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The Impact of Pandemics on Oil Contract Disputes

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Abstract:

This study aims to elucidate the effects of force majeure on oil contracts and the ensuing disputes that have impacted the production, export, and import of oil. Consequently, this has led to breaches of obligations and rights among the parties involved. Our research is anchored by a case study of force majeure represented by the COVID-19 pandemic. We examine certain provisions within national legislations and oil contract clauses that reference the concept and conditions of force majeure. This is to demonstrate the resultant effect of contract suspension before entering the negotiation phase due to force majeure, thus avoiding contract termination as indicated by national laws, to sustain the contract's objectives. This negotiation process is detailed in numerous contracts and international arbitration decisions. Subsequently, we will elucidate the impact if parties fail to reach an agreement through negotiation, leading to arbitration—a method ubiquitous in oil contracts for dispute resolution. Moreover, we will discuss the pandemic's effect on arbitration, transitioning from in-person to virtual arbitration, thereby transcending spatial and temporal boundaries in resolving disputes. Hence, we adopt the descriptive and analytical methodology to depict the doctrinal and legal debate concerning force majeure and its impact on oil contracts. Our analysis includes contractual and legal texts specific to Iraq and several Middle Eastern countries regarding the application of force majeure and its impact on contracts. We also employ a comparative approach regarding legal texts on force majeure and dispute resolution methods through negotiation and arbitration in Iraq and some Middle Eastern countries. The goal is to establish clear foundations to avoid future dispute resolution complications and strive for specialized legislation and agreements related to arbitration during such crises. Additionally, we aim to draft contracts emphasizing negotiation and arbitration to protect the public interest from similar future crises and keep pace with the advancements in national legislation of developed and neighboring oil-producing countries. Thus, we have divided this study into two sections: the first addresses the impact of the COVID-19 crisis on oil contracts, and the second explores its effect on resolving oil contract disputes.

Keywords: Impact - Force Majeure - Oil Contracts - Contract Suspension - Dispute Resolution

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Introduction:

1. Research Topic: In the past three years, the world has witnessed a global crisis characterized by its widespread impact and nature, namely the COVID-19 pandemic. This crisis has affected all facets of life, including both private and public contracts, notably oil contracts. This has led to disputes between the parties involved, necessitating legal resolutions that align with the crisis's nature and the significance of these contracts. One of the most severe impacts of the crisis has been the halting of transportation and the restriction of travel and movement both between and within countries. This naturally resulted in delays and difficulties in executing these contracts and consequently in resolving the ensuing disputes through traditional methods. This predicament has driven nations to seek remote and technologically advanced or electronic means to resolve such disputes. Therefore, this study will focus on the impact of the COVID-19 pandemic on oil contracts and the resolution of disputes arising from these contracts under Iraqi law and the laws of some Middle Eastern countries, referencing specific oil contract provisions from these jurisdictions. We will divide this introduction into sections on the study's importance, its issues, methodology, and research plan as follows:

2. Significance of the Research:

This study aims to shed light on a crucial and fundamental concept in the field of oil contracts, specifically the COVID-19 pandemic as a model of force majeure and its impact on the obligations and rights of the parties involved. Subsequently, it will focus on the suspension of contracts under force majeure as a prelude to initiating negotiations between the parties to ensure the continuity of the contract, contrary to the internal laws that mandate contract termination under force majeure when execution is impossible. Following this, we will explore arbitration as a means to resolve disputes in oil contracts if negotiations fail, to prevent potential damages to the state from such crises in the future. We will also demonstrate how some countries and arbitration bodies have sought to develop arbitration systems suited to the nature of these disputes. Despite the importance of this topic, remote arbitration during such pandemics has not been adequately addressed in the legal regulations of most Middle Eastern countries and has not kept pace with the legislative advancements made by some nations. Furthermore, there is scant academic attention to this issue; we have found few legal studies that comprehensively cover the COVID-19 crisis and its impact on oil contracts and their disputes. Consequently, this importance has driven us to select this topic and give it its deserved attention by striving to achieve the study's goals.

3. Research Problem:

The core questions of this research revolve around addressing the impact of the COVID-19 pandemic on oil contracts, which might disrupt the contractual balance between parties, potentially leading to contract suspension for reaching an amicable agreement through negotiation. If such negotiations fail, the issue may escalate to arbitration for dispute resolution. Notably, internal laws have stipulated contract termination under circumstances like the COVID-19 pandemic. Hence, this study seeks to answer the primary questions as follows:

1. What are the effects of the COVID-19 crisis on oil contracts?

2. What are the effects of the COVID-19 crisis on the resolution of oil contract disputes?

4. Research Methodology:

In this study, we have employed both descriptive and analytical methodologies to elucidate the doctrinal and legal debate concerning force majeure and its impact on oil contracts, analyzing the provisions of oil contracts that refer to this situation. Additionally, we used the comparative method regarding legal texts related to force majeure and those addressing dispute resolution through negotiation and remote arbitration in Iraq and several Middle Eastern countries.

5. Research Plan:

We have divided our study into two main sections: the first examines the effects of the COVID-19 pandemic on oil contracts, and the second addresses the impact of the COVID-19 crisis on the resolution of oil contract disputes.

Section One: The Effects of the COVID-19 Pandemic on Oil Contracts

An oil contract is an agreement between oil-producing countries or their affiliated institutions on one side and a foreign oil company on the other, aiming to explore, search for, and extract oil in a specified area and for a certain duration in exchange for a payment made by the oil-producing country[1]. Hence, oil contracts are crucial for oil-producing nations, striving to achieve the highest possible levels of development and prosperity for their societies. These contracts also yield significant profits for the specialized foreign companies involved.

Any impact on the execution of these contracts will affect the operations of the state, prompting these nations to focus on facilitating the implementation and easing the tasks of the specialized foreign companies they contract with. However, sometimes circumstances beyond the parties' control lead to the suspension and impossibility of executing these contracts, as witnessed during the COVID-19 crisis, which was deemed a severe pandemic.

Following the global spread of COVID-19 in early 2020 and the United Nations' declaration of the virus as a severe pandemic, the world began to grapple with its profound effects, especially in the realm of legal relationships, with a particular focus on contractual relationships. This had a direct impact on the parties involved in oil contracts and their legal relationships. Therefore, we will divide this section into two subsections: the first will illustrate the direct impact of the COVID-19 pandemic on oil-producing countries and oil companies, and the second will clarify the pandemic's effect on the contract and the contractual relationship of the parties involved in the oil contract, as outlined below:

Subsection One: The Direct Impact on Oil-Producing Countries and Oil Companies

In response to the pandemic, nations implemented stringent measures to control its spread, such as city lockdowns, facility closures, and travel restrictions. These actions led to a significant reduction in energy demand as most factories and projects halted operations due to the pandemic. The World Health Organization's recommendations, including limiting international travel and enforcing social distancing, prompted many countries to impose curfews and restrict or reduce working days for both public and private sector employees. Consequently, numerous sectors experienced a severe decline in demand and operational capacity.

Due to this decreased demand, oil production rates fell. According to estimates from the Organization of Arab Petroleum Exporting Countries, production rates in 2020 were approximately 92 million barrels per day, reflecting a 6.7% decline from 2019. This downturn caused a continuous slowdown in the oil industry, with companies struggling to proceed due to capital constraints, falling oil prices, and operational challenges posed by the pandemic. The oil and gas industry saw a reduction in the number of contracts from 1,267 in the first quarter of 2020 (with 658 in the exploration and production sector) to 907 in the second quarter of 2020[2].

Despite these challenges, the pandemic resulted in reduced oil revenues and significant financial deficits, posing substantial economic risks for Iraq, which faced a gradual deficit of 29% of its GDP in 2020, continuing into 2021[3]. Saudi Arabia's oil sector also witnessed a 4.6% decline in the first quarter of 2020[4

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), with the downturn worsening by the year's end. Similar declines were observed in other Middle Eastern oil-producing nations such as Iran, the UAE, Iraq, Bahrain, Kuwait, and Egypt[5].

The decisive and precautionary measures taken globally to curb COVID-19 led to a decrease in oil demand and halted international companies' operations, causing global oil prices to plummet from $60 to less than $25 per barrel[6]. Consequently, global oil demand began to drop at the start of 2020, decreasing to 1.93 million barrels per day in the first quarter from 8.1 million barrels per day in the previous quarter, a 64.7% decline. This reduction was due to the negative impact of the pandemic on several energy-consuming economic sectors. In the second quarter of 2020, global oil demand continued its decline by 74.1% compared to the previous quarter[7].

As the crisis worsened and the virus spread, commercial entities struggled to fulfill their obligations, unable to operate amid the pandemic. This was a major cause of disputes between the parties in oil contracts, leading them to invoke the theory of force majeure, which disrupts contractual balance during execution. Among these effects were the suspension of oil contract execution and the parties' intent to renegotiate. Renegotiation is a condition established for the investor's benefit, and the national party can only resort to it through arbitration.

Subsection Two: The Pandemic's Impact on the Contractual Relationship of Oil Contract Parties

Force majeure, as an event hindering contract execution, has garnered legislative attention both internationally and domestically. National legislations indicate that force majeure affects the contractual relationship and may lead to the contract's dissolution by law. However, contract dissolution is not the only consequence of force majeure as defined in traditional national legislations. The modern concept introduces flexibility, allowing for contract suspension until the force majeure ceases. During this suspension, parties may renegotiate the contract's terms to balance their rights and obligations in line with the circumstances imposed by force majeure. Particularly in oil contracts, parties aim to sustain their agreements, and in case negotiations fail, they often resort to arbitration, a standard clause in most oil contracts.

Traditionally, force majeure is defined as an unforeseeable and unavoidable event making contract performance impossible without fault from the debtor[8]. The modern definition, however, involves the parties in determining what constitutes force majeure, describing it as a condition stipulated by the contracting parties to define force majeure[9]. Thus, this section is divided into two branches: the first addresses force majeure under national legislations, and the second explores its impact under the provisions of oil contracts.

Branch One: Force Majeure Under National Legislations

National laws define the concept of force majeure and outline its conditions: the event must be unforeseeable, unavoidable, and eliminate the causal link between the act and the damage to justify non-performance. Such an event negatively impacts contract execution, leading to its dissolution. Contract dissolution means the contract's termination by law if fulfilling the contractual obligation becomes impossible due to an external cause beyond the debtor's control.

Most legislations, despite different terminologies, have addressed this effect of force majeure. For instance, the Iraqi legislator under Article 406 of the Iraqi Civil Code No. 40 of 1951 (as amended) states: "In bilateral contracts, if the performance of an obligation becomes impossible due to an external cause, the obligation is extinguished, and the corresponding obligation of the other party is also extinguished, and the contract

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is dissolved automatically." Similarly, this is mirrored in Article 195 of the Egyptian Civil Code No. 131 of 1948 (as amended).

Article 425 of the Iraqi Civil Code also references the termination of obligations under foreign causes, stipulating: "An obligation is extinguished if the debtor proves that performance has become impossible due to a foreign cause beyond his control." The Iraqi Civil Code mandates that contractual obligations are extinguished without liability if rendered impossible by force majeure. Legal texts require several conditions for dissolution: the impossibility must be permanent and absolute, meaning performance is utterly impossible. Temporary impossibility leads to contract suspension, resuming once the impediment is removed. This is also recognized by Article 215 of the Kuwaiti Civil Code No. 67 of 1980.

Other conditions for dissolution include that the impossibility arises post-contract formation and is external, beyond the parties' control. If these conditions are met, several effects follow: the contract dissolves, the parties are released from their obligations, and both are returned to their pre-contract state[10]. This eliminates contractual liability and exempts the parties from compensation, as indicated by Article 168 of the Iraqi Civil Code.

Thus, force majeure differs from unforeseen circumstances. Force majeure makes performance absolutely impossible, while unforeseen circumstances make it onerous but not impossible. Additionally, force majeure involves the parties' agreement, whereas unforeseen circumstances are considered public policy, prohibiting parties from agreeing otherwise[11].

Branch Two: Force Majeure Under Oil Contracts

The traditional concept of force majeure is not applicable to oil contracts during pandemics due to the critical and influential nature of these contracts on the national economy. Terminating such contracts in this manner is not feasible given their importance. Therefore, the urgent need to execute these contracts and the parties' genuine desire to avoid the impact of force majeure as traditionally understood has led them to seek alternative procedures that allow the continuation of the contract without dissolution.

Oil contracts typically include specific provisions defining force majeure. For example, the Halfaya oil contract in Iraq states in Article 31/1 that "any party's non-performance or delay in performing its obligations under this contract is justified if such non-performance or delay is due to force majeure." Article 31/3 further defines force majeure as "any cause or event beyond the reasonable control of the affected party, including but not limited to acts of God, war (whether declared or undeclared)..."

Similarly, the contract ratified by Law No. 161 of 2020 for the Egyptian Minister of Petroleum and Mineral Resources to contract with the Egyptian Natural Gas Holding Company, Chevron Egypt Holdings, and Tharwa Petroleum SAE, in Article 23, defines force majeure as "any act of God or... any other cause not resulting from the fault or negligence of EGAS or the contractor, whether similar or dissimilar to the foregoing, provided that such cause is beyond the reasonable control of either EGAS or the contractor."

Article 23(a) of the same law specifies that force majeure exempts EGAS and the contractor from responsibility for non-performance or delay in performance, extending the contract term by the duration of the force majeure and the time needed to rectify any resulting damage. This provision aligns with the Halfaya contract, which adds force majeure periods to the contract duration as per clause 12/2-w. The offshore oil exploration contract No. 1 between the Syrian Arab Republic, the General Petroleum Corporation, and Capital Company, signed on April 26, 2020, defines force majeure in Article 22 as "any actual circumstances preventing the contractor or the corporation from fulfilling their obligations under this contract, including... governmental orders or directives, whether in the form of laws or acts of God or disasters... provided that such causes are beyond the reasonable control of the corporation and the contractor[12]."

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These contracts illustrate that force majeure does not result in contract termination but serves as a justification for continuing the contract and allowing the party unable to fulfill its obligations due to force majeure to seek renegotiation. Since force majeure is not a matter of public policy, parties can suspend contract execution to renegotiate terms to reach a satisfactory agreement. In oil contracts, suspension is a primary effect of force majeure or an invocation of the renegotiation clause. Suspension precedes negotiation, maintaining the contract's validity and allowing it to resume once the impeding conditions are resolved.

Many agreements and domestic regulations adopt the suspension system. The International Chamber of Commerce's model clauses, for example, include force majeure as a reason to suspend contract execution for a reasonable period, excluding the other party's right to terminate or rescind the contract. Additionally, ICC arbitration awards, such as award No. 1703 of 1971, recognized suspension due to temporary impossibility, ruling that contracts should resume post-impossibility[13].

Domestic decisions may also permit suspension to preserve crucial ongoing contracts. Iraq's Crisis Cell, established by Order No. 55 of 2020, deemed COVID-19 a force majeure event from February 20, 2020, until the pandemic's resolution, affecting ongoing contracts where time is essential, including oil contracts. The decision suspends the statute of limitations per Article 435 of the Civil Code, considering the pandemic a legitimate excuse for suspension.

This decision has faced criticism from researchers for assigning a legal qualification to the pandemic, which should be the judiciary's prerogative. The judiciary must determine whether an event constitutes force majeure, not administrative bodies like the Crisis Cell. The Cell should have limited its role to describing the pandemic's severity without intervening in legal qualifications reserved for the judiciary[14].

In the next section, we will explore the implications of the COVID-19 pandemic on the settlement of oil contract disputes.

Section Two: Impact of the COVID-19 Crisis on Resolving Oil Contract Disputes

Oil contracts are typically long-term agreements preceded by extensive negotiations and preparation, often requiring governmental approval. These procedures highlight the significant economic and social impact of oil contracts on both producing countries and the countries of the oil companies. Consequently, the primary objective of these contracts is their continuity and execution despite various circumstances. Parties and international trade arbitrators strive to maintain these contracts at all costs. This section will discuss two methods for resolving disputes under force majeure conditions and the impact of the crisis on these methods:

First Topic: Renegotiation in Oil Contracts

Renegotiation is a relatively new legal approach that establishes legal rules based on contractual practices to address the repercussions of the COVID-19 pandemic. This concept, integral to international contracts, including oil contracts, aims to manage changing circumstances affecting the contract. Renegotiation ensures the contract's existence and execution by balancing contractual obligations, as these contracts are based on the principle of maintaining and continuing the contractual relationship between oil contract parties. These contracts typically include clauses that mandate renegotiation in the event of force majeure, intending to amend certain provisions to align the contract with new conditions imposed by the force majeure event. Traditionally, renegotiation involves personal meetings and direct communication between contract parties, but recently, electronic communication methods and modern technologies have been utilized, especially during the COVID-19 pandemic.

Legal scholars define renegotiation as a contract clause intended to restore contractual balance, obligating parties to renegotiate and amend the contract's terms if unforeseen circumstances significantly affect the

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economic balance. The reasons for introducing this concept are similar to those behind the modern understanding of force majeure. The key difference between the traditional and modern concepts of force majeure is the idea of renegotiation, now a standard clause in most oil contracts. This method allows parties to avoid the automatic dissolution of the contract due to force majeure and ensures the contract's continuity.

The foundation of renegotiation lies in the principle of contractual freedom, which allows parties to create any contracts and define their terms, provided they do not violate public order. Renegotiation is based on the principle of good faith in contract execution, as mandated by most national laws, including the Iraqi Civil Code in Article 150(1), which requires contracts to be executed according to their terms and in good faith. The International Chamber of Commerce (ICC) has emphasized that good faith implies implicit obligations in every contract when unexpected changes significantly affect contractual performance. These obligations include renegotiation, considered a general legal principle[15].

Renegotiation in oil contracts can benefit the investor, the foreign oil company, or both. For instance, Iraqi contracts from the 2009 licensing rounds stipulate renegotiation for the investor's benefit if financial shares are affected by legal changes, according to Article 29-4. If no resolution is reached, arbitration is pursued per Article 37. However, renegotiation for the state's benefit is not feasible in Iraqi oil contracts due to the absence of such a clause and the contracts' provisions on legislative stability. Thus, the only path for renegotiation in oil contracts during oil price collapses is through arbitration under ICC rules, as Article 37 outlines. The ICC has acknowledged the state's right to renegotiate oil contracts even without a renegotiation clause. Moreover, Article 62 of the Vienna Convention on the Law of Treaties allows the affected party to renegotiate in the event of a fundamental change in circumstances, enabling the state to seek renegotiation

Second Topic: Settling Oil Contract Disputes Through Arbitration

The legal objective of force majeure is to ensure the continuity of contracts rather than their annulment. Parties prefer to review contracts through renegotiation. However, if renegotiation fails to overcome the challenges posed by force majeure, arbitration is pursued as an alternative to ensure contract execution. Arbitration is a method chosen by disputing parties to resolve conflicts through an arbitrator or panel instead of resorting to the courts, and this method is often included in oil contract clauses.

The authority of the arbitration panel or arbitrator in resolving disputes is contingent upon the parties' agreement and the powers granted to address force majeure effects. Parties define the concept of force majeure within the contract, facilitating the arbitrator's task and preventing interpretive deviations from their agreement.

Due to the repercussions of the COVID-19 pandemic, numerous disputes arose in oil contracts. Statistics from the International Criminal Court (ICC) in 2020 indicated that the energy sector experienced the highest number of disputes referred to arbitration. The annual report for 2020 also highlighted the dominance of energy sector cases[16].

The pandemic naturally affected the litigation system, necessitating specific measures to address the resulting implications. Electronic arbitration became the preferred method in many countries. Arbitration during COVID-19 differs from traditional arbitration only in the means used, with proceedings conducted in a virtual environment without physical presence, raising the need for procedural rules that protect parties' rights and ensure the resolution of disputes in a manner consistent with the nature of those transactions. Remote arbitration is thus suitable for resolving disputes under such exceptional circumstances.Several international arbitration institutions and centers declared an emergency to manage the COVID-19 crisis, adopting measures similar to those in judicial proceedings, such as suspending sessions and deadlines in some countries.

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Given this context, it became necessary to change arbitration procedures. As face-to-face meetings in international arbitration decreased, some centers turned to technology, particularly video conferencing for hearings, which became essential during the pandemic. COVID-19 also impacted evidence collection, granting arbitration courts discretion in procedural matters. This was reflected in Article 22(2) of the 2017 ICC Rules, ensuring comprehensive case management and continuity of the arbitration system. The rules of the United Nations Commission on International Trade Law (UNCITRAL) grant arbitration panels discretionary authority, emphasizing the avoidance of unnecessary expenses and ensuring a fair and efficient dispute resolution process. The London Court of International Arbitration (LCIA) also upheld this principle.

Many parties and arbitration institutions sought guidance from the ICC on managing COVID-19-related challenges. The ICC provided solutions and called for cooperation among various centers and chambers to ensure effective support for international arbitration, stabilizing and resolving pending cases while maintaining procedural effectiveness despite general instability.

Countries like the UAE amended their arbitration laws to adapt to the new reality. Federal Decree No. 15 of 2023, amending Federal Law No. 6 of 2018 concerning arbitration, allows parties to agree on conducting arbitration either physically or virtually using modern technology, as per Article 28.

Conclusion:

Through this study, we have observed the significant impact of the COVID-19 pandemic on the oil sector, including its prices and contracts, as well as its effects on contractual relationships and dispute resolution mechanisms. We will divide the conclusion as follows:

1. Findings:

1. Impact on the Industrial Sector:

- The COVID-19 pandemic affected the industrial sector through three main factors: production disruptions, global supply chain interruptions, and a decline in global demand. These factors also affected most global investment contracts, including oil contracts, leading to numerous disputes. The energy sector witnessed a particularly high number of disputes.

2. Force Majeure and Contract Continuity:

- Force majeure is not considered a matter of public policy, allowing the parties to suspend the contract's enforcement to renegotiate and reach a mutually satisfactory agreement. Suspension precedes the negotiation process and is the most suitable method for maintaining the contract's continuity.

3. Effects of Force Majeure:

- Force majeure results in several impacts that disrupt the contractual balance during execution. These include the suspension of the oil contract and the parties' intention to renegotiate. Renegotiation is a condition in these contracts that benefits the investor. Therefore, the national party cannot invoke renegotiation unless through arbitration.

4. Remote Arbitration:

- The study revealed that remote arbitration differs from traditional arbitration only in the use of modern information and communication technologies throughout the arbitration process. Remote arbitration is considered one of the most effective alternative dispute resolution methods due to its efficiency, lower costs, and speed, making it a preferred path for dispute resolution.

2. Recommendations:

1. Review of Oil Licensing Contracts:

- It is essential to disclose whether oil licensing contracts have been reviewed, particularly since these contracts include a force majeure clause that allows for adjustments. The impact of the pandemic on Iraq during this period should be addressed through these adjustments, and this topic should be made available to researchers to devise solutions in the public interest.

2. Explicit Inclusion of Renegotiation Clauses:

- Those involved in drafting oil contracts should clearly and explicitly include renegotiation clauses for the benefit of both parties in case of changing circumstances, not just for the investor.

3. Access to Arbitration Cases:

- There should be a specific mechanism for announcing arbitration cases related to state contracts, making them accessible to researchers while maintaining confidentiality. This will help develop the arbitration system by researchers and authors.

4. Legislative Support for Arbitration:

- We urge the Iraqi legislator to enact an arbitration law and encourage the establishment of arbitration centers in Iraq, including provisions for electronic arbitration similar to some Middle Eastern countries.

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