

THE EFFECT OF CORONA VIRUS ON OBLIGATIONS IN ADMINISTRATIVE CONTRACTS

Dr. Feras Syah Matar Al Shrafat

Ministry of Education / Administrative Law/ Part-time Lecturer - Al al-Bayt
University/Jordan

Abstract

The impact of the Corona virus (Covid 19) on contractual obligations in administrative contracts that aim to maintain the continuity of public utilities, and given the importance of administrative arrangements, theories of the administrative contract appeared in the past to maintain the financial balance of these contracts in the event of events or circumstances affecting them and the volatility of the economies of those contracts, first Administrative contract theories, the force majeure theory, which is applied in the event that the implementation of the agreement becomes impossible due to the circumstance that occurred or appeared, and the theory of emergency circumstances that apply in the event of something that makes the implementation of the contract stressful for the contractor and upsets his economics, but does not reach the limit of the impossibility of performance, and the theory of the work of the prince that is applied in If orders are issued by the management authority, these orders affect the economics of the contract.

The study showed that the impact of the Coronavirus and the measures taken by the public authority in light of this pandemic on administrative contracts does not go beyond the scope of these theories, but the application of theories varies from one contract to another according to the severity of the damage caused to each agreement from the difficulty of implementation in some arrangements to the impossibility of performance in Other contracts, and compensation was also different according to the damage and according to the agreement and according to the theory whose terms were applied with the conditions of those contracts, and the study also showed the applicability of the theory of emergency conditions to this pandemic in a very large way to most administrative contracts.

Keywords: Corona virus, administrative contracts, emergency conditions theory.

introduction

The world witnessed the Corona Virus (Covid 19) pandemic and the positions of countries in dealing with this pandemic varied. Still, they all resorted to comprehensive or partial bans that suspended many areas of life, especially the economy. Among the consequences that accompanied the prohibition was the stopped or postponed some Administrative contracts. This suspension or postponement was accompanied by non-fulfilment or non-compliance with contractual obligations and the financial and legal consequences for the contractor and management.

One of the most important effects of this pandemic is the imbalance in administrative contracts so that it has become difficult to implement them without seriously harming the contractor—the organizational balance under which the interests of the contracting parties and management.

International positions, as well as jurisprudential opinions and jurisprudence in dealing with the Corona pandemic, have varied according to the measures of each country and the extent of the impact of those measures on the administrative contract and its nature. Impossible, and in this study, we will see the fate of contracts that did not reach the limit of impossibility but exhausted the contractor to implement, the extent to which the theory of emergency conditions can be applied, and the compensation mechanism through which the financial balance of these contracts can be addressed under the theory of emergency conditions.

Research Importance

A statement of the legal effects of the Corona pandemic and its impact on administrative contracts, and an account of the legal facts that support and confirm the opinion that the Corona pandemic is like emergency conditions, and the extent of the discrepancy in the consequences of that, the most important of which is the value of compensation and how it was calculating.

Research problem

What is the impact of the Corona pandemic on the obligations in administrative contracts in light of the existence of the theory of emergency conditions, and therefore we ask the following questions:

- 1- What is the fate of contractual obligations and the rights of both parties to the contract in light of this pandemic?
- 2 What is the legal impact of non-compliance with administrative contracts due to the Corona pandemic?
- 3 What is the legal basis on which the cases will be filed before the competent courts due to the impact of the Coronavirus?
- 4- To what extent do the conditions of the theory of emergency conditions coincide in the context of the Corona pandemic?

Research Methodology

The researcher followed the following approaches in completing this study:

First: is the analytical approach, in which work has been done to analyze some legal texts and judicial rulings.

Second: The comparative approach, by comparing the opinions of jurists in administrative law and the legal rulings issued regarding the theory of emergency conditions and the Corona pandemic.

The first topic

Administrative contracts and the Corona pandemic under the theory of emergency conditions

The impact of the Corona pandemic on many contracts did not reach the administrative degree of force majeure with which it is impossible to implement, but most of those contracts became burdensome for the contractor; for example, supply contracts were delayed but did not stop permanently, and the evidence for this is that international trade did not stop permanently, and for other contracts such as works General and concession contracts also, the effect was relative and temporary. We noticed that the ban in all world countries was partial and temporary. The

procedures that are taking place now in various countries confirmed this trend and this opinion. In Jordan, after about 30 days, many sectors partially returned, and after 40 days, they returned. Most economic sectors are completely and fully productive, for example, the express bus project and the desert road project, and most countries in the world follow this approach.

So we will take this pandemic and drop it on the theory of emergency conditions and see how compatible it is with this theory until we come up with a distinct legal situation for this pandemic so that the talk will be on the first requirement: what is the theory of emergency conditions in the administrative contract and the second requirement: the conditions for applying the theory of emergency conditions and their applicability to a pandemic corona.

The first requirement

What is the theory of emergency conditions in the administrative contract?

The research into the nature of the theory of emergency conditions in the administrative contract requires us to clarify the heart of the administrative contract and the content of that theory, and whether it applies to the Coronavirus. And contracts follow private law when it performs their work waiving their public authority and equal in it with ordinary individuals, so it buys and sells. So we will only address the administrative limit during our research.

First: the definition of the administrative contract

The jurist DUGUIT defined the administrative contract by saying, “The administrative contract is like other contracts, it has the same characteristics and legal effects, and if the jurisdiction related to it is to the administrative courts, it is due to the purpose of the contract itself, such as commercial contracts, for example (Muftah, 2007).

As for the judicial definition, the provisions of the French Council of State have settled in defining the administrative contract as “the contract concluded by a legal person from among the public law persons to manage a public facility that shows its intention to adopt the method of public law by including in the contract exceptional conditions unfamiliar in private law contracts, or allowing the contractor to With the administration directly participating in the management of a public utility (Bahr, 2017).

The Jordanian judiciary did not specify the nature of administrative contracts in particular, as it deals with the treatment of civil contracts and follows the rules of private law and its disputes under the hands of the civil judiciary. He states, “the administrative contract has a special character that makes it independent of the civil contract, as it is based on satisfying the needs of the public utility so that it runs regularly...” (High Justice, Adalah Publications).

Secondly, the theory of emergency conditions

The theory of emergency conditions is defined as Unexpected events and circumstances that occurred during the implementation of the administrative contract, which made the continuation of the contract's implementation more costly and burdensome than the parties to the contract expected. Thus these circumstances and events overturned the economics of the contract because the potential loss exceeded the limits of the expected loss under normal circumstances. Rather, a heavy loss exceeds the contracting party's ability to bear it. Therefore the injured party has the right to ask the other party to participate in bearing part of the losses as partial compensation for what he suffered due to these emergency circumstances (Al-Tamawi, 1991).

The administrative and ordinary judiciary has approved the application of the theory of emergency conditions to restore the financial balance of the contract and has mentioned many definitions of this theory in its various rulings, including, for example, the definition of the Egyptian Supreme Administrative Court, where it said in its ruling that "...the application of the theory of emergency accidents in jurisprudence and administrative judiciary Subject to the occurrence during the implementation of the administrative contract of accidents or circumstances, whether natural or economic, or from the work of an administrative authority other than the contracting administrative authority, or from the work of another person, which were not considered by the contracting party when concluding the contract, and he does not have the right to pay for them, and which would inflict heavy losses on him. With it, the economics of the decade are seriously disrupted..." (Okasha, no year of publication).

The researcher believes that the theory of emergency conditions is exceptional economic, natural or general administrative circumstances, which occur during the implementation of the contract, and the management or the contractor has no hand in their occurrence. It was impossible to expect them to occur at the time of the conclusion of the contract. The occurrence of these emergency conditions is accompanied by inflicting heavy losses on the contractor that he cannot bear. It leads to the disruption of the economics of the contract and turns it fundamentally. To apply this theory, several conditions must be met related to the emergency circumstance on the one hand and the contractor on the other.

The one who looks at the Corona pandemic (Covid 19) carefully notes the extent to which the definition of the emergency conditions theory applies to the circumstance of the emergence of the Coronavirus. (Covid 19).

The second requirement

the conditions for applying the theory of emergency conditions and its applicability to the Corona pandemic.

In order to be able to apply the theory of emergency conditions, certain conditions must be met, related to the emergency situation on the one hand, and related to the contractor with the administration on the other.

First: the conditions that must be met in the emergency situation

1-That the circumstance be general and exceptional: that is, the circumstance affects the general public or a general category, that is, it is characterized by generality, and not the person of the contracting party himself. The death of the contracting party or his bankruptcy is not considered a general circumstance. Generality means the inclusion of a general and large group, such as the spread of an epidemic or a large raid of locusts, and in addition to the generality The emergency circumstance also requires that it be an exceptional, unfamiliar event that is not circulating in normal daily dealings with the general public under natural conditions, such as violent earthquakes, wars or outrageous epidemics (Thabit, 2011-2012).

We note the requirement that the damage be general to all the public for the application of the theory of emergency conditions, and not a special one that affects the contractor with the administration alone. The special damage alone brings us to the application of the theory of the prince's work, and this condition fully applies to the Corona pandemic, as it is the injury of the

public and affected all sectors and all countries in the world, Thus, this condition is achieved under the theory of emergency conditions.

2- The occurrence of the emergency circumstance during the implementation of the contract: that is, the occurrence of the exceptional circumstance during the period of contract implementation and before the completion of its implementation is also a prerequisite for the application of the theory of emergency conditions. If the contractor concludes the contract with his knowledge of this circumstance or event, it is not considered an emergency circumstance, and this theory applies to him (Okasha, without a year of publication).

In the event that the contract was concluded in the presence of the emergency circumstance and with the knowledge of the contracting party in this circumstance, the contracting party is not entitled to demand the application of the theory of emergency conditions, because the circumstance was known to him initially and He had to bear the consequences of the decision to accept the contract in the presence of this circumstance (Thabit, 1997).

It is not considered an emergency if it occurs after the expiry of the contract implementation period. However, if the administration requests an extension of the implementation period for a longer period than agreed upon with the contractor at the moment of concluding the contract. If an emergency circumstance occurred during the extension period, then, in this case, the contractor has the right to compensate for the emergency circumstance The one who signed the extension period because the extension period in the implementation of the contract takes the rule of the original period agreed upon with the administrative authority (Khudair, 1997).

In this regard, the Jordanian Court of Cassation (cassation of rights) said in its decision No. 1565/2005 dated 9/11/2005 that: "It is useful from Article 205 of the Civil Code, that the provisions of this article are applied only when the general exceptional incident has occurred during a period. It separates the conclusion of the contract and the implementation of the obligation. The debtor must review the judiciary regarding reducing the severity of the loss that threatens him due to the implementation of the obligation (Court of Cassation, 1565/2005).

By studying this condition, it becomes clear to us that the essence of this condition is the contract itself. The date of concluding the contract is the separation in determining the extent of the damage of this emergency circumstance and the application of the theory of emergency conditions. In light of the Corona pandemic, the administrative contracts concluded or were in progress before this epidemic caused severe damage. It applies to her this theory without a doubt.

3- That the implementation of the count is cumbersome and not impossible: it is necessary to continue the contract, and this continuation is accompanied by material fatigue that falls on the contractor because if the implementation of the contract becomes impossible, we leave the scope of the theory of emergency conditions and enter under the umbrella of force majeure theory, and the degree of financial stress means a revolution in economics The contract so that its implementation causes heavy losses that fall on the contracting party, and the arrangements of countries in dealing with the Corona pandemic, from the comprehensive ban to the partial ban, will certainly cause the contractor to be financially exhausted, so the application of this condition in the Corona pandemic is established, and there is no room for doubt .

Second: Conditions related to the contractor

1- That the contracting party is not a cause of the emergency circumstance: there must be no connection or relationship to the contracting party with the occurrence of the emergency circumstance, so it is not possible to apply the theory of emergency circumstances if the contracting party had a hand in the occurrence of the emergency circumstance, whether intentionally or in good faith or because of his negligence, or as a result of negligence. The contractor in making the necessary effort to avoid and prevent the occurrence of this emergency circumstance (Fawzi, 2003).

This condition is equal to the contracting and management, so do not apply the theory of emergency conditions if the administration causes the occurrence of the emergency circumstance as a result of a mistake from it because if the error occurs from the administration, we move from under the application of the theory of emergency conditions to the case of applying the rules of contractual responsibility to management or the application of the theory of action Prince, and this trend was confirmed by the Egyptian Administrative Court (Abdel-Maqsoud, 2009).

2- That the occurrence of the emergency circumstance exceeds the expectation of the contractor: the expectation is usually a relative matter, the emergency circumstance that can be expected is an event that has been repeated or expected to occur, but rare circumstances and events are not considered as expected accidents, and the French jurist (Corneille) says in describing the unexpected accident. The event that exceeds the maximum limits of the expectations of the parties to the contract and does not violate all the accounts that the parties to the contract are likely to occur (Al Banan, 2013).

The contractor's ability to anticipate varies according to the nature of the contractor. The company, in addition to the term of the contract, has a short-term contract, the possibility of emergency accidents being few, compared to the long-term contracts, the possibility of being injured and exposed to emergency circumstances is great (Abdul-Maqsoud, 2009).

3- That the loss incurred by the contracting party is large, fluctuating the economics of the contract: the contractor is not entitled to demand the application of the theory of contingency conditions unless the occurrence of the emergency circumstances implemented the obligation very burdensome for the contractor, and led to the economics of the contract upside down, and this condition is not taken if the damage is within logic And it is acceptable, or that the damage is only that the contracting party loses the expected profits that he will achieve, and here he does not mean the impossibility of implementation, but rather the difficulty of implementing the obligation is sufficient because the impossibility of implementing the obligation leads us to the application of force majeure theory (Al-Tamawi, 1991).

Moreover, the impact of the emergency circumstance on the economics of the contract is measured by the extent to which the contractor can bear the losses he incurred due to the emergency circumstance. Accordingly, its application varies from one contracting party to another. Therefore, the result in measuring the extent of the impact of the emergency circumstance on the economics of the decade is a flexible criterion, not a static one (Bahr, 2017).

In this regard, the Council of the Fiqh Council of the Muslim World League, in Makkah Al-Mukarramah, the first session, said in Resolution No. (7) in Paragraph No. (2): "A commitment is not considered burdensome unless the loss exceeds a third of the commitment." (The Council of the Fiqh Council of the World League Islamic Resolution No. 7, 1984).

The second topic

Obligations and rights of the contractor under the Corona pandemic

Although the conditions for applying the theory of emergency conditions in the event of the Corona pandemic have been fulfilled, the contractor must continue to implement the contract on the pretext that the implementation of the contract has become very stressful. And help in bearing his stumbles and standing by him so that we will divide this topic into two demands; the first is the contractor's commitment to continue implementing the contract, and the second requirement is the contractor's right to obtain compensation.

The first requirement: the contractor continues to implement the contract during the emergency circumstance.

The theory of emergency conditions was found to ensure the regular and steady functioning of the public facility. The basic justification for the contractor's obligation with the management authority to implement his contractual obligations is due to the idea of the regular and steady functioning of the public facility, which requires the contractor to exert his utmost effort in implementing his contractual obligations, which aims to provide benefit and service with the facility. The general purpose for its continuity considers the functioning of the public utility as the end from which the theory of emergency conditions came. Thus, the administrative contract is one of the means of management to ensure the regular and steady functioning of public utilities (Khalifa, 2008).

The availability of the conditions of this theory does not mean in any way that the contractor stops executing the contract or that the contractor disclaims his obligations because this commitment of the contractor, no matter how stressful it is under these emergency circumstances, does not reach the point of impossibility of implementation as is the case in force majeure (Hani, 2012).

And if the contractor stops implementing his contractual obligations despite the availability of the conditions for applying the theory of emergency conditions, then he has committed a contractual error that gives the administration the right to impose a penalty on the contractor, and usually the penalty in such cases is implementation at the contractor's expense, even if the theory is applied Emergency circumstances, the contractor's refusal to work will reduce the value of compensation (Hani, 2012).

And in special cases, such as the Corona pandemic (Covid 19), although it is an emergency and the navigator has begun to return to normal life in many. Many sectors, the impact was temporary and temporary. It did not excuse the contractor from the continuity of the implementation of the contract if the general situation allows it. However, the warnings continue, And fears of new waves of this epidemic, and here the question arises: What if this emergency circumstance turns into a force majeure that prevents the continued implementation

of administrative, contractual obligations?

It is known that the main purpose of the theory of emergency conditions is to assist the contracting administration in overcoming exceptional emergency circumstances and in order to continue implementing its contractual obligations, provided that those circumstances are temporary, but if the emergency circumstance turns at a later time into a force majeure with which it is impossible to continue implementing The contract and the financial rebalancing of the contract, except with the permanent assistance of the administration. In this case, the two parties to the contract try to reconsider the terms of the contract so that the possibility of contract continuity is renewed under the current circumstances or the judge is asked to terminate the contract (Bahr, 2017).

The second requirement

the contractor's right to receive compensation

After confirming the applicability and compatibility of all the conditions of the theory of emergency conditions during the Corona pandemic in most administrative contracts, and the contractor's continuity in implementing its contractual obligations despite the difficulties that he faced in implementing this commitment, he thus deserves the assistance of the contracting administration, so that he can get out of the crisis that It goes through during the execution of the contract, by partially compensating for the loss suffered due to the emergency circumstance.

First: The legal basis for the right to compensation in the theory of emergency conditions

There were several views on the legal basis for granting the contractor the right to compensation in the application of the theory of emergency conditions, as follows:

The first opinion: the common intention of the two parties to the contract

Administrative contracts are supposed to be implemented in good faith, and the parties' intention to conclude the contract was implicitly drawn to this intention. Therefore, some jurists in France, such as Bonar and Cardinia, took the idea of the common intention of the two parties to the contract as a basis for compensation in the event of applying the theory of emergency conditions (Ali, 1991).

A part of jurisprudence criticized this view because the search for the common intention of the contracting parties is very difficult for the judge to challenge or know, as it requires the judge to refer to the date of the conclusion of the contract. The contract may have been concluded for a long period. The contracting parties' intention may have been directed to the exclusion of the application of the theory Emergencies, however, are theoretically applied because their provisions are related to public order (Al Banan, 2013).

The second opinion: the financial balance of the contract

Some see that the idea of financial balance of the contract is the basis for the application of the theory of emergency conditions because the idea of financial balance in administrative contracts does not need a text, as it is one of the axioms of administrative contracts. The idea of financial balance is one of the foundations of the general theory in the administrative contract (Said, 2006).

Jurisprudence has criticized this view because the idea of financial balance in the administrative contract of the contract is not considered sufficient justification for the contracting party to

obtain compensation after requesting the judicial termination of the contract. After all, in the event of a judicial ruling for the termination, it is impossible in this case to talk about re-balancing the financial contract in the contract. , as well as adopting the principle of the financial balance of the contract as a basis for compensation, which takes us from the main objective of applying the theory of emergency conditions, which is to maintain the continuity of the public facility through the continuity of contract implementation under exceptional circumstances, to the idea of establishing compensation as being built for the benefit of the contractor only (Thabit, 2011-2012).

Third opinion: The principle of regular and steady functioning of public utilities

Those who hold this view believe that the basis of the idea of compensation in applying the theory of emergency conditions is based on the principle of regular and steadily running public utilities. So that he can overcome these emergency conditions (Anas, 2003).

Despite the great consensus of the majority of jurists on this opinion, there are juristic views that it is not sufficient alone as bases for compensation under the theory of emergency circumstances because, according to this basis, the right to the contracting party has been granted to obtain compensation in the event of the contract being valid or in the event of its expiry. However, the case of compensation after The termination of the contract cannot be based on the principle of the regular and steady functioning of the public utility (Sabet, 2011-2012).

Fourth opinion: mixed or double basis: The principle of the continuity of the regular and continuous functioning of public utilities is also not sufficient alone as a basis for compensating the contractor in the event of emergency conditions. With it, even if no mistake was made by it, compensation for the termination of the contract is justified by its dissolution if it is impossible to restore the financial balance of the contract (Said, 2006). Therefore, the theory of emergency conditions is first applied in the field of administrative contracts.

Second: The powers of the judge in the face of emergency circumstances

The administrative judge does not have the right to amend the texts of the contract, as his role and powers are limited to the ruling on partial compensation, and thus the Egyptian Supreme Administrative Court decided in its ruling that "...the role of the administrative judge is limited to ruling the appropriate compensation without having to amend the contractual obligations" (Okasha) without the year of publication).

Third: How to determine the value of compensation for administrative contracts affected by the Corona pandemic, in light of the theory of emergency conditions.

After it became clear to us that the theory of emergency conditions applies to many administrative contracts in light of the Corona pandemic (Covid 19), it is necessary to address the most important rules and provisions that determine the value of compensation due to the contractor in light of this pandemic, which can be summarized as follows:

-1 The contractor with the administration is partially compensated, as the contractor with the administration bears part of the loss, even if this loss is simple or small, that is, the value of the loss is distributed between the administration and the contractor, provided that the administration bears the bulk of the loss (Mohamed, 1998).

-2 The judge must consider a set of matters when determining the compensation value in which the administration will participate in the losses incurred by the contractor under the emergency circumstance.

A- The behaviour of the contractor with the administration and the extent of the effort expended by the contractor to meet the emergency

B - The extent of cooperation, attention and assistance the administration provides to the contractor to overcome the emergency (Thabit, 2011-2012).

3- If any condition is stated in the contract according to which the contractor with the management authority waives his right to claim compensation in an emergency circumstance, this condition is considered void because the application of the theory of emergency conditions is related to public order. It is a way to ensure the continuity of the functioning of the public facility.

In the Jordanian judiciary, administrative contracts in compensation are subject to the rules of private law. In this regard, we quote the text of Article (205) of the Jordanian Civil Code of 1976, which states: The contractual obligation, even if it does not become impossible, becomes burdensome to the debtor to threaten him with heavy loss, the court may, according to the circumstances and after balancing the interests of the two parties, reduce the burdensome obligation to a reasonable extent if justice so requires, and any agreement to the contrary is void” (Jordanian Civil, Article 75).

In conclusion, we must point out that the compensation arising from the application of the theory of emergency conditions is partial and temporary compensation, unlike the theory of the work of the prince, in which the value of compensation is a comprehensive compensation.

Conclusion

At the end of our study, we reached a set of the following conclusions and recommendations:

First: the results

1 -The conditions of the theory of emergency conditions fully apply to the Coronavirus (Covid 19) in most administrative contracts, which was considered a pandemic that affected the whole world, and included the entire global community. Therefore the general feature is achieved in the aspect of the current crisis because it is rare to find an accident like this. The current crisis is afflicting all countries, both developed and developing, rich and poor, which is why it has been called a pandemic.

-2 Corona's current pandemic is an exceptional event that does not conform to the normal course of things. Accordingly, we find that the contractor did not consider or expect the possibility of such a crisis when concluding the contract.

3- The consideration of the Corona pandemic as an exceptional circumstance that affects many administrative contracts entails the right of the contractor to obtain partial compensation to avoid part of the losses incurred by him due to this pandemic until the crisis is over.

Second: Recommendations

-1- It is desirable to apply the theory of emergency conditions to this pandemic extensively because the financial imbalance in administrative contracts resulting from this pandemic has turned the economics of contracts upside down, which made the contractor's implementation

of his contractual obligations very cumbersome, and in order to preserve the continuity of performance of the work and tasks of public utilities.

-2 The effects of this pandemic must be dealt with within the framework of protecting the financial balance of the administrative contracts concluded by the state because this current pandemic (Corona) is an exceptional accident that does not conform to the normal course of things. Economic hit the economics of all administrative contracts.

3- To mitigate the damages caused by the Corona pandemic, states must intervene and organize work in light of this pandemic, either by issuing laws, regulations or instructions that modify the terms and conditions of these contracts and balancing the provision of compensation to the contractor in a consensual and friendly manner, to ensure the state's prestige in the continuation of Contractors and maintain contractors to work with management in the future.

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