

THE IMPACT OF THE CORONAVIRUS PANDEMIC ON THE FINANCIAL BALANCE OF ADMINISTRATIVE CONTRACTS IN THE JORDANIAN LEGAL SYSTEM

¹Ahmad Aldalaien, ²Safaa Alswelmieen

¹College of Law, Al Ain University, Abu Dhabi, UAE (S. Yarmouk University, Irbid, Jordan)–

– ²College of Law Yarmouk University, Irbid, Jordan

ABSTRACT: *The World Health Organization has labelled the corona virus outbreak as a pandemic, and this exigent circumstance is affecting financial and economic transactions. All countries, including Jordan, have issued defence orders, leading to curfew and the cessation of work in many sectors. This study examines the impact of the pandemic on the financial balance of administrative contracts, as the basis on which public utilities can continue performing their work. In addition, the study investigated the consideration of the pandemic as a force majeure that hinders compliance with the obligations. On the other hand, exigent circumstances make the fulfilment of that obligation difficult, but not impossible. This study concludes that the pandemic is an exigent circumstance that does not suspend a contract, but rather disrupts the financial balance of its parties and that this problem requires a solution. The study, therefore, recommends that the administrative judiciary in Jordan is provided with the authority to examine administrative contracts, since it is specialized in administrative affairs.*

Keywords: COVID-19; pandemic; financial and economic transactions; administrative contracts; exigent circumstances.

1. INTRODUCTION

In comparison to earlier viruses, such as HPAI and H1N1 (bird and swine flu, respectively), COVID-19 is both stronger and more easily transmitted to humans. The resulting corona virus pandemic has provoked fear and terror worldwide, and driven governments to adopt different, firm attitudes towards this unforeseen crisis. The nature of some of these attitudes has been harsh, casting a shadow over the economic status of both countries and individuals. Government measures, including those of Jordan, have led to economic consequences, which have made the implementation of contractual obligations onerous, and even impossible. This is because the nature of economic relationships is circular, and if one relationship is affected then the others automatically are.

The significance of this study is that it clarifies how the *sudden corona virus outbreak*, labelled a *pandemic* by the World Health Organization, will cast a shadow on all the aspects of life. The pandemic raises a question about the extent to which the COVID-19 pandemic may be considered a *force majeure* or exigent circumstance affecting the financial balance of the contract; such circumstances can allow a person who forms a contract with government administration to claim that there are exceptional circumstances and that they are, therefore, unable to fulfil their obligations. This is reflected in the financial balance of an administrative contract, and thus requires a re-examination of the financial balance of contracts, especially since the pandemic has resulted in the issuance of defence orders, which have disrupted state facilities, including the judiciary ones. Subsequently, there is an impairment to the contractor's ability to resort to the judicial system to demand the balance of contracts, and thus avoid damage due to the exigent circumstances.

The problem of this study concerns the economic effects of the corona pandemic in connection with their impact on the legal obligations and reactions in dealing with the pandemic. This does not depend on the attitude taken separately by each country, where the action taken in one will be reflected on others. For example, China's international trade stoppage also affected the contracts and obligations of contractors outside

the borders of China. Since the last global pandemic was one hundred years ago, current legislation lacks experience in dealing with such pandemics, or such issues have yet to be brought before the courts. Based on the foregoing and since administrative contracts in the Jordanian legal system are under the jurisdiction of the civil courts, the concept of *force majeure* plays a significant role in these contracts. To achieve the objective of this study, in Section 2, there is an explanation of the legal basis of this concept and the exigent circumstances and conditions for its application and then the legal effects of the concept are examined in Section 3[1].

The Legal Basis for the Concept of Exigent Circumstances and its Application to the Corona virus Pandemic.

The idea of the financial balance of an administrative contract is based on achieving equality and justice between the two contracting parties. If certain reasons affect the economics of the contract and cause a major imbalance resulting from unforeseen circumstances beyond the control of the contractor, compensation may be given to the contractor. In order to achieve this balance, we must look for a legal basis and evidence to support this concept, to enable the contractor to request the reuse of the financial balance of a contract and compensation.

Some jurists argue that the ruling delivered by the French Council of State in the *Gaz de Bordeaux* case of 1916 is the cornerstone of this concept, but its basis may even go back to a ruling issued in 1846 [1]. When prices increased in a contract that was concluded with the French administration due to the war, the Council stipulated that it was not possible to expect such conditions when concluding the contract [2]. *Gaz de Bordeaux* was a clear development in the adoption of this concept in Jordan, however, the Court refused to apply this concept unless there is an express provision thereon, as mentioned in Article 205 of the Jordanian Civil Law.

1.1 Requirement 1: Legal Basis for the Concept

Jurists disagree on the legal justification for the compensation and its conditions, with the justifications revolving around three main matters, which will be discussed next.

1.1.1 Financial Balance of Contract

Some jurists argue that a contractor has the right to consult the principle about the financial balance of the contract. In their opinion [3], if a sudden external event undermines the contract's economics, then the contractor's right to obtain compensation must be decided, with the sole purpose of achieving a balance between the two contractors [4].

However, this opinion has been criticized for various reasons. Firstly, the person contracted by the administration is not entitled to full compensation, [5], which would cover the contractor's entire loss; rather, the compensation should mitigate the losses, since the administration did not make a mistake, and therefore cannot incur the consequences of COVID-19. Second, the benefit of the reparation is not only intended for the contractor, but to ensure the continuity of the public utility in providing its services to the beneficiaries, in line with what the French Council of State intended. Thirdly, the purpose of deciding the compensation for the corona virus pandemic as an exigent circumstance is that such a pandemic has undermined the economics of contracts and that the damage is a heavy loss, not a minor one [6].

1.1.2 Joint Management of the Contract Parties

Some jurists argue that the financial balance does not reflect the contractors' will, as the basis for any administrative contract [7]. This means that the presumed will of the contractors is that they have implicitly agreed to restore and maintain the financial balance for the duration of the contract [5]. Indeed, we argue that to assume there is a presumed administration makes the administration bear the lion's share of the burden of the pandemic, and this is inconceivable and unacceptable. Instead, we suggest that the same basic principle applies, in that the work of the administration must be continuous, regular, and steady functioning of public utilities.

1.1.3 Continuous, Regular, and Steady Functioning of Public Utilities

The well-known basis of administrative work is the continuous, regular, and steady functioning of public utilities [1, 8]. There is no justification for service utilities to cease performing their work and duties, even if they face pandemics, such as COVID-19, which may be classified as an exigent circumstance. This principle governs the necessity of taking into account the financial rebalancing of administrative contracts that involve the continuous functioning of public utilities. If the idea of justice justifies compensation for the contractor within the scope of the private law, it may be argued that nothing prevents the application of the rules of justice to a pandemic, such as COVID-19, which affects administrative contracts and disturbs their balance. This is especially so, since the Jordanian legislator has placed administrative contracts within the jurisdiction of the civil court.

The rules of justice were also approved by the French Council of State in *Gaz de Bordeaux*, as it relied on "the idea of justice in participation in bearing non-contractual expenses that resulted from exigent circumstances, and the requirements of the functioning of the public utility to provide public service and achieve the public interest, where compensation is paid provided that the contractor continues to implement the obligation and achieve the financial balance of the contract". One reason for this concept can be found in

the Instructions on the Organization of Jordanian Tenders, as these confirm the necessity of a financial balance in the event of economic risks as a result of the pandemic. This is confirmed in a decision issued by the Egyptian Supreme Administrative Court, which states [9], "since the concept of exigent circumstances is based on the idea of abstract justice, which is the essence of the Administrative Law, and it aims to achieve the public interest, then the regular and steady functioning of the public utility should be guaranteed".

In Jordan, it may be argued that, in applying the concept, the Jordanian judiciary relies on the rules of civil law. However, an alternative argument proposed here is that the basis should be only the constitution itself, in Articles 124–125 dealing with exceptional circumstances and that the defence orders applicable in the State have been issued as a result of the COVID-19 pandemic. Under these constitutional provisions, the legislator's purpose is to protect both the public interest and public health. Indeed, the legislator does not overlook the fact that this pandemic has led to the disruption of State facilities and caused exceptional and unforeseeable damage.

To address such economic risks, where compensation in exceptional circumstances is not given, the legislator will compensate for them through defence orders. This is achieved by the creation of funds deducted from salaries, with the aim of compensating the incurred. Further, the defence order uses the term exigent circumstances, which means an unexpected situation that is difficult to control and tedious to the contractor. A lack of assistance to the contractor means that, in light of the COVID-19 pandemic, the providers of masks and respirators, for example, will not be able to perform their duty of supplying products, which means the health facility will cease to perform its duties regularly which is, in turn, reflected in the spread of the pandemic inside the State in a way that is impossible to control.

Accordingly, it can be argued that the task of settling administrative contract disputes, especially those related to economic risks arising from *force majeure* and exceptional circumstances should be assigned to the administrative court. This is because its formation enables it to deal with the principles of administrative law to achieve justice, and ensure the regular and steady functioning of public utilities. Moreover, the rules of private law are not always suitable to apply to the rules of common law (Court of Cassation, 1980, p.775)[11].

1.2 Requirement 2: Conditions for the Application of the Theory of Exigent Circumstances to the Corona Pandemic

1.3 A financial balance in the administrative contract needs to be achieved, despite the economic risk resulting from the COVID-19 pandemic, but to do this, a certain set of conditions are required regarding the concept of exigent circumstances. These will now be discussed.

1.3.1 Unexpected and Unavoidable Exigent Circumstances

The application of the concept of exigent circumstances to avoid the economic risks arising from the COVID-19 pandemic requires that such circumstances should be sudden, unusual, and unforeseen, within the normal course of life. The criterion in this definition should be a general objective

criterion and not confined to the contractor alone. In other words, the pandemic was not expected or envisaged [10]. Otherwise, we would not have said that there are economic risks that necessitate compensation to the contractor, to restore the contract's economy and prevent its imbalance. This is especially so, since the legislator does not mention specific cases, such as exigent circumstances, and thus the issue is decided by jurisprudence and the judiciary. We believe that they will recognize the exigent characteristic of this pandemic, as it has been globally approved as an exigent, special, unexpected circumstance that contractors cannot control and, therefore, avoid its economic risks.

Like other exigent circumstances, this unforeseen pandemic could not have been predicted when the contract was concluded. In contrast, if an administrative contract has been concluded during the COVID-19 outbreak, it cannot be argued that it is an exigent circumstance that requires the financial rebalancing of the contract. In principle, the administrative contract was concluded before the pandemic that went beyond the control of contractors, was unexpected, and did not occur by a mistake or default by either party [11]. This confirms the decision of the Jordanian Court of Cassation, that "the concept of exigent circumstances may only be applied if such exigent circumstances are unforeseen [10].

1.3.2 Economic Risks to the Contract

The COVID-19 pandemic has dangerously undermined the economics of administrative contracts and caused defects that are difficult to manage. Even though this is a relative issue, which differs from one contract to another, the fact remains that the losses exceed the ability of the contractor. In this context, the Court of Cassation states, "in order to apply the provisions related to emergency events, these such events must be general and could not be expected, and that the implementation of the contractual obligation has become onerous to the debtor if not impossible [2].

2. Legal Effects of the Concept of Exigent Circumstances

The COVID-19 pandemic is considered as an exigent circumstance, not a *force majeure*. This is because the pandemic makes the implementation of the contract onerous for the contractor, it does not prevent the obligation from being implemented, i.e. it does not make it impossible [2]. Therefore, the contractor's compensation is partial and proportional and guarantees the continuous functioning of the public utility. On this point, an explanation of the legal effects of these economic risks is required.

2.1 Requirement 1: The Contractor's Commitment to Implementing the Contract

The COVID-19 pandemic did not make the implementation of the administrative contracts impossible; rather, it made such implementation onerous for the contractor. This means that the contractor, despite the difficulty of implementation, must continue with it to ensure the continuity of providing services to beneficiaries. The contractor will not benefit from the circumstances of the pandemic by being compensated if they suspend implementation. Instead, they may be subject to penalties, for example, the confiscation of the delay penalty [16]. On this point, the Jordanian Court of Cassation ruled that "the appellant should have resorted to court to mitigate

the loss due to depreciation of the dinar, and should not have refrained from implementing the contractual obligation" [14]. Therefore, the COVID-19 pandemic can be considered as an exigent circumstance, in which the implementation of the commitment is suspended, and, when the effect of such exigent circumstance ends or ceases, the implementation will continue.

The point to note here is related to the prevention of the complete suspension of implementation, and not leaving the contract without performing the tasks entrusted to the contractor. Otherwise, the administration also has the right to implement the contract at the expense of that contractor, so that they lose the compensation and take the subsequent financial and economic consequences. This opinion is supported by the tender instructions, which used temporary *force majeure* regulations to emphasize a temporary suspension, or a circumstance, which leads to slow implementation, to indicate the continuity of the obligation and the fact that implementation, is not impossible [3].

2.2 Requirement 2: The Administration's Commitment to Pay Compensation

The contractor's entitlement to compensation due to the COVID-19 pandemic is based on basic determinants that regulate its calculation. These will be explained in the following sections [13].

2.2.1 The Start Time of the Pandemic (the Exigent Circumstance)

The pandemic's start time determines the point at which the compensation for loss is calculated, and from which the impact of the pandemic begins on the contractor's ability to fulfil their obligation. COVID-19 pandemic has affected the whole world, and its impact is reflected in most contracts in the world, whether local or international. Since this is the case, what matters in this study is related to its effect as an exigent circumstance as reflected in the actions of other countries, and as reflected in contracts in other countries. In Jordan, it can be argued that the judge has to examine the effect of COVID-19 on government measures as an unexpected pandemic, which has been reflected in administrative contracts. We argue that this matter may vary from one administrative contract to another, and that, in turn, may affect the compensation calculation method and calculation of the time at which the financial imbalance of the administrative contract occurs. The Jordanian Court of Cassation ruled that "the economic shortfall, the financial imbalance, and the floating of the dinar exchange rate against foreign currencies occurred before the signing of the agreement, which does not obligate the university — Yarmouk— to pay the extra cost, which prevents the application of the concept of exceptional events [12].

2.2.2 Determining the Loss Incurred by the Contractor

These losses are determined within considerations related to the necessity of the utility to perform its duties, without calculating the expected losses and profits at the beginning of the exigent circumstance, or any potential profits that the contractor had expected in the future. Further, the calculation of loss does not include the loss caused by a contractor's error.

2.2.4 Loss-Sharing

Since the corona virus emerged with no fault of the administration, it bears the greatest percentage of losses based on its duty to ensure the continuity of the public utility. If the amount of compensation is related to the percentage of loss incurred by the contractor and which caused the financial imbalance, its calculation is related to the provisions of the law applied by the judge; this person is the civil judge in Jordanian legislation.

2.2.5 Summary

The administration's bearing of the burden of losses is due both to its authority to amend the terms of the contract as a public authority with privilege and to the nature of the administrative contract itself (Court of Cassation: <http://www.asaleh.info,2002\3109>) [15]. This contract includes exceptional clauses not usually seen in private law. Article 205 of the Jordanian Civil Law grants the judge the power to amend the terms of the contract when the conditions for exigent circumstances apply to COVID-19, by reducing the onerous obligation to a reasonable extent to achieve a fair balance. However, due to the different purpose, content, and nature of private and administrative contracts, we have reservations about applying the legal provisions of the former to the latter, because compensation must also be awarded in administrative contracts, rather than just the terms of the contract being amended. We also argue that nothing prevents the use of judicial mediation as a means of settlement in disputes where an administrative contract has been affected by the pandemic as an exigent circumstance, to achieve a fair balance.

CONCLUSIONS

The COVID-19 pandemic is nothing, but a realistic application of the concept of exigent circumstances in striving to achieve a financial balance in administrative contracts. Its application seeks to compensate the person contracted to the administration, and who bears the greatest percentage of losses in order, for public facilities, to continue providing their services regularly and steadily. In order for the judiciary to meet these economic risks, it seeks to place the provisions of the Civil Law into effect. As a global pandemic, COVID-19 is a form of exigent circumstances which, in turn, has led to an imbalance in administrative contracts, the base of which is founded in the provisions of the Civil Law. Therefore, the study first suggests that to activate the concept of exigent circumstances, the circumstance must be serious, unexpected, and general. Secondly, the reason for making reparation to the contractor is not because of a mistake by the administration, but rather to ensure that public utilities run regularly and continuously. However, the contractors must continue to implement their commitment; otherwise, they will be subject to penalties and won't benefit from the privilege of exigent circumstances.

RECOMMENDATIONS

Three main recommendations can be made. The first is that legal provisions must be developed relating to administrative contracts in order to deal with the possible obstacles and risks they face due to economic risks which, in turn, fluctuate the contract's economies. This is because the nature and purpose

of an administrative contract are vastly different from that of a private law contract, and the rules for reparation and compensation in the administrative contract differ from those in private law. Secondly, the settlement of disputes arising from the administrative contracts must be assigned to a person who can consider the pandemic as an exceptional circumstance, and who is the most capable of calculating the compensation for the contractor. Third, different types of administrative contracts must be distinguished when restoring their financial balance in case of exigent circumstances, especially if such circumstances are global, or if the administrative contract is of an international nature.

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