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A comparative study of judge authority in adjustment contracts in the Iranian and French laws

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Abstract

The principle of stability and firmness of contracts has been recognized in laws of obligations as a general rule. Undoubtedly, principle of intention dominance and the rule of adherence of contract from common intention require that compromise provisions always be respected and needed-to-meet and none of the two parties cannot defy from provision contract and due obligations or capture the territory of common will or theater the terms of the contract. In investigating the limits the contractual freedom principle, the judge authority in juridical moderation of contract, is along with forging this authority for the judge which if required after attaining qualifications to change the situation and conditions of the contract, the purpose of this balance and fairness and uniformity in terms of its contractual obligations after making changes to the terms of modifications to the Amendment Agreement. Articles 277 and 652 of the Civil Code of Iran in the format of granting juridical date and the division of judicial enforcement of the obligation, the possibility to intervene in contract by judge are anticipated. But the issue of judge's authority to modify the contract is not stated directly. weather a comparative study of different countries in the admitting this subject, and by taking a principled and juratory rules-based solutions, fill this legal gap and by proposing passing appropriate laws, we give judge the authority to modify the contract and provide the possibility to fulfill long-term contracts that have not been implemented due to unpredictable events, or faced with an obstacle.

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Introduction

Adjustment of contracts is a concept introduced in the law systems of Western countries and mostly applies to long-term contracts the execution of which is difficult due to the prevailing circumstances. Under such conditions, according to the French and Western legal systems, courts are authorized, due to the difficulties facing execution of the contract, to act towards returning the obligations of the contracting parties to their respective original states.

There are three types of adjustment: 1) agreed contractual adjustment based on certain rules, 2) legal adjustment which is allowed in specific cases, and 3) judicial adjustment, i.e., adjustment of a contract by a judge. The problem of revising contracts becomes prominent, particularly in long-term transactions, if the balance of a contract is upset due to major changes in general economic conditions. If the execution of a contract becomes absolutely impossible due to unpredictable and external circumstances (force majeure), then the contract shall be null and void and the parties shall be relieved of their contractual obligations. There are other situations, however, where, due to certain developments and occurrences, execution of a contract, though not impossible, may become extremely difficult.

The proponents of the occurrence of fraud theory consider two effects or guarantees for its execution: the contract can either be reasonably adjusted by the court with due regard to temporal conditions, or be cancelled by the party who has sustained losses so as to rid himself of further consequences. Jurists believe the second solution, i.e., giving the party who has sustained losses the right to cancel the contract is more compatible with the spirit of the Iranian law as well as the rule of free will and seeking justice. The aim of this paper is a comparative study of judge authority in adjustment contracts in the Iranian and French Lows.

Materials and methods

Data collection

Data collection in this study was conducted via taking notes from available sources including books, articles, statutes, internet sites, etc. The available information used in this study can be divided into two kinds: 1) books, articles, and writings written in non-Persian languages, which discuss the subject matter explicitly as a recognized and accepted category. Such information can be used for defining the problem and determining its position in Iranian regulations and can be implemented for the purpose of opening new avenues in these regulations, and 2) other information which, rather than explicitly referring to the subject matter, provide implicit references to the same. Such sources can be used in the proper legal context through analysis and inference to see into the meanings expressed by their respective authors and legislators.

Theories

The laws and legal procedures in different countries, one comes across theories which have been set forth as solutions for cases where contracts are difficult to execute or their execution would upset contractual balance. These theories are similar in terms of the occurrences that lead to changes in the difficult circumstances hindering the contract, impossibility of contract execution, or selection of contractual purposes.

Result and discussion

Comparison of Fundamental Powers of a Judge in Adjustment of Contracts in the Iranian and French Legal Systems

In studying the laws and legal procedures in different countries, one comes across theories which have been set forth as solutions for cases where contracts are difficult to execute or their execution would upset contractual balance. These theories are similar in terms of the occurrences that lead to changes in the difficult circumstances hindering the contract,

impossibility of contract execution, or selection of contractual purposes. Once a contract has been concluded, the parties thereto are obligated, in observance of the PACTA SUNT SERVANDA ("agreements are to be respected") principle, to strictly execute the terms and conditions thereof without exception (Bigdeli, 2009), unless, due to some general, unpredictable, and uncontrollable event outside the power of the parties, the contract either become impossible or very difficult to execute. In the former case (impossibility of execution), the parties are exempted from their contractual commitments; and the latter case (difficulty of execution) is the subject of the present article. In the French judicial system, a relative stance is taken in dealing with this subject, whereby although judicial adjustments are accepted in the administrative laws, strict legal procedures are imposed in the civil law in observing the PACTA SUNT SERVANDA principle (Katouzian, 1990).

1. Fundamentals of Contract Adjustment in the French Law

Due to the observance of the PACTA SUNT SERVANDA principle in the French legal system, a judge is not authorized to rule out or adjust the execution of a contract unless such action is explicitly authorized by law. It is a judge's duty to issue votes in accordance with the terms and conditions specified in each contract. According to Article 1134 of the French Civil Law, "Those agreements concluded in accordance with the law are to be regarded as the law itself by those who have concluded them." This guarantees the commitment of the French law to execution of agreements (Sadeqi Moqaddam, 2011). Upon describing that contracts are binding for all the parties involved in them and that unilateral termination of contracts is illegal, the same article states in Paragraph 3, "All contracts are to be executed in good faith." Generalization of this rule would lead to the obligation of the parties to actually and earnestly and completely execute the terms of the contract and the conclusion that any violation of a joint agreement shall itself be regarded as an act of ill faith. Likewise, the judge is not authorized to take a decision against the common demands set forth by the contracting parties. All this points shows these facts that the intent of legislators in emphasizing on the execution of contracts in good faith is to stress such execution and to outlaw refraining from such execution (Bigdeli, 2011).

The balance and stability created in a contract based on the parties' mutual consent cannot be upset without their prior mutual consent. The consistency of contracts would require that the parties consider themselves committed to the effects and results of the contract and that they refrain from violating the contract. Such commitment on the part of the parties would provide stability for contracts, so that the parties shall execute the terms of the contract except in cases where non-execution is permitted by law or by mutual consent. In the French Law, a judge can resort to the "force majeure" theory for the purpose of adjusting administrative contracts (Sadeqi Moqaddam, 2011).

When issuing their votes in accordance with this theory, the French courts would often base their rulings on either implicit conditions or by resorting to superior and irresistible forces (force majeure) (Bogdeli, 2009). On the strength of occurrence of some kind of force majeure, the French courts would observe the unpredictability (force majeure) theory if a contracting party was unable to (in relative terms) fulfill its contractual obligations (i.e, if execution of the contract was too costly).In the French Supreme Court, Article 1134 of the Civil Law (regarding the obligatory nature of contracts) was binding for the contracting parties and the judge alike. The new procedure in the Supreme Court of France was that under no circumstances was the court authorized to resort to the prevailing situation for the purpose of changing contractual terms and substituting old terms with new ones. Unlike the French Civil courts, the administrative courts in this country, following the "state council" view,

take a different approach towards the unpredictable events (force majeure) hypothesis. According to the State Council of France, special requirements are created as a result of the existing relationship between public contracts and social and public interests (Katuzian, 2009).

The force majeure hypothesis continues to govern the administrative contracts in the French legal system, and has found numerous applications. The recent development in this country is the result of the new global situations that now prevail.

2. Fundamentals of a Judge's Power in Adjustment of Contracts in Iranian Law

According to the Iranian Law, in hearing the disputes arising from contracts in Iran, a judge is obligated to act as an agent for executing the parties' contractual demands, and has no right to, under the guise of administering justice and fairness, refrain from executing the joint will of the parties or introduce changes in the terms and conditions of the contract. Nevertheless, there are cases in long-term contracts where, due to the occurrence of unpredictable events, the balance between the contractual obligations and the justice in exchange expected in the contract is so dramatically upset in favor of one party that the fulfillment of obligations for the other party can become either very difficult or very costly, and concluding a similar contract under new prevailing circumstances is traditionally laughed at. Naturally, if due predictions are included in the contract form, or if the legislator, at his own discretion, introduces certain facilities to eliminate such problems, then the matter can be solved. Therefore, although judicial adjustment is not explicitly accepted in the Iranian legal system (Shahidi, 1989), different views are presented for the purpose of justifying judicial adjustment of contracts and authorizing judges to implement such adjustments including: the theory on changed contractual circumstances (Sadeqi Moqaddam, 2011: 16), the unpredictability of events theory (Katouzian, 2011; Qasemzadeh, 2009), and the occurrence of fraud theory (Katuzian, 2011).

The Unpredictability of Events Theory

To prevent any possible imbalance in their mutual obligations, contractual parties may include terms in the contract for reviewing the already agreed upon conditions in a proper and determinate manner or, equivalently, they can reach agreement in this regard during the term of the contract. Similar authorities can be granted by legislators to a judge also. Although legal security would require that a contract mutually written and agreed to by the parties based on their predictions and calculations be considered as permanent, sometimes, the circumstances prevailing at the time of the contract conclusion are, due to unpredictable events, so dramatically changed later on that no one, even the most experienced persons could not have predicted. It is true that the parties to a contract usually evaluate their chances of benefits/losses as a result of the contract and take appropriate measures to deal with either event; but, the losses we refer to here are unconventional losses which cannot be acceptable to any party who might possibly suffer them by entering into the contract. Under such extreme circumstances, the justice in exchange view rules that the contract must be altered or that terms for reviewing or cancellation should be included in the same. In such a case, the judge shall be authorized in accordance with the "unpredictability" or "force majeure" view, take appropriate measures to interfere in the contract for the purpose of compensating for the imposed inequalities (Bigdeli, 2009).

The Implicit Condition Theory

The concept of implicit condition is explained as follows, "The term "implicit condition" is applied to a condition which is considered to be an obligatory content of the terms in a contract" (Katouzian, 2011). As a result, all that is not predicted explicitly in a contract, but can be deducted from the existing relations among the terms of the contract can be regarded as an implicit condition. Jurists consider the following as the bases of obligation: wisdom, (worthy) customs, and law. Sometimes, a contract might contain implicit rights or

obligations without explicitly referring to the same. All kinds of implicit conditions, regardless of their origin, are considered to be the will of the contracting parties. The creators of the implicit condition theory believe that by entering into a contact, the parties have their own interests in mind, forever trying to give less and receive more, until a relative balance can be established between the obligations and the rights of the parties. However, in a long-term contract, a different situation prevails. The nature of these contracts is such that there is a high probability of fluctuations in the price or value of the subject of the contract as time passes. However, such a state of affairs must not be adhered to for disturbing a contract since profiting from new situations in would kindle trade and transactions among people. When calculations and variations exceed the customary and commercial bounds, leading to one party's utter inconvenience and desperation in meeting its obligations, then the contract cannot be regarded as one which is based on the parties' initial joint will and predictions (Shahidi, 2007). The proponents of this theory believe that in such contracts, the parties not only jointly rely on the customary balance of obligations when concluding the contract, but also consider an implicit condition as well, based on which the contract shall continue only if the prevailing customary conditions continue, and in case any unpredictable circumstances to the contrary cause fundamental changes in the contractual terms, then the contract shall not be obligatory for the parties. This theory has met with approval in the International Law (Hekmat, 1985).

The Change of Circumstances Theory

The PACTA SUNT SERVANDA (agreements are to be respected) principle is an accepted principle in today's world, which can guarantee the security and strength of legal relations. According to this principle, neither part to a contract can unilaterally refuse to fulfill its obligations or to cancel the contract. Nevertheless, certain exceptions have been agreed upon in different legislations based on which contracts can be rendered nonobligatory in cases where they are incompatible with social requirements and establishment of justice and fair practices. One such exception is due to extreme changes in circumstances (Bigdeli, 2009). According to the change of circumstances theory, if, upon concluding a contract, unpredictable circumstances occur outside the power and control of the parties which upset the economic balance so dramatically that one party fails to execute its contractual obligations or has to undergo extreme and unreasonable expenses and labor in fulfilling its obligations, then the concerned party can either cancel the contract or ask of its adjustment (Sadeqi Moqaddam, 2011).

The Occurrence/Incidence of Fraud Theory

Some of the proponents of adjusting contracts refer to the fact that certain contracts can, due to unpredictable events, become detrimental to a contracting party, just as an imbalance between the contractual terms at concluding the contract can lead to the option of loss for the disadvantaged party, unless it can be proved that he was aware of the higher price at the time le consented to it. If unpredictable accidents upset this balance, then the disadvantaged party can again either cancel the contract or apply for its adjustment (Katouzian, 2011).

In the Iranian law, option of loss is a general rule in contracts of exchange (Articles 416 and 456 of Iran's Civil Law), and may be adhered to if a contract is based on leniency or neglect. In the Iranian law, the option of loss is based neither on a fault in intention nor a violation of cause, but is meant to prevent the undeserved loss suffered by the disadvantaged party as a result of the exchange.

3. Effects of Judicial Power in Adjustment of Contracts in French and Iranian Laws

a. The French Law

The French judicial procedure absolutely rejects the unpredicted circumstances theory and does not authorize a judge to adjust a contract based on the change in circumstances or

upsetting contractual discipline. French courts can merely provide the debtor with the fair respite or reduce those owed amounts which are proportional to the true damage sustained. However, they are not entitled to interfere with the contractual balance. If he deems necessary (in such cases as breakout of war or in sample contracts, etc.), the legislator can adjust contracts. However, whenever a French court has attempted to interfere with contractual texts or include unbalanced economic conditions as a force majeure stance, the Supreme Court has voted against such actions (Katouzian, 2011).

In the French judicial procedure, the court grants to the judge the authority to assign a fair respite to the debtor. The most significant effect of granting fair respite in the French law is that the carrying out of the procedure or issuing the court ruling can thus be delayed (Shahidi, 2007). Once the fair respite has been expired, if the delayed debt or obligation has not already been met, then the creditor can pursue the legal procedure from that point on without being obliged to repeat any executive procedures. Thus, the fair respite to the debtor plays no role in the original amount owed. The debt shall nevertheless apply and a further interest is also added for the delayed period (Esmailabadi, 2006).

b. The Iranian Law

Based on the unpredictability of circumstances, sometimes the conditions ruling a contract as well as the circumstances governing the contract at the time of its concluding are so dramatically changed that they cannot be predicted by even the most experienced and farsighted traders. Nevertheless, the sides of any contract always assess their possible loss/gains before proceeding to conclude the contract, and sometimes sustain losses as well. However, the losses we are concerned with here are unconventional losses which no farsighted and wise contracting party would ever consent to. In such cases, it seems that the justice in exchange principle rules that the contractual terms must be altered or adjusted (Kermani, 1996). Ultimately, the judge is authorized in accordance with the unpredictability theory to interfere with the contract in a proper manner for the purpose of countering the existing inequalities by introducing adjustments into the contract or the terms and conditions thereof (Kermani, 1996; Katouzian, 1995).

If difficulties arise in the execution of the contract due to occurrence of unexpected accidents, to the extent that they lead to temporary distress and constriction on the debtor, then the execution of the contract shall be suspended until such time as the force majeure conditions have been lifted or resolved (Shafai, 1997). We assume here that the contract is long term and this would lead to delays which pose no harm to the obligator without the time for fulfilling the obligation being expired. The regulation regarding the force majeure situation being temporary depend on the customary laws in place. If the court finds that the nature of the contract has been completely altered and that executing the contract is against the common will of the parties at its concluding, then the court shall vote to cancel such a contract (Safai, 1974). A correctly concluded contract undergoes such developments in case of occurrence of unpredictable events that it cannot be continued under the new circumstances. On the other hand, as the effects of these accidents are not short-lived, execution of the contract cannot be delayed, the contract cannot be adjusted based on the parties' mutual consent, and neither party can be given the authority to cancel the contract. In such a case, the judge is not authorized to adjust the contract and thus, the contract shall not be ineffective after the occurrence of the accident, and shall be terminated (Sadeqi Moqaddam, 2011). In the author's view, a contract might not need adjustment under all circumstantial changes since, after all, there are events which can be predicted beforehand without causing undue alarm. Therefore, considering the effects of the "change in circumstances" theory, this theory cannot properly justify the removal of contractual terms or authorizing a judge to adjust the contract.

Conclusion

The proponents of the occurrence of fraud theory consider two effects or guarantees for its execution: the contract can either be reasonably adjusted by the court with due regard to temporal conditions, or be cancelled by the party who has sustained losses so as to rid himself of further consequences. Jurists believe the second solution, i.e., giving the party who has sustained losses the right to cancel the contract is more compatible with the spirit of the Iranian law as well as the rule of free will and seeking justice. They believe that, since the conditions of "occurrence of fraud/loss" are different from those of "option of loss", then the nature and basis of these two assumptions are basically the same. Undue loss imposed against the will of the person who is to sustain the loss without his having done anything to bring about such a loss is always avoided. Therefore, to interpret the law and promote spirit of the same, we must follow the guarantees predicted in the Iranian Civil Law. This is contrary to the case where the judge can adjust the contract, substituting its terms with what he deems as fair and just and thus changing the previous contract and creating another contract in the name of society.

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