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The Legal Impact of the "COVID-19" Pandemic; the Application of the "Force Majeure" Clause and the "State of Emergency" Theory under Saudi Law and the Judiciary.

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Introduction

The international community is experiencing a health crisis linked to the epidemic involving the outbreak of the "Corona virus", the so-called "COVID-19". This has led to adverse health, social, economic, and legal effects, and in other areas that are not covered in this article. The disease was officially announced in China on December 31, 2019, and on March 11, 2020, the Director-General of the World Health Organization (WHO) officially declared the global epidemic a **pandemic**. At the national level, the Kingdom of Saudi Arabia introduced several measures to prevent the spread of this virus. The King, *Salman bin Abdulaziz Al Saud*, delivered a speech on March 19, 2020 regarding the pandemic, emphasizing the need to take all preventive measures in order to confront the pandemic, and reduce the adverse effects on Saudi society.

This paper will discuss the legal effects of this pandemic on companies and other organizations, and on commercial and administrative contracts in the Kingdom of Saudi Arabia. It does this by researching the principles of the "Force Majeure" clause and the theory of the "State of Emergency", and discuss the term "Pandemic" (*Jayiha*) in Islamic law (*Sharia*). In addition, it will answer several related questions, including researching "Force Majeure" and "the State of Emergency" under Saudi law. It will also extrapolate the situation to the Saudi judiciary by examining some judicial precedents, and by studying the impact of "Pandemics" in Islamic jurisprudence (*fiqh*). It will then propose a number of solutions before offering a conclusion.

First: The Legal Basis of the Clause "Force Majeure" and the Theory of "The State of Emergency" under Saudi Law:

It should be clarified that the two terms have been dealt with in Saudi Law in a number of regulations such as the Common Customs Law (2003),¹ Mining Investment Law (2004),² Labour Law (2005)³ Civil Aviation Law (2005),⁴ the Law of Transporting Pilgrims to Saudi Arabia (2005),⁵ Financial Lease Law (2012),⁶ the Government Tenders and Procurement Law (2019),⁷ E-Commerce Law (2019).⁸ The oldest laws relating to these terms is the Commercial

Court Law (1931)⁹ when Article 24 stipulated that "... **Every damage that arises from his delay guarantees it unless the inhibitor is compelling and unable to prevent it**". However, it should be noted that there are few regulations deal with applying one of the two theories. Their general texts do not detail how or what conditions of use apply. It is difficult to offer a specific definition of "Force Majeure" or "State of Emergency" in Saudi law. Still, we will include some of the definitions considered in the articles of these regulations. For example, the Government Tenders and Procurement Law defines the term "Emergency" as "A situation in which public safety, security or health is seriously and unexpectedly threatened, or where there is a breach that threatens to cause loss of life or property, and under which the normal tendering procedures are useless." With regard to "Force Majeure",¹⁰ Article (28) of the Mining Investment Law stated that force majeure "... means all events normally recognized as force majeure that render it impossible for the licensee to carry out his obligations as provided in the license, and which arise from circumstances unforeseen at the time the license is issued and which cannot be attributed to either party".

What is noticeable with regard to the definition is the lack of detail in describing the state of force majeure. It has been found that it is stipulated that this force majeure was not caused by any party and is external, which makes the implementation of obligations impossible. In addition, the element of surprise and unpredictability is achieved. When comparing "Force Majeure" and "the State of Emergency", it would appear that both terms agree that there is a force beyond the control of the parties involved. Moreover, since neither party had a hand in its occurrence, the element of surprise existed. However, both terms differ in terms of their impact on the obligation to implement the contract, due to the fact that force majeure lacks the ability to commit to the implementation of the contract, which makes it impossible to uphold; in such a situation the judiciary usually rules for annulment. Meanwhile, in an emergency situation, the obligation to implement the contract becomes heavy and burdensome on one of the parties involved. When a dispute is referred to the Saudi judiciary, one option would be to rebalance the contract obligations to a reasonable extent.

Second: The Sharia Law Basis with regard to "Pandemics" (*Jayiha*), or "Force Majeure" (*Alquat*

¹ Issued by virtue Royal Decree No. (M / 41) on 3/11/1423 AH

² Issued by virtue Royal Decree No. (M / 47) on 20/8/1425 AH

³ Issued by virtue Royal Decree No. (M / 51) on 23/8/1426 AH

⁴ Issued by virtue Royal Decree No. (M / 44) on 18/7/1426 AH

⁵ Issued by virtue Royal Decree No. (M / 58) on 28/12/1425 AH

⁶ Issued by virtue Royal Decree No. (M / 48) on 13/8/1433 AH

⁷ Issued by virtue Royal Decree No. (M / 128) on 13/11/1440 AH

⁸ Issued by virtue Royal Decree No. (M / 126) on 07/11/1440 AH

⁹ Issued by virtue Royal Decree No. (M / 2) on 15/01/1390 AH

¹⁰ Article (1) of the Government Tenders and Procurement Law.



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Alqahra) and "the State of Emergency" (Alduruf Alttaria):

The fact is that *Sharia* law does not address the subject of "Force Majeure" or "the State of Emergency" explicitly and directly. However, there are many inferences in the Holy *Qur'an* that indicate a valid excuse (*ALeuthr*) in the event that there is something that prevents execution; as (the God) *The Almighty Allah* said: "**Allah burdens not a person beyond his scope**", and "**Our Lord! Punish us not if we forget or fall into error**".¹¹ With regard to contractual transactions, it is stated on the *Hadith* of Prophet *Mohammed* that "If you sell fruits to your brother and these are stricken with Calamity, it is not permissible for you to get anything from him. Why do you get the wealth of your brother, without justification?".¹² The Islamic scholars addressed the subject of force majeure, even if not explicitly stated. *Ibn Qudama*,¹³ in his comprehensive work, *AL-Mughni*, states "When there is a general fear that prevents the tenant from living in that place where the house is rented; or confining the country, so he refrains from going out to the rented land for cultivation; this situation proves and grants to the tenant the option of annulment; due to it is a dominant thing that prevents the tenant from fulfilling the benefit, so the choice is proven".¹⁴

What is stated in the "*AL-Mughni*" is that the option of annulment is apparent even with binding contracts (e.g. lease contracts) if there is a situation of force majeure. This is in accordance with the *Sharia* rule of "**No mission except what is possible for doing it**". The above situations can be compared with the event of an emergency. This is done by reducing the fare in order to balance the contractual obligations between the parties based on the *Sharia* rule of "**No harming nor reciprocating harm**", as well as the *Sharia* rule of "**The most severe damage is eliminated by less severe damage**". In the brief of the Sheikh of Islam *Ibn Taymiyyah*, he stated: "Those who have rented what is useful to rent to the general public, such as a bath, hotel and market, then the known benefit has been reduced, because of the lack of customers due to fear, war, political changing and so on; the value of rent should be reduced from the rent as much as the benefit is lacking".¹⁵ It is a practical solution to a state of emergency as an essential

need to rebalance the contract. For a detailed explanation, we refer to the Resolution of the Islamic *Fiqh* Council on the title "**Emergency Situation and their Impact on Contractual Rights and Obligations**", held at its fourth session on 1402 AH.

Third: Extrapolating the Saudi judiciary's approach to the "Coronavirus" pandemic (COVID-19):

Since most Saudi laws did not clearly refer to "Force Majeure" or "State of Emergency", and since there is a high probability that these terms will not be included in terms of private contracts between parties, such contracts will be subject to full judicial interpretation, and to the adaptation of the rules of *Sharia* law and Islamic jurisprudence, in order to adjudicate disputes resulting from the "**Coronavirus**" pandemic. This shows the importance of discussing this issue and extrapolating the Saudi judiciary's approach to consider such cases.

If these contracts had included terms related to "Force Majeure" or "State of Emergency" such as restriction terms that prevent or which cause difficulty with regard to implementation, or when the contract is governed by laws that have referred to such as the Government Tenders and Procurement Law or Labour Law, the basic principle is that these provisions are binding on its parties, and these obligations cannot be avoided. This is based on what *Allah* said in His Holy *Quran*: '**O you who believe! Fulfill (your) obligations...**'.¹⁶ In terms of the *Hadith* of the Prophet *Mohammed*, he says "**Muslims are bound by their conditions**"¹⁷ The main general rule of a contract under *Sharia* Law is that all matters are permitted unless they are prohibited under *Sharia* Law.¹⁸ When exceptions are mentioned in a contract that is related to the force majeure or to an emergency situation that relates to that contractual relationship, or that the relationship is governed by a Law that specifically refers to such an exception, then the jurisprudence of the judiciary is limited to looking into the verification of the incident, then applying the most appropriate ruling to the contracting parties, either a ruling relating to the cancelation of the contract, or a rebalancing of the contractual relationship. However, controversy will occur if the contractual relationship did not include provisions for an emergency situation or force majeure, or that the relationship was not governed by a Law or regulation indicating these

¹¹ *The Holy Quran, Surah 2. AL-Baqarah, (286); Al-Hilali and Khan, "The Noble Quran: English Translation of the Meaning and Commentary."*

¹² Narrated by Jabir bin Abdullah, quoted by Muslim (1554), and Abo Dawood (3470).

¹³ *Ibn Qudama Maqdissee (1147-1223)* is considered the most authoritative source of the *Hanbali* School.

¹⁴ *ALMughni of Ibn Qudama (5/338)*, *ibid*

¹⁵ The Brief of Opinion (*Fatawa*), *Ibn Taymiyyah (S/637)*

¹⁶ *The Holy Quran, Surat al-ma'idah, Part 5 Verse 1*

¹⁷ Narrated by *Abu Dawood (3594); classed as Saheeh by al-Albaani in Saheeh Abi Dawood*

¹⁸ *The Holy Qur'an, Surah AL-Jathiyah; 45:13; As Allah said in His Holy Quran 'And has subjected to you all that is in the heavens and all that is in the earth; it is all as a favour and kindness from Him'*



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exceptions. In order to clarify the position from the point of view of the Saudi judiciary, we will cover possible aspects of the lawsuits that will be brought, and then comment on the disputes related to the various contractual relationships.

1. Regarding the decisions of the Saudi Government related to combating this pandemic:

Referring to the speech of King *Salman bin Abdulaziz Al Saud* on March 19, 2020 regarding this pandemic, all decisions of government agencies are based on the sovereign decision issued by the King in order to deal with this pandemic; these decisions are based on the text of Article (62) of the Basic Law of Governance, which stipulates " **If a threat arises which endangers the safety or the territorial integrity of the Kingdom or the security and interests of its people, or hinders the institutions of the State from performing their functions, the King may take urgent measures as would guarantee to deal with that danger. If the King deems that such measures be permanent, he may take whatever actions required pursuant to the Law.**" Thus, the decision issued by the government agencies is considered a sovereign governmental decision which has an authority immunity; it is a decision issued by a ruling authority rather than an administrative authority, a distinction that was stressed in Article (14) of the Board of Grievances Law which states "**Courts of the Board of Grievances may not review cases related to sovereign acts...**". This ruling prevents the affected party challenging any administrative decisions that relate to a sovereign action before the administrative judiciary. For example, it is not acceptable to file a compensation lawsuit or challenge the administrative court, with regard to the governmental authority that issued a decision to close markets and commercial complexes, even if such an action resulted in financial damage.

2. Regarding contractual relations, and extrapolating the Saudi judiciary's approach:

The Kingdom of Saudi Arabia has previously been exposed to several emergency situations such as the Gulf War (1990), that led to a massive change in normal conditions irrespective of whether its impact was limited to a specific geographic area or was more comprehensive. This has affected the implementation of obligations in terms of administrative contracts, and the administrative judiciary has addressed such obligations with the theory of "State of Emergency" and "Prince's Act or Act of State"

(*Feal ALAmir*) for several contracts. In this respect, we found repeals of some administrative decisions that imposed fines or awarded compensation, based on the conditions accompanying the implementation of the contract, such as the appeal decision No. [102 / T / 2 of 1416 AH], which was a contract between a private entity specialized in printing, and the General Presidency for Girls' Education (the governmental party) to supply textbooks for all educational stages with a contract worth more than 4 million Saudi Riyals. A fine was applied for the delay on the part of the private entity in the amount of 426,000 Saudi Riyals. However, the plaintiff (the private entity) claimed that the delay had arisen from an emergency situations beyond its control. Specifically, this referred to a delay in the shipment of imported paper and the exodus of labour from Riyadh due to the Gulf War (1990). Accordingly, the court ruled that the fine be cancelled. In another administrative decision, the administrative judiciary dealt with the theory of "Act of State" or, as it is called the "*fait du prince*"¹⁹ in appeal decision No. [367 / S / 1 of 1430]. In this case a private entity contracted with the administrative authority to carry out road works. However, due to the length of the contracting period the prices of the primary materials for the construction of the asphalt (bitumen) increased. As a result, the cost of implementing the contract increased dramatically to an outrageous extent (65%) over the price specified in the initial contract and during the bidding to an extent that it was not possible to foresee. However, the reason for the cost increase was an increase in customs duties, which is an order of the government. Accordingly, the claimant was ruled in full, the value difference between the price before and after the increase, in the amount of 1,165,892 Saudi Riyals. In the case of private lease contracts, we find that the general court has ruled on the termination of such a lease contract between the two parties. The legal reason was based on what is stated in the "*AL-Mughni*" - "**If an unavoidable action comes in, the tenant reserves the benefit of what is signed by the contract, then he is required to pay only the amount of time he benefits**".²⁰

3. What are the conditions for applying these theories in the Saudi judiciary?

We find that the Saudi judiciary has dealt with cases of financial imbalance in contracts, and has issued judicial rulings under both the "State of Emergency" theory and the "*fait du prince*" theory. The Saudi judiciary has specified a number of necessary conditions for their

¹⁹ It is a French term mentioned on the French Administrative law.

²⁰ *ALMughni* (8/27) Issue No. (4178). In case No [33442221], approved by appellate decision No [34208836] in 5/7/1434 AH.



application to any incident. These are limited to the following:

- a) **Requirements for the "state of emergency" theory that must be fulfilled:** (1) that the implementation of the contract on which the theory is raised should be lax, i.e. there should be a period separating the issuing and enforcing of the contract. (2) After the issuance of the contract, exceptional general emergencies such as earthquakes, wars, and the spread of a pandemic should suddenly appear. (3) That these general emergencies are unexpected and impossible to be anticipated or unavoidable. (4) That these unexpected emergencies make the implementation of the obligation cumbersome, not impossible. When the implementation of the commitment is impossible, this means that the emergency is considered a "force majeure" by which the obligation will be terminated and the contract revoked.²¹
- b) **Requirements for the "fait du prince" or "Act of State" theory that must be fulfilled:** (1) There should be a contractual link between the government agency and the affected private entity in terms of the procedures or orders issued by the government (Act of State). (2) That the government actions (Act of State) cause special damage to the private entity in terms of its contract with the government. This means submitting a claim for actual damage as a result of the government action regardless of the severity of the damage. (3) The action issued by the government (Act of State) has led to the cause of the increase in the contractor's financial burdens or obligations, i.e. a claim with regard to the harmful procedure or order that caused an increase in the contractor's financial duties or obligations must be issued by the government as Act of State. (4) That the action that was taken by the government must be unexpected at the time of contracting. (5) The conduct of the government that harms the private entity is within the limits of its authority in terms of protecting the public interest. However, if the government's action involves an error, it will be held responsible for the government's mistake according to the terms of contractual responsibility.²²
- c) **The difference between the theory of "the State of Emergency" and the theory of "Act of State / fait du prince" is under the judge's authority to compensate:** the judge in the case of a State of Emergency has a wide authority involving considering the balance of interest of both parties to the contract. Examples include an increase in compensation for the

exhausting obligation, decreasing the exhausting obligation, or stopping the execution until the unexpected emergency disappears, given that it is temporary. Indeed, reducing the burdensome and exhausting commitment shall be shared between the two parties to the contract, not applied to only one party. As for the theory of *fait du prince*, the private entity will be compensated for all the damages that the private entity suffered if the conditions mentioned above are met.

Fourth: Proposed Solutions to the Effects of this Pandemic:

While prevention measures have been taken by the government to limit the spread of the pandemic (COVID-19) these will have an extensive impact on all sectors and economic activities. These will affect the economy and require all parties to share the burden of the side-effects of the pandemic, such as not imposing legal fines, or applying the penal clause in contracts, until all activities return to full operation. There is no doubt that the negative effects will be uneven, as most sectors have already been affected by this pandemic, but there are several sectors that have reaped profits and benefits such as the pharmaceutical, food and e-commerce sectors ... etc.

- a) **Regarding the public sector (contracts with government agencies):** As private entities that contracted with government agencies will be affected, and there may be changes in their obligations due to an increase in prices or delays in project implementation and delivery ... etc. We expected and have seen many initiatives from the leaderships of Saudi Arabia to help the private and public sectors, and support those affected by the pandemic. It is expected that government agencies will take into account these circumstances with contractors, evaluating each contract and each case separately. If the contractor continues the contract and this pandemic causes a delay in delivery, or an increase in obligations or whatever, and the government agency imposes fines with no consideration of these circumstances which impact on the financial balance in the contract, the option exists for the contractor or private entity to file a lawsuit to the administrative courts (The Board of Grievances) to split and reduce the heavy burden of the contract with the government agency.
- b) **Regarding the private sector (contracts between private entities):** Such contracts include labour contracts, lease contracts, construction contracts, commutative contracts, and supplies contracts. Some

²¹ The Appellate Decision No. 5/T/1 in 1417 AH, and 199/T/1 in 1417 AH. These requirements are mentioned in legislation in a number of Arab countries.

²² The Appellate Decision No. 253/S/1 in 1431 AH.



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of these contracts contain penalties with regard to delays in project implementation without an excuse clause "Force Majeure", and it is vague at this point in time when the preventive measures might end. This makes it difficult to predict the extent of the impact on business and economics activities. Certainly, all sectors that are negatively affected will require a rebalancing of the obligations in their contracts if the contracts are flexible and possible to carry out. Alternatively, the contracts will be terminated if the proceeding is impossible. This solution could possibly avoid the collapse and bankruptcy of some existing business organisations due to the failure to fulfil contractual obligations on time. For example, in leasing contracts of real estate, the joining of all parties could postpone payment on the part of commercial tenants or decrease the rent for this year; and in employment contracts, most employees (workers) in commercial establishments should accept a reasonable decrease in their salaries or rotate in the taking of leave without payment between employees. Such action might mean that the business owner (the employer) does not face bankruptcy leading to everyone losing their job. In addition, executive positions paying high wages should be cut or reduced to ensure the availability of sufficient liquidity to facilitate the continuation of the business. Examples and methods abound with regard to the participation of all parties in order to overcome the current circumstance and lower its negative effect.

Conclusion:

This paper shows that the theory of the "State of Emergency" in most contracts, and also a "Force Majeure" in some contracts, apply in response to the COVID-19 pandemic. The pandemic is an Act of God which has emerged and spread suddenly and unexpectedly. It has exhausted most contracts or made them impossible to implement. This has led to different effects – mostly negative but some positive. The parties involved in a contract should settle the dispute with goodwill by rapprochement and reconciliation. Otherwise, they will have to go to court. This paper points out that there are actual principles in the Saudi judiciary and in Saudi legislation including the theory of the "State of Emergency" and the term "Force Majeure", and that Saudi judges have a wide range of discretion in assessing the impact of the pandemic, in terms of the nature of the conflict, the contractual relationship, the parties involved and the extent of their harm due to the pandemic. However, we expect that the Supreme Judicial Council will create a committee under the high court to discuss setting specific judicial principles to regulate the jurisprudence in the "Corona Virus" pandemic issue, as all kinds of Saudi courts will undoubtedly be busy in the coming period in dealing with disputes brought by parties

affected by the pandemic. This paper has presented several solutions that could be applied by commercial establishments before entering the long process of filing a lawsuit in the courts.

Disclaimer: This paper is considered a scientific discussion to study the impact of the "Corona Virus" pandemic in the legal field. It examines the contractual relationship between commercial entities in general inside Saudi Arabia, without going into specific contracts or cases. It is hard to confirm with certainty that the recommendations if this study is suitable for all cases, and is not considered to be legal advice in any shape or form, so be warned! Contact us directly to answer any inquiries in this regard by emailing us on info@aleissalawfirm.com.

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