Geopolitics Quarterly, Volume: 17, Special Issue, Spring 2021 Scopus

PP 123-135

Legal Issues Tsunami in the Wake of COVID -19 and Contractual Breach

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Received: 28/02/2021 Accepted: 24/04/2021

Abstract

As the COVID-19 pandemic rages through the world, a "tsunami" of legal and economic issues including breach of contracts occurred in the private and public sectors. In Iran and throughout the world, almost all contracts contain so-called "force majeure" clauses, which excuse a business's non-performance if circumstances beyond their control prevent (or sometimes hinder) performance. These clauses often list out the circumstances which excuse non-performance and they may include flood, fire, terrorism, war "Act of God" and sometimes epidemic. Due to the impacts of the pandemic on the price of materials and tremendous increase in the costs, contractors try to take COVID-19 as a legal excuse (force majeure) to breach the contract. The present paper tries to answer the questions that can the contractors take force majeure as a "get out of jail free" card? Does the COVID-19 outbreak constitute force majeure and excuse non-performance of contract? And how does it affect "time of Essence" clauses in contracts? Through the critical analysis method, this article scrutinizes the legal challenges of the issue. Findings show that having a look ahead, the legislator has to redefine the meaning of force majeure in the Iranian and European law.

Keywords: COVID-19, Breach of Contract, Force Majeure.

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1.Introduction

Throughout the outbreak of Covid-19 scores of lawsuits have been filed across the world challenging the use of national and international legislations in response to the Covid-19 pandemic. Meanwhile, some contractual obligations might without the default of either party become incapable of being performed. The reason for this might be different. It might be because of difficulties for performance, or impossibility or frustration of the contract or even financially not recommended performance. Unforeseeable circumstances may also render the undertaken obligations unperformed. (Aderinboye,2020:31) The question under this paper is to show how different systems of law tackle these challenges. There is no doubt that the rights and duties of the contractual parties would be affected under such situations, many big companies might run into bankruptcy and something should be done to ease the parties' relations. The ideology of law makers will certainly affect the responsibilities of the parties, which is dealt with here. More important than this is to provide that every theory which firstly creates equilibrium between the rights and duties of the parties and secondly keeps the previous balances of the parties undertakings at the time of conclusion of the contract or the appearance of an act or in-act by which the obligations are created by the legislature. (Berger,2020:34) Contracts should be kept alive as much as possible. The civil liabilities and contractual obligations which meet these requirements should be reinforced and performed for the benefit of the parties to the disputes and the society as a whole.

Stability in political, economic and social conditions is one of the important factors in timely execution of projects in the contracted and planned time and the occurrence of various events during the life cycle of a project can affect its time, cost and quality. Corona virus without borders has affected the social and economic conditions of countries and has affected the relations between countries as well as social relations and the way things are done and now it can be claimed that the spread of Corona virus is the main challenge of most countries and societies. It is human economically, socially and politically. (Fathi,2020:23) Now, in this situation, the question arises, what will be the impact of the outbreak of Corona virus on the implementation of the project from the contractual point of view and the general conditions of the contract, and can it be mentioned as examples of

force majeure conditions or not? In order to answer this question, we will examine the conditions of force majeure in the law, contracts and general conditions of contracts.

Force majeure in the term means the occurrence of any external accident that is beyond the scope of authority and power of the person who is responsible and cannot prevent it.(www.tradefinance.training/blog /articles/force-majeure-consistency-between-icc-rules/2021/08/02).

Although, the principle is based on the need to execute contracts and individuals do their best to fulfill their contractual obligations, but if an incident occurs that neither party has been able to evade and has not failed in their duties, and the issue unpredictable and, in fact, beyond the power of the obligee, it can be an example of force majeure.

2.Force Majeure and Covid-19: Iranian and European legal system viewpoint

In the case of pandemic diseases, if force majeure is explicitly mentioned in the contract, force majeure will be realized. French courts have not ruled out cases of plague, Ebola, Congo fever, or swine flu in Cigunia. In fact, they believe that the mere existence of an epidemic does not lead to force majeure. For example, in some cases, the court has argued that the outbreak was not serious and that a person could have prevented the infection by using antibiotics. But the situation is different with coronavirus. (Darabpour, 2020:24) The disease is deadly, the drug is not yet available, everything is unclear about it, the rate of transmission is high, and so governments have taken drastic measures to shut down factories, offices, organizations, companies and more. So far, different countries have responded positively to whether the corona virus is a case of force majeure. In February 2020, China's International Trade Promotion Commission announced that it had issued 1,615 force majeure certificates to individuals.(www.chinadaily.com) The French Minister of Economy announced in February 2020 that the government of Corona considered the virus as an example of force majeure and exempted them from damages in government contracts with individuals. In Iran, no official statement has been made by government officials so far, and no court ruling has been found that the coronavirus is a case of force majeure. (Gore,2020:33)

In France, the first ruling on force majeure was issued by Branch 6 of the

Court of Appeal of Colmar on March 12, 2020, and the court argued that there were three conditions in the case: foreign, unpredictable and unavoidable.(Colmar, 6e ch. 12 March 2020, n 20/01098). An invocable contractual clause could be force majeure. These standard contractual clauses allow for the suspension or even performance of mutual contractual obligations due to the occurrence of a disruptive event beyond the control of the party concerned and for which the party could not reasonably have been prepared. Whether a party can successfully invoke force majeure in connection with the coronavirus outbreak depends crucially on the wording of the individual clause. The legal consequences can also raise difficult questions for the parties. Is a travel warning from the Chinese government sufficient reason to invoke force majeure if the supplier refuses to deliver? The courts are generally have to be very restrictive when it comes to affirming force majeure, as such cases should remain exceptional cases in business operations. Although the Chinese authorities have begun to issue force majeure certificates, such certificates are not binding on the court. (Chung,2020:21) Whether force majeure can be invoked does not only depend on the event itself; perhaps even more important is the actual impact of the event on the complaining party. In particular, it has a duty to mitigate damages, i.e. it must have made every effort to meet its obligations, for example by seeking suitable alternative buyers for perishable goods. Article 227 of the Iranian Civil Code states: "A person who violates an obligation is sentenced to pay damages when he fails to prove that the non-performance was due to an external cause that cannot be attributed to him." Article 229 of the same law also states: "If "The obligor will not be liable to pay damages due to an event which is beyond his / her jurisdiction to repay." The same mechanisms have been recognized by the European legal system such as France, England and United States and of the international documents such as Unidroit, UCP600 and Uniform Rules for Bankto Bank Reimbururseme nt under Documentary Credits.

Covid-19 causes several lawsuits regarding the fulfillment of contracts with customers, suppliers and in the relationship between them. The tsunami also entails numerous potential and actual legal risks. In the text of Islamic rules, there is a series of controlling rules called governing rules that govern all Islamic rules and regulations. The rule of no harm, the rule of negation of hardship, the rule of not abandoning the fulfillment of all obligations under

the pretext of not being able to fulfill some components of the obligation, the rule of maintaining the economic system and preventing the disruption of the system, the theory of not invalidating other people's property Islam is in the sense of good faith and is close to Western law, and the rule of denying oppression and looking at rulings based on the purposes of *Sharia* are all progressive Islamic rules that can be used to pave the way for legal recognition of force majeure in corona virus conditions. (Safaee,2010:58) Regarding the application of force majeure conditions to corona virus, it can be said that it is not possible to check the conditions of force majeure until the outbreak is announced in an area, but if its presence is announced in an area, the conditions of force majeure can be announced. There is no question of the condition of being out of the will of the individual, but of the unpredictability of the time to be judged. (Mohaghegh,2020:17) The rule of negation of hardship is one of the rules that control and dominate all Islamic regulations. According to this rule, any obligatory or legal sentence that is difficult for a person to bear will be removed from the obligor as long as that difficulty remains. However, in Islamic jurisprudence, on which Iranian law is also based, the issue of the difficulty and difficulty of the contract has been less studied. On the other hand as the outbreak of Covid-19 terbulated the economical situation of the society and consequently has made lots of contracts be breached, therefore, Disruption of the economic system of society is something that is not compatible with the purposes of Sharia in transactions and the legislator is forced to identify this epidemic and dangerous disease as force majeure.(Mohaghegh,2020:23) In the law of European countries such as France and Germany, the term force majeure is used, which is the same in the Iranian law. Commonwealth countries such as the United Kingdom and the United States use the term contract sterilization, practical or commercial impossibility. If a contract does not contain a corresponding force majeure clause or if this does not cover the situation, the applicable law is decisive, although in some countries either a specific form of force majeure or possible alternatives are provided for, for example the “force majeur” in French law or the “impediment” provisions in the Vienna Sales Convention. (Crespi,2020:24)

Numerous legal questions have been raised about the outbreak of the deadly epidemic Covid 19, which requires legal systems to answer these questions. For example, this pandemic has led governments to take various measures to

better ensure the health of their people. This has led to drastic changes in the economy and greatly affected contractual relations between people. In order to meet the legal needs of all, legal systems have come up with ways to regulate new laws for keeping public interest and avoid corruption, to establish justice and order. (In this article, an attempt has been made to consider the views of various legal systems in the face of severe economic changes caused by Covid 19 in order to discard the principle of binding effect of contracts, paying attention to excuses and their impact on the contract and explain the effect of hardship on contract performance. Finally, it should be analyzed the remedies of dissolution, suspension and adjustment based on the accepted principles in different legal systems. At the meantime, Islamic law, as a legal system based on principles, rules and regulations, especially in the field of transactions in order to provide the interests of the people and avoid corruption, proposes remedies such as (dissolution, suspension and adjustment). (Ghanavati,2020:11)

Following the outbreak of Covid 19 virus and its spread in the community and the inability of any party in the legal relationship to fulfill the obligation in the concluded contracts, there is now an excuse in fulfilling the contractual obligations, now with the outbreak of the corona many businesses and other contracts they have a legal problem. The conclusion is that according to the current situation and the current situation to investigate the issue that, in case of non-fulfillment of contractual obligations by the parties with regard to the contractual liability of Article 219 of the Iranian Civil Code and laws laid down in accordance with Articles 227 and 229 of the Iranian Civil Code, Cairo is considered and the concluded contracts either lead to permanent termination of the contract or create temporary termination or in some cases terminate or cancel or create the right of imprisonment.

Natural and unnatural events such as pandemic can make contractual obligations impossible or very difficult for one of the parties to the contract. The binding nature of contracts is a rational and accepted rule by all legal systems, but the necessities and excuses of the contract justify the acceptance of exceptions to this legal rule. (Cheshire,2012:23) The question of this article is whether the corona virus epidemic makes it difficult to execute contracts or does it exclude contract execution and is an example of force majeure?

3.Force Majeure and Hardship in Unidriot, UCP600 and URR 725

Article 7-1-7 of the Unidroit states that: "Non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it 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. (https://www.unidroit.org/)

When the impediment is only temporary, the excuse shall have effect for such period as is reasonable having regard to the effect of the impediment on the performance of the contract. The party who fails to perform must give notice to the other party of the impediment and its effect on its ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, it is liable for damages resulting from such non-receipt. (Zivkovic,2012:25) Nothing in this article prevents a party from exercising a right to terminate the contract or to withhold performance or request interest on money due". However, This Article covers the ground covered in common law systems by the doctrines of frustration and impossibility of performance and in civil law systems by doctrines such as force majeure, Unmöglichkeit, etc. but it is identical with none of these doctrines. The term "force majeure" was chosen because it is widely known in international trade practice, as confirmed by the inclusion in many international contracts of so-called "force majeure" clauses. (https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles. available at 10/02/2021) articles 6-2-1 and 6-2-2 of the Unidroit regarding the definition of hardship it declares that Where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the following provisions on hardship. (Grady,2013:13)

The purpose of this Article is to make it clear that as a consequence of the general principle of the binding character of the contract (see Article 1.3) performance must be rendered as long as it is possible and regardless of the burden it may impose on the performing party. In other words, even if a party experiences heavy losses instead of the expected profits or the performance has become meaningless for that party the terms of the contract must nevertheless be respected.

"There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and

(a) the events occur or become known to the disadvantaged party after the conclusion of the contract;

(b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;

(c) the events are beyond the control of the disadvantaged party; and

(d) the risk of the events was not assumed by the disadvantaged party.

This Article defines hardship as a situation where the occurrence of events fundamentally alters the equilibrium of the contract, provided that those events meet the requirements which are laid down in sub-paragraphs (a) to (d). Since the general principle is that a change in circumstances does not affect the obligation to perform (see Article 6.2.1), it follows that hardship may not be invoked unless the alteration of the equilibrium of the contract is fundamental. Whether an alteration is "fundamental" in a given case will of course depend upon the circumstances. Meanwhile, the legal effects of the hardship is ascertained in article 6-2-3 of the same document as follow: (1) In case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based. (Donald,2003:21)

(2) The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance.

(3) Upon failure to reach agreement within a reasonable time either party may resort to the court.

(4) If the court finds hardship it may, if reasonable,

(a) terminate the contract at a date and on terms to be fixed; or

(b) adapt the contract with a view to restoring its equilibrium.

According to the Article 1218 of the French civil code "In contracts, a force majeure event is when it is out of the control of the obligor and it is not possible to predict normally at the time of concluding the contract and its effects cannot be avoided with appropriate measures so that the event prevents the contractor from performing the contract". From the above article it can be understood that the effect of force majeure on the non-performance of the contract must not only be proved by the obligor, but he

must also prove that he could not have foreseen its occurrence at the time of concluding the contract. (Gritsenko,2014:8)
With regard to UCP 600, force majeure events include ‘Acts of God, riots, civil commotions, insurrections, wars, acts of terrorism, or by any strikes or lockouts or any other causes beyond its control.'
Acts of God refer to events caused by natural forces including, for example, earthquakes, floods, tornadoes, snowstorms, hurricanes, etc. In other words, it refers to events which are caused without any human interference and which could not be prevented. (treitel,2015:77) The second paragraph of UCP 600 article 36 emphasises that banks will not honour or negotiate any credits that expire during the course of a force majeure event and where, due to that event, no presentation could be made to the concerned bank. At the meantime, Article 15 of URR 725 (Uniform Rules for Bank-to-Bank Reimbursements under Documentary Credits) is identical to that in UCP 600 apart from the fact that it refers to a reimbursing bank only and does not include the second paragraph of UCP 600 article 36. Article 15 of URC 522 (Uniform Rules for Collections) also follows the same structure as UCP 600 article 36, although again without the second paragraph. Perhaps reflecting the situation at the time of publication, the only other contextual difference is that it makes no reference to ‘acts of terrorism'. (https://www.tradefinanceglobal.com/letters-of-credit/ucp-600/ 2021/07/02)

4.Force majeure Frustration and covid-19 In English and American law
English law on the difficulty of enforcing a contract is influenced by the theory of frustration and impossibility of enforcement. In frustration theory, the difficulty of enforcing the contract in terms of sterilization of purpose is also raised. (Andrew,2016:164) In English law, frustration can be justified on the basis that if the contractual obligation is not fulfilled without the fault of either party and due to a fundamental and drastic change in the terms of the contract at the time of execution, the obligor will be exempted from performing the contract. (Davis contractor Ltd V. Farenham,1956, AC 696)
In the view of American law, it is accepted that an issue is impossible when it is not executable. On the other hand, an issue is not executable when it is executable only by means of high and unreasonable cost. The term impracticability of contract in American law implies conditions that, in spite of non-realization of necessary conditions for frustrating contract, the contract‟s life would be finished due to unreasonable and high costs of

performing the commitment economically. In the other words, although performing contract is possible technically but conditions of performing contract are very different from conditions at the time of contract‟s conclusion in the Restatement (second) of contracts, in comment "d" following article 261, it is stated that impracticability of contracts includes hardship, cost, illogical or high lost for one of parties [7]. As it can be seen, in contrast to impossibility, doctrine of impracticability of contract does not imply its physically impossibility but also includes changes to circumstances which lead to high hardship and costs for one parties so that be intolerable. This doctrine has broadened scope of contract‟s loss by sudden events and unpredictable. This flexibility in American law is remarkable. (Poole,2016:17)

Furthermore, from the American legal system view point, the more modern law of contracts Uniform Commercial Code basically rejects the terminology of impossibility, or tries to re-explain it by making use of other terminologies. (Robert,2014:35) The two concepts of frustration of purpose and impossibility are commonly combined resulting into the single concept of commercial impracticability, 2-615 UCC. The comment 1, 3 of 2-615 UCC‟s essentially the leading concept or the definition for the section that has the title of "Excuse by Failure of Presupposed Conditions" and is the used terminology which is usually used today is commercial impracticability. (Mazzacano,2012:26) Even though, literally, they might be interpreted as the same. However, in actuality and in terms of law they mean two different things. From the legal perspective, the term of impracticability of contract means an extremely difficult and increasingly more burdensome performance that occurs suddenly and in an unanticipated way. (Restatement (second) of contracts 1981, 261, comment d). Pursuant to the provisions of Articles 261, 265 and 266 of the Second Restatement, in the event of an event which results in the non-performance of the contract or the impossibility of the purpose of the contract, the obligor will be exempted from fulfilling his contractual obligations.

5.Conclusion

In all legal systems, the principle of adherence to transactions is recognized as the most important principle governing contract law. But on the other hand, force majeure and the difficulty of enforcing the contract have been accepted by legal systems in various forms and with different literature,

including European, American and Iranian legal systems. In these systems and in international contractual documents such as Unidroit, Force Majeure and Hardship have been identified. And from the viewpoint of some these legal systems covid-19 has been recognized as force majeure. Occurrence of natural and unnatural events such as floods, earthquakes, changes in political, economic and social factors can affect the basis of contracts. Diseases such as Ebola, SARS, and corona virus can also make contractual obligations impossible or difficult for one of the parties to the contract. As a result, due to force majeure or difficulty in executing the contract, the parties can exempt themselves from short consequences and consequences in fulfilling the contractual obligations, terminate, suspend or modify the contract. Although so far the courts and laws of the countries have not recognized pandemic diseases as force majeure, but because of the contagious, deadly, untreated and unvaccinated disease, covid-19 diseases can be considered as a case of force majeure. In a few cases, the French courts have made decisions regarding the identification of coronavirus as force majeure and similar incidents, and believe that in order to achieve force majeure, all the criteria and conditions for force majeure must be present in order to be considered subject to Article 1218 of the French Civil Code. In British and American law, frustration theory can justify the effects of the coronavirus on contract enforcement, both in cases where it is impossible to enforce and if it is difficult to enforce the purpose of the contract. In Iranian law and Islamic jurisprudence, where the rules of Shari'a are based on corruption and interests, accepting the dissolution, suspension or modification of the contract according to the aforementioned legal and jurisprudential rules in order to ward off corrupt people, which is the main purpose of Shari'a in transactions between people, Losses are supported. The courts of Iran, like the rest of the world, should consider the pandemic corona virus as force majeure if there are all the tools to achieve force majeure.

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