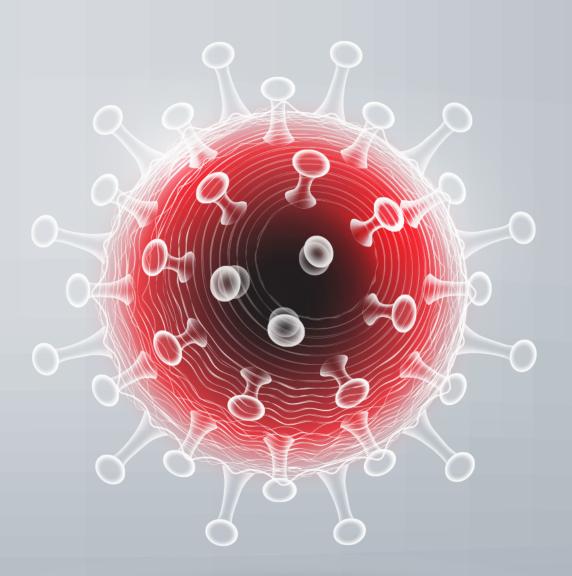






Coronavirus' Impact on Contracts

12 April 2020 Kingdom of Saudi Arabia





Disclaimer

This paper does not serve as legal advice. The divergent facts, rates and methods affect legal solutions and applicability. In fact, this paper urges solidarity and precaution and emphasizes the possibility of finding legal and regulatory solutions for each case rather than hastily terminate contracts for possibly unlawful reasons or make decisions that have legal or judicial consequences.





Introduction

The outbreak of **COVID-19** ("Virus") was first identified in Wuhan, Hubei province, China, in December 2019, but then spread to the rest of the world through infection. **COVID-19** is a virus transmitting between people from one infected person to another through contact, causing several symptoms, including but not limited to pneumonia. It may also cause severe complications in people with weak immune systems, the elderly and people with chronic diseases

first identified in Wuhan,

Hubei province, China

COVID-19

in December 2019

Introduction





(«Pandemic»)

Considering the spread of this Pandemic to multiple countries, the World Health Organization has declared it a global pandemic, and announced a number of recommendations to limit the spread of this disease, including restricting international travel, closing borders and applying social distancing. However, the application of these measures have led, directly or indirectly, to the disruption of the local and international economic movement and caused damage to a number of vital economic sectors.

Introduction 4



As part of its responsibility towards the safety of its citizens and residents and the eradication of the disease, the Kingdom of Saudi Arabia decided on 18 March 2020 to reduce the attendance of private-sector employees at their workplaces to 40%, and suspend the attendance of public-sector employees at work headquarters in all government entities. On 23 March 2020, a royal decree was issued imposing partial curfews at night, varying from one city to another, and based on the region, together with some other important decisions, altogether resulting in a total decrease in demand and employment in a number of sectors, met with a significant increase in other sectors such as food, pharmaceutical and medical products.

Whereas, countries across the globe, especially Saudi Arabia, are taking precautionary measures to prevent the spread of this pandemic, these measures will have legal implications on some of the obligations arising from certain contracts. In light of the foregoing, we feel obligated to identify appropriate adaptation of such implication on concluded contracts by explaining the theories of force majeure and the state of emergency and highlighting the differences between them and other relevant regulations and rules.

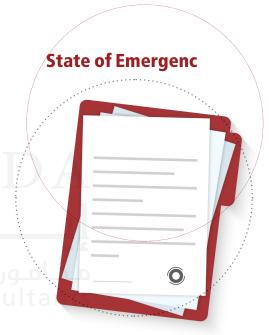
reduce the attendance of private-sector employees at their workplaces to

40% of employees





The theory of "state of emergency" is based on the assumption that a binding contract is concluded in ordinary conditions, then these conditions on which the contract is based change "in an unforeseeable manner that makes the implementation of this contract onerous for either party and threatens it with a loss". In this case, is this person forced to perform the obligation regardless of the degree of loss and the circumstances, or should this obligation be adjusted to the acceptable level of appropriating the damage or termination. The theory allows the judge to intervene in such cases to restore the balance between the interest of the parties by restoring the onerous obligation to an acceptable extent through the distribution of damage to contractors or the termination of the contract.



distribution of damage to contractors or the termination of the contract.



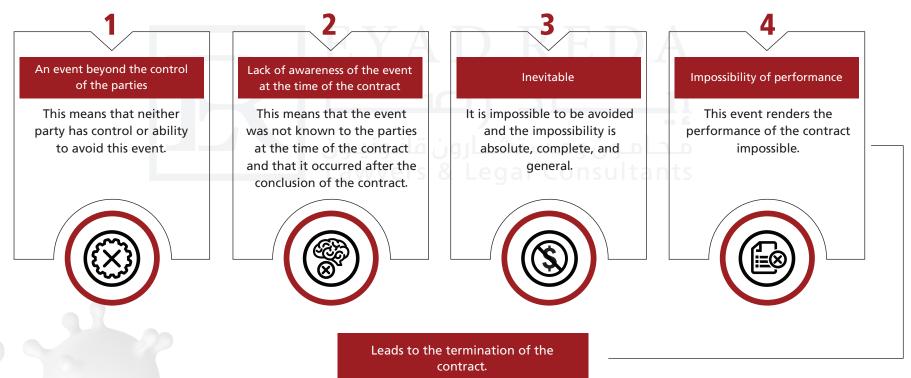
Difference between force majeure events and states of emergency

Force Majeure

Definition:

Force majeure is defined as an event that is uncontrollable, unforeseeable, or inevitable by the parties. It includes war, flood, and other events that are beyond the control of the parties and of which they were not aware of at the time of concluding the contract.

Elements:



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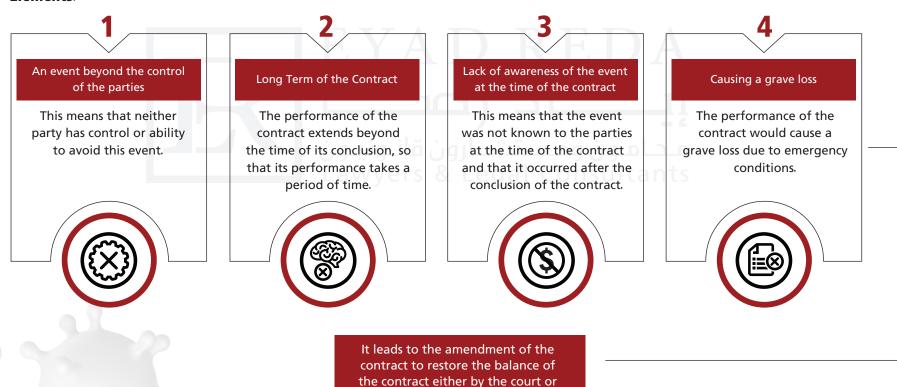


State of Emergency

Definition:

On the other hand, a state of emergency is defined as every condition subsequent to the conclusion of the contract, which exhausts one of the parties to the relationship in performing its obligation as a result of the emergency incident, which would threaten it with a grave loss.

Elements:



by agreement between the parties to the contract.

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Differences between the application of the theory of emergency conditions and the force majeure theory to the contract

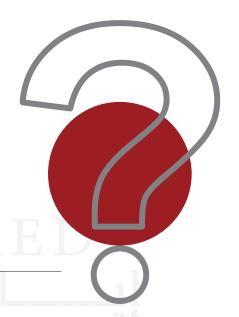
The application of force majeure theory requires that the performance of the obligation is absolutely impossible, while the application of the theory of emergency conditions only requires that the performance of the obligation is onerous. In other words, it can be performed but with some damage and difficulty and with relative impossibility rather than absolute impossibility.

2 It is noted that the application of the theory of emergency conditions is temporary and transitional, so its effect is not permanent and may end by amending or postponing the contract to prevent causing any damage to either or both parties, considering that the damage is temporary and contingent on its cause. Conversely, force majeure theory is usually characterized by durability and the impossibility of performing the contract, thus leading to the termination of the contract.



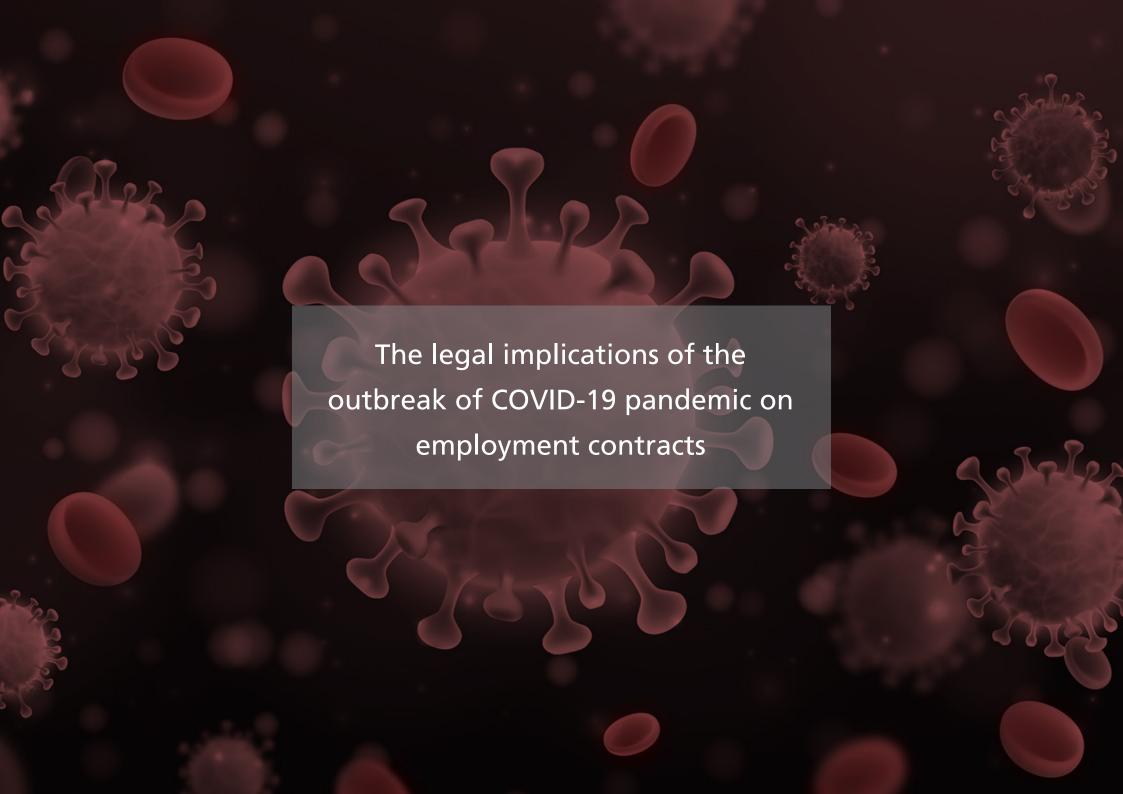
The question is, is this pandemic considered a force majeure or an emergency condition,

To answer this question, the legal incident must be considered in detail. For example, there are sectors that were not affected, e.g. food or pharmaceutical stores, unlike other sectors with less demand, entertainment sectors, or the organization of conferences, which was impossible due to its cancellation by government decisions for health reasons.



The role of the lawyer or legal advisor is to outline the legal impact and the effect of government decisions due to this pandemic on contractual relations,

The lawyer should consider each incident separately and applies laws, jurisprudential and judicial regulations, theories and principles to state a legal opinion in this regard. The explanatory and discretionary authority is vested in the judiciary to expand these principles or not, as the judiciary has a fair holistic view of all members of the community and apply the principle of enforcement of contracts to the extent possible, as well as the legal rule "There should be neither harming nor reciprocating harm".





Addressing the legal implications of the outbreak of COVID-19 pandemic means to draw conclusions based on the law and actual facts that can be proven

What are the facts of the situation?

The outbreak of Corona pandemic is an emergency condition for many businesses - as defined in the introduction – as to employment contracts. The employee is able (his ability is available) to perform his employment obligation. Similarly, the employer is able to perform his obligation to pay wages. As such, the performance of the contract is not impossible. This is supported by the following grounds:



The Circular of the Ministry of Human Resources of employees while enabling any and Social Development dated 18 March 2020, which provides for suspending attendance to headquarters and reducing the attendance to

facilities that wish to be excluded from this order to apply accordingly.



Decision of the Minister of a WV Interior to lockdown stores from 8PM until 6AM

These grounds do not include a total prohibition of work and conduct of activities, but rather reduce them in terms of the duration and the number of persons allowed to perform them. Therefore, they do not render the performance of employment contracts absolutely impossible. However, employment contracts became onerous for some employers, as he pays the same wage paid in ordinary conditions, while not achieving the same results as in ordinary conditions, bearing in mind that business in particular is fraught with risks and losses are expected.



- However, this characterization certainly does not apply to all cases. The context and the facts on the ground may differ, in whole or in part. The paragraph above excludes employees who can work remotely. In this case, employment contracts are not subject to an emergency condition or force majeure event. Paragraph (1) above further excludes workers in sectors that are not affected economically or financially by the current situation of the outbreak of the Corona pandemic and conduct their businesses as usual. In this case, employment contracts are not subject to an emergency condition or force majeure event.
- In conclusion, in order to characterize the outbreak of Corona pandemic as an emergency condition for employment contracts, taking Paragraph (2) into account, the judicial customary practice in the case of an emergency condition is to make the contracts amenable to modification instead of termination, with some exceptions. This amendment through the court means restoring balance to employment contracts so as not to be onerous for one party at the expense of the other, because this imbalance is due to an emergency condition beyond the control of both parties. This type of cases requires proving a grave and unusual loss (which represents the subject of the onerous obligation).



- Employment contracts are classified as contracts with unequal parties. The law considers the employee to be the weakest party in this contractual relationship. Consequently, the provisions of the Labour Law, amended by Royal Decree No. (M/46) dated 051439/06/ AH [212018/02/], strictly establishes a guarantee for employees through the requirement to obtain the written approval of the employee before proceeding with certain procedures that affect his rights or legal position.
- Employment contracts are long-term contracts, i.e. their performance extends for a period of time. This description of employment contracts makes the option to amend the employment contract through the court more appropriate and fair to both parties, so that the emergency condition is not invoked as an excuse to terminate contracts and end the obligations.



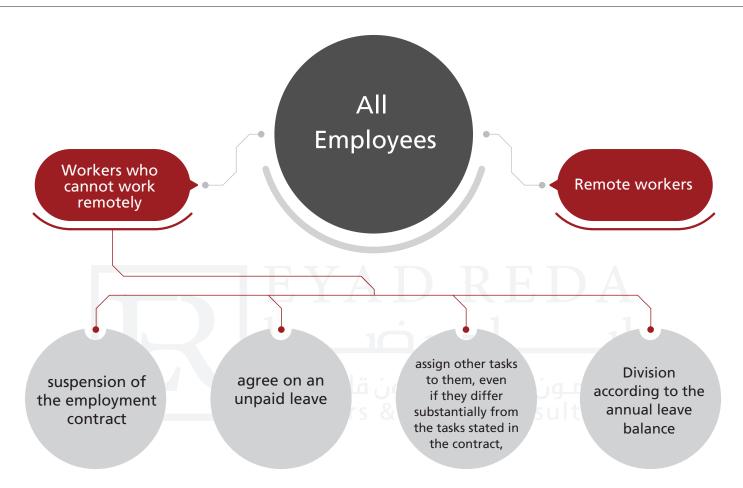
What are the solutions?

In light of these facts, the first solution is to urge the two parties to the employment contract to adopt the philosophy of contingency plans that are put in place to save the largest possible part. This means combining the efforts of both parties to choose an equitable solution that reduces losses and increases gains for them both.

First: One of the legal proposals that could be taken into consideration is that the employer offers possible options by either:

- Activating remote work
 - for employees who can perform this type of work, making use of the Remote Work Manual issued by the Ministry of Human Resources and Social Development, and ensuring its success for both parties.
- Create a plan based on two points
 - **A.** Data of the employees who are not able to work remotely according to the following categories: (Annual leave balance, experience and qualifications)





B. List of the remote works required to be performed for the current period or to reduce the pressure on the category of employees set out in point (1) above. List of works that do not entail contact with large numbers. Then the employer would suggest options to the category of employees set out in point (2), based on the results of this plan, e.g.: Agree to grant annual leave to those who have a leave balance, in accordance with Paragraph 2 of Article 109 of the Labour Law, and assign other tasks to them, even if they differ substantially from the tasks stated in the contract, for those who can perform these tasks, for no more than thirty days, according to Article 60 of the Labour Law. Finally, agree on an unpaid leave or suspension of the employment contract for those who are not eligible for the first or second option, according to Article 116 of the Labour Law.



Second: A Ministerial Decision was issued by HE Minister of Human Resources and Social Development on 131441/08/ AH [072020/04/] adding Article (41) to the Executive Regulation of the Labour Law, which states that:

- "In the event the State adopts, as it deems appropriate, or according to the recommendations of a competent international organization, measures regarding an event or condition that requires a reduction in working hours, or precautionary measures that limit the aggravation of that event or condition, which is included in the description of the force majeure set out in Paragraph (5) of Article 74 of the Law, the employer will agree with the worker within the six months from the date of adopting these measures on any of the following:
 - A. Reduce the worker's wages, in proportion to the actual number of working hours.
 - **B**. Grant the worker a leave that is calculated from the days of his due annual leave.
 - **C**. Grant the worker an exceptional leave, according to Article 116 of the Law.
- The termination of employment shall not be lawful if it is proven that the employer has benefited from any state subsidy to address this situation.
- 3 This is without prejudice to the worker's right to terminate the employment contract".

In light of the above, it is evident that that the Ministry has stepped in to reorganize the legal positions, according to the available legal instruments, to develop a specific mechanism based on the agreement between the worker and the employer, which allows the employer to:

- **A.** Benefit from the subsidy provided by the state without having the right to terminate the employment contract of its workers due to the precautionary measures; or
- **B.** Agree with the worker, within six months from the adoption of the precautionary measures, on any of the cases set out in the Article. If the worker rejects these options, the employer can terminate the worker's contract.



■ The wise leadership, led by the Custodian of the Two Holy Mosques and the Crown Prince, has sensed the expected economic consequences on the private sector due to the impact of Corona Virus and the associated huge economic and social repercussions. Therefore, the State decided to bear a portion of the financial burdens to support the private sector. Accordingly, a Royal Decree was enacted to exclude the Saudi workers in private sector enterprises affected by the current consequences of Covid-19 outbreak, from Articles 8, 10, and 14 of the Unemployment Insurance Law. Accordingly, the employer is entitled, instead of terminating the contract of the Saudi worker, to apply to the General Organization for Social Insurance to receive a monthly remuneration for its employees at the rate of 60% of the wage registered in social insurance for three months, up to a maximum of SAR 9,000 per month, with a total value of up to SAR 9 billion.

Article 20 of the Labour Law, amended by Royal Decree No. (M/45) dated 051436/06/AH [262015/03/] states that: "An employer or worker may not perform any act that may abuse the provisions of this Law or the decisions or regulations issued for its implementation. Neither of them may undertake any act that infringes upon the freedom of the other or the freedom of other workers or employers to realize any interest or impose a point of view that conflicts with the freedom of work or the jurisdiction of the competent authority in charge of settlement of disputes". This provision serves as a real and legal invitation that is in line with the emergency condition. Each party should properly respond to the other party to overcome this emergency condition in the interest of the country and people.



Unemployment insurance system for Saudis in private sector facilities

60% of the wage registered in social insurance

Contractual obligations subject to the Government Tenders and Procurement Law and the impact of the pandemic on its application





The precautionary measures against the Virus outbreak in the Kingdom of Saudi Arabia is an emergency condition for many administrative contracts. Article 74 of the Government Tenders and Procurement Law states that the contract may be extended and the fine exempted in a number of cases, including, "If the delay is due to the government agency or emergency conditions". The Law defines these conditions as: "A situation in which the public safety, security or health is seriously and unexpectedly threatened, or where there is a breach that threatens to cause loss of life or property". On the other hand, the force majeure is interpreted by the administrative court, in some provisions related to it, as an event that results from conditions beyond control, due to a foreign sudden, enforceable, and unpreventable cause that may not be prevented when it occurs, as stated in the administrative decision in case No. (2117/J/1437 AH).



- The Government Tenders and Procurement Law does not address any regulations related to the details of dealing with unreasonable or unexpected damages that may result from contracts governed by the law. The Law permits the government agency to suspend the contract in the event of an emergency but does not address the effects of this suspension on the contracting party with the government entity, which entrusts the matter of amending the issue of balance of onerousness and restoring the administrative contract to the court.
- ☑ Certainly, it cannot be conclusively argued that the above characterization applies to all administrative contracts, as some administrative contracts have not been affected by this pandemic or did not incur heavy losses. However, the role of the administrative court in such contracts is to restore the balance between the two parties to the contract.

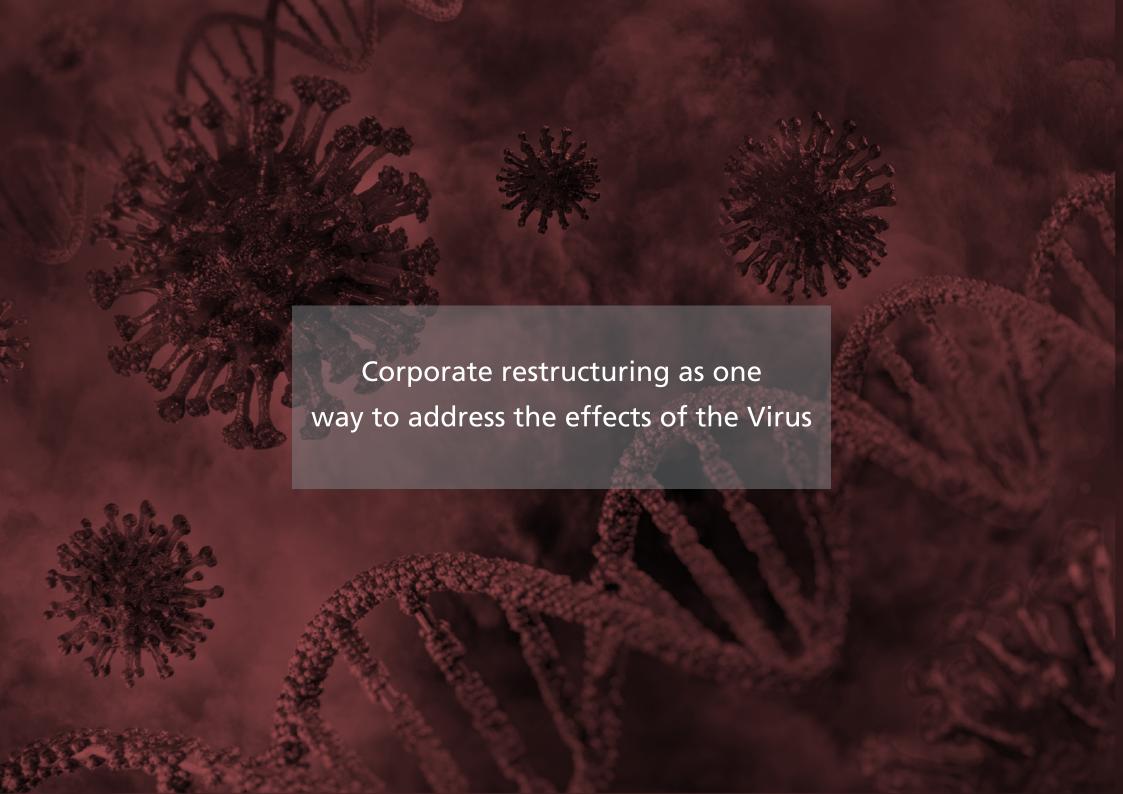




The precautionary measures against the outbreak of the Virus in the Kingdom of Saudi Arabia are an emergency condition for many real estate lease contracts. These contracts are long-term, which means that they extend to a certain period of time. Precautionary measures have never made the performance of these contracts impossible, but rather onerous in some types. Making use of the property, in terms of duration, mechanism, and ability, may not be as it is in the normal condition, while the same amount of rent is paid. Here lies onerousness.

On the other hand, short-term lease contracts, i.e. contracts that do not extend to a certain time, such as renting a wedding hall, have become impossible to be performed. This means that the precautionary measures constitute a force majeure in this case. For example, the performance of the lease contract dated 20 March, became impossible due to the precautionary measures, as it is completely prohibited.

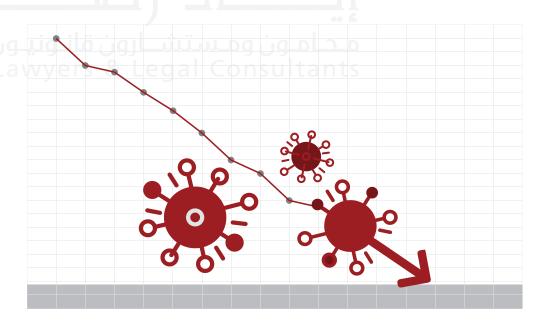
Once again, it is not possible to conclusively assert that the above characterization applies to all lease contracts. The context and facts may differ, in whole or in part, from the argument above in some administrative contracts, and so it may affect the validity and accuracy of the characterization. In view of these circumstances, an amicable solution by agreement between the two parties, either by reducing the rent or temporary exemption, is the best and most sustainable solution. This is the action that has been taken by many real estate owners in the Kingdom of Saudi Arabia as a good-faith initiative on their part. The issue today is not commercial but rather a national and public issue that requires solidarity by all parties. There are some businesses that were not affected by the current conditions. On the contrary, they are currently operating more than usual, e.g. food stores. So it cannot be argued here that the tenant has incurred damage or that the performance of its obligations has become more difficult. Therefore, the contractual relationship remains as it is without any change.





There is no doubt that the impact of the pandemic will adversely affect companies during the coming months in light of the precautionary and health measures adopted in the Kingdom and worldwide. These measures had a clear impact on many companies that were most affected due to preventing them from practicing their activities, in whole or in part, or lower demand for these activities provided by these companies.

Despite the adverse impact that this pandemic has on the local and global economy, and the government decisions that support the local economy to mitigate the impact of this crisis, the Saudi regime has taken precedence in developing several solutions that enable companies and enterprises to deal with financial confusion or grave loss without resorting to declaration of bankruptcy or liquidation and getting out of the national economy to help them sustain their activities, without prejudice to the rights of creditors or contracting parties addressed in two forms in the Saudi Corporate Bankruptcy Law.





Restructuring According to the Companies Law

The Companies Law obliges companies, if their losses exceed half of their capital, to adopt measures to consider the continuation or dissolution of the company. The Law decides to consider the company dissolved under the force of the law, if the officials of the company or partners omit to make a decision in this regard or if it is not possible to make this decision.

In addition, the Companies Law allows the company owners to reduce the capital of the company if it exceeds its need or if it has suffered losses that do not equal half of the capital, while preserving the right of creditors to file an objection to the reduction procedure.

By examination of the Companies Law, it is evident that it addresses the delinquency or loss incurred by the company, according to the two following cases:

First case:

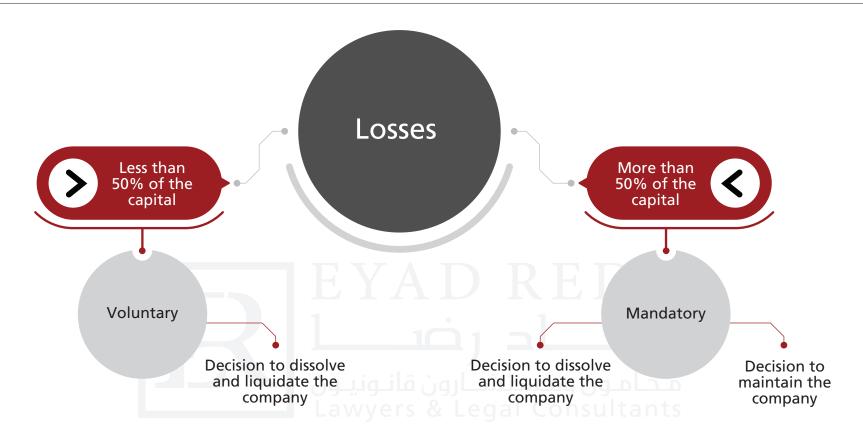
If the company debts do not exceed 50% of its capital.

Second case:

If the company debts exceed 50% of its capital.

In this case, the Law requires the company to record the loss incident in the commercial register, as well as invite the owners to take a decision. In addition, the Law requires taking a decision for:

- Dissolution and liquidation of the company. Through one of the following options:
 - Voluntary liquidation. For this option to be valid, the company assets must be sufficient to repay all of its debts.
 - Liquidation under the Bankruptcy Law that will be stated below. If the company assets are not sufficient to repay all of its debts.
- Maintain the company, which may be carried out through one of the following options:
 - Take a decision to reduce the capital, in accordance with the regulations stipulated in the Companies Law.
 - Cover the company losses with the partners funds.
 - Merger or acquisition to cover losses and minimize their effects on the company



The above cases have the following legal effects:

- The decision to maintain the company, in accordance with the legal controls set out in the Bankruptcy Law, entails the continuation of the company to carry out its business as usual and perform all legal actions as a corporate personality.
- The decision to dissolve and liquidate the company leads to the closure of all company files at the public authorities, the closure of all bank accounts, inviting creditors to submit their claims and pay their debts from the company funds, and the cancellation of the commercial registry.
- In the decision to dissolve and liquidate the company pursuant to the Bankruptcy Law leads to liquidation under the supervision and control of the commercial court, in accordance with the procedures stipulated in the said Law.



These implications raise the question as to the partners, executives or the Board of Directors; liability for the company's debts or compensation.

The debts of a limited liability company or a shareholding company must be repaid with the company's funds only. According to the Companies Law, the liability of the partners, shareholders, executives or members of the board of directors is separate from the company's liability. Moreover, the Companies Law considers the company to be solely responsible for its debts and liabilities.

If this is the applied principle, the Companies Law identifies cases in which partners, executives, or members of the board of directors are held liable for compensation or repayment of the company's debts in the event of their failure to perform their responsibilities under the Law.



The restructuring option for companies facing losses that may exceed

50% their capitals



The restructuring option for companies facing losses that may exceed 50% of their capitals is granted by the Saudi Companies Law to support their continuity within the national economy. The restructuring option addresses two main aspects, when a company deems it necessity to reconsider its organizational structures, operating methods and existing procedures to keep up with the new goals it sets due to the developments occurring during the course of its business. Company restructuring comes in several forms, including:

- 1 Restructuring of assets and incomes;
- 2 Restructuring of debts, which comes in several forms, such as:
 - © Converting short-term debts into long-term debt, which gives the organization a longer period to invest this debt.
 - Suspending the payment of debt payments temporarily or giving a new grace period, which helps in restricting part of the cash outflows temporarily until the conditions improve.
 - Reducing the interest rate or waiving the interest.
 - Debt-equity swapping, whereby current debts are wholly or partially converted into contributions to the company's capital by issuing shares/ ownership interests equal to the value of this debt, depending on the understanding and acceptance of the commercial establishment partners and creditors.
 - Increasing the capital by issuing new shares to provide some liquidity, especially if the establishment can achieve profits in the future due to the availability of liquidity.



Preventive Settlement and Financial Restructuring according to Bankruptcy Law

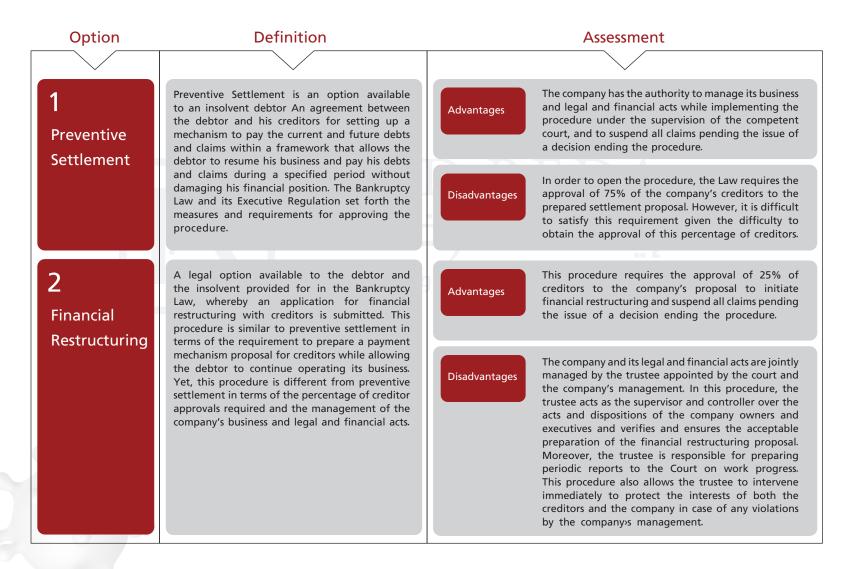
The Saudi Bankruptcy Law was issued by Royal Decree No. (M/50) dated 28 Jumada al-Awwal, in accordance with a legal and procedural framework that maximizes the value of assets, while taking into consideration creditor rights and enabling investors to overcome financial difficulties. Contrary to what is commonly believed, the Bankruptcy Law is not limited to organizing the cases and procedures for liquidating debtor assets; it enables the debtor to restore financial balance and resume his activity.

The Bankruptcy Law aims to support companies operating in the Saudi market, regardless of their legal form and nature, including persons carrying out professional businesses and foreign investors, as well as merchants and entrepreneurs, in the event of a state of bankruptcy or insolvency to enable them (as debtors), to continue in the business while taking into account creditors' rights, and to create balance between restructuring and liquidation through a number of procedures that support the Law's objectives, as shown below:

- ☑ Preventive settlement procedure aims at facilitating the debtor's coming to terms with his creditors to settle his debts while continuing to manage the business.
- Financial restructuring procedure aims at facilitating the debtor's coming to terms with his creditors regarding the financial restructuring of his business under the supervision of a Financial Restructuring Officer.
- Bankruptcy Procedure.Article 7.1 of the BankruptcyLaw stipulates as follows:
 - "1- Subject to Article (4) hereof, no person shall be liquidated under any other law unless the Assets of the Debtor are sufficient to cover all its Debts and that such Person is not insolvent."



The above provisions indicate that the legal options offered in the Bankruptcy Law are directed to the company whose assets are insufficient to pay off all its debts, whether or not its losses exceed 50% of its capital. These options are clarified in the following Table:





Option Definition Assessment

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Liquidation

According to the Bankruptcy Law, an insolvent or bankrupt company whose assets are not sufficient to settle all its debts may resort to liquidation, subject to the provisions of the Law. Article 7.1 of the Law stipulates, "Subject to Article (4) hereof, no person shall be liquidated under any other law unless the Assets of the Debtor are sufficient to cover all its Debts and that such Person is not insolvent." Based on this, a company may apply to the court to initiate a liquidation procedure if it is insolvent or bankrupt and its debts exceed the value of its assets. This procedure is taken if the company is unable to resume business or if the partners wish to terminate the company by liquidating and selling all of its assets to fulfil its obligations towards creditors.

Advantages

The powers of partners and executives of the company are suspended upon the admission of the application for initiating the liquidation procedure and the appointment of a bankruptcy trustee by the court, and the trustee becomes the only one responsible and allowed to take action. This protects the company and the partners from any executive claims against them and suspends all claims pending the issue of a decision ending the procedure.

Disadvantages

The company will not be able to continue operating the business after the issue of a court ruling appointing a bankruptcy trustee and ending the procedure, as the trustee's work will focus, following the initiation of the procedure, on determining the company's assets and properties, recording its debts and obligations, distributing these assets among creditors on pro rata basis, subject to the portion of each creditor's claim out of the company's total debt, and verifying the deletion of the company's commercial register and licenses.



The options above have the following legal implications



The preventive settlement and financial restructuring options allow the company to continue operating its business in order to repay its debts based on the proposal submitted by the company and approved by the Commercial Court in accordance with the procedures stipulated in the Bankruptcy Law.



Company liquidation, on the other hand, does not allow the company to continue operating its business, but results in closing all its files and records with public authorities, closing all its bank accounts, inviting creditors to submit claims. and repaying all debts from the company's assets and funds. This option ends with the termination of the company's commercial register.



In all of the options listed above, the company, as a general asset, is deemed solely liable for its debts, save the cases indicated in this Memorandum.

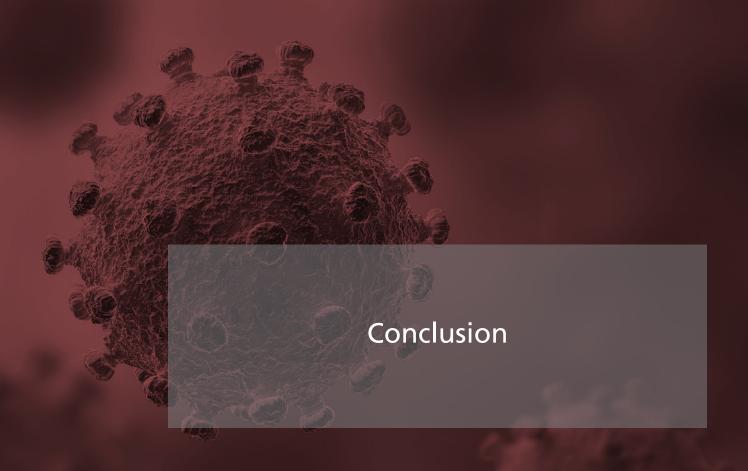


The bankruptcy option vests in the designated trustee the power to review all the actions and dispositions performed by the partners and the board of directors during the period of suspicion prior to the bankruptcy procedure, in addition to the power of holding the partners and the board of directors accountable for these actions.

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provided competent government authorities with significant economic measures in the value of

120 Billion Saudi Riyals

An agreement to share loss and damages at this critical stage will cause the least damage and provide the safest solution to maintain relations and ensure the stability of business dealings among people, considering that it will reduce the economic impact of the coronavirus pandemic. With this in mind, this solution has been supported by the prudent leadership of Saudi Arabia, which provided competent government authorities with significant economic measures in the value of SAR 120 billion, followed by economic and operational measures from several entities, on top of them were the Ministry of Justice, the Saudi Arabian Monetary Authority, the General Organization for Social Insurance and the Ministry of Human Resources and Social Development. These measures target the key sectors adversely affected by the pandemic, thus confirming that the Kingdom, may Allah protect it, spares no effort in supporting all sectors and business establishments to mitigate the economic impacts that may be caused to the Saudi economy due to the pandemic. This further proves that the cooperation of traders, workers and others contributes to a faster economic recovery, God willing, and the achievement of the desired synergy between the Kingdom and the entire spectrum of society.

May God protect us from all harm,

Conclusion 36

