

# COVID-19: Is it a Force Majeure Event?

كوفيد-19: هل يشكل قوة قاهرة؟

Taitous Fethi<sup>1</sup>

<sup>1</sup> University Saida Dr. Moulay Tahar (Algeria), e-mail: fethi.taitous@univ-saida.dz

*Received:* 19/05 /2020

*Accepted:* 06/07 /2020

*Published:* July /2020

## الملخص:

تهدف ورقة البحث هذه إلى بيان ما إذا كان COVID-19 هو حدث قوة قاهرة أم لا ومراجعة الشروط العامة التي يتم تطبيقها على حدث القوة القاهرة وإدخال بعض المفاهيم حول كل من حدث القوة القاهرة ومرض فيروس كورونا. وأخيراً تسليط الضوء على تأثير COVID-19 كحدث قوة قاهرة على الآثار المترتبة عن العقد بما في ذلك أداء التزامات الأطراف.

سنتم مناقشة أهم الأفكار الرئيسية حول فيروس كورونا COVID-19 وكذلك حدث القوة القاهرة من خلال آراء ودراسات الخبراء والعلماء الذين عالجوا موضوع بحثي، وبعد ذلك سنتطرق إلى أهم الأفكار التي جاءت في هذا الصدد من خلال الاتجاهات الدولية حول COVID-19 وتأثيره على سريان العقد بشكل عام وأداء الأطراف لإلتزاماتهم بشكل خاص.

**الكلمات المفتاحية:** كوفيد-19، القوة القاهرة، الحدث، الشروط العامة، التنفيذ، العقد.

## Abstract:

This research paper is aiming to state whether COVID-19 is a Force Majeure Event or not and reviewing the general conditions which are applicated on the Force Majeure Event and introducing some concept about both Force Majeure Event and Corona virus disease, finally shading a light on the impact of COVID-19 as a Force Majeure Event on the duties result from contract, including the performance of the parties' obligations.

The main principle ideas about the Corona virus as well as the Force Majeure Event will be discussed through thought of experts and scholars those who wrote about my paper's topic, and then we will have some ideas about the international trends about COVID-19 and its impact on the contract in general and the performance of contracts' obligations in particular.

**Key words:** COVID-19, Force Majeure, Event, General conditions, Execution, Contract.

*Corresponding author: Taitous Fethi, e-mail: fethitaitous@yahoo.fr*

**Introduction:**

Because of the spread of COVID-19 and the continuing of the restrictions and controls in the governments' policy,<sup>1</sup> there was a rise of a number of contractual issues to take into account, for both reasons, the first one is to reviewing risks related to the performance of the parties obligations, and the second the reviewing of the issue of liability resulting from the non-execution of the duties contract because of the corona virus (COVID-19).

The majority of Jurists over the World posed the same question: shall we consider COVID-19 as a Force Majeure Event?

The references which are cited below refer to those scholars who wrote about my paper's issue:

In *Corona virus and Force Majeure*,<sup>2</sup> *David Metzger* discusse why the corona virus should be considered as a Force Majeure Event, in addition, he shows that laws require two primary conditions to state whether the Covid-19 Is a Force Majeure Event or not.

Another jurist, *Sam Song* shows in his article *Corona virus Disease (Covid-19) : Is it Force Majeure or Something Else ?*,<sup>3</sup> how the corona virus touch the legal system, including the performance of contract.

My aim in this article is to go on suggest that Corona virus (COVID-19) is similar to case that represent the Force Majeure, but it has its own characteristics that make it a special Force Majeure Event.

I devote the first part of this paper to discusse a general provisions about Force Majeure Events, whereas the second part will be devoted to talk about the impact of COVID-19 as a Force Majeure Event on the performance of the contract.

**1- What is a Force Majeure Event?**

Before we discuss the general conditions of a Force Majeure Event, we use to know the definitions of this new disease which touch almost the whole world especially Europe and United States of America (1), and then we try to track the general conditions that are applied on the Force Majeure Event (2).

**1.1- The concept of Force Majeure Event:**

Since the COVID-19 is an event beyond the authority of contractans, we will try to shade a light on the definition of a Force Majeure Event (1), and then we try to provide a technical definition of Corona virus (2).

**1.1.1- Definition of Force Majeure:**

A Force Majeure clause is a contractual terms by which one or more of the contractans is entitled to suspend performance of their obligations to claim whether an extension of time to perform or exemption from their obligations.<sup>4</sup>

It is also considered as a circumstance beyond the parties' control which can render performance of a contract substantially more onerous or impossible.<sup>5</sup>

Others scholars say that the Force Majeure clause is an event that can touch the ability of parties contract to perform their duties in a given contract, and which may release them from the execution of their obligations.

Furthermore, the Force Majeure or irresistible force is acts of god or a third person outside of the control of the party's contract.<sup>6</sup>

### **1.1.2- Technical definition of COVID-19:**

According to certain scholars,<sup>7</sup> corona virus causes respiratory infection including pneumonia, cold, sneezing and coughing while in animals it causes diarrhea and upper respiratory disease.

The first appearance of Corona virus was in 1960, at that period it was treated like a simple virus, but in 2003, this virus touches several persons over the worlds, and it began with a respiratory syndrome which killed over 1000 persons.<sup>8</sup>

This virus beats another time in Hong Kong in 2004 and in Saudi Arabian in 2012; in the late of 2019 COVID-19 was identified in Wuhan, in china.<sup>9</sup>

This new disease is spherical; single stranded, enveloped RNA and covered with club shaped glycoprotein.<sup>10</sup>

In addition, it has been defined as substances of human origin (SOHO) include human blood, blood components, tissues reproductive and non-reproductive cells and organs,<sup>11</sup> and all these substances when they are used as starting materials of the manufacture of medicinal products.

According to certain scholars,<sup>12</sup> corona virus causes respiratory infection including pneumonia, cold, sneezing and coughing while in animals it causes diarrhea and upper respiratory disease.

Corona viruses are a wide range of viruses that may cause disease in animals and humans. It is known that a number of corona viruses cause human respiratory diseases in severity ranging from common cold to more severe diseases such as Middle East Respiratory Syndrome (MERS) and severe acute respiratory syndrome (SARS). The newly discovered Corona virus causes Covid-19 disease.<sup>13</sup>

### **1.2- Force Majeure Conditions:**

Since the Force Majeure take a variety of forms, we cannot determine all the cases that can be considered as a Force Majeure Event, but there are some conditions must exist to consider an event as a Force Majeure.

In this part of study we will try to know these conditions through the Algerian law (1), and then we shade a light on the international trends about this issue (2).

### **1.2.1- Force Majeure Conditions under Algerian Law:**

If we look to the Algerian civil law we don't find a definition of Force Majeure Event, but the Algerian Supreme Court had provided a definition to Force Majeure as below:

« An event caused by a Force that surpasses the man's power, as it lasts one cannot avoid or Control it, and it is known by its nature of man's ability to expect. »<sup>14</sup>

Another decision runded from the Supreme Court has provided a definition of the force majeure event, when it states that: « Force Majeure is an unexpected natural disaster which cannot be dealt with escapes human observation. »<sup>15</sup>

However, our legislator referred to the force majeure event as a foreign cause exempt from responsibility when he states: « if the person proves that the damage was caused by a reason in which he has no hand, such as a sudden accident, a force majeure, a line issued by the victim, or a mistake from others, he was not obligated to compensate for this damage unless there is a legal text or agreement contrary to that. »<sup>16</sup>

### **1.2.2- Force Majeure under the International Trends:**

For both English and French law, we have notice the same trend of these two legislators on the Force Majeure issue.

If we refer to English Law, we do not find a prescribed definition of Force Majeure Event, because it is considered as contractual terms which are under the will of the parties' contract.

However, the English Courts have held that where clauses provide that a Force Majeure Event must:<sup>17</sup>

- **Prevent:** which means that the Force Majeure Event must prevent parties' contract from the performance of their obligation in contract.

The event should make the contractans unable to perform their obligations.

But the English Courts insist on the fact that the event must take the parties' performance impossible and not only more difficult or costly.<sup>18</sup>

- **Hinder:** The Force Majeure Event must delay party from being capable to execute their obligations, but the English Courts require from the party who seeks to rely on Force Majeure as a convincing reason to suspend or avoid the performance of their duties in contract, to providing proves that :<sup>19</sup>

\* The Force Majeure Event had strong impacts on the performance of contracts.

\* The non performance of party's obligation due mainly to a reason that are beyond his capacities.

\* There was nothing could be avoid or mitigate the impact of the Force Majeure Event.

Furthermore, according to English Courts the Force Majeure clauses in contracts allocate the risk of non-performance due to unforeseen or uncontrollable events and may excuse or suspend a party's duties to execute under the terms of contract in some cases.

However, the French legislator has given a concrete concept about Force Majeure Event in his article 1218 of the Civil Code when he state: "There is Force Majeure in contractual matters when an event beyond the control of the debtor, which could not have been reasonably for seen at time of signing of the contract and whose effects cannot be avoided by appropriate measures, prevents the performance of its obligation by the debtor".

Through this previous article, three conditions had been required to qualify an event as a Force Majeure:<sup>20</sup>

- The event must be external beyond the will of parties' contracts;
- The event should be unforeseeable while signing the contract;
- The impact of this event cannot be mitigated even if the parties' contracts have done all measures to avoid the effects' event.

Moreover, the French legislator has distinguished between two types of Force Majeure Events:<sup>21</sup>

The first type: is a temporary Force Majeure where the performances of the obligations are suspended unless the resulting delay justifies termination of the contract.

The second type: is a final Force Majeure Event, in this case the contract is terminated and all parties are released from their duties.<sup>22</sup>

Furthermore, the French Court of Cassation had provided a definition of the concept of Force Majeure, and it states that: "It is an independent incident of a human will, which cannot be expected or pushed."

On the contrary, we notice that the Moroccan law of Obligations and contracts define force majeure in Article 269 as:

"It is everything that a person cannot expect, such as natural phenomena, floods, droughts, fires, enemy raids and the act of authority, and it would make the implementation of the commitment impossible."

The same definition has been adopted by The Tunisian legislator under the civil section law of Commitments and Contracts.<sup>23</sup>

Whereas, The Egyptian legislator did not provide definition of the Force Majeure Event, but the Egypt Appeal Court define it as: “It is something that could not be expected and would not be met and would make fulfillment of the commitment impossible.”<sup>24</sup>

## **2- The Impact of COVID-19 on Contract**

The majority of jurists say that Corona virus has a strong impact on the performance of contract, that’s why several contractans ask to be exempted from their duties in these contracts.

We will see the impact of COVID-19 on the contract according to the World Health Organization (1), and then we will see these impacts according to the contract’s terms (2), and finally we analyze this impact through legislators (3).

### **2.1- According to World Health Organization (WHO):**

According to the definition of WHO to a Force Majeure Event, it had been mentioned that: “It is an extraordinary event which is determined:

- (i) To constitute a public health risk to other States through the international spread of disease, and
- (ii) To potentiality require a coordinated international response.<sup>25</sup>

The WHO has commented what does mean by “an extraordinary event”, by saying:

“Implies a situation that: is serious, unual or unexpected; carries implications for public health beyond the affected state’s National Borders; and may require immediate international action.”<sup>26</sup>

This new comment make COVID-19 an event that constitute a Force Majeure, in addition; all jurist state that Corona virus is a real case of Force Majeure similar as: riots, war, fire, government regulation, disaster, medical epidemic, strikes, terrorism or threat of terrorism, civil disorder, curtailment of transportation, etc.

Furthermore, there were two provisions cited in WHO report which may consist a real Force Majeure Event, “epidemic” and pandemic, these two events can touch the ability of contractans to perform their obligations or carry on, that’s why all experts were agree to say that COVID-19 may be considered as a Force Majeure Event that can touch the performance of commercial contract as well as civil contract.<sup>27</sup>

Thus; the World Health Organization (WHO) has declared on January 30<sup>th</sup>, 2020, the outbreak of Corona virus (COVID-19) was a Public Health Emergency of International Concern which is known as PHEIC.

### **2.2- According to contract’s term:**

The majority of jurists say that if we try to apply the previous conditions of Force Majeure Events on the Corona virus (COVID-19), the issue should be determined on the

terms of contract itself, thus; if the contract has mentioned in their content some words which refer to “epidemics” or “diseases” or any similar word.<sup>28</sup>

According to those jurists, we can consider COVID-19 as a temporary Force Majeure Event which last for a limited period, but it can be a final Force Majeure Event when we are in front a particular contract which the time is of the essence.

This qualification touch the duty of the parties’ contract, either with the suspension of their obligations if we consider COVID-19 as a temporary Force Majeure Event, and as a result we delay the performance of the contract, or we exempt parties from their obligations because their duties became impossible to be executed.<sup>29</sup>

If we look beyond the contract and its parties, we notice that the government actions about COVID-19 has obviously affects the contractual obligations, thus; it is clear that even measures that are taken from governments to face the Impact of Corona virus are considered at least as a sudden event that cannot be excepted from the contractans.

So if we refer to contract’s term we can use any interpretation to state whether these actions taken from the Government are a direct result from the Covid-19 or not.<sup>30</sup>

This statement is decisive about the compensation issue, because judge cam exempts the debtor from compensation if he states that these governmental actions are a direct result of this Novel Disease.<sup>31</sup>

But if the contractans didn’t specified in contract’s term whether the pandemic or epidemic can be considered as Force Majeure Event, the contract will be under the Legal jurisdictions and the interpretation of language used in the redaction of contract.

### **2.3- According to legislators:**

If we refer to our legislator, in the article 107 of the Civil Code, the Algerian legislator require from a debtor to provide a proof that he initiate to execute his obligation but some event happened and make the performance of this duties impossible.

The same statement has been adopted by the French legislator, in the article 1231 of the French Civil Code, he provide that:

“The debtor is condemned, if the payment of obligation, or because of the non-fulfillment of the obligation, or because of the delay in the execution, if he does not justify that the execution was prevented by Force Majeure.”<sup>32</sup>

However, in its decision, the Court of appeals of Colmar, in France has decided that Corona virus (COVID-19) is not a Force Majeure Event.<sup>33</sup>

In addition, the same Court state those two issues can be considered as Force Majeure Event:

- (i) The fact that there is no medicine to cure this new disease;
- (ii) This disease is contagious, and it can touch every one with a simple touch.

According to this tribunal, if we consider the Corona virus as a Force Majeure Event, there will be legal effects, including:

- Effects on procedures: this leads to three effects:
  - A suspension of the deadlines.
  - The breaking down of the jurisdictions.
  - The breaking down of sentences.
- Effects of the contracts' obligations:
  - Miss fulfillment of commitment obligations
  - No compensation.
  - Inability to implement the obligations.

This provision was also adopted by the English Courts when they state that:

“The party claiming Force Majeure relief is usually under a duty to show it has taken reasonable steps to mitigate the effects of the Force Majeure Event.”<sup>34</sup>

If we come back to the virus “SARS”, it was stated at that time in china that:

“...disputes caused by the government and relevant departments' administrative measures to prevent the SARS epidemic that directly result in the contract being unable to perform, or due to the impact of SARS epidemic, the parties to the contract being unable to perform at all, should be dealt properly in accordance with the provision of Article 117 and 118 of the contract law.”<sup>35</sup>

The same disposition was expressly stated in the article 17.1 of the Construction Engineering contract in China when he listed “epidemic” as one of the acknowledged Force Majeure Events.

Similarly, the Commission of legislative Affairs of The National people's congress in china, had response the public queries about whether COVID-19 is a Force Majeure or not, and it states that: “...the type of epidemic prevention and control measures taken by local governmental departments that make a party unable to perform its obligations constitutes a force majeure event, being one which is unforeseeable, unavoidable and insurmountable.”<sup>36</sup>

## **Discussion:**

It is relatively simple to say that Corona virus (COVID-19) is a Force Majeure Event, if it is the main cause of the non-execution of parties' contract.

However, Some scholars say that one must be careful before considering the COVID-19 a Force Majeure Event, they state that we must ask the following questions before we say that COVID-19 is a concrete event of Force Majeure:



- 1- Is it COVID-19 which makes the contractans unable to perform their obligations?  
Or
- 2- Is it the restrictive governments actions enacted to face the effects of COVID-19?
- 3- Is it something beyond control of the practice but which is linked directly to COVID-19?

Furthermore, one must know that there are some contracts take a long time to be executed, thus, judge must examine the ability of debtor during the whole period of execution, and then he states whether COVID-19 as an event touch the ability of destor , or not.

In the context of contracts' obligation, it is important to mention that the debtor can provide proof that a new event happened and make his accomplishment impossible, so we do not need to qualify this new event as a Force Majeure but one focus on the fact that it was a convincing reasons make the execution of the contract impossible.

That's why they require the relativity of the application of Force Majeure effects on the contracts, they ask to be limited in time in order to perform other obligations in the future after the Corona virus.

### **Conclusion:**

At the end of this humble paper, it seems obviously clear that the question of whether the Corona virus is a Force Majeure Event or not depends on at least four factors which is:

- We must take into consideration the official interpretation of governing laws about the restrictions and controls which were declared over the world including Algeria.
- The contractans both of them must claim Force Majeure relief to be prevented from the impact of the non-execution of duties' parties.
- One must known that judges when they want to interpretate contracts must focus on the contract's terms and see whether the contractans has mentioned the destiny of contract if a Force Majeure Event happened during the performance period or not.
- One of the features' Corona Virus is that it is a temporary event even if according to some experts it takes a long time to be solved.

**References**

- 1 Algeria has imposed a general lockdown in 48 provinces, and it was extended for four times, the last one was in to may11, when the government decide to extend the lock down 15 days till the end of the month, this lockdown was characterized by measures, including suspension of education and all kind of political, economic and cultural activities were initially due to the end of may.
- 2 David Metzger, Corona virus and Force Majeure, Clifford Chance, April 2020, p.p.1-4, <https://www.cliffordchance.com> (viewed April 25 th, 2020 at 18 :35)
- 3 Sam Song, Corona virus Disease (Covid-19) : Is it Force Majeure or Something Else ?, Squire Patton Boggs, Marsh 2020, p.02.
- 4 Force Majeure : A New Dimension to the corona virus outbreak, Relience 360 special report, February 20 th, 2020, p.p.1-9, <https://www.reliance36.com/reliance36@dhl.com>, (viewed April 28 th, 2020 at 11 :35)
- 5 Jeffrey S.& Tenenbaum Esq, Corona virus : Legal Strategies for Association Meetings, Managing Partner Tenenbaun law Group PLLC ? Washington, USA, 2020, p.21, <https://www.tenenbaumlegal.com>, (viewed May 07th, 2020, at 01 :40)
- 6 Jeffrey S. And Tenenbaum Esq, Ibid.
- 7 Kumar Dharmendra, Malviya Rishabha and kumar sharma Pramod, Corona Virus: A Review of COVID-19, EJMO 2020 ; 4 (1), p.p. 8-25.
- 8 Coronavirus disease 2019 (COVID-19), Sitation Report-61, World Health Organization, Data as reported by national authorities by 23:59 Marsh 20, 2020, p.p.1-9.
- 9 European Centre for Disease Prevention and Control, Outbreak of Novel Corona virus Disease 2019 (COVI-19) : increased transmtion globally- fifth update, Marsh 02 nd, 2020, ECDC, Stockholm, 2020, p.1.
- 10 Corona virus disease 2019 (COVID-19) and supply of substances of human origin in the EU/EEA, ECDC, Marsh 2020, p.09.
- 11 Directive No.36-8 of EU/EEA of European Centre.
- 12 Kumar Dharmendra, Malviya Rishabha and kumar sharma Pramod, Corona Virus: A Review of COVID-19, EJMO 2020 ; 4 (1), p.p. 8-25.
- 13 Definition of Corona Virus COVID-19 According to WHO, Given in its report in 2020, Available : <https://www.who.int/ar/emergencies/diseases/novel-coronavirus-2019/advice-for-public/q-a-coronaviruses> (viewed May 18, 2020 at 11:30)
- 14 Supreme Court Decision, Civil Chamber, file No.65920, June 11 th, 1990, Judicial Magazine, Vol.11, 1991, p.88.
- 15 Suprem Courte, Decision issued on November 11, 1990, non published.

16 Article 127 of the Algerian Civil Code.

17 Micah Sadoyama, Matthew Secomb and Alexander Woody, Covid-19 and force majeure under LNG sale and purchase agreements, client Alert, Oil, Gas, International Arbitration, Marsh 2020, p.p.1-3.

18 British Electrical and Associated Industries (cardiff) LTD, Patley Pressings LTD, 1953, 1, WLR, p.280.

19 Cleary Gottier, Coronavirus- Force Majeure or Frustration? Cleary Gottlieb Steen & Hamilton LLP, February 20, 2020, London, p.p.1-5.

20 Sophie Pignon, Doctrinal Questions, Taylor Wessing LLP, Marsh 2020, p.3. (in French language)

21 Article 1218 of the French Civil Code.

22 COVID-19 Impact on contractual relationships, MEDEF-Jurisdictional Direction, C-F, Marsh 10, 2020, p.p.1-2 (in French language)

23 Article 283 from the Tunisian Civil Law, section of Commitments and Contracts.

24 The Egypt Appeal Court, Decision Issued on Marsh 28 th, 1948.

25 Article 01, International Health regulation (2005), <https://apps.who.int/iris/bitstream/handle/10665/246107/9789241580496eng.pdf;jsessionid=c27F680B20E1EE483AAF0480A25D689A?SEQUENCE+1?> (viewed Marsh, 27 th, 2020 at 10:17)

26 World Health Organization, <https://www.intlihr/procedures/pheic/en/>, (viewed May 10th, 2020 at 00 :35)

27 World Health Organisation, WHO Statement Regarding Cluster of Pneumonia Cases in Wuhan, China, Geneva 2020, (up dated 09 January 2020 and 14 January 2020), <https://www.who.int/china/news/detail/09-01/2020> (viewed May 18 th, 2020 at 00:15)

28 Shared Responsibility, Global Solidarity: Responding to the socio-economic impacts of COVID-19, United Nations, Marsh 2020, p.8.

29 Delivorias A. and Schlz N, Economic Impact of Epidemics and Pandemics, EPRS, European Parliament, February 2020, p.13.

30 Article 26 of The Interpretation on Certain Issues Concerning the Application of the Contract Law (II), Fa shi, 2009, No.05., According to the PRC Contract Law.

31 Shared Responsibility, Global Solidarity: Responding to the socio-economic impact of COVID-19, United Nations, Marsh 2020, p.07.

32 The French Legislator has provided for the parties' contract the right to renegotiate the contract conditions if it had been signed after the 1st of October 2016.

33 Court of Appeal, Tribunal of Colmar, 6th chamber, decision issued on March 12 th, 2020, France.

34 Guidance on Contractual Issues Caused by Corona virus, Wedlake Bell LLP, April 2020, p.p.2-19.

35 Article 03 the Notice of the Supreme People's Court on Conducting the Trial and Enforcement of the People's Court in the Period of the prevention and control of infections Atypical pneumonia, 2003, No.72.

36 Hogan Lovells, The Impact of The Novel Corona virus on the Construction Sector, February 19, 2020, [www.hoganlovells.com](http://www.hoganlovells.com), (viewed on May 17 th, 2020 at 11:05)