

## **The Effect of Force Majeure Caused by the COVID-19 Pandemic on Contractual Obligations**

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### **Abstract**

As known as the global epidemic of a phenomenon, a pandemic can directly affect economic relations. Pandemics can create conditions of force majeure and make it impossible to fulfill contractual obligations. Some various solutions are present for contractual relationships in legal systems that are affected by force majeure conditions. The first question is whether the pandemic of COVID-19 can be considered a force majeure condition or not; what will happen to the contractual obligations of individuals, especially companies, if COVID-19 is a force majeure agent? Undoubtedly, the solutions provided in the laws can greatly reduce the problems facing companies. The possibility of termination, modification, discharge, and severability of the contract is the most well-known and most common legal solution before the obligor and the obligee in the face of violation of obligations due to force majeure.

**Keywords:** Pandemic, COVID-19, Contract, Obligation, Force Majeure.

### **Introduction**

An obligation is a legal relationship that requires individuals to do something for the benefit of another under the law. Some define it as a legal relationship between the obligor and the obligee that enables one party to demand something from the other. In Roman terminology, the obligation is a two-way legal relationship between two people. Some jurists believe that obligation in current law is used in two senses: first, the general meaning, which includes all religious rights, and second, the specific meaning, which refers to the debts arising from the contract and is opposed to the tortious obligation. Not all contracts necessarily lead to the desired outcome of the parties, and in the world of obligations, countless cases of total or partial breach of contract can be seen.

On the other hand, all breaches of contracts do not necessarily lead to the creation of contractual liability for the obligor because, in limited and specific cases, the obligor has been released from liability. If it is possible to oblige the obligor to compensate the damage caused by the breach of the obligation, we will approach justice. However, suppose the breach of the obligation occurs due to unforeseen circumstances or a fundamental change in the circumstances of the contract fulfillment time. In that case, the obligation of the obligor to compensate will be unfair. Due to the conflict of interests of the obligor and the obligee, in case of breach of the obligation, the parties' rights to the contract must be carefully considered.

The study of the law of obligee in all commercial contracts is of great theoretical and practical importance, assuming that the other party to the contract executes part of the contract and for any reason is not unable to perform the other part. The issue of non-fulfillment of contracts in the field of international trade and international sales contracts is extremely important because, in this area, we see in many cases that for various reasons, the fulfillment of the whole contract is not possible or obligor

for any reason, whether due to economic considerations or other aspects, not to execute the whole contract (Mirzanjad, 2003; p. 290).

This study seeks to examine one of the factors that lead to the impossibility of contract fulfillment. However, on the other hand, the obligor will not be required to compensate for the damage caused by the breach of obligation, or at least to a fair extent, his liability is reduced.

### **The Concept of Pandemic**

A pandemic is an epidemic that extends beyond a continent. Diseases such as AIDS and COVID-19 are examples of the pandemic of the disease in recent years. This is also called a global epidemic. There have been several pandemics throughout history, the most well-known of which are Smallpox, plague, tuberculosis, influenza, cholera. One of the world's greatest pandemics was the Black Death, which killed 75 to 200 million people in the 14th century. Before the pandemic of COVID-19, one of the most modern pandemics in 2009 was the swine flu pandemic. The COVID-19 disease was first diagnosed in December 2019 in China. So far, more than 200 countries have been affected by the disease, with major outbreaks in China, the United States, Italy, and Spain. On March 11, 2020, the World Health Organization (WHO) declared the COVID-19 a pandemic.

### **The Concept and Definition of Force Majeure**

Force majeure is a term in French law that was first used in the French Civil Law, the Napoleonic Code, and then in other countries, the same word or its translation became common, and in international law, the same term is used and common even in English texts and books (Askari, 2016; p. 179).

In the dictionary of Blix legal terms, the definition of force majeure<sup>1</sup> is as follows: It is a French term commonly used in insurance law and is an irresistible and extraordinary force. This term is usually used in construction contracts, and its purpose is to support the parties if a part of the contract is not enforceable due to events beyond the control of the parties and cannot be avoided with due care (Blix Dictionary).

The definition of the force majeure states that human has no power to repeal it and it is impossible to avoid it. The person is not responsible because the rule is that what cannot be avoided is not guaranteed. In the yearbook of the International Law Commission, force majeure is considered unpredictable or predictable but unavoidable or irresistible, which makes the fulfillment of the obligation impossible for the obligor. Some have called the force majeure an unpredictable event that the obligor has no power to repel (Samavati, 2011; p. 4).

### **Examples of Force Majeure**

Regarding the examples of force majeure, the various legal systems are silent. Therefore, the determination of the example depends, firstly, on the agreement of the parties. Secondly, in the absence of agreement, it will depend on the court's opinion to consider any cause or event that has the characteristics mentioned in the definition as force majeure. However, the jurisprudence, international opinions, and the opinion of legal scholars have mentioned many cases, such as the outbreak of the Revolutionary War, the strike, the uprising, the flood, the earthquake, and the fire, as examples of the force majeure. Therefore, in the form of contracts, especially international contracts, the parties, by agreement and opinion, define the force majeure and mention its examples as a condition of the contract.

Events such as war, strikes, natural disasters, such as floods, earthquakes, economic sanctions, changes in domestic laws and regulations may hinder the fulfillment of the contract and thus change the contract's fate. This type of event is mentioned in the law as force majeure (Adel, 2016, p. 25).

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<sup>1</sup> Cairo force

In general, the factors that cause force majeure conditions can be divided into two categories:

**1. Human factors:** Factors that humans, systems form, and interpersonal relationships should be considered in human factors. These factors are very diverse and can vary from community to community and from time to time. In general, factors such as sudden and unpredictable social, political, and economic changes resulting from human will can be placed in this category. One of the examples of force majeure is legal prohibition. The legislature's action or government order may be considered force majeure. This is the case if the operation of the order makes the fulfillment of the obligation illegal and therefore impossible; the impossibility of fulfilling the obligation may be normal, physical, or legal. The general rule is that fulfilling a contract may not be mandatory when it requires a breach of rights or government order or approval. Fulfillment of the contract in such cases is considered a violation of public order. Even a condition to the contrary in the contract is considered invalid due to opposition to public order. Suppose the prohibition announced by the government is temporary. In that case, it will cause the suspension of the obligation fulfillment, and if it is permanent, it will cause the obligation to fall or expire or the contract (Chitty, 1977; p. 58).

**2. Natural disasters:** Natural disasters are mostly tied to the concept of natural events such as tsunamis or volcanic eruptions, but following the criteria set out in paragraph A of Article 3 of the draft of the International Law Commission for the Protection of Persons Concerned in Natural Disasters (2016), the outbreak of diseases such as COVID-19 should also be considered as natural disasters because it seriously disrupts the functioning of society through widespread death and the great suffering it inflicts on human beings and imposes great damage on human societies, regardless of their natural or human origin (Draft, 2016; p. 35).

The International Federation of Red Cross and Red Crescent Societies has listed epidemics as a biological hazard categorized as a natural disaster (ki-gab, 2018; p147).

Given the effects of the COVID-19 crisis, the disease can also be considered a natural disaster, regardless of its exact origin, and the considerations of the International Law Commission can be considered current. The WHO identified the new virus outbreak on December 31, 2019, and since February 20, the WHO has encouraged governments to take serious steps to monitor and identify the disease (WTO, 2019; p. 54).

However, few governments followed this recommendation while also having the technical, economic, and human resources. In the same context, on March 11, 2020, the WHO declared the disease a pandemic and called on all governments to take serious and aggressive measures to deal with this disease. In this regard, they asked them to activate their immediate response mechanism (Report of WTO, 2019; p.25).

### **Elements of Force Majeure**

An obligor who has not fulfilled his obligation, in order to be able to absolve himself of liability by invoking the force majeure, must prove the existence of conditions which have been mentioned in the domestic and international legal systems as follows: externality of the event, the unpredictability of the event, irreducibility the event (Safaei,2012; p. 125).

#### **1. Externality**

In general, non-fulfillment of the obligation occurs either due to the fault of the obligor or without his fault. By committing a fault on the part of the obligor, it cannot be said that the non-fulfillment of the obligation was not attributed to him and the external obstacle caused the non-fulfillment of the obligation. However, where the obligor is not at fault for not fulfilling the obligation, and another factor has caused it, we use the title of external factor to introduce the breach of obligation. The external factor is a general title that can include force majeure and third-party intervention. Externality means that the event is outside the will of the obligor and his activity and liability, so any event that can not be attributed to the obligor, even if it occurs in the scope of his activity, is considered external. However, an externality is always associated with the non-interference of the obligor act in

the occurrence of the event. In other words, the obligor may not be involved in the non-fulfillment of the obligation, but he is still responsible for the obligation (Katozia, 2016; p. 206).

Sometimes the obligor is at fault for not fulfilling the obligation, but his fault is so minor that it is very small in the face of an external obstacle, and vice versa; sometimes, the external obstacle is so severe that the guilt committed by the obligor is ignored. In this case, it is fair to assume that the external obstacle prevented the fulfillment of the obligation and that the fault of the obligor had no role in it. In the Napoleonic Code, the condition that the obstacle is external is explicitly accepted. Under this code, the obligor will be liable for damages to the obligee unless he proves that the non-fulfillment of the obligation was due to an external cause that cannot be attributed to him (Soal, 1977; p.84).

It should be noted that an event is considered external if it is outside the scope of the obligor's domination and the scope of his liability, so the fault of the raw materials or the fault of the obliged employees is not considered the force majeure. On the other hand, for that event to be considered external, the obligor must not have a role in creating, continuing, or aggravating the event.

## **2. Unpredictability**

Another condition that is necessary for the realization of the force majeure is the condition of the unpredictability of the event. The predictability criterion is also the time of concluding the contract in civil liability or the time of occurrence of the harmful event in coercive liability. The behavior of a normal person is considered to determine the predictability of an event, and the obligor will be released from liability if the obstacle of the fulfillment of the obligation belongs to things that are generally unpredictable. Otherwise, if the obstacle is generally predictable, but the obligor did not predict it due to negligence or carelessness, or inexperience, he is liable for damages resulting from the non-fulfillment of the obligation because the obligor's negligence and carelessness and interpretation, in general, should not cause harm for the obligee.

The criterion of unpredictability is a kind of criterion; that is, a normal person can not predict the occurrence of an event if it is considered in the circumstances; just because the event happened in the past does not exclude it from being unpredictable. Suppose the event is typically predictable, but the cause of the damage can not be predicted due to little information, carelessness, and negligence. In that case, it is not possible to invoke the force majeure to absolve him of liability. It should be noted that the inability to predict when it occurs is a criterion, and the event should not be predictable when it occurs to be considered the force majeure

## **3. Unavoidability**

The third condition for the realization of the force majeure is that the event is inevitable. An external event is considered a force majeure if it cannot be neutralized or its effect prevented. If the event can be prevented, it will not be considered a force majeure because the repulsion of the event is necessary to avoid the preconditions of fulfilling the obligation. It is necessary as the fulfillment of the obligation on the obligor. It is necessary to mention that an external event is in the case of force majeure and is relieved of liability if it is not possible to repel it by a normal human being, and the obligor's ability alone is not the criterion for action. Suppose ordinary people cannot repel an external event, but the obligor can repel it due to special knowledge or skills and experience. In that case, it will not be an example of force majeure. On the other hand, if ordinary people can repel the event but the obligee cannot repel the event due to the weakness of a person who is not due to a fault, the force majeure can be considered conceivable.

According to some jurists, considering that the removal of liability from the obligor is due to two elements of disability and non-interference, the existence of three conditions is not necessary for being force majeure, because if external and unavoidable events are inevitable, it will lead to disability of the obligor to prevent loss. Thus, it can be said that the existence of the condition of unpredictability is ineffective in causing the loss because if the event is unavoidable, it cannot be prevented by predicting it alone. It seems that the condition of unpredictability is effective in achieving and measuring the condition of the unavoidability of the event and is not considered an independent

effect because many factors are effective in avoiding the event. One of these important factors is predictability because if the event is predicted in time in terms of time and facilities, it can be prevented, and vice versa; if not predicted in time, it will not be avoided. Therefore, it is enough to realize two external elements and the unavoidability of the event in order to realize the force majeure (Ebrahimi, 2019, p. 198).

### **The Effect of the Force Majeure on Contractual Obligations**

According to Rousseau in the first volume of the book *International Law*, force majeure is an unavoidable obstacle to external events that prevents the fulfillment of an obligation or the observance of a rule of international law. All domestic legal systems accept the removal of personal liability for which it has become impossible for force majeure to fulfill its contractual obligations.

Exercising the external cause sometimes prevents the attribution of fault to the causer and sometimes remove the causal relationship between his fault and the damage; that is, the external cause affects the pillar of the causal relationship and in cases where it is known as the main factor in the damage, remove the relationship between the obligor and the damage (Jordan, 2007; p. 89).

Article 79 of the UN Convention relating to International Trade in Goods and Article 74 of the Law on Uniform Accused of International Sale clearly state the conditions for the fulfillment of force majeure and the methods of dealing with it. The effect of the Force majeure in international trade contracts is also the discharge of obligations if it permanently eliminates its fulfillment and the suspension of the obligation if the fulfillment of the agreement is temporarily impossible.

The force majeure is a defense, so it usually arises when one party claims a breach of contract by the other party and seeks damages. There are two cases of this lawsuit; one is that the obligor has not fulfilled his obligation and does not intend to fulfill it or he can not fulfill it at all, and the obligee has reached this conclusion that claims damages by a lawsuit or to request the obligor to fulfill the obligation. Another is that due to the force majeure, during the fulfillment of the contract, its fulfillment was stopped for a while. Then the fulfillment was resumed, and in terms of this suspension, the obligee suffered damages.

There is no explicit expression in French civil law of the impossibility of completing the contract. However, the meaning of articles such as Articles 1722, 1741, 1788, 1790 of this law indicates that the obligor is released from her obligation (Barry, 1992; p205).

In English law in 1863, with the adoption of the doctrine of the cancellation of a contract, its effect was established in English law so that the occurrence of a cancellation event would terminate the contract immediately and without the need for anything else (Nikfarjam, 2012; p.62).

The effect of the force majeure on contracts and obligations is not a purely legal issue, as much of the people's economic relations are regulated through contracts, so choosing a fair and reasonable legal effect can undoubtedly have economic effects, just as choosing the wrong legal path can increase instability and increase risk in the economic environment, which will adversely affect the conclusion of future contracts.

### **Legal Solutions**

One of the effects of coercive events is creating difficulty in fulfilling obligations. Difficulty in fulfilling obligations is one of the factors influencing the change of contractual liabilities. A difficult term is a change in monetary, legal, or technological economic factors that causes severe economic losses to one of the parties to the contract. As it makes it very difficult for him to fulfill his contractual obligations; in commercial contracts that aim to make a profit, it is obvious to expect a loss, but a reasonably common loss is a gross and irreparable loss due to a change in the circumstances of the obligor, has never been expected of the parties (Sadeghi Moghadam, 2011; p. 54).

In the difficult conditions of fulfilling the obligations, the legal systems have chosen different solutions, and some systems have accepted the discharge of the contract, some modification or termination of the contract, and others the suspension of the contract (Sharifi and Safari, 2010; p. 93)

Legal solutions in case of non-fulfillment of obligations due to force majeure or difficulty in fulfilling obligations:

1. Suspension of the fulfillment of the obligation or contract: If the abnormal situation is not permanent and it is possible to wait for the fulfillment of the obligation without the obligor being harmed, the obligor will have to fulfill the obligation without being able to invoke the principle of change of circumstances and force majeure.

2. Modification of the contract: The modification of the contract or the obligations of the parties means that the judge, believing in the continuation of the contract and the possibility of continuing the legal life of the contract, has created the economic balance of the contract which has been disrupted due to changes in circumstances at the time of concluding the contract and by dividing the loss of the event somehow prevent the occurrence of unusual and gross losses. In this case, the contract has not lost its validity, and on the other hand, the change in the situation is not temporary. By suspending the contractual obligations, it is not possible to prevent losses. The judge can order the contract to be modified and allow the obligor to fulfill the obligation. Regarding how to modify the obligation, it should be mentioned that the obligation should first be modified to a normal and tolerable amount in case of unconventional losses. The entire obligation should not be considered over unless the obligation itself is inseverable.

3. Termination of the contract: In each contract, there is a customary implicit condition that in case of change of circumstances, the time of the contract of the party that has suffered from the occurrence of new conditions may not be bound by the provisions of the contract, so the termination permit is issued. Termination means the possibility of unilateral discharge of the contract by the aggrieved person

4. Discharge of the contract: The purpose of discharge of the contract is the early termination of the contract. A contract that has been concluded based on correct conditions will become unbearable due to unforeseen events that cannot be continued with the new conditions. On the other hand, the effect of events is not temporary, so in fact, the legal life of the contract is terminated, and it is not possible to continue the contractual relationship (Safaei, 1985; p. 113)

5. Severability of the contract: In English law, when a part of the contract is illegal or void due to violation of law or public order, that part of the contract is severed, and the rest of the contract is valid. For this purpose, three conditions are necessary (Richards, 2005; p. 263). The subject matter of the obligation must be inherently severable. It is possible to separate and sever the invalid and illegal parts without interfering in the contract. The severability should not change the nature of the contract; in other words, the purpose of the parties should not change completely. Suppose the court is satisfied that the subject of the obligation is the independent components that are grouped, and one of them can be severed without changing its nature. In that case, if a part of it is invalidated or illegal, it will be severed (Treitel, 1999, p. 469).

### Conclusions

The principle of necessity obliges the parties to a contract to fulfill their obligations. However, a contract may be breached in exceptional cases, and compensation may not be possible for reasonable reasons. The occurrence of unforeseen circumstances that have arisen outside the parties' will to the contract and there is no way to avoid it relieves the obligor from the burden of fulfilling the obligations and damages due to non-fulfillment or incomplete fulfillment. However, release from liability requires certain conditions that the obligor must prove. An epidemic of diseases will be a force majeure situation if it leads to widespread disruption of the day-to-day running of the economy and the necessary activities of the economy, because, on the one hand, deaths due to disease and loss of health, and on the other hand, the legal requirements that governments adopt in the event of a pandemic to control the situation and prevent the deterioration of society, are logically unforeseen and beyond the will of individuals, which they will not resist. In order to achieve justice in times of crisis, some requirements and rights must be ignored, and this is possible by making changes in contractual

obligations. COVID-19 disease was not taken very seriously initially due to its unknown nature, which caused it to spread very quickly. At present, AIDS is also considered a pandemic, but since it has not caused serious and widespread disruption in people's lives, it can not be considered a force majeure. With these explanations, it seems that in order to reduce the financial burden and economic losses and also to prevent the closure of economic enterprises due to bankruptcy in crises such as a pandemic, it is necessary to formulate an integrated and comprehensive legal system regarding the status of commercial enterprises, which by determining the legal duties of the obligations of economic actors and the collapse, modification or severability of their obligations can provide an opportunity to overcome the crisis. Legal solutions such as termination and discharge of the contract or its modification in the normal conditions of society can be very effective in regulating trade relations. However, the question is that these solutions, each with its requirements and conditions, can regulate trade relations in times of financial and social crisis, which will be widely insecure or not.

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