the burdensome obligation to a reasonable extent if justice necessitates the same and any agreement otherwise shall be rendered null and void.)

The Jordanian judiciary concluded that Article 205 of the Civil Code specified the regulations for contingency as follows:

1. The incident must be a general and exceptional one.
2. Such incident must not be foreseeable.
3. Such hardship situation shall be burdensome for the debtor even if the same has not become impossible.
4. The contract must be lenient.

Coronavirus Pandemic between Force Majeure and Contingency Theory

Since the date the Defense Law of 1992 was put into force on 17/03/2020, there was legal debate about the contracts, which involve reciprocal obligations. For the objective of derogating from such obligations, does this as a result cause us to be deemed subject to a force majeure rendering the performance of obligation impossible pursuant to the provisions of Article (247) of the Jordanian Civil Code? Such Article stipulated that in bilaterally binding contracts, if any force majeure event occurs, rendering the performance of the obligation impossible, the reciprocal obligation shall be expired and the contract automatically is terminated. If impossibility is partial, the reciprocal impossible part shall be expired and temporal impossibility in continuous contracts is similar to partial impossibility, and the creditor, in respect of each of them, shall terminate the contract on condition that the debtor shall be notified. Alternatively, are we, as a result, deemed subject to the Contingency Theory which was set forth by the Jordanian Legislator in Article (205) of the Civil Code? Such Article stipulates as follows: “If general exceptional events occur, which were unforeseeable, and result in rendering the contractual obligation burdensome, if not impossible, for the debtor and threatens such debtor of a considerable loss, the Court may, depending on the circumstances and after balancing between the interests of both parties, amend the burdensome obligation to a reasonable extent if justice necessitates the same and any agreement otherwise shall be rendered null and void.”

The Legal Jurisprudence established that the Contingency Theory has some conditions and requirements to be met such as being general that it includes all parts of the country and related to an emergency and unexpected event where such contingency or exceptional incidents would render the performance of the obligation burdensome, rather than impossible, for the debtor. This, in my opinion, applies to the Coronavirus pandemic; as it is a contingency situation, which the Hashemite Kingdom of Jordan has never encountered in terms of disrupting the daily and public life of the state for days, and allowing some sectors to operate on other days for the continuation and sustainability of life. Thus, we are much closer to applying the Contingency Theory rather than the force majeure. This point will be decided in the future at the discretion of the fair and impartial Jordanian judicial authority, through the competent courts which will have the power and discretion to apply the criteria for the exceptional hardship situation and to estimate the burden criterion for a debtor and alleviate the obligation assumed by the debtor to a fair and reasonable extent. This will occur if the fair judicial authorities of Jordan manage to assume control on the disputes, which will be referred thereto, where the Researcher expects numerous lawsuits to be filed, which will throw more burden on the fair judicial authorities if no defense order is issued in this respect.

If we observe the current situation we are going through, the provisions of Article (11) of the Defense Law No. (13) of 1992 declared to be put into force as of 17/03/2020, stipulate that “If it is difficult to perform any contract or obligation due to the reasons set forth in the provisions of this law, any order, or instructions issued thereunder or because of complying with such provisions, the person who was subject to such contract shall not be deemed in breach of the provisions thereof; rather, the contract shall be deemed suspended to the extent where the performance of the contract is difficult, and the same shall be deemed a defense in any lawsuit instituted or to be instituted against such person or any actions taken against such a person as a result of failing to perform the contract or obligation.

Judicial Applications and Jurisprudence of the Judiciary on the Spread of the Coronavirus Pandemic

Since the beginning of the Corona pandemic, there were several case law opinions about the Coronavirus pandemic and its spread worldwide. France was one of the first countries which had a decision issued by the French Judiciary, where a decision was issued by Court of Appeal of Colmar was issued on March 12, 2020, whereby the French Judiciary deemed the Coronavirus pandemic as a force majeure event.

Due to the impact of the Coronavirus crisis on the international arbitration field and contracts, which contain arbitration clauses, the International Chamber of Commerce (ICC) paid attention to this point and issued its decision on 09/04/2020 which includes that the Coronavirus crisis will cause a tsunami of international arbitration proceedings, and all must be ready to encounter them. In addition, no one will be able to establish a unified legal position about whether this virus created a force majeure, which rendered the obligations in long-term contracts impossible to be performed or it is a hardship situation. Furthermore, the bet, which will finally, be decided by the international arbitration in contracts containing arbitration clauses will rely on the principle of proportionality and striking the balance between both theories against the world interests, which will be connected in their fate with a number of economic collapses. The economic situation must be studied to

determine the beneficiary party in applying or failing to apply the Force Majeure Theory and the Contingency Theory.

The Syrian Cassation Court, in its Decision No. (211/1961) stated that “1. The contractor might with the management to claim compensation from the hardship resulted from contingency after performing his contractual obligation even if the term for which the contract was concluded came to an end.

2. Harship situations are different from the force majeure, which renders the performance of obligations impossible. Therefore, agreeing on exemption from bearing the consequences resulting from hardship situations is null and void as this breaches the public order, pursuant to the provisions of Article (148) Civil.

The Egyptian Judiciary addressed force majeure in several decisions in Decision No. 2711 of 1983. It stated that the force majeure event is the event which results in society being exposed to unusual circumstances which interrupt the course of life such as natural disasters, internal unrest, external aggression or revolutions.

In addition, the Egyptian Cassation Court stated in its Decision No. (258) of 1931, that deciding whether the alleged incident is deemed a force majeure or not shall be at the substantive discretion of the competent judge. The appealed judgement has stated that force majeure event had never existed by stating that both parties expected, on the date of concluding the contract, that it would not be possible to have the importation permit issued for shipping the commodities to Egypt. Such appealed judgement expressly stated that if the appellant does not have the importation permit issued on the agreed date, the commodities shall be sold in Khartoum for its own account. The apparent meaning of such clause denotes that it includes all the instances of failing to have the importation license issued; hence, the decision under cassation shall not be deemed in breach of the law.

On the other hand, the Jordanian Judiciary approached the force majeure and Contingency Theory in several decisions issued by it, including Decision No. (4031) of 2019, where the Jordanian Judiciary concluded that Article 205 of the *Civil Code* determined the rules for the hardship situation as follows:

- 1- The incident must be a general and exceptional one.
- 2- Such incident must not be foreseeable.
- 3- Such hardship situation shall, as a result, be burdensome for the debtor even if it does not become impossible.
- 4- The contract shall be lenient.

The esteemed Jordanian Cassation Court Order No. (461/ 1985) stated as follows: “Exemption from performing the obligation depends on proving that the elements of a force majeure event exist, namely, the force majeure event which the debtor argues for goes beyond the reasonable contractor of the debtor, is unforeseeable, renders performance impossible. Hence, if the force majeure event alleged by the debtor so as not to perform the obligation is foreseeable, the allegation about force majeure shall be dismissible.”

The Impact of the Coronavirus on Contracts

There is no doubt that the principle of “pactasuntservanda” is grounded on three foundations: First, a legal foundation that lies in the autonomy of the will principle; second, a moral foundation which lies in respecting the charters and conventions; third, a foundation of social and economic nature translated in the necessity for transactions stability.

Such notion necessitates respecting the contract content whether by the part of the contracting parties or the judiciary. However, health epidemics, as a purely physical incident, could have clear negative impacts, with observable features, on the legal relations in general and contractual relations in particular. Such relations snap as a result of the stagnation in some investment sectors which causes the performance of some obligations to become impossible or at least difficult, or delays the performance of such obligations.

Definition of Suspended Contract and Non-binding Contract, according to the Jordanian Civil Code.

Among the types of contracts that the Jordanian legislator has established in the Jordanian Civil Law include the suspended contract and non-binding contract. The Researcher will address in this section the definition of both types since they are the closest ones in terms of application to the contracts concluded in the light of the Coronavirus pandemic, which the Jordanian society is experiencing today. In this section, the Researcher will provide their detailed definition and the decisions of the Jordanian Cassation Court. Both types of contracts were approached by the Jordanian Legislator in Article (171) of the Jordanian Civil Code, stipulating as follows: “The effect of disposition shall be suspended until ratification if it is by an officious person disposing of another's property, by the owner of the property to which third parties' rights are attached, by an owner of the property when he is in competent and his disposition varies between benefit and harm, or by a person under duress or if the law so provides.”

Regarding the suspended contract, Cassation Court, in its Order No. (7100) of 2018, stated: “At this point, the Court finds that the Respondent's claim is for the period from 08/09/2013 to 31/08/2014. The Respondent declared the work incident and the personal proofs submitted by the Respondent proved that the Respondent worked for the Appellant under employment contract for the said period. In addition,

issuance and revocation of licenses is a point with which the Respondent has nothing to do; the contractual relationship between the Appellant and the Respondent is governed under the employment contract concluded between both Parties. *It was not stipulated that the contract is suspended and conditional on the issuance of licenses.*”

Regarding the non-binding contract, the Jordanian Legislator referred to it in Article (176) of the Jordanian Civil Code, stipulating as follows: (1) The contract shall be non-binding for either or both contracting parties despite its validity and effectiveness if it is subject to a clause on termination without consent or litigation.

(2) Each party shall unilaterally terminate the contract if the contract is non-binding in nature or if the party set a condition for itself to have the option of contract termination.

Concerning the non-binding contract, it is established under the case law of the Jordanian Cassation Court in Order No. (8028) of 2019, that “The surety contract is deemed one of the non-binding contracts, *and* for the conclusion and effectiveness of a surety agreement, the surety’s acceptance is sufficient unless the obligee returns the surety and the surety shall be eligible to donate pursuant to the provisions of Articles (951) and (952) of the Civil Code. The guarantor has no right to return anything on the principal from what he pays on his behalf, unless the guarantee is based on his request or approval and the guarantor repays it given that the surety is a combination of payables in claiming for performing the obligation pursuant to the provisions of Article (950) of the Civil Code. Therefore, the Claimant’s case under cassation “lacks the sound legal grounds and shall be dismissible.”

The Impact of the Coronavirus on Bilateral Binding Contracts in light of Issued Defense Orders Here in Jordan, and due to the spread of the Coronavirus pandemic worldwide and the announcement of Defense Law No. (13) of 1992 and the Royal Decree approving its implementation as of 17/03/2020, pursuant to the provisions of Article (124) of the Jordanian Constitution which stipulates that “If an incident occurs necessitating defending the country in the event of an emergency, a law shall be promulgated under the name of Defense Law whereby the power shall be given to the person appointed under the Law to take the necessary measures and actions including the suspension of the country’s ordinary laws to secure the defense of the State. The Defense Law shall be effective when the same is announced under a Royal Decree issued based on a Cabinet resolution. After a Royal Decree is issued, announcing the effectiveness of the Defense Law No. (13) of 1992, Defense Order No. (2) was issued, suspending the daily life activities, stipulating as follows: “(1) Citizens are prohibited from moving and roaming in all regions of the Kingdom, starting at 7 in the morning on Saturday dated 21/03/2020 until further notice. 2. All shops in the areas and provinces of the Kingdom shall be closed, and specific timings will be announced on 24/03/2020, allowing citizens to meet their necessary needs, and in the mechanism which will be announced in due course.”

Also, the Defense Order No. (3) of 2020 was issued, explaining the punishments to be applied to any person who breaches the defense orders as follows:

“Pursuant to the provisions of Articles (3) and (7) of the Defense Law No. (13) of 1992, and subsequently to Defense Order No. (2) dated 20/03/2020, the following defense order was issued and ratified: First, any person who breaches Defense Order No. (2) of 2020 on the prohibition of movement and roaming of persons in all the areas of the Kingdom and the complaints issued thereunder, shall be punished as follows: 1. A penalty not less than JD100 (one hundred Jordanian Dinars) and not more than JD500 (five hundred Jordanian Dinars) if the violation is committed for the first time. There shall be no litigation against the violator if the violator pays the minimum limit of the fine within one week from the date of the violation. 2. Imprisonment for a period not exceeding one year or a penalty not less than JD 100 (one hundred Jordanian Dinars) and not exceeding JD500 (five hundred Jordanian Dinars), or both punishments if repeated. 3. The vehicle used during the curfew shall be seized for thirty (30) days.

Second, any permitted person who opens his shop outside the permitted hours shall be punished by paying a penalty not less than JD1000 (one thousand Jordanian Dinars) and his shop shall be closed for 14 days (fourteen days). Third, any non-permitted person who opens his shop shall be punished by imprisonment for a period not exceeding three (3) months and/or a penalty amounting to JD3000 (three thousand Jordanian Dinars) or both penalties.

Based on the issuance of Defense Order No. (2) on the prohibition of persons’ movement and closure of all shops and Defense Order No. (3) imposing punishments against violators, most citizens complied with the defense orders. They stopped roaming the streets, closed their shops, factories, stores, corporate offices and others. As a result, they stopped practicing their daily work and life and complied with the government-issued instructions including home quarantine. Thus, they became unable to perform their financial and contractual obligations of all types such as employment contracts, lease contracts and commercial contracts, and other types of contracts.

Whereas the main objective of the curfew is to protect the life and health of Jordanian citizens, make the possible efforts to carry out the required procedures for reducing the economic impacts on the operators, private sector companies and the persons working for them, and for the purpose of enabling the economy to recover after the end of the current Coronavirus crisis with the possibility of studying the gradual opening and operation of the economic sectors as per the rules of public safety, health and national priorities, the following Defense Order was issued:

First, all personnel working for the private sector companies and corporations, or any other entities subject to the Labor Law, shall be entitled to their usual wages for the period from 18/03/2020 to 31/03/2020, provided that none of the personnel working in the sectors excluded from the Council of Ministers' resolution shall be entitled to overtime wages for their work during such period unless they had been instructed to do overtime work, pursuant to the provisions of Article (59) of the Labor Law No. (8) of 1996.

B. For the purpose of enforcing the provisions of Paragraph (A) of this Article, Paragraph (B) of Article (59) of the Labor Law No. (8) of 1996 shall be suspended in connection with the legal provisions related to work on the days of official vacations only.

Fifth, an employer, unable to pay the wages as set forth in the fourth clause above in the private sector companies and corporations which are subject to the Labor Law and permitted to carry on business or those which are subject to the suspension decision and not permitted to carry on business, shall submit an application to a joint committee to be formed by the Minister of Industry, Trade and Supply and the Minister of Labor to totally suspend work in its company or corporation and to suspend the employment contracts of all employees. Such employer shall not take any action in this respect unless with the approval of such committee, and shall attach with the application a list of the names of employees, nature and form of the employment contract of each of them, its term, working hours and remuneration as registered at the Jordanian Social Security Corporation (SSC). The issuance of the approval decision of suspension shall result in the following:

A. An employer who totally suspended work at its company may not carry on any business during the suspension period.

B. Contractual relationship between the employer and employee shall not terminate during the suspension period, and the employer shall not be obligated to pay the employee's wages during such period.

Having reviewed Defense Order No. (6), we find that it is related to the concluded employment contracts as the defense order intervened in the contractual obligations of each of the employment contract parties as a result of the spread of the Coronavirus and the issuance of several defense orders since the start of combating this virus. The question here is to what extent the Coronavirus would impact the performance of contractual obligations in contracts in general. As we have noticed that the aforementioned defense orders determine the place and time, which arouses a legal issue about the impact of the Coronavirus pandemic on the performance of contractual obligations in terms of place and time. In temporal terms, it is possible to argue for derogation from contractual obligations due to Coronavirus pandemic as of the date of announcing the effectiveness of Defense Law No.

(13) of 1999, i.e. on 17/03/2020. This is in terms of temporal, but as for the spatial aspect, place denotes the place of Coronavirus pandemic spread and determining whether the Coronavirus broke out in the place of performing the contracts and obligations, noting that the Coronavirus pandemic was spread worldwide. Finally, the defense orders issued under the Defense Law, which are related to the bilaterally binding contracts, shall be applicable and enforceable against the contractual parties.

4-Findings / Results

4-1.The research concluded that the impact of the Coronavirus on the contractual obligations in temporal aspect could be as of the date of announcing the effectiveness of the Defense Law No. (13) of 1999 as of 17/03/2020. It is possible to argue for derogation from contractual obligations as of such date.

4-2 . The Research concluded that the impact of Coronavirus on the contractual obligations in spatial aspect is in the countries where the Corona pandemic has spread.

4-3.The Research also concluded that most defense orders issued under Defense Law No. (13) of 1999 had intervened by determining the legal positions, amending the contractual obligations and detailing several cases as set forth in the provisions of the Defense Order No. (6) which was issued in relation to the employment contracts concluded between the employee and employer and differentiated between the employee unable to perform work through modern technology tools and equipment and employee unable to work remotely and the nature of his/her work requires to be physically present at work place.

5-Conclusion and Discussion

To sum up, we have tackled the legal issues for the spread of Coronavirus pandemic and answered the research questions through this paper, starting from whether the Coronavirus and its spread is deemed a force majeure event or a contingency, and ending with the impact of the Coronavirus pandemic on the contractual obligations in terms of time and place. We have come up at the end of this research with a number of findings and

recommendations as follows Jurists differed among themselves and there were different case law jurisprudence among several countries. Some of them considered the Coronavirus pandemic a force majeure event and others considered it a Contingency situation since some contracts are of continuous nature whether before the Coronavirus and were suspended during the Coronavirus. It is possible that the Coronavirus could end and contracts would continue. Hence, it will be required to perform the obligations in such contracts after the Coronavirus.

6-Recommendations

6-1. In light of the controversy surrounding whether the Corona pandemic is a force majeure or an emergency circumstance, we recommend that the judicial disputes related to this be resolved to settle disputes related to utility contracts.

6-2. Adopting the principle of the theory of emergency conditions in the countries in which the Corona virus has spread, and applying it to contracts and obligations entered into by the parties to the contract.

6-3. Taking into accounts the temporal and spatial element to take the theory of emergency conditions in the countries in which the Corona virus has spread and apply it to contracts and the obligations entered into by the parties to the contract.

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Article (171) of the Jordanian Civil Code stipulated that: "The contract shall be non-binding for either or both contracting parties despite its validity and effectiveness if it is subject to a clause on termination without consent or litigation. (2) Each party shall unilaterally terminate the contract if the contract is non-binding in nature or if the party set a condition for itself to have the option of contract termination.

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