



## AL HADEEL HASAN LAW

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### THE LEGAL EFFECT OF CORONAVIRUS (COVID-19) UNDER THE THEORY OF EXCEPTIONAL CONDITIONS IN THE IRAQI LAW

The global concern over the outbreak of Coronavirus caused many countries in the world to take measures that have affected the business sector, trade, maritime, air and land transport, trade exchange, tourism, travel, and other sectors. Such circumstances may negatively affect the ability of a contractor/supplier to fulfill its contractor obligations and may inflict a heavy loss on it .

The question arises here whether such concern about risks of the spread of coronavirus and the measures taken could be establishing an exceptional circumstance that requires the application of the article 146/2 of the Iraqi Civil Code (emergency conditions theory).

Para 2 of Article 146 of the Iraqi Civil Code states: "where however as a result of exceptional and unpredictable events of a general nature the performance of the contractual obligation has not become impossible but onerous on the debtor such as will threaten him with exorbitant loss the court after balancing the interests of the parties may if it would be equitable reduce the onerous obligation to a reasonable limit; every agreement otherwise shall be null and void".

In order to verify the occurrence of the exceptional condition in view of the above Article, the following elements must exist:

1-That exceptional general accidents occur:

Such as the issuance of a new law, a flood, war, or the spread of a serious pandemic, earthquake, a sudden strike, fixing an official pricing or its cancellation, administrative seizure, etc.

The exceptional condition must occur during the implementation of the contract, so it is not an excusable general exceptional accident if occurred before or after the conclusion of the contract .

It is also a requirement that the exceptional condition this (general) meaning that it is not specific to the debtor/obligator, such as bankruptcy, the burning of its warehouses or the destruction of its crops. Having the above legal provision introduced, the concern about the spread of Coronavirus and the accompanying measures and reservations are the same as the spread of any other epidemic is an exceptional public occurrence, because it is not a specific occurrence pertains to a particular contractor, but rather a general matter involving countless numbers of people, and an impact on the economy and commercial and financial activity in general.

2-That these occurrences are not expected to be expected upon the conclusion of the contract; hence, if it is expected or even predictable, it is not sufficient to fulfill the conditions of Article 146/2 of the Civil Code, then war is considered a general exceptional event, but if it is expected to occur at the conclusion of the contract because it preparations are in place, then it does not fulfill the conditions of this article, as well as the issuance of a new law if it is expected to be issued when the contract is concluded, then it does not fulfill the conditions of Article 146/2,

The risk of the spread of Coronavirus is a condition that cannot be expected at the time contracts are concluded, but it is a requirement here that the contract is concluded before the outbreak of the Coronavirus has been declared whether locally or globally, but if the contract was concluded after coronavirus outbreak then one of the elements of the general exceptional occurrence will be missed.



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3-That the occurrence of the exceptional condition causes the implementation of the contractual obligation to become onerous that it threatens the debtor/contractor with a heavy loss, this could be seen in cases where the prices significantly increase beyond the usual limit in merchants' ordinary losses.

If the implementation of the contractual obligation turns to be impossible, then such case shall count as a force majeure that terminates/ends the obligation, which is the difference between the force majeure and the emergency exceptional condition .

As for the criterion for determining whether the obligation has become onerous [exhausting] for the debtor/contractor, it is a flexible criterion and does not have a fixed standard, so what is onerous for one debtor may not be the same for another, and what is onerous for a debtor in certain circumstances may not be onerous to him in other circumstances; in any case, the implementation of the obligation must be cause or threaten the debtor with a heavy loss, as the regular loss is not sufficient for the application of the exceptional condition theory. Furthermore, the value of the loss is irrelevant even if it is not considered a major figure in relation to the debtor total wealth.

The Iraqi Court of Cassation tends to seek the opinion of experts for the purpose of verifying the presence of onerous element that resulted from the occurrence of the exceptional condition.

Having the above stated and although the risk of the outbreak of the Coronavirus is an exceptional public event, it is not enough to apply to the theory of emergency exceptional conditions stipulated in Article (146/2) of the Civil Code unless the risks of the spread of the coronavirus or the accompanying measures must lead to a collapse in the economic balance between the obligations of the two parties so that one of the two parties is threatened with a heavy loss.

These are the legal conditions according to the apparent provision of Article (146/2) of the Civil Code, but the Iraqi judiciary added other conditions in their interpretation and practice, as follows:

- a) That the contractor continues to fulfill his obligation. [Cassation Order number 1229 / H / 967 on 27/1/1968].
- b) That the contract is still ongoing, and its full obligations have not been fulfilled yet when referring to the application of the exceptional conditions theory [Cassation Order No. 206 / First Civil / 978 on 12/25/1987].



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### The effects of the occurrence of the exceptional event conditions

The claimant who argues the occurrence of an exceptional condition such as the Coronavirus pandemic is not entitled to claim any compensation, even if the conditions of Article 146/2 of the Civil Code are met, however, the aforementioned article authorizes the judge to restore the economic balance to the contract in case it was disturbed by the exceptional public event by reducing the onerous obligation to a reasonable extent only, that is, the judge mitigates the heavy loss suffered to the claimant/debtor to some extent in accordance with the requirements of justice without removing the entire loss from the debtor (the claimant), but normalize his loss. [Cassation Order number 1649 / AD / 1994 on 19/3/1996].

And, therefore, the judiciary does not compensate the debtor whose obligation has become onerous for any loss suffered or for any profit lost, due to the realization of the general exceptional condition but it only reduces its obligation to the extent that makes its loss regular only. The effect that the law applies on the fulfillment of the conditions of Article 146/2 is a permissible and not obligatory effect, that is, it is permissible for the judge to excuse the debtor claim or denies it, but under the supervision of the high courts.