J. Basic. Appl. Sci. Res., 1(12)3182-3186, 2011

ISSN 2090-4304
Journal of Basic and Applied Scientific Research
www.textroad.com

Changes in the Circumstance of the Contract With a Comparative Approach to Common, Roman-Germany and Islamic Law

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ABSTRACT

As what is mentioned in the civil code of France, principle of sanctity or requirement of the contract is accepted as the strict liabilities between the parties. It is so that the significance of the contract is obligatory, just like the private rights. Nowadays, the significance of the contract is not strict, but it is variable and depends on the economic developments and the impact of external factors. These factors may cause some changes in the circumstance of the contract, in a way that one of parties exposes to hardship and even gets to the end of rope, while other parties earn much more profits.

In order to observe equity, regarding the changes in the circumstance of economy, modification of contract seems essential to equalize the promises of parties.

This paper investigates the topic of modification of contract in the common, Roman-Germany and Islamic law in a comparative approach. In different legal systems, requirement of contract (which also is known as sanctity of contract) obligates the parties to observe the significances. While this matter is observed, sometimes lack of balance between economic factors causes hardship for one of parties. In this condition, it seems the modification of the contract is essential to be done.

In the Iran law that is based on the jurisprudential rules, while there exists some principles such as "Non-hardship" and "there must be no injury", but there doesn't exist an integrated regulation that covers all the rules.

The theory of "making unforeseen incidents" -defined as: unpredictable- is accepted in the law of Europe. But, in the Roman-Germany law, subjects of "frustration of performance" and "making unforeseen" are isolated. It has many advantages.

In the articles 1147 and 1148 of civil code, "frustration of performance" is known as one of exclusions of liability factors that revokes the contract. But, in the theory of "making unforeseen", it is been consisted on continuing the contract and compensation based on the cooperation of mutual.

The proposed paper will get into different aspects of modification of contract, and investigates it in Common, Roman-Germany and Islamic law.

KEY WORDS: Contract; modification; jurisprudence; requirement of the contract.

I. INTRODUCTION

While jurisprudential systems strictly pay attention to fortification of requirement of the contract, but existence of some circumstances causes legislature to consider some exceptions. These circumstances include: "impossibility", "hardship", "force major", "impracticability", "frustration", "frustration of purpose", and "change of circumstance".

Theory of change in circumstance is absolutely new in Iran law (based on jurisprudential rules). It just covers the force major factors. When one of parties is unable to perform the promise for the force major reasons, it will be ignored to pay for the damage [1].

This paper tries to give a comparative approach to modification of the contract between Iran (Islamic), Common and Roman-Germany law. Proposed paper consists of 4 sections. In the second section, background information and definitions such as: contract, modification, jurisprudence and requirement of the contract will be talked. Third section is dedicated to modification of the contract in the law of different countries (containing Islamic, Common and Roman-Germany law). Finally, conclusion is placed as the forth section of paper.

II. BACKGROUND

In this section, we will present some basic information including words definition, description of contract, modification, etc.

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Contract

Contract is defined in Black's law dictionary as: "An agreement between two or more parties creating obligation that are enforceable or otherwise recognizable at law" [2]. But, Oxford dictionary of law gives a more complete definition: "A legally binding agreement. Agreement arises as a result of 'offer' and 'acceptance', but a number of other requirements must be satisfied for an agreement to be legally binding [3].

Article 1101 of France civil code defines the contract as: "A contract is made when one or more persons make a mutual agreement with other one or more persons, on certain things and that agreement is accepted by the latter person [4]. France law assigns the contract to persons not only to individuals. So, it covers individuals and corporations, and it is too beneficial.

According what mentioned, it seems the most perfect definition is: "Contract is mutual cooperation between two or more persons' intention, in order to create a legal nature." [5]

Modification of the contract

Contract is a self-made rule between parties, which is enforceable if it isn't in opposite of legislature command. While the explanation of enforce isn't regarded, which is dedicated to social convenience, legislature order or sovereignty of parties intention [6]. Nowadays, there is no doubt in acceptance of the indispensable effects of contract.

In civil code of France, it is mentioned: "Contracts that are in for of rules, have the same act of rule for parties". So, according to regulations, if a contract be concluded, parties are enforced to perform the promises. Basically, no one of parties can excuse and avoid of doing the promises unilaterally, for the reasons like changes in the circumstance of the contract or hardship [7].

Regarding the theory of modification of the contract, when an unpredictable occasion happens and it makes the performance very hard (because of destroying the economic balance of contract), modification can be done by the judge. So, the concept of modification can be defined as: "Modification is affecting the mutual consent and changing the condition of the contract in order to make it convenient to new circumstance or economic and social situation". Usually, some conditions will be omitted or added to the contract for modifying it. Sometimes, just the disproportionate conditions will be changed [8].

Islamic jurisprudence

Jurisprudence is defined as: "the philosophy or science of law" [2]. So, a jurisprudent is a person who is able to understand the law and extract the legal tips [9].

Islamic jurisprudence is defined as: "knowledge of minor and major canon acts from complex reason and sources" [10].

Requirement of the contract

Requirement of the contract states that the contract can't be canceled by one of parties, because it is irrevocable (not revocable contract). Principle of sanctity of contract is mentioned in all of legal systems and always been a favorite topic for law scientists and jurists. This principle is known as "Pacta sunt servanda" in Roman law and "Absolute contracts" in England law and "Presumption of irrevocability" in Islamic law [11].

Article 219 of Iran civil code states: "Contract made according to law are binding on the parties or their substitutes, unless they have been canceled by mutual agreement or for some legal reasons" [12]. This article is adapted from civil code of France.

III. MODIFICATION OF THE CONTRACT IN DIFFERENT COUNTRIES AND LEGAL SYSTEMS

Here we will investigate the subject of modification of contract in the different legal systems of different countries.

Jurisprudence and Islamic law

Considering the new topic of modification, Islamic law is potent enough to offer solutions for new problems. Solutions will be based on three theories:

- *Theory of implied terms:* In this theory, it is mentioned: "the term 'implied terms' is used for some cases that denote on promissory words which are stated in the contract" [13]. So, some cases that aren't predicted by the explicit words of contract (but they have a connection with the mean

of contract [14]), they will be included in implicit terms [15]. In another place, it is defined as: "promises that are agreed before the contract (which are pre-contract agreements) that aren't mentioned among the contract are known as implied terms".

- *Theory of there must be no injury or loss in Islam:* This theory is one of the most applicable and useful theories in jurisprudence that is based on Quran (holy book of Islam) and saying tradition of the prophet of Islam. Injury and loss aren't acceptable in Islam, and no one is allowed to injure the public or private right of others for individual benefits. Person is correspondent about remedy in this case [16]. According to the theory of no injury and loss, any unforeseen occasion that causes hardship for one of parties, the injuring contents must be omitted in the contract.
- *Theory of no hardship clause:* Hardship in the jurisprudential sources is synonym of "limitation", "poverty", and "guilty" [17]. The measure of hardship is common customs. According to this, performing a promise that is been done hard, is covered by hardship [18]. In other words, the action which is commonly intolerable is interpreted as hardship. If debtor is enforced to sell his/her primary facilities of life, and expose to hardship, in order to pay the debt, then the debt payment must be canceled [16][19].

Iran law is based on jurisprudential rules and famous opinions of religious scientists. It is mentioned about the modification of the contract that the rapid changes in the social and economic circumstance of society causes new circumstances that needs to modify the contract essentially.

In article 219 of Iran law, requirement of the contract is absolutely accepted; but some exceptions are considered, too. For example, following articles could be pointed out:

- Article 277: the obligator can't deliver only a proportion of the amount due to oblige, but a judge may grant an equitable period or arrange for payment by installment, if the debtor's financial situation calls for such action.
- Article 652: at the time of the lender's claims for payment, the judge orders a delay for payment by installment on behalf of debtor according to the circumstance [8].

In the international protocols like article 5 of declaration of Al-jazireh in 1980 between Iran and USA, circumstance changes were considered. According to this article: the tribunal shall decide all cases on the basis of respect for law, applying such of law rules and principles of commercial and international law as the tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances.

Modification of the contract in Common and Roman-Germany systems

Nowadays, modification of contract in common law and Roman-Germany systems is accepted in relevant countries. In some countries, it is entered to the rules, and in some other it is a part of stare decisis and scientists are interested in this topic. In the follow, we will get into this subject in legal rules of different countries.

England law

In the contract law, if the entire performance of a contract becomes fundamentally changed, without any fault by either party, the contract is considered dissolved [2].

USA law

In USA law, performance of the contract can be canceled in the situation that any unforeseen happening causes hardship for one of parties [20].

France law

In France law, the requirement of the contract was always been regarded by jurists, and performing of the content is seen enforceable.

As the article 1134 of France civil code states: Contract made according to law are binding on the parties or their substitutes, unless they have been canceled by mutual agreement or for some legal reasons [4].

In the France law, two processes are considered: "Force major" and "Frustration". Force major is defined as: an event or effect that can be neither anticipated nor controlled. The term includes both acts of nature (such as flood or hurricanes) and acts of people (such as riot, strikes or wars). When force major comes in, parties are irresponsible about the promise.

Frustration is the unforeseen termination of a contract as a result of an event that either renders its performance impossible or illegal or prevents its main purpose from being achieved. Frustration would for example occur if the goods specified in a sale of goods contract were destroyed (impossibility of performance) [21]. In the France law, frustration causes continuing the contract and remedy.

Germany law

In contemporary law of Germany, theory of unforeseen events is called "Geschäftsgrundlage" by Orteman in 1923 for the first time. According to this theory, the base of the contract is intended. When unforeseen events causes destroying the intention, modification can be done, because performing the promise will become hard for one of parties [22].

Switzerland law

Switzerland is one of countries that accepted the theory of unforeseen events [23]. The bases of this theory are "good faith" and "non-abuse of the rights" according to the opinion of scientists. When a party insists of continuing the contract in hard condition of other party, it is in opposite of two mentioned philosophies. Abuse of the rights has sanctity in the civil code of Switzerland. One of parties must ask for modification, or contract can be revoked by other party [24].

Italy law

Basically, in the Italy law, judicial modification of contract is accepted, and it is called "Eccessiva onerosita", which is based on equality. In the civil code of 1942, this theory is agreed. Before it, judges acted as case law [25].

Egypt law

Before 1948, the theory of frustration wasn't nominated, but after that time in the article 147 of civil code, the theory of frustration was accepted and it allowed to judges to modify the contract based on the new circumstance. Article 147 states: in the case of changes in circumstance of contract, and its cause of hardship for one of parties, in the way that he/she expose to large amount of loss, only the judge can modify the contract in a justified way and all the agreements between the parties are invalid [26].

IV. Conclusion

Regarding the requirement and the sanctity of the contract in different legal systems, the parties who are included in benefits, must be included in loss, too.

If an unforeseen event occurs after forming a contract and it destroy the economic balance of contract, it may cause one of parties expose to large amount of loss. If a party who is in loss was known about the new circumstance, it wouldn't create the contract. Here, the principle of good faith, theory of implied terms, theory of there should be no injury and loss, and theory of non-hardship are confirmers of modification of the contract.

Another point about modification that there exists in Iran law is that there is no explicit article about modification of the contract. Article 167 of constitutional law states: judge must adjudicate according to the law in all the claims, but if there isn't any explicit article related to subject, he must refer to the jurisprudential principles or basics of the law. Consequently, the following article is proposed to be added to Iran law as a complement: in occurring of an unforeseen event that causes destroying the economic balance and consequently hardship for one of parties of contract, judge must adjudicate according one of these principles in right order:

1. Granting a period of equity.
2. Arranging for payment by installment if the debtor's financial situation calls for such action.
3. Cancellation of contract.

Second solution is that the parties anticipate the changes of circumstance in the contract and force major in implied terms. Third proposal is that governments form an international uniform convention in order to solve the problem of possible conflicts between the governments.

At the last point, France legal system differs between force major and unforeseen events (that is very beneficial), but other European countries just accept the unforeseen events. Force major causes irresponsibility, but unforeseen event causes remedy and continuing the contract. Based on the principle of sanctity, it is a big advantage for France law.

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