

Third Parties' Intervention in Modifying the Substance of The Contract in The Event of Contractual Imbalance Comparative Study

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Abstract

Achieving contractual justice is linked to the necessity of maintaining the contractual balance, which may be disturbed in contracts of adhesion or consumption, or when emergency incidents occur, which requires allowing others to intervene to amend the content of the contract in order to restore the imbalance in the contract. We have tried in this research to explain the treatments. Legislation for this intervention, identifying its deficiencies and deficiencies, and presenting the necessary proposals to overcome them. The descriptive and analytical approaches, and the comparative study method, were used to reach the best results.

Keywords: Justice, Consumption, Legislation

INTRODUCTION

The issue of contractual balance is one of the most prominent issues that must be achieved in contracts, whether in their formation or implementation. It is one of the basic requirements for achieving contractual justice, which is the ultimate goal that various legislation aims to achieve in contractual relations. Legislation allows third parties represented by the judge to intervene to restore The imbalance in contractual contracts is due to several reasons, such as the fact that the contract is a contract of adhesion, and the contract is imbalanced starting in this type of contract because one party is in a stronger economic position than the other party, and consumption contracts are also characterized by lack of Contractual balance, because there is a cognitive disparity between the parties to the contract, but in addition to that, the contractual balance may be disturbed after concluding the contract, meaning that the contract may be balanced at the moment of its conclusion, but this balance may be disturbed as a result of emergency circumstances and incidents that are beyond the control of the parties and cannot be predicted.

The issue of third-party interference in amending the content of the contract in the event of a contractual imbalance raises a number of legal problems, especially in Iraqi legislation, due to the absence of legal regulation of many issues related to this topic. The Iraqi legislator is still indifferent to the arbitrary conditions included in consumption contracts, and has not established texts for us. Determine when a condition is considered arbitrary? What is the penalty for including it in the contract? In addition, his treatment of the theory of emergency circumstances also requires some necessary modifications in order to achieve its required function optimally.

Based on the above, the nature of the research requires the use of the descriptive analytical method, and the method of comparative study between Iraqi legislation and Egyptian and French legislation. We will divide the research plan into two sections: In the first section, we show the intervention of third parties in amending the content of the contract when the contractual balance is imbalanced due to arbitrary conditions, and we discuss in The second section is the intervention of others in amending the content of the contract when the contractual imbalance is disturbed due to unforeseen incidents. We end the research with a conclusion that includes the most important findings and proposals we have reached.

THE FIRST TOPIC

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The Intervention of Third Parties In Amending The Content Of The Contract When The Contractual Balance Is Imbalanced Due To Arbitrary Terms

Contemporary economic, political and social changes and the resulting concentration of production forces in a monopolistic manner in the hands of a limited number of people, as well as progress and complexity in the technical nature of goods and services, have made the contractor ignorant of how to use and maintain them or be aware of their risks, in addition to the legal ignorance of the terms of the contract that often be to his disadvantage, all of which were factors that helped impose arbitrary conditions by the powerful party in the contract, which led to an imbalance in contractual relations (Abdul, 2011, p. 246; Nasser al-Din, 2018, p. 90; Al-Tamimi, 2010, p. 70), and therefore he intervened. The legislator and the judiciary to protect the weak party from these conditions under the justification of justice (Al-Kalabi, 2011, 208). Legislative treatments for the case of imbalance in contractual relations when one party imposes arbitrary conditions with the aim of achieving its own interests have been divided between two theories, for each of which we will devote a future requirement.

The First Requirement

The Theory Of Adhesion Contracts

The legislator addressed the issue of arbitrary conditions for the first time under the theory of contracts of adhesion included in civil codifications. Anyone who follows the legislative texts related to this theory does not find in it a specific definition of arbitrary conditions. Rather, the legislator contented himself with granting the judge broad discretionary power to determine the extent of arbitrariness and unfairness in the conditions it contains. The contract is based on the circumstances and circumstances of each individual case, as well as the personal circumstances of the contracting parties (Dawoud, 2014, pp. 39-40). However, the judge's authority is restricted by the availability of three basic conditions in the contract that includes such conditions: The first is the legal or actual monopoly of goods and services. Or at least his control over it is such that the competition in it is limited in scope, and thus the powerful party in the contract can impose his terms on the other party without reservation, because he does not fear competition that would force him to review his terms (Shanab, 1977, p. 49. Al-Alusi, 2017, p. 192. Abd Al-Salam, 2003, p. 78. Kahlawan, 2015, p. 176), and the second is the necessity of the good or service, and this condition is considered complementary to the first condition, because if the strong party is able to impose its conditions, it is not only because of its economic strength, but because the other party is in dire need of the contract. This is because the contract relates to necessary goods or services that are indispensable to the public, which puts them in a position where they cannot reject the conditions set by the powerful party in the contract (Mark, without year of publication, p. 183). Al-Ahwani, 1995, p. 123), and the third is the generality of the offer and its continuity, that is, the offer must be directed to unnumbered persons and for an indefinite period, and it should be issued according to a model formula containing printed conditions, most of which serve the interest of the economically powerful party (Al-Sanhouri, Contract Theory, 1998, p. 281. Al-Hakim and others, without year of publication, p. 45), but this condition should not lead to confusion between contracts of adhesion and the model contracts - mentioned above - as the latter are not contracts of adhesion unless the first and second conditions are combined with them, i.e. monopoly and the necessity of the good or service (All, 1996, p. 106).

When this is achieved, the judge may amend or cancel the arbitrary conditions, as Article (167/2) of the Iraqi Civil Code stipulates that "if the contract was concluded by way of submission and included arbitrary conditions, the court may amend these conditions or exempt the compliant party from them, in accordance with What justice requires, and any agreement to the contrary is void." The same text is included in Article (149) of the Egyptian Civil Code. However, the question that arises here is whether the judiciary's authority to amend or cancel is focused on conditions that the aggressor did not know about, or does it include Also the conditions that he knows about? Is it limited to ambiguous conditions or does it extend to clearly stated conditions? Some argue that the legislator's failure to define the concept of arbitrary condition in contracts of adhesion was aimed at expanding the protection of the submissive party (Jamili, 1996, pp. 246-247), and one of the results of this is that protection extends to all arbitrary conditions, even those that the submissive party knows about and is aware of (Abdul, 2011, p. 267), and the judiciary must exercise its authority to amend or cancel arbitrary conditions, regardless of the clarity or ambiguity of the condition statement; This is because

this authority is bound by the arbitrariness that mars the condition, not by its ambiguity or hidden meaning. Rather, it is the clarity of the condition that justifies the exercise of the judiciary's discretionary authority to amend or cancel it, because the ambiguous condition will be interpreted by the judiciary in the interest of the submissive party, while the clear condition is what the legislator meant when the judiciary was empowered to amend or cancel (Al-Jumaili, 2002, p. 157).

It is noted that the Iraqi and Egyptian legislators did not set limits on the judge's power to amend or cancel arbitrary conditions except what justice requires. The parties may not remove this power from the judge by special agreement, and such an agreement, if it occurs, is considered invalid because it violates public order, but what is taken into account is their position. They made the judge's power to amend or cancel arbitrary terms permissible and not obligatory, and this may weaken the position of the submissive party, because the judge may use this power, or he may not use it when he is convinced that there is no arbitrary nature in any of the terms of the contract, and it would have been better to make it a mandatory power. To ensure the achievement of justice and address the contractual imbalance, it is noted that the Iraqi legislator, as well as the Egyptian legislator, intervened directly and nullified some of the arbitrary conditions contained in insurance contracts, as Article (985) of the Iraqi Civil Code stipulates that "everything contained in The insurance policy is subject to the following conditions: 1- The condition that requires the forfeiture of the right to insurance due to a violation of laws and regulations, unless this violation involves a felony or intentional misdemeanor. 2- The condition that requires the insured to forfeit the right due to a delay in announcing the insured accident to the authorities. Or in submitting documents, if the circumstances indicate that the delay was due to an acceptable excuse. 3- Every printed condition that is not clearly justified and is related to a condition that leads to invalidity or cancellation. 4- The arbitration clause if it appears in the document among its printed general conditions, not in the form of a special agreement separate from the general conditions. 5 - Every other arbitrary condition, the violation of which was found to have had no effect on the occurrence of the insured accident. Iraqi jurisprudence holds that if an arbitrary condition is included in the insurance contract that does not fall within the text of the previous article, it can be subject to the judge's authority to amend or cancel in accordance with the provisions of Article (167/2) of the Civil Code, whose ruling is absolute and general for all contracts of adhesion, including the insurance contract (Al-Kalabi, 2011, pp. 236-237).

In the same regard, Article (1171) of the French Civil Code, amended by Law No. 287 of 2018, stipulates that "in the accession contract, any non-negotiable condition, determined in advance by one of the parties, that creates an apparent imbalance between the rights and obligations of the parties is considered unwritten." The contract does not estimate the apparent imbalance based on the main objective of the contract or the appropriateness of the price for performance. Thus, any arbitrary condition included in contracts of adhesion that leads to a clear imbalance is considered invalid as if it did not exist. It is understood from the last part of this article that the imbalance even if it exists. Apparently, it does not fall within the concept of an arbitrary condition in an adhesion contract if it is related to the main subject of the contract or to the proportionality of the price to the performance, and the reason for this is to emphasize that the purpose of invalidating these conditions is to combat the manifestations of imbalance in the content of the contract and not to ensure total equality between the corresponding performances (Shiron and Najat, 2017, p. 59. Abdel Karim Waddin, 2020, pp. 1-25), and despite this, some French researchers (David, 2017, p. 75) argue that this text does not prevent the application of the provision of Article (1165) of the French Civil Code. Which allows the debtor to resort to the judge to demand compensation when the parties do not agree to determine the price in the contracts for the performance of services and the creditor determines it and this occurs arbitrarily, and also Article (1164) which establishes the same ruling when it is agreed that one party alone will determine the price in the framework contract and this is arbitrary. In determining it as well.

The Second Requirement

The Theory of Consumption Contracts

The idea of arbitrary conditions is no longer limited to contracts of adhesion, but may exist in other contracts that do not necessarily require the presence of a monopolist of the necessary goods and services and a person in need of these goods and services, which are consumption contracts (Al-Tamimi, 2010, p. 70). Therefore, the

legislator intervened through special laws. Consumer protection is required to address these conditions more precisely and broadly, as defined by Article (L212-1) of the French Consumer Law of 2016 when it stipulates that “in contracts concluded between professionals and consumers, conditions that aim or would create an apparent imbalance are arbitrary.” between the rights and obligations of the parties to the contract at the expense of the consumer,” and the French legislator set a general standard in this article to determine arbitrary terms, which is represented by a clear contractual imbalance between the rights and obligations of the parties, after the French legislator relied on the standard of arbitrariness in the use of economic superiority, and the standard of obtaining The outrageous feature of Law No. 23 of 1978 relating to the protection and information of consumers of products and services, although some believe that the legislator maintained this last standard, but in another form expressed by the contractual imbalance, and the reason is due to the French legislator abandoning the standard of arbitrariness in the use of economic superiority, Likewise, preferring the phrase (apparent imbalance) over the phrase (outrageous advantage) indicates that they are not compatible with the European approach issued in 1993. Some French jurists criticized the legislator’s position in abolishing the criterion of arbitrariness in the use of economic superiority, on the grounds that it is not possible to imagine the existence of a condition described as arbitrary. It was not imposed by the stronger party in the contract, while others believe that if this is the case, it means that the existence of superiority is assumed, and therefore the stipulation or absence of it is the same, and superiority is not limited to the economic aspect, but may relate to other forms of Superiority, such as social, technical, or legal superiority, and the legislator’s intention may be not to link the arbitrary condition to a specific form of superiority (Al-Kalabi, 2011, pp. 264-266). Mohsen, 2015, pp. 157-158. Al-Saadi, 2020, pp. 17-87. Hussein and Abdul Razzaq, 2021, pp. 116-145. Abdul, 2021, pp. 172-200).

The aforementioned Article (L212-1), after defining arbitrary conditions, clarified the mechanism through which arbitrary conditions should be determined, as it indicated that the arbitrary nature of any condition is estimated by referring to all the circumstances surrounding the contract at the time of its conclusion, in addition to all other conditions of the contract. The arbitrary nature is also estimated by looking at the conditions included in another contract when the two contracts are legally linked in their conclusion or implementation, but the arbitrary nature of the condition is not estimated based on the definition of the main subject of the contract nor on the equality of the price or rent with the sale or service provided, and it is also determined The Council of State, by decree issued by it based on the advice of the Arbitrary Conditions Committee, the types of conditions that are considered categorically arbitrary, and those that are considered arbitrary unless the professional proves otherwise, then Decree No. 884 of 2016 was issued, which added Article (R212) to the regulatory part of the Consumer Law, In its first paragraph, it specified a set of arbitrary conditions that do not accept proof of the contrary, which is what is called the black list. The most prominent content of this list is granting the professional the right to amend the contract unilaterally, and canceling or reducing the consumer’s right to compensation for damages that befall him as a result of a breach. The professional fulfills any of his obligations, giving him the right to terminate the contract at his discretion, and retaining the amounts paid for services that he did not perform, without acknowledging this to the consumer, and also preventing the consumer from the right to request cancellation or termination of the contract in the event that the professional does not perform his obligations to deliver or guarantee the goods or His obligation to provide the service, as well as restricting the professional’s obligation to respect the obligations undertaken by his employees or agents, and imposing the burden of proof on the consumer when it is usually required of the other party to the contract.

While the second paragraph specified a set of arbitrary conditions that can be proven to the contrary, which is what is called the gray list, and one of the most prominent things included in this list is allowing the professional to retain the amounts paid by the consumer in the event that he withdraws from concluding or implementing the contract, without stipulating the consumer’s right to Obtaining compensation equal to the amounts paid in the event that the professional withdraws, and imposing exaggerated and disproportionate compensation on the consumer who does not fulfill his obligations, and also allowing the professional the right to terminate the contract without notification within a reasonable period, or with less stringent conditions compared to the consumer, as well as restricting the means of proof available to the consumer, Obliging him to resort to amicable settlement of the dispute before resorting to the judiciary.

The Egyptian legislator did not define the concept of arbitrary condition in Consumer Protection Law No. 181 of 2018, even though it specified in its second article a set of basic rights for the consumer, and prevented the professional from concluding any agreement with the consumer that would violate these rights, and therefore some believe (Mohsen, 2015. p. 159) that any condition that violates these rights is considered arbitrary, and it appears that the legislator mentioned these rights as an example and not as a limitation, as evidenced by the fact that the phrase “basic consumer rights, in particular” was included in this article. The same applies to the Iraqi legislator, as he did not specify The concept of arbitrary condition in Consumer Protection Law No. 1 of 2010, but it also mentioned a set of basic consumer rights in Article 6 thereof, and indicated in Article 8 that the supplier shall be fully responsible for the rights of consumers for his goods, goods or services, and the Iraqi legislator is required to The rights mentioned in Article Six are limited, which requires the judiciary to adhere to them and not be able to add other rights. He is also criticized - as well as Al-Masry - for not establishing a general principle or standard that defines the concept of arbitrary conditions (Al-Kalabi, 2011, pp. 273-277. M10) From the Competition and Antimonopoly Law No. 14 of 2010).

The effect of associating a consumption contract with an arbitrary condition is to invalidate this condition only and keep the contract subject to its effects. Thus, Article (L241-1) of the French Consumer Law of 2016 stipulates that “arbitrary conditions are considered unwritten, and the contract remains valid in all its provisions except Those that were considered arbitrary if its continuation was possible without these provisions, and the provisions of this article are considered part of the public order.” Article (28) of the Egyptian Consumer Protection Law stipulates that “every condition contained in a contract, instrument, instrument, or otherwise shall be null and void.” related to contracting with the consumer, if it would reduce or exempt any of the supplier’s obligations stipulated in this law or its executive regulations.” In application of this, the First Civil Chamber of the French Court of Cassation, in its decision issued on June 2, 2021, concluded that the clause stipulating That the interest on a mortgage granted to a consumer or non-professional will be calculated on the basis of three hundred and sixty days instead of three hundred and sixty-five days is arbitrary and unwritten; Because the interest calculation is based on an imaginary year (Cass. Civ, 2 juin 2021, 19-23.131).

As long as the Iraqi legislator does not stipulate in the Consumer Protection Law the standard for determining an arbitrary condition or its ruling, we call on the legislator to adopt the apparent imbalance standard for determining arbitrary conditions, as well as stipulating the invalidation of these conditions, and considering them as if they were not in the contract to begin with.

The Second Topic

The Intervention of Third Parties in Amending the Content of The Contract When the Contractual Balance Is Imbalanced Due to Unforeseen Incidents

The legislator allows a third party (the judge) to intervene to amend the content of the contract when the contractual balance is disturbed from an economic standpoint due to the occurrence of exceptional, general and unexpected incidents that make the implementation of the contract cumbersome and threatens great loss to the debtor. Therefore, Article (146/2) of the Iraqi Civil Code stipulates that: “Provided that if general exceptional incidents occur that could not have been predicted and their occurrence results in the implementation of the contractual obligation, even if it does not become impossible, becoming burdensome for the debtor such that it threatens him with a heavy loss, the court may, after balancing the interests of the two parties, reduce the burdensome obligation to a reasonable extent if necessary.” This is fair, and any agreement to the contrary shall be void.” Article (1195) of the French Civil Code, which was created by Decree No. 131 of 2016, stipulates that “if an unforeseen change in circumstances occurs at the time of concluding the contract that would make the implementation of the obligation burdensome to a degree.” For a contractor who does not accept to bear the risks, he may ask the other contractor to renegotiate the contract, provided that he continues to implement his obligations during the renegotiation. In the event of refusal or failure of the renegotiation, the parties may agree to terminate the contract, on the date and conditions stipulated They determine it, or ask the judge, by mutual agreement, to amend the contract. If an agreement is not reached within a reasonable period, the judge may, upon the request of one of the parties, amend the contract or terminate it on the date and on the conditions he specifies.” It is understood from these articles that a number

of conditions must be present so that the judge can intervene to restore the imbalance in the contract, and we will try to explain These conditions are in the first requirement, and we explain in the second requirement the mechanism for third parties to intervene to amend the content of the contract.

The First Requirement

Conditions For Applying the Emergency Accident Theory

Five conditions must be met to apply the emergency accident theory, which are as follows:

First: That some time must pass between the conclusion of the contract and its implementation: This condition is always met in time contracts, whether they are continuous implementation, such as a lease contract, or periodic implementation, such as a supply contract. It is also fulfilled in immediate-execution contracts, if their implementation is deferred, such as a deferred sale contract in which payment is made. The price may even be achieved in immediate contracts, even if their implementation is not deferred, if exceptional incidents occur immediately after concluding the contract, even if they are rare matters, such as if a sale contract was made for a specific commodity, and then the public authority issued a pricing decision a few minutes after concluding the contract. Compulsory pricing of that commodity or canceling its pricing, and as long as the legislation does not restrict it to a specific type of these contracts, all of these types can be accommodated within the scope of the theory of emergency accidents (Tenago, 2009, p. 161; Saleem, 1991, pp. 238-243).

Second: The occurrence of an exceptional, general accident: An exceptional accident means one that rarely occurs, as it appears to be abnormal according to the usual affairs of life, so the ordinary man does not rely on it, and does not take it into account, such as war, earthquakes, fires, the spread of epidemics, violent floods, and the imposition and raising of forced tariffs, and this should be The event is general, that is, not specific to the person of the debtor, such as his death, insolvency, bankruptcy, cessation of work, or a fire that destroyed his home alone (Abdul Baqi, 1984, pp. 546-548. Al-Sanhouri, 1966, p. 248), and unlike the Iraqi and Egyptian legislators, the French legislator did not stipulate generality in this matter. the incident.

Third: The accident must be unexpected and cannot be prevented: If it can be expected, then there is no room for applying the theory of emergency accidents, and the standard of expectation is an objective standard, in which the average person is considered if he were in the same circumstances when contracting, and adopting the personal standard contradicts the basis on which The theory was based on justice, as it would reward the negligent and unsuspecting person for his negligence and lack of foresight, and punish the careful and insightful person for his caution and foresight. Likewise, the accident must be something that cannot be prevented. If it is possible to prevent it, then it is equally expected or unexpected (Al-Hakim). , 1963, p. 342. Al-Dhanoon, 1970, p. 148).

Fourth: The accident makes the implementation of the contractual obligation burdensome for the debtor, not impossible: the impossibility of implementation leads to the expiration of the obligation, and then one of the contracting parties bears the consequences of this impossibility rather than the other, and implementing the obligation is burdensome for the debtor if it threatens him with a heavy loss, as a common loss does not justify taking In theory, exhaustion is estimated by an objective, not personal, criterion, as performance is looked at in itself regardless of the economic circumstances of the debtor, in terms of his wealth or poverty, that is, the circumstances of the ordinary or average debtor are taken into account. Performance that is considered burdensome for the ordinary debtor such that it threatens him with a heavy loss is considered The same applies to the debtor who is required to implement it, even if this loss is nothing compared to his total wealth (Hejazi, 1960, pp. 257-258. Al-Sanhouri, Al-Waseet, without year of publication, p. 645. Mansour, 2005, p. 302), and some prefer to combine the two standards. Objective and personal when assessing exhaustion, and this is justified by the fact that adopting the objective standard alone leads to complete neglect of the debtor's circumstances in implementation, and this is something that justice rejects and is denied by the tangible reality. Also, adopting the personal standard alone brings the judge into an endless ocean of cases that differ and vary according to individuals (Al-Naimi, 1969, p. 134), although we believe that adopting the objective standard is the best, because it spares the judiciary from delving into the details of individuals, and the judges' differing viewpoints regarding them.

Fifth: That the contractor whose implementation of his obligation has become onerous has not accepted in advance, explicitly or implicitly, to bear the risks of changing circumstances: The French legislator was unique in this condition, from which it is clear that text (1195) of the French Civil Code is a complementary text, and therefore not part of the public order. Because it allowed the parties to agree not to implement it, unlike the Iraqi and Egyptian laws, which made the provisions of the emergency accident theory part of the public order, and invalidated every agreement to the contrary.

The Second Requirement

A Mechanism For Third Parties To Intervene To Amend The Content Of The Contract

When the above conditions are met, and the debtor asks the judge to intervene to restore the imbalance in the content of the contract, then, according to the words of the Iraqi legislator, “the court may, after balancing the interests of the two parties, reduce the onerous obligation to a reasonable extent if justice requires it” (Article 146/2, Iraqi Civilian). Iraqi jurisprudence (Al-Hakim, 1963, p. 343) believes that the expression (the burdensome obligation is reduced) contained in this text is inaccurate, because it feels that the judge is not free to remove the burden that befalls the debtor as a result of implementing his obligation. The judge may see that the burden is removed if he grants The debtor has a period of time to implement, and therefore it would be better to use the expression (remove the burden) or (remove the burden), and the burden is removed by the judge according to Iraqi and Egyptian law either by increasing the creditor’s obligations, that is, increasing the obligation corresponding to the burdensome obligation, such as increasing the price, for example, or by reducing the debtor’s obligations. In terms of quantity or quality, such as reducing the quantity that he pledged to supply or keeping the same quantity but of a lower type. It is also possible to increase part of the corresponding obligation and decrease part of the onerous obligation, according to what the judge deems consistent with the circumstances, and as required by justice and dictated by reconciliation. The interest of all parties (Hejazi, 1960, p. 262). Abdel Baqi, 1984, p. 559), and in all cases, the usual expected loss is not included in the calculation of exhaustion, as it is borne by the debtor alone (Saad, 2004, p. 293. Al-Zaqrad, without year of publication, p. 218), and the Iraqi courts acted on the advice of the Chamber Trade stipulates that the usual loss is one whose amount does not exceed 5% of the deal. It also applies - and the Egyptian Court of Cassation agrees with it - that the unusual loss is divided equally between the contracting parties (Al-Dhanoun, 1976, p. 158; Abdel-Baqi, 1984, p. 562), and whoever it is. The amendment that responds to the obligation in implementation of the theory of contingent incidents, the ruling that is decided revolves around the contingent event, whether it exists or not. If the contingent event that led to the modification of the effect of the contract disappears, a ruling must be made to terminate this modification and return to what the contract was originally, and there is nothing to prevent it. The judge is free to reconsider the amendment he decided to increase or decrease if the emergency incident becomes more severe or less severe (Al-Naimi, 1969, p. 140. Abdul Baqi, 1984, p. 564. Al-Dhanoun, 1976, pp. 158-159).

While the matter is different in French civil law, the management of the contract, when the conditions of the emergency accident theory are fulfilled, progresses between three stages: The first is called the agreement stage and is characterized by the absence of third party interference in it, as it is carried out through negotiation between the parties based on the request of the contractor, whose implementation of his obligation has become burdensome. However, the parties must begin this stage before resorting to the second stage, and in the event that the other contractor rejects the request for renegotiation or when the negotiations fail and there is no agreement to terminate the contract (Article 1195 French Civil), then the second stage is moved to and is called the quasi-agreement stage, because the judge He does not interfere in the contractual relationship except with the agreement of the parties to this. If this agreement is reached, the judge alone has the authority to determine the fate of the contract, and as long as the text does not indicate the limits of the parties’ role after submitting their request to the judge, jurisprudence holds that the parties can submit some of the agreement’s issues for reference before the judge. The judge, and the final authority remains with the judge in determining the fate of the contract. He may take what the parties agreed upon or abandon (Jaber, 2017, p. 325). However, if the parties do not agree within a reasonable period to request the judge’s intervention, then the third stage is moved to, which is the judicial stage. As any of the parties can ask the judge to intervene to determine the fate of the

contract, whether by reviewing its terms, that is, amending it or terminating it at the time and with the controls that it determines, and the French legislator did not set limits to the judge's authority when reviewing the terms of the contract, unlike the Iraqi and Egyptian legislators who limited his authority to amend the contract by removing burdensomeness. To a reasonable extent, which means that the French judge can take multiple different ways and means, which may include imposing new obligations of a different extent or amount different from that specified in the contract, with the aim of reaching the restoration of the contractual balance that was disturbed due to unforeseen circumstances. (Hassan, 2020, pp. 1271-1272).

CONCLUSION

First: Results:

- 1- In the theory of contracts of adhesion, the legislator contented himself with granting the judge broad discretion to determine the extent of arbitrariness and unfairness in the terms included in the contract, considering the circumstances and circumstances of each individual case, as well as the personal circumstances of the contracting parties, and allowed him to cancel or amend these terms.
- 2- The French legislator set a general standard in this article to determine arbitrary conditions, which is represented by a clear contractual imbalance between the rights and obligations of the parties, after the French legislator relied on the standard of arbitrariness in the use of economic superiority, and the standard of obtaining an obscene advantage, and neither the Iraqi nor the Egyptian legislator stipulated On a criterion to define an arbitrary condition.
- 3- The French legislator has explicitly indicated that the effect of associating a consumption contract with an arbitrary condition is only to invalidate this condition and keep the contract in accordance with its effects.
- 4- Fulfilling the conditions of the theory of emergency accidents leads to the possibility of demanding that fatigue be raised to a reasonable level as required by justice.

Second: Proposals:

- 1- The absence of a provision in the Iraqi Consumer Protection Law to define the meaning of the arbitrary condition and the penalty resulting from its inclusion in consumer contracts makes it lack the most important means of consumer protection. Therefore, we call on the Iraqi legislator to add a fifth paragraph to the text of Article (6) of the Consumer Protection Law, which indicated To consumer rights, it is as follows: "Any arbitrary condition included in contracts concluded between professionals and consumers is considered invalid, and the condition is arbitrary if it aims to create an apparent imbalance between the rights and obligations of the parties to the contract at the expense of the consumer or would achieve that," and we prefer That the legislator replaces the term (supplier), which was mentioned in the texts of the Consumer Protection Law, with the term (professional), in line with this text.
- 2- We call on the Iraqi legislator to keep pace with legislative developments, and to stipulate the formation of committees or specialized bodies concerned with addressing the issue of arbitrary conditions included in consumption contracts, which are common in our practical reality, and to grant them the powers to issue binding recommendations that specify the arbitrary conditions and procedures that must be followed by professionals to cancel These conditions may be amended or amended, provided that the members of these committees or bodies are from the judiciary, university professors, and other specialists.
- 3- We call on the Iraqi legislator to amend Article (146/2) of the Civil Code and replace the term (reducing burdensome obligation) with the term (reducing burdensomeness), because the latter is more accurate. The new text should also include the gradualism that the French legislator included from the agreement stage, Then quasi-judicial, and finally judicial.

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