THE PANDEMIC EFFECT ON THE EXECUTION OF THE INTERNATIONAL PUBLIC CONTRACT

(The Study includes France, Italy, Germany, Spain, England, Netherlands, Sweden, Egypt, India, and International law)

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ABSTRACT:

Confirmed cases of COVID 19 have soared over 118000 worldwide with fatalities crossing the threshold of 4291, which has led the World Health Organisation ("WHO") to upgrade the COVID 19 outbreak from a "public health emergency of international concern" to a "pandemic" (the "Pandemic") on 11 March 2020.

Different industries have been hard hit by the aggressive measures imposed by the authorities worldwide, and working from home is not an option for labour, except for certain activities. These measures have disrupted many businesses, supply chains, operations, and different contractual relationships. Therefore, there are many voices calling for the necessity of declaring this epidemic as a "Force Majeure".

Therefore, it became necessary to clarify the effect of the pandemic on the execution of the international administrative contract? Is it considered a force Majeure? And the rights and the obligations of each party during the period of a pandemic?

KEYWORDS:

Public International Law*| *International Law* | *Crises*| *Force Majeure* | *Hardship*| *Pandemic* |*Public Law*| *Contract Law*| *Administrative contracts* | *Execution difficulties*| *Rights of contracting parties*| *Obligations of contracting parties.

INTRODUCTION:

The government's role, activities, and intervention in all fields are increasing day after day. There are different forms of such intervention; the administrative contract represents one of them.

Administrative contracts are qualified as such either by virtue of a specific legal attribution, or because they concern a public service or contain a highly unusual clause (clause exorbitant). They are examined by the Administrative Court.

In order for a contract to be considered as an "administrative" one, it must fulfill the following conditions:

1. One of the parties thereto must be a public authority.
2. The administrative judicial authorities must have jurisdiction to look into such contracts.
3. It must be related to public service or be classified by the law as an administrative contract.
4. It must include an "onerous" clause or condition from the public law.

We should take into our consideration that most civil law jurisdictions apply a different regime and rules to public contracts entered into with the state or a public agency **and** private contracts between private parties. Moreover, disputes are resolved by administrative courts for public contracts, **and** civil or commercial courts for private contracts.

Actually, the pandemic effects are based on its classification. We found that the approach followed or adopted, by the legislator, in dealing with the legal effects of the epidemic differs from one country to other.

Therefore, the author has to discuss the situation adopted, in each country, in dealing with the pandemic of Coved – 19 and clarify whether the epidemic is classified as a Force Majeure? Or a Hardship? What is the difference? What about the rights and obligations of each party? According to the following:

I- Difference between Force Majeure and Hardship.

II- How the Pandemic may qualify as Force Majeure, in both common and civil law countries, and its consequences.

I- Difference between Force Majeure and Hardship :

The difference between the two concepts is that Force majeure refers to a party's contractual requirements have become impossible, at least temporarily, while hardship is the performance of the disadvantaged party becoming much more burdensome but still possible. The author will discus both in more details as following:

A- Force Majeure:

According to article 1218 French civil code which stipulated that "There is force majeure in matters relating to a contract when an event, beyond the control of the debtor that was not foreseeable at the time of the contract and whose effects could not be avoided by appropriate means, prevents the debtor from performing his obligations".

French Courts have established that "to consider an event as a Force Majeure, It had to be:

- **Unforeseeable**: the event could not have been reasonably foreseen at the time of the contract and French Courts expected an experienced contractor to foresee most events that could negatively impact the works and;
- **Irresistible**: It had to be beyond the control of the contractual Parties and could not be prevented or avoided by adequate steps; and
- **External**: the occurrence of the event did not have any connection with the Parties[1].

Regarding the burden of proof, the party seeking to invoke force majeure (typically the party who stop performing the contract duties) must prove that these conditions are met. Such party will typically need to show a causal link between the force majeure event and the failure to perform contractual obligations[2].

We all know that this is probably not the ideal outcome for contractors facing substantial additional charges as a result of the Pandemic!

Therefore, another legal concept generally referred to as "Hardship" has been created, which may provide to the contractor an alternative way to claim compensation or to ask for a renegotiation of the

[1] (fn) CHAMPALAUNE C., 2015.

[2] (B) Klaus Peter Berger (2004); see also Hubert Konarski (2003).

onerous terms of a contract in order to avoid termination. This will be the case if the exceptional event resulted in unforeseeable difficulties that disrupt the economic balance of the contract[3].

B- Hardship:

The legal term of **Hardship** ("Théorie de l'imprévision" in French) has derived from the jurisprudence of the council of state. In addition, article 1195 of the French Civil code provided that:

"If a change of circumstances, unforeseeable at the time of the contract, renders performance excessively onerous for a party who has not agreed to bear the risk, therefore, such party is entitled to ask the other party for a renegotiation of the contract. It will however continue to perform its obligation during the renegotiation period.

In case of refusal or failure of the renegotiation, the parties may agree to terminate the contract at a date and with the effects of their choice. Alternatively, they may mutually agree to ask the judge of the contract to adjust it. If the parties fail to reach agreement within a reasonable period, either party may ask the judge of the contract to pronounce its termination at a date and with the effects to be determined by the judge".

Basically, If the occurrence of an unforeseeable event makes it very difficult or substantially more onerous for the contractor to continue the performance of its obligations as agreed in the contract, hardship may be invoked by the contractor of a public contract. Additionally, the contractor is entitled to seek compensation and/or to ask for a renegotiation of the onerous terms of the contract in the event the economic balance of the contract is likely to be disrupted by some 30% or more[4].

The rationale behind such an administrative-legal Term is to ensure the continuity of public service as a priority over and above the sanctity of contracts.

It is noted that **Hardship** would open a new path to contractors who would rather continue performance of their contracts at economically acceptable conditions, rather than rely on Force Majeure and the limited relief of an extension of time or an early termination without compensation.

In all cases, the contractor can request the suspension of a contract due to force majeure or fortuitous event, however, it is up to the Public Administration to decide if the request is granted or not. The suspension of the contract can be declared once the contract is effective and during its execution. Moreover, Six months is the maximum term for the suspension of the execution of the contract, which can be extended for another equal term.

Additionally, there are the required procedures to declare the suspension of the contract, In other words the suspension should be notified by writing and indicating the following:

- The part of the contract that has already been executed until that moment and its current status.
- Who is responsible for safeguarding the part that has already been executed.
- Measures that will be taken to guarantee the financial balance of the contract.
- The date in which the contract execution will restart, **which** should also be notified in written, before the date in which the suspension comes to an end.

The author refers that the suspension of the contract implies the suspension of all obligations and rights of the parties, and, therefore, entails the suspension of the contract's term as well, however, it is

[3] (Fn)K.Zweigert, H. Kötz, 1998.

[4] (B) See E.Baranauskas, P.Zapolskis 2009.

possible that the term for the execution of the contract is suspended and the contract's obligations remain according to some legislations, such as: the Egyptian law[5].

Besides, If the contractor does not receive any notification of the suspension of the contract, the contractor should continue executing the contract, under the terms and conditions previously agreed upon.[6]

However, in case of contract suspension, the Administration should recognize the following economic compensation to the contractor:

- Compensation for the part of the contract that has already been executed.
- Damage compensation due to contract suspension[7].

It should be noticed that, since contract suspension due to COVID-19 originates from force majeure or fortuitous event and not in a unilateral action of the Public Administration, on principle, there is no right of the contractor to claim lost profits, however, each case should be analyzed in the light of the surrounding circumstances.

[5] (S)It stipulated that "A different thing occurs when the suspension of the term for the execution of the contract operates without the suspension of the contract. As a matter of fact, it is possible that the term for the execution of the contract is suspended and the contract's obligations remain. It is also possible that a partial suspension of the execution term is declared, for example, of a certain obligation, without having any effect over the execution term of the other obligations included in the contract".

[6] (S) If the contractor doubts whether to carry on executing the contract or has difficulty doing so, the author advises to deliver a written inquiry to the Administration or directly requesting suspension of the contract. However, as long as the Administration has not expressly authorized contract suspension, the contractor must continue with execution its contractual obligations.

[7](S) The author recommend that the contractor registers and justifies every additional cost that it paid with a note for reference, so that it can be used to determine its price using objective parameters.

II- HOW THE PANDEMIC MAY QUALIFY AS FORCE MAJEURE, IN BOTH COMMON AND CIVIL LAW COUNTRIES:

Legal systems in countries around the world generally fall into one of two main categories: common law systems and civil law systems. There are roughly 150 countries that have what can be described as primarily civil law systems, whereas there are about 80 common law countries.

The main difference between the two systems is that in common law countries, case law — in the form of published judicial opinions — is of primary importance, whereas in civil law systems, codified statutes predominate. In fact, many countries use a mix of features from common and civil law systems. International Public Contracts or the State contracts are considered administrative contracts. Those types of contracts can be defined as "contracts where one of the parties is a public person.

A- In Common Law Countries:

1- ENGLAND

Like the USA, English statutes do not cover this issue which means that the force majeure is a creature of contract and not of the general common law out. The general rule applicable here is that "where a party does not perform its obligations under a contract, this would give rise to liability towards the other party".[8]

However, if a contract does not include a Force Majeure clause, the contract could potentially still be terminated on the grounds of frustration. Which means "when something occurs after the formation of the contract, which renders it physically or commercially impossible to fulfil the contract" this will be a case of Frustration. If a contract has been frustrated, it is automatically discharged and the parties are excused from their future obligations.

Otherwise, taking into consideration the unprecedented nature of the Covid-19 outbreak and/or the actions of governments around the world in response, Most of jurists expected that Covid-19 would constitute a force majeure event, under force majeure clauses which are mentioned above[9], Which will lead to **excuse** the contractor from its obligations and/or liability under the contract, without any

[8] (B)Stott, Clifford, Owen West and Mark Harrison, 2020.

[9] (Fn)Stevenson, Douglas, 2020.

damages being payable, **extension** of time, **suspension** of time, or termination in case of non performance.

2- **NEDERLAND**

In the Dutch legal system, there are no specific laws that regulate the fate of contractual obligations that are not enforceable due to the effects of the corona-virus emergency and no provision to consider it as a force majeure. However, the Dutch government has taken measures to help businesses that are affected by this crisis.

For example: the government will award a compensation of EUR 4.000 to business sectors that have been hit hardest by the mandatory closing until 6 April.

3- **SWEDEN**

In Sweden "Force Majeure" is not regulated in statutory law and there is a case of lack legislative, **because** the Swedish Parliament, Contrary to some other European countries, has not issued any specific laws or regulations regarding contractual obligations during the period of pandemic.

It is supposed that, if contractual parties have agreed on a Force Majeure clause, this clause will determine whether or not a specific situation can be classified as force majeure.

Additionally, In order to determine if a party is relieved from responsibility for not being able to perform according to contract with reference to force majeure, it is necessary to analyze the agreed Force Majeure clause and the specific circumstances of the particular case.

4- **India**

The concept of force majeure finds its genesis under the Indian Contract Act, 1872. When it is relatable to an express or implied Clause in a contract, it is governed by Chapter III dealing with contingent contracts, and more particularly, Section 32 thereof. A force majeure event which occurs de hors the contract, it is dealt with by a rule of positive law under Section 56 of the Act. Section 56 of the Act deals with the agreement to do an impossible act or to do acts which, afterwards become impossible or unlawful.

The approach of the Courts has been to examine the issue based on the facts of each case and relief has been granted to parties accordingly.

B- **In Civil Law Countries:**

1- **France**

French Jurisprudence, **in their earlier decisions**, has been reluctant to admit that epidemics (such as Ebola, SARS or the H1N1 flu) could qualify as Force Majeure.

This COVID 19 Pandemic is, however, unprecedented not only as a deadly global outbreak but also in consideration of the government's radical measures taken as an attempt to control its spread. Therefore, on 25 March 2020, the French government adopted ordinance no. 2020-306 on the extension of time limits and adaptation of legal procedures during the period of the public health emergency (Article 4).

Additionally, the Court of Appeal of Colmar decision, rendered on March 12, 2020, has already ruled that COVID-19 is a force majeure event. We might assume that this case law was the first one issued in France on this issue[10].

Actually, the application of force majeure will always be assessed by the French judge to determine whether the corona virus pandemic constitutes a force majeure event on the basis of the facts of each case, and in particular with regard to the possibility of implementing appropriate measures to prevent or avoid adverse effects on the performance of the contract (e.g., Using other sites for production).

2- ITALY

Italy was one of the first and most affected European countries which faced the Pandemic, which lead the government to adopt drastic measures, such as the closure of non-core economic activities and the restriction of the free movement of people and goods.[11]

In front of the obvious effects of these measures on the economy, the government provided an initial response with Decree-Law no. 9 of 2 March, 2020, stipulated that "the terms for contractual obligations were suspended from February 22 to March 31 of this year for those who work in the cities affected by the pandemic.[12]

Additionally, The Italian Government intervened again with Decree-Law no. 18 of March 17, 2020, (introducing the new paragraph 6, art. 3 of Decree-Law no. 6 of February 23, 2020)[13], Providing that "Compliance with the containment measures referred to in this decree is always considered for the purposes of exclusion, pursuant to and for the effects of articles 1218 and 1223 of the Italian Civil Code, of the debtor's liability, also with regard to the application of any forfeiture or penalties connected with delayed or failed performance".

Those measures did not consider the epidemic as **force majeure** explicitly, but rather they applied procedures that guarantee the rights of the damaged Party.[14]

3- GERMANY

In order to face the Covid-19 Pandemic, Germany has passed "The Law on Mitigating the Consequences of the COVID-19 Pandemic in Civil, Bankruptcy and Criminal Procedure Law"[15].

With regards to Contract Law, the legislator provides, by the new and temporary Art.240 § 1 of the German EGBGB, **a "right to refuse performance**" for consumers and micro-businesses (and a maximum of EUR 2 million as an annual turnover) until June 30, 2020. These apply to essential long-term contracts which have been concluded before March 8, 2020. This includes, particularly, contracts for the supply of electricity and gas or telecommunications services, and for water supply and disposal.

According to this article, contractors who are unable to fulfill their contractual obligations (due to the COVID 19 Pandemic) are granted the right to temporarily refuse or cease their performance without being subject to legal responsibility. This also excludes liability for damage caused by delay and an

[10] (Fn)FAGES B., 2009.

[11](b)https://www.multilaw.com/Multilaw/Documents/Italy_COVID19_impact_on_business_contracts_in_Italy.pdf

[12] (S) See art. 10 of Decree-Law no. 9.

[13](B)https://www.esteri.it/mae/resource/doc/2020/03/decreto_del_presidente_del_consiglio_dei_ministri_8_marzo_2020_en_rev_1.pdf.

[14] (B)file:///C:/Users/mohamed/Downloads/2020-03-Covid19%20GPP%20Europe%20overview%20(1).pdf

[15] (S) For example, Germany has already made COVID-19 specific changes to the Introductory Law to the Civil Code which permits consumers and small businesses to withhold performance in certain circumstances. These changes are currently set to expire at the end of June 2020 (see Art.240, §1 "Moratorium").

obligation to pay interest. In spite of the moratorium was limited to June 30, 2020, an extension option (up to a maximum of September 30, 2020) has already been created in the law.

However, the exercise of **the right to refuse performance** is excluded **if** the contractual creditor cannot be reasonably expected to exercise it. In this case, the micro-entrepreneur has the option of being released from the contract[16].

4- SPAIN

The Additional Provision 4th of the Royal-Decree 463/2020 (BOE March 14, 2020) was the procedure issued by the Spain Government to handle the COVID-19 Pandemic's effect. It declared the State of Alarm, stipulating that: "the suspension of the statute of limitations and expiration of any actions and rights during the validity of the state of alarm".

The jurisprudence decided that this lack of legal support does not imply that the Pandemic situation and the state of alarm do not affect the ordinary contractual obligations, and to solve the arising issues, reference is to be made to the following Spanish law principle "pacta sunt servanda" (the obligation to comply with what has been agreed) [17], which must be balanced with the Fortuitous Event and Force Majeure principles[18].

The Supreme Court indicates that in order to apply the Force Majeure, it must be a matter of circumstances: "totally unpredictable at the time of contracting and that by themselves prevent the provision". On the other hand, the Supreme Court also requires "good faith in the contractual field".

5- Egypt

As a rule, for reasons of force majeure or the public interest, the Public Administration has the right to declare the suspension of a contract or even revoke the contract; because of acts of God, force majeure or the public interest. The suspension or the termination of the administrative contract, here, is unilaterally.

The government declared that the case of national emergency due to the COVID-19 pandemic.
In addition, the Egyptian legislator, by article 147 of the Egyptian Civil Code, provided that "When, however, as a result of exceptional and unpredictable events of a general character, the performance of contractual obligations, without becoming impossible, becomes excessively onerous in such a way as to threaten the debtor with exorbitant loss, the judge may, according to the circumstances, and after taking into consideration the interests of both parties, reduce to reasonable limits, the obligation that has become excessive"[19]. Moreover, the Supreme administrative court classifies the corona virus as a force majeure[20].

C- INTERNATIONAL LAW :

It is a fact that there are no European regulations or international conventions governing such issues, however, support may be provided by the Vienna Convention of 1980 and by the UNIDROIT principles.

[16] (B) See M. Schmidt-Kessel and C. Möllnitz, (2020).
[17] (S) (articles 1.091 and 1.256 CC).
[18] (S) (articles 1.105, 1.602, 1.625, 1.777, etc. CC)
[19] (B) https://www.lexology.com/library/detail.aspx?g=0a1432b8-9889-4884-950b-d8b1c729cff8
[20] (S) Supreme administrative court, decision no.2489/63, session 15/01/2020.

- According to Art.79 of the 1980 Vienna Convention on Contracts for the International Sale of Goods (CISG) "failure to perform a contractual obligation which has caused by an impediment (like Force Majeure), beyond the debtor's control, and not foreseeable at the time the contract was signed **is not a source of the contractor liability**"[21].
- More generally, the principles of international trade (UNIDROIT) provide (Art. 6.2.2.) that "if an unforeseeable and uncontrollable event threats the fundamental balance of the contract (either by reducing the value of the performance or increasing its cost), the disadvantaged party is entitled to ask the other party to renegotiate the terms of the contract and, in the alternative, to ask for the termination the contract[22].

CONCLUSION

Finally, regarding the corona virus and Force Majeure, we can find in common law countries that Force Majeure exists only as a contractual concept. This means "in the absence of a Force Majeure clause in the contract or if such clause is inadequate to address the devastating effects of COVID-19, the affected contractor will have to seek relief otherwise".

That's Leads to the fact that, unless the contract expressly states otherwise, Force Majeure in such jurisdictions may entitle the contractor to an extension of time or to termination without fault but not to compensation for extra costs and losses. In brief, Force Majeure may entitle the contractor to time and exemption of liability but not to money[23].

By contrast, most civil law countries acknowledge Force Majeure as a legal concept, which is generally enshrined in codified law and expanded upon by case law. However, such legal concepts will differ from one jurisdiction to another and also evolve over time within the same jurisdiction[24].

Additionally it is supposed that, with the rapid spread of COVID-19 and the expansion and escalation of government measures taken to combat and contain the outbreak, we are likely to see more cases of parties declaring force majeure.

Therefore, the author recommended that affected companies should review the force majeure provisions in their contracts carefully and consider the implications if such force majeure provisions are to be invoked. Companies may also consider drafting their force majeure clauses more broadly in

[21] (S)It provided that "(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences……". See more at : http://cisgw3.law.pace.edu/cisg/text/e-text-79.html

[22](B) https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010/403-chapter-6-performance-section-2-hardship

[23] (Fn) ALBARIAN A., 2009.

[24] (Fn)CHAGNY M., 2015. And P. Stoffel-Munck ed. 2015.

the future to clearly include epidemics and public health emergencies, without the need to rely on a force majeure certification.

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- See art. 10 of Decree-Law no. 9. of 2 March, 2020, Italy.

- See Art.240, §1 "Moratorium" For example, Germany has already made COVID-19 specific changes to the Introductory Law to the Civil Code which permits consumers and small businesses to withhold performance in certain circumstances. These changes are currently set to expire at the end of June 2020.

- Articles 1.091 and 1.256 CC.

- Articles 1.105, 1.602, 1.625, 1.777, etc. CC.

- Art. 57 of Vienna convention, It provided that "(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and

that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences……”.

- Egyptian Supreme Administrative Court, decision no.2489/63, session 15/01/2020.