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The effect of the impossibility of execution without error on the liability of perishing in the contracting contract

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Abstract

The issue of bearing the liability in the contracting contract may cause confusion in some cases, as it is the responsibility of who falls and who bears it, and the intended loss here is not the loss that occurs before or at the time of the conclusion of the contract, this leads to the absence of the contract, but the research revolves around the loss that occurred after The conclusion of the contract, and before delivery, and there may be confusion between the consequences of the loss of the thing and the consequences of the loss of the contract, which makes it impossible to determine the responsibility.

Keywords: without error, contracting contract.

INTRODUCTION

G Many contracts are characterized by the long duration of their implementation, which requires that many of them be exposed to many problems in this contractual stage, which is the most important part in the life of the contract. It required the legislator to enact many legal texts to regulate the contractual relationship in such contracts whenever it was exposed to tremors and strong winds that destroy the contract or destroy the contracted thing.

research importance

Force majeure and sudden accident, as well as a foreign cause, may cause the destruction of the contracted thing, but may in turn lead to the destruction of the contract as a whole. From this point, the importance of research is evident in determining the framework of contractual responsibility and who bears the responsibility for this loss and when this liability is transferred between the employer and the contractor, especially in the presence of There is a clear difference in this context between the French civil law and the Iraqi civil law, and this is what this paper seeks to clarify.

Research problem

Civil law texts differ in their dealing with the liability of the destruction of things and when this liability passes, especially within the framework of the contracting contract, which is characterized by the possibility of supplying materials by the employer or that the contractor undertakes the preparation of these materials and the implementation of the required work. improperly executed and what is required of the two parties to the contractual relationship to prove their non-violation, and this is all within the framework of the civil law, to begin with, and the texts regulating contracting contracts in particular.

Structure of the research paper

From the foregoing, it is better for us to refer briefly and enrichingly to the meaning of perishing, as well as to distinguish between the liability of perishing the thing and the perishing of the contract in the civil law, and this is what we will deal with in (the first section), and then we move on to determining the liability of perishing in the contracting contract in (the second section).

Literature review

1. The meaning of perdition

It is not hidden from anyone that the main and most important obligation that falls on the contractor is to complete the work in accordance with what is included in the contract and in a manner consistent with the principles of his profession and industry, whether materials are provided to him by the employer or by him, and to exercise the necessary care in completing the work according to the agreed period The contractor, the subject of the contracting contract, must be handed over to the employer in accordance with his obligation to deliver under the contracting contract, at the agreed-upon place and time, and the responsibility of the contractor here is a contractual one. It is proven that the contractor did not take care of the usual person in preserving the thing, and that his negligence resulted in the destruction or damage of the thing. Because the burden of proving the foreign reason falls on the contractor, as he does not get rid of the responsibility for non-delivery except by proving the foreign reason, and also the burden of proving that the contractor has caused the lack of his technical expertise to make the material or some of it damaged and unsuitable for use. It is necessary in the A contractor must have the necessary technical expertise, and the contractor on his part may absolve his responsibility by proving that he has performed all his duties in accordance with the principles of the craft and what is required by good faith in the implementation of the contract, or that making the material unusable is not due to a technical deficiency on his part, but rather due Damage is defined as "the total or partial destruction of a certain property due to a force majeure or a sudden accident, and it is considered as a result of the loss of a force majeure that prevents the benefit of a certain thing, or prevents the person from carrying out a specific activity that was beneficial to him." The person loses this benefit or the benefit of that thing." The Egyptian Court of Cassation has ruled in this sense and said (((The goods contracted by order of the urgent judiciary for fear of being damaged until the dispute between the two parties regarding the ruling issued between them is resolved, does not lead to the termination of this contract. In itself, annulment is not justified, since the sale of the goods in this manner is not measured by the destruction of the thing sold that necessitates the termination of the contract of sale, because the destruction stipulated in the civil law is the disappearance of the thing sold from existence with its natural components due to a celestial calamity or a material accident caused by a human being. The thing is an urgent court order For fear of damage, it is a temporary measure intended to preserve the thing sold from perishing and preserving its value for the account of the one to whom it is decided to surrender. Losing and spoiling it takes the rule of doom (Ben Nadush, 2004). When the obligation and its consequences are extinguished, the debtor is obliged to assign to the creditor what he may have of his right or claim in compensation for the thing that was destroyed. The creditor is entitled to the amount of the security deposit or his right On Compensation (Al-Sanhouri, 1962).

There is no doubt that the total loss or damage to the subject of the contract is the ideal picture that leads to total impossibility, regardless of how the destruction occurred, as the destruction may arise as a result of fire, damage, destruction, bombing, or the like (Ben Nadush, 2004). .

As for bearing the responsibility of perishing in the civil law, it means bearing the loss resulting from a force majeure or a foreign cause, and they are of two types in legal jurisprudence (Abd al-Hayy, 1998):

First: the liability for the destruction of the thing, and the basic principle here is that the liability is borne by the owner, and the exception to this is if the thing is subject to an obligation to transfer a right in kind in a contract binding on both sides, then the liability is on the debtor by delivery (Al-Sanhouri, 1962).

Second: The consequences of the perishing of the contract, in contracts binding on both sides, is borne by the debtor whose obligation is impossible to carry out, for example, a paid deposit. If the deposit perishes, then the depositor (creditor) loses the thing, so bearing the liability of the contract does not always mean bearing the liability of the thing's destruction, so a distinction must be made between the liability of the thing's perishing, and the liability of the breach of the contract binding on both sides if it is impossible to implement one of the opposite obligations. to the contractor for repair, before returning it to the employer, the contractor shall not demand his wages or reimbursement of his

expenses, and thus he may bear the responsibility of the contract, i.e. the loss resulting from the termination of the contract, after the impossibility of carrying out his obligation, but he will not bear the consequences of the loss of the thing, i.e. the loss that It is represented in the loss of the value of the thing. Rather, this liability rests with the employer, who is the owner, unless the loss occurs by the action of the employer, then the contractor is entitled to his full wages, and the two consequences may combine, the liability of the contract perishing and the liability of the thing's perishing, so one person bears it without mixing. lick d. Contracting, if the thing provided for its material by the contractor perishes due to a foreign reason, before it is handed over to the employer, the contractor bears the responsibility of the contract as a debtor of delivery and by enabling the employer of the thing, then he does not have the right to demand the employer to pay the fee, just as the contractor bears the loss of the property itself by its destruction He is the one who bears, as an owner, the responsibility of this perishing, and here the responsibility of the contractor's perishing and the perishing of the thing are combined (Al-Sanhouri, 1962). What is worth pointing out here is that the loss and damage agree that both of them are material damage to the thing, so it is often the annihilation of the thing and its corruption in a way that is not suitable for its intended use, and they differ in that the damage can transform the thing or re-manufacture it or remove the cause of corruption from it and then use it So, the harm in it is less than the destruction with which the thing is not usable unless it is a partial destruction that does not affect the rest, provided that there are those who see that there is no difference between destruction and damage, as they are both the same (Muhammad, 2012).

2. Determining the liability of loss in the contracting contract

Article (887) of an Iraqi civil stipulates ((1- If the thing is destroyed or damaged due to a sudden accident before handing it over to the employer, the contractor may not demand either the wages of his work or the reimbursement of his expenses unless the employer has been excused from receiving the thing. The destruction of the work material shall be borne by the person who supplied it.3 If the contractor was excused from delivering the thing, or the destruction or defect of the thing before delivery was due to his fault, the employer shall compensate for what he had returned from the work material.4- If the thing was destroyed or damaged. Due to an error on the part of the employer or to a defect in the material he supplied, the contractor was entitled to the rent and compensation when necessary. The thing was destroyed before delivery by a sudden accident that was proven by the contractor, because the burden of the sudden accident falls on the contractor, as he does not get rid of the responsibility for non-delivery except by proving the foreign cause. The garment was burnt, and the fire was by force majeure, and it was not proven that there was no negligence on the part of the contractor Here it is borne by the contractor (the weaver) for what he provided of work and material, and the employer bears it for what he provided of the material. He does not take the wages of his work or what he spends on it, because the employer did not benefit from this work, and he also bears the consequences of the loss of the material that he provided, so he cannot return the value of the cloth to the employer, because he did not deliver the thing to him and if we impose it as a seller of the material made on The best appreciation is for him, and the ownership of this material passed to the employer as soon as it was made, so he still bears the responsibility as a seller of the destruction of the thing sold before delivery, as the general rules stipulate. the wages of his work and his expenses, and he cannot demand it from the employer, because the latter did not benefit from anything from the contractor's work, so he bears neither the wage nor the expenses. And a thing perishes for its owner as well General rules dictate (Al-Sanhouri, 1962). However, in all cases, the rule of notice must be observed, since if it is impossible to implement the obligation due to a foreign reason after the creditor has notified the debtor (the contractor), then he remains responsible for the non-performance, because it is stipulated in the foreign reason that imposes the obligation and relieves the debtor of its consequences that it is not preceded by a breach The debtor, as it is assumed that had it not been for his delay after his excuse, he would have been able to pay, or expect what he claims from the foreign cause (Ismail, 2003).

The Roman used to place the responsibility of the destruction of the used materials if the loss was due to a foreign cause, on the owner of the

land, based on the rules of adhesion, and when the French Civil Code was legislated, the ruling on the destruction of things equipped by the manufacturer became subject to the operative part of Article (1788) of this law, which is the following: (If the manufacturer had prepared the materials, and then the thing was damaged, in any way, before the delivery took place, then the loss falls on the manufacturer, unless the employer had excused him to deliver the thing).) of the French Civil Code (Abdul-Jabbar, 1979). It is clear and agreed that it is the employer who bears the loss of the materials, if he is the supplier of these materials and they perish due to a reason foreign to the contractor, because the employer was the owner of them before and after their use.

But disagreement and hesitation arise regarding the application of Article (1788) of the French Civil Code, which is identical to the provision of Article (887) of the Iraqi Civil Code, on contracting. The contractor is not responsible for the destruction of the materials. According to this opinion, the materials used by the contractor in the implementation of the contracting contract transfer their ownership to the employer immediately even before the agreed work is completed, so these materials become the property of the employer by sticking, and this opinion seems weak under the Iraqi civil law This can be taken into consideration because the provisions of adhesion as a reason for the transfer of ownership are applied in the absence of agreement. But the majority of French jurisprudence approved the opposite, as it gave Article (1788) a French civil privacy in application, as it does not support the introduction of the rules of adhesion to transfer the liability of the destruction of materials, but considers, and in accordance with the provision of Article (1788) of the French Civil Code, that the liability of the destruction of materials before delivery falls It is the responsibility of the contractor, and even in the event that the building merges with the land, the contractor remains a guarantor as long as the work has not been completed yet. The assumption that the two parties agree to pass the risk of the destruction of the materials to the employer as soon as they are attached to the property is baseless, because the assumed will does not transcend a legal provision stated in an express text (M 1788) French civil, and there is no way for the contractors if they want to violate this legal provision, except That they include in their contract an explicit and unmistakable text according to which they transfer the liability of the destruction of the materials from the responsibility of the contractor to the responsibility of the employer, and then that the rules of adhesion are not taken into account except when there is no contractual bond (Al-Sanhouri, 1962). While another group of them went to consider the contractor a seller of the materials that he supplies, and if they perish before handing them over to the buyer (the employer), then the responsibility for their destruction falls on the buyer according to the provisions of the sales contract in the French Civil Code (Abdul-Jabbar, 1979), but within the scope of the Iraqi Civil Code The issue of adapting the contract in which the contractor provides the work materials, is it a mixture of the sales and contracting contracts, or is it a contracting contract, loses its importance in terms of bearing the liability, because the rule of bearing the liability in the contracts of sale and contracting is contrary to what is in French law, there is an adaptation that the contract It is a contracting if the value of the materials is less than the value of the work, and that the contract is a mixture of the sales and contracting contracts if the two values are equal or close (Al-Sanhouri, 1962).

There is another adaptation, which sees that the lesson is in the relationship of work with the material, regardless of the value of this or that. On the transfer of ownership of the materials, the contract is a sale (Abdul-Jabbar, 1979). Therefore, the position of the Iraqi civil law, was in contrast to the position of the French law, where the rule of liability of the contract prevailed over the rule of liability of the king, so the destruction of materials before the completion of the work and before delivery is the responsibility of the contractor if the loss was due to a foreign cause, and it was before delivery as a debtor to delivery. It is impossible for him to carry out his obligation, and this is in application of the general rule that bears the liability of the debtor's impossibility of implementation in exchanged contracts, but if the loss occurred after delivery, the employer is the one who bears the liability (Tariq, 2019). We conclude from all of the above, that the contract must first be adapted, whether it is a sale contract or a contracting contract. To add unity to this contract, and it is not useful to imagine

two contracts and each of them being subject to different provisions. For work or I said (Abdul-Jabbar, 1979). Thus, the responsibility for the destruction of the materials supplied by the contractor, for a foreign reason, cannot fall on the employer, because we said that it is always a contracting contract, as it is necessarily subject to the provision of Article (887), which discloses The contractor bears the responsibility for the destruction of the materials used in a sudden accident, and what confirms this opinion is the Iraqi Court of Cassation's refusal to consider the contractor a seller of the materials he uses in his work. Nor can this liability fall on the (employer), based on the rules of adhesion in view of the weakness of the arguments that were made in this regard, as well as in the event of the destruction of the supplied materials because of the contractor, then the liability of the loss will be on him and compensating the employer for the damage he sustained. And since the rule that the contractor bears the liability for loss is not from the public order, so it is permissible for the two parties to agree expressly or implicitly to transfer such liability to the employer.

Rebellion, revolution, civil war, military coup ... etc., and since the general rule is that the contractor is obligated to re-work at his own expense if it was damaged by a sudden accident or from it during the implementation, and whatever this accident or cause was, so mitigating the contractor's obligation in this way, It can be interpreted as an exception to the interest of the contractor, and here it is correct to ask that if the contractor had taken precaution to protect his partial interest in transferring the liability of the loss to the employer when the loss was partial, would he not a fortiori have taken precaution to transfer this liability when the loss is total? It may be replied that when the employer agreed to compensate the contractor for the partial loss, he wanted to ensure that his benefit was achieved by enabling the contractor to proceed with the work and complete it, and what is meant by this mitigation is to protect the interest of both parties, and it is required that the contractor re-work again after his total loss And at the expense of the employer, instead of the contract expiring and the contractor alone receiving the wages and depriving the employer of the benefit of the contract (Tariq, 2019).

Some believe that this issue depends on the interpretation of the contract, and the solution can be found by referring to the extent of the employer's commitment to compensate the contractor for the loss. Because it has risen and the conditions of implementation have fundamentally changed, it is not permissible to force the contractor to repeat all the work again. Rather, he deserves the wages from all the lost work. He does not bear the responsibility of anything. According to this view, the interpretation of the contract may lead to the contractor getting rid of the liability of the loss of the work materials and his remaining bearing the consequences of time, i.e. the gains that the contractor loses as a result of completing the work in a double period, and this loss is estimated either by the gains that he would have earned if he implemented a new contract or contracts during d Anya (Abdul-Jabbar, 1979). Therefore, we prefer what this sound opinion has led to, and it must be supported and taken into account.

It is not disputed that the liability of the loss after delivery falls on the employer in most cases, whether he was the one who provided the material or the contractor was the one who provided it, and the employer must pay the full wages to the contractor. We have previously said that the liability of the loss falls on the contractor, and if this is the general rule, then every rule has an exception. There are cases in which the liability of the loss falls on the employer, even if the death occurred before the proper, and among these cases are the following (Tariq, 2019) :

1- If the employer inspects the manufactured thing and accepts it, but temporarily leaves it with the contractor, and it perishes by force majeure, then its destruction will be on the employer, even though he did not actually take delivery of it, because accepting the work modifies the delivery.

2- If the thing perishes in the hands of the contractor while he withholds it until he pays the wages, then the destruction in this case is on the employer, because he is at fault, as he did not pay the wages, so the contractor, by his mistake, pushed him to withhold the thing.

3 If the two contracting parties agree that the employer bears the responsibility for the destruction of the manufactured thing or the work even if he does not take delivery of it, then this agreement is permissible and must be acted

upon, because the rule that the contractor bears the responsibility of perishing before delivery is not one of the jus cogens rules, so it is permissible to agree on what contradicts it, and this agreement may be implicit In particular, it is useful for the employer to examine the thing and be satisfied with it before handing it over.

4- If the employer puts his hand on the thing without the consent of the contractor, and without a ruling from the judiciary, and the thing perishes, then it perishes on the employer, although the legal surrender was not completed because it is not permissible for the person to claim his right himself.

Finally, it is important to determine the moment of transfer of ownership of the work done in the contracting contract, this contract takes time to implement when its subject is making something, so it is necessary to determine the time of transfer of ownership and accordingly the jurisprudence differed in determining the time of transfer of ownership.

There is a view from the jurisprudence that the ownership of the manufactured work is transferred by the completion of the making of the thing, i.e. from the time the contractor completes his work and the manufactured thing gains all its intrinsic components.

While a second opinion goes to the fact that the ownership is transferred by acceptance, that is, the ownership of the thing manufactured according to the contracting contract is transferred upon the acceptance of that work by the employer, and the acceptance is by looking at the thing, examining it and examining it in order to ensure that it conforms to the terms of the contract and the required specifications, and this opinion stems from the fact that the contractor has He claims that he made the thing, but examination and scrutiny show that his claim was not correct. According to this view, the ownership of the manufactured work is transferred to the employer from the time of acceptance if the contractor is the one who supplied the material he used in the work, as well as the transfer of the consequences of the work's destruction from the contractor to the employer from the time of acceptance (Al-Sanhouri, 1962). As for the third opinion, it is that the ownership of the work is transferred by surrender, and this is the prevailing opinion in jurisprudence in France, as we explained previously, where the jurisprudence took the consequences of the loss of the work with the transfer of ownership and did not link it to the implementation of the obligation to surrender (Al-Sanhouri, 1962). And the opinion that we prefer is that the ownership of the work transfers from the time of completion of the work, contingent on its acceptance by the employer, in fact or in judgment. Completion of the work is an inevitable necessity for the transfer of ownership in the thing that the contractor makes from materials owned by him to the employer. Acceptance is nothing but a revealing of the fact that the work was complete from the time the contractor placed it at the disposal of the employer and asked him to take it, because the most important consequences of Acceptance is the transfer of the consequences of the work's loss from the contractor to the employer at the time of the kiss, so when it perishes in a sudden accident, the thing perishes on its owner as a general rule (Abdul-Amir, 2014). Neither the wages of the work nor its expenses, but after acceptance, the loss of the work for a foreign reason, the consequences of this doom fall on the employer.

Results

1- It became clear to us that the contractor's obligation in the contracting contract is to complete the work in accordance with what is included in that contract and in a manner consistent with the nature of the thing agreed to be implemented, whether the materials are supplied by the project owner or by him.

2- It became clear to us that the contractor's responsibility in the contracting contract is a contractual one, and he is not acquitted of it unless he proves that the destruction of the thing contracted was due to force majeure and that he exercised the care of the usual person.

3- We noticed that there is a jurisprudential dispute regarding the application of Article (1788) of the French Civil Code, which is identical to the provision of Article (887) of the Iraqi Civil Code, on contracting. The materials, but the majority of French jurisprudence acknowledged that the responsibility for the destruction of the materials before delivery rests with the contractor, while the Iraqi civil law makes the destruction of the materials before the completion of the work and before delivery the

contractor if the loss was due to a foreign cause, and it was before delivery as a debtor to delivery, but if the loss occurred After delivery, it is the employer who bears the liability.

4- It became clear to us that there is a jurisprudential disagreement in determining the moment of transferring the ownership of the completed work in the contracting contract. Part of the jurisprudence goes that the ownership of the manufactured work is transferred by the completion of the making of the thing, while a second opinion goes that the ownership transfers upon the acceptance of that work by the employer, and finally there are those who see The ownership of the work is transferred by delivery, and the opinion that we prefer is that the ownership of the work transfers from the time of completion of the work, contingent on its acceptance by the employer, in fact or in judgment.

Reference

[1] Abd al-Hayy Hegazy, Warranty of Loss in Sale, Dar Al-Israa, Jordan, 1998.

[2] Abdul-Amir Jafat, The Legal Basis for Transfer of Ownership in the Contracting Contract, Research published in Al-Mohaqiq Al-Hilli Journal for Legal and Political Sciences, Tenth Year, Second Issue, 2014.

[3] Abdul-Jabbar Naji Saleh, Expiry of the contracting contract, PhD thesis submitted to the University of Baghdad, College of Law, 1979.

[4] Al-Sanhoury, Al-Wasit, part 2, Egyptian Universities Publishing House, Cairo, 1952.

[5] Al-Sanhoury, Al-Wasit, part 3, Explanation of Civil Law, Dar Al-Nahda Al-Arabiya, Cairo, 1962.

[6] Al-Sanhoury, Al-Wasit, Part 7, Theory of Contract, Dar Al-Fikr for Printing and Publishing, 1966.

[7] Bin Nadush Nadra, Mu'jam Al-Wasit, Volume 1, Dar Al-Da'wah, Cairo 2004.

[8] Ismail Ghanem, The General Theory of Commitment, Part 2, Rulings of Commitment, Abdullah Wahba Library, Cairo, 1967.

[9] Ismail Ghanem, The Named Contracts, Part 3, Mansha'at al-Maarif, Alexandria, 2003.

[10] Muhammad Muhammad Awad Salama, The death of the defendant, Dar Al-Wafaa for Printing and Publishing, Alexandria, 2012.

[11] Suleiman Mark - Al-Wafi in explaining the civil law, part 1.

[12] Tariq Kazem Ajeel, mediator in the contracting contract, 1st floor, Dar Al-Sanhoury, Beirut, 2019.