

THE JUDGE'S POWER TO AMEND THE PENAL CLAUSE AND ITS GUARANTEES IN IRAQI AND COMPARATIVE LEGISLATION

Ibrahim Khaled Abdullah

Sfax University Faculty of Law

ibrahim.ka1995@gmail.com

Professor: Fathi Al-Hamedi

University of Sousse, Faculty of Law

Sfax University Faculty of Law

fethielhemdi@yahoo.fr

Ziad Tariq Ibrahim

Sfax University Faculty of Law

Zeyad.albaitar@uosamarra.edu.iq

Abstract

Through this research, we discussed the impact of the economic imbalance when implementing the contract as a result of the penalty clause, when the contract entered into force and especially when it was implemented. Maintaining the contractual balance is the goal of the contractual process and the goal of legislation since it existed to achieve justice and equality between the parties to the contractual relationship, and where the most important results were represented by making... The Iraqi legislator and comparative legislation are provisions granting the judge the authority to amend the amount of the penal condition in order to be proportional to the damage actually caused by public order. Thus, it is not permissible to agree to exclude it or determine its scope. Among the most important recommendations was the need for the Iraqi legislator to regulate contracts of adhesion that include arbitrary conditions in light of economic developments. Technology and the resulting misuse of economic power by the powerful party in the contract are modern and sufficient to protect the submissive party so that it does not fall victim to abuse or any exploitation when concluding contracts in its various forms.

Introduction

Due to the importance of the penal clause in contemporary life and the need of contractors for it, especially in the field of civil and commercial transactions, it has become widely used in many contracts and legal actions, as it is resorted to in order to ensure that the employer carries out its obligations, and in return, the employer requires it in order to guarantee the completion of the agreed-upon work. Without delay and according to the specifications agreed upon in the contract, and also in the sales contract, both the buyer and the seller resort to the penalty clause. The buyer enacts it against the seller's breach of non-delivery of the sold item or delay

in delivery, and the seller takes precautions against it in the case of non-payment of the price or delay in it, and it is also possible to resort to it. To the penal clause in lease contracts of various types, and in credit contracts and other named and unnamed contracts.

One of the most important internal reasons that lead to an imbalance in the contract is that the contracting parties include a penalty clause when concluding the contract to ensure that each party implements the obligations imposed on it under the contract, or that there is no delay in implementation and because the implementation process is not guaranteed, as one of the contracting parties may fail when implementing his obligation. In whole or in part, or it is delayed, so the laws in question allowed the contracting parties to agree in advance to determine the amount of compensation that one of them deserves in the event that the other party breaches his obligation, and this is what is called, in jurisprudence and law, the penal clause or the agreement compensation.

The study of the above topic will be within the legal provisions contained in the French Civil Code, the Egyptian Civil Code, and the Iraqi Civil Code, in addition to consumer protection laws in comparative studies.

Research Importance:

The importance of the research lies in the fact that it deals with the impact of the economic imbalance upon the implementation of the contract as a result of the penalty clause, because research into the issue of balance at the inception of the contract may be useless, as research in this aspect finds its place strongly when the contract enters into force, especially when it is implemented, so maintaining the balance Contractual is the goal of the contractual process and the goal of legislation since it exists to achieve justice and equality between the parties to the contractual relationship.

Research Problem:

The problem of the research is that the judge's authority to amend the contract constitutes, according to jurisprudence and the judiciary, a departure from the most important legal principles that govern the contractual relationship, which is enshrined in the rule of the contract by the law of the contracting parties, and this rule that we find a widespread departure from in some contracts in light of economic fluctuations or contracts of adhesion that include a condition Criminally, therefore, the problem revolves around what protection does the judiciary provide to the contractor in light of the economic changes that occur during the implementation of the contract? Therefore, how can the principle of binding force of a contract be reconciled with the judge's power to amend it?

Research Methodology:

To address the research problem, it was necessary to rely on the analytical approach, as this study needs in terms of analysis and interpretation of legal texts and the use of jurisprudential opinions and relevant judicial rulings, and also to rely on the inductive approach, as this study needs research into legal and judicial details and some jurisprudential opinions in order to reach a comprehensive base. Comprehensive and can be relied upon when necessary.

Search Plan:

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The second requirement: Pictures of the judge's intervention in amending the penal condition

The first section: Definition of the penalty clause and its characteristics

The penal clause has been given several names, including the penal clause, the fining clause, or the contractual penalty and contractual compensation. This clause is characterized by several characteristics that determine its legal system, and this is what we will explain in turn:

The first requirement: definition of the penal condition

The penal clause has been given several names, including the penal clause, the contractual compensation, the contractual penalty, the contractual penalty, the penal damages, and the penalty clause. However, the term penal clause has been preferred by jurisprudence, law, and the judiciary, because it generally refers to every condition added to the contract, and multiple definitions have been given for this term. Some of them are legislative definitions included in legal texts, and some are jurisprudential definitions.

The term penal clause, like other legal terms, has been the subject of multiple definitions, and this is common in legal thought. Referring to the legislation in question, we note that the French legislator defined the penal clause in Articles (1226) and (1229) of the Civil Code before the amendment of 2016. As it was stated in the first article that the penal condition is ((the condition under which a person undertakes to guarantee the implementation of an agreement to provide something in the event of non-performance. As for the second, the penal condition is defined as compensation to the creditor for the damages he suffers as a result of non-implementation of the original obligation or its late implementation. (Vlachopoulos, 1896,663).

It seems that the definition provided by Article (1226) is very general and does not mention anything about the nature and essence of the penal condition, and it is also characterized by incompleteness, as it only mentions the case of non-implementation, and from here we find that the legal definition has only a very relative value, and cannot It facilitates the work of pure theory except rarely. Therefore, we find that the other legislations subject to comparison did not provide a definition for it, but rather were satisfied with approving it and explaining its rulings, and left the matter of defining it to jurisprudence.

In the context of jurisprudence, many jurists have addressed the definition of the penal condition or the agreed upon compensation. One of them defined it as that condition that imposes on a person the necessity of paying an amount or something as a punishment for not fulfilling an obligation or delaying its implementation (Ibrahim, 2013, 46), and another also defined it as a prior agreement to Estimating the compensation that the creditor is entitled to if the debtor abstains from or delays implementation.

There are those who defined it as an agreement in advance, whether in the contract itself, or under a document, and neglected the case of delay in implementation despite its widespread adoption in many contracts. As for the second definition, which was mentioned in Article

(1229), it raised strong opposition related to the issue of the nature of the penal clause. The word “compensation” contained in it means that there is no place for applying the penal clause in the event that the debtor does not bear any damages, which is something that is difficult to accept in French law, because it contradicts in a manner Article (1152) of it was clear before the amendment, in addition to its contradiction with the legal nature of the penal clause that the French Civil Code wanted to create, and therefore it was agreed that the word (compensation) that appeared in Article (1229) of it means (appreciation or representation), and it was recognized that it is permissible The creditor may demand the penalty clause even in the event that there is no harm resulting from failure to implement the original obligation or its late implementation) (pleasure,1985,63)

It seems clear from the previous definitions that the penal condition is an agreement prior to the occurrence of the damage, and as long as it is an agreement, it must contain the general elements that must be present in any agreement or contract, which are the subject’s consent and the reason. This agreement is often mentioned within the terms of the original contract, but not There is something preventing it from being in an agreement subsequent to this contract, except that it must be before the occurrence of the damage for which this compensation is due, because if that is no longer it becomes a settlement.

Also, the object of the contractual compensation or the penal condition is often the payment of a sum of money, but this does not prevent it from being replaced by something other than money. It may be replaced by performing an act or abstaining from performing an act, and its object may be the requirement that all debt installments be due upon delay. To pay one of them on the agreed upon due date.(Al-Awji, 2022, 577).

In our opinion, the previous definitions focused on the aim and purpose of the penal clause, and that its aim is to punish the negligent debtor when he breaches the obligation imposed on him under the concluded contract, and at the same time, it is to compensate the creditor for the damage resulting from this breach. However, these definitions were limited to two forms of breach. With the obligation, they are failure to implement the obligation and delay in implementation, and I neglected to mention partial implementation and defective implementation.

Therefore, you can define the penal condition as a prior agreement contained in the contract itself or in a subsequent contract that includes an estimate of the compensation that the creditor is entitled to in cases where the debtor does not implement his obligation in whole or in part, and if the implementation is defective or there is a delay in implementation, under which the debtor is obligated to pay an amount of money. Or doing something or abstaining from doing something.

The second requirement: Characteristics of the penalty clause

The debtor's commitment to the penalty clause has several characteristics that determine his legal system. Firstly, it is an agreement to estimate compensation. Secondly, this agreement estimates the compensation due arbitrarily. Thirdly, it is a reserve obligation, as it can only be resorted to in the event that the debtor fails to implement the original obligation. Finally, it is a subsidiary obligation that follows the original obligation in its origin, continuation, and expiration. We explain below the characteristics of the penalty clause:

First: The penal condition is an agreement to estimate compensation: The penal condition is an agreement between the two parties to the contract in advance to determine the amount of compensation due in the event of breach of the contractual obligation, due to non-performance or partial or defective implementation, as well as delay in implementation, and therefore the penal condition is linked to the will of the parties. However, if the two parties to the contract do not spend on it, then none of them can use it as evidence against the other, as the penal clause is not imposed by the force of law, as the will of the parties is what creates it, and this is what the laws in question indicate(Abu Al-layl, 1995, 403).

It follows from this that the penal condition, whether it is a clause in the contract or a subsequent agreement, in its formation or establishment, the conditions for concluding any contract and the conditions for its validity must be met. The elements of the contract must be met, which are consent, subject matter and reason, and consent must be free of defects, and all provisions apply to it. Of invalidation and discontinuation. This is what was stated in a decision of the Iraqi Federal Court of Cassation ((that agreement compensation is not valid to claim except in valid contracts) (Al-Ajili, 2015, 146)

This is more clear if it arose under an agreement subsequent to the original contract, and there must be satisfaction with what goes on in the subsequent agreement, which is considered one of the subsequent contractual documents, and consent must come from the same parties to the original contract, and the necessary knowledge of the content of the agreement must be achieved(Ahwani , 2014,8).

Therefore, in order for the penal condition to be concluded, there must be mutual agreement between the two parties. The subject, reason, and subject of the penal clause is the commitment to compensation, which must be specific or clear in the agreement, whether in terms of the amount of compensation or the obligation that results from failure to implement the penalty clause, and since the intended goal of the penal clause is to ensure Implementing the original obligation, the basis of the reason for it is to ensure the implementation of the original obligation. In this regard, the reason means the motive sought by the contracting parties in agreeing on the penalty clause (Al-Bakri 1967, 76).

Second: The penalty clause is an arbitrary estimate of compensation. The penalty clause is a prior agreement to estimate the compensation due in the event that one of the contracting parties breaches his obligation resulting from the contract. Therefore, the lack of knowledge of the value and extent of the real damage is what gives the penalty clause an arbitrary character in estimating compensation, and the compensation may be The pre-specified damage value is less than, more than, or equal to (Sins.1952 ,62)

If it is in implementation of the arbitrary nature of the penal condition, that it is due even if it is not proportional to the damage that befell the creditor, and that the judge may not amend this estimate, then what is observed, and as we will see later, is that the matter is otherwise. The legislation in question has transferred the judge's authority to amend the penal condition by increase or The decrease is according to specific controls (Al-Bakri 1967, 76)., in order to achieve justice. Among these legislations is the French legislator, which was adopting the principle of stability of the penalty clause before the amendment of 2016, as Article (1152) stipulates that when the agreement stipulates that the contractor who breaches his obligation is obligated to pay a certain amount on As compensation, the other contracting party cannot

be awarded an amount greater or less than this amount, and the law issued on 7/9/1975 amended the provisions of the penalty clause and added a second paragraph to Article (1152) according to which the judge can now exercise judicial control over the penalty clause. Accordingly, he can amend the agreed-upon condition if the damage is excessive or excessive. Therefore, the penal condition does not exist according to the legislation being compared, including the French legislator, after amending the nature of penal compensation, and the compensation is estimated to the extent that the condition is proportional to the damage suffered by the creditor.

Third: The penal condition is a reserve obligation: The penal condition is not intended in and of itself, but it is a means to a specific end, which is to force the contracting party to implement his obligation. It is an indirect means of pressure on the debtor to fulfill the obligation. The penal condition is therefore a reserve obligation in implementation, because what is important in the obligation is the specific implementation. He is the one who is the original.

Therefore, the penal condition can only be implemented when the contractor fails to implement the original obligation in kind, as he is required to compensate the other contractor for the damages he sustained due to his failure to implement his obligation, delay in it, or flawed implementation, and this compensation is represented by the penal condition. The consequence of considering the penalty clause as a backup method is that the penalty clause is not valid and cannot be implemented except in the event that it is impossible to implement the original obligation in kind. If this concrete implementation is possible, then what is required is implementation. Also, the creditor can only demand that the debtor fulfill the original obligation he undertook as long as its implementation in kind is possible.

This is because the creditor cannot choose between the original obligation and the penal condition. Rather, he can only ask for the implementation of the original obligation if it is still possible. This is what distinguishes the penal condition from the discretionary obligation, and the debtor cannot offer to the creditor except the original obligation, that is, the first, which is to provide Specific implementation, therefore, compliance with the penal condition is not an alternative, under which the debtor can force the creditor to accept another payment in place of the original subject of the obligation.

Fourth: The penalty clause is a subordinate obligation: We saw above that the penalty clause is an agreement to estimate the compensation that is due to the creditor in the event of the debtor's failure to implement his obligations, and therefore the penalty clause is not considered intended in itself, as it is a means aimed at forcing the contracting party to implement his obligation and not breach it, so it is An accessory obligation follows the original obligation. As for the original obligation followed by the penal clause, it is what the debtor was originally committed to in the contract or other sources of obligation. The debtor may be obligated to transfer ownership or perform an act or abstain from an act.

The second section: Pictures of the judge's intervention in amending the penal condition

There is no doubt that modern civil legislation requires respecting the will of contracting parties

By legal texts, or amending it except by the will of the parties or for reasons determined by the law, and one of the results of this freedom is that this legislation grants the right to the

parties to the contractual relationship to determine in advance the compensation that will be incurred by the debtor as a result of his breach of his obligation, whether this determination came in the obligation itself or in a subsequent agreement. .

We also indicated that the legislation in question allowed the judge to amend the penal clause in the contract to the extent that it is compatible with the amount of damage, as the judge corrects the course of the condition by reducing its value to the extent that makes it an appropriate compensation for the damages sustained by the other contractor. The judge may also invalidate the condition. If the other party does not suffer any damage as a result of the contractor's breach of the obligation associated with the penalty condition, in the event that the contractor requests an amendment to the contract, specifically the part related to the penalty condition, as a result of increased expenses or delay in delivery or implementation in a defective manner that is not a major defect, to determine the forms of the judge's authority in Addressing the resulting contractual imbalance by amending the penalty clause according to the economic conditions in the contract, we will address the following:

The first requirement: The judge's authority to monitor the penal condition

In fact, the influence of the Iraqi and Egyptian legislators on the provisions of Islamic jurisprudence, which recommended the principles of justice and fairness on the one hand, and social and economic trends on the other hand, was clearly evident when they decided to protect and nurture the legal positions of the parties to the contractual relationship by granting the judge broad discretionary power to intervene regarding the penalty clause by increasing or decreasing it. And granted him the circumstances of non-implementation of the penal condition and exemption from it, and we will clarify the limits of this control and the position of Iraqi-Egyptian and comparative legislators regarding that:

First: Oversight of the legality of the penal clause and its adaptation

What is meant by oversight over the legality of the penal condition is that oversight carried out by the judge through the exercise of his mental activity in exercising his discretionary power to verify that the penal condition conforms to the provisions of the law because legality is related to public order. So whenever it appears to the judge that the penal condition is illegal, or that the obligation guaranteed by this The condition is illegal if it violates the provisions of the law or public order and public morals, so the judge must ignore this condition and rule it invalid(Shehata ,2000, 106)

Invalidation, then, is the legal penalty that results from the illegality of the penal condition, as it is not permissible for the penal condition to violate the restriction of legality by deviating from the permissible rules, as in the penal condition that guarantees the implementation of an agreement related to the estate of a living person)(Al-Ajili, 2015, 146). The penal condition may be limited by a restriction related to its scope or the extent of its implementation. If the law stipulates specifying the amount of compensation due when the contractor breaches his obligation, such as the delay of the carrier, for example, then the penal condition may not exceed the legally specified restriction.

It is logical that there is a contradiction between will and adaptation, because adaptation reveals a truth towards which none of the parties' will was directed. However, if some conditions are met, it is possible for us to choose to adapt the term to determine such a legal effect, and the adaptation that the parties to the contract claim is an expression of two wills. It

expresses the truth of the facts, and determines the subject of the dispute or the disputed issues. In theory, the judge of the matter cannot accept the incorrect adaptation even if the parties agree to do so. He must comprehensively survey the range of adaptations in the legal system and re-give them the correct interpretation.

Therefore, a legal act consists of two parts, a voluntary expression of intention upon which the law produces the effects that it deems necessary to achieve this intention in the best possible way in a legal form. The first part represents the internal composition of the act, and the second part defines the legal description of the condition that attaches to the act, had it not been for the first part. Because there was no action, and were it not for the second part, this action would not have been legal and would remain merely a fact that, if not devoid of effects, would at least be deprived of the legal effects resulting from the actions.()

Accordingly, the subject judge does not adhere to the description given by the parties, which may not match the actual legal description. The parties adhere to the description that is more consistent with their interests and demands, and the judge must search for the correct description in preparation for knowing the applicable legal texts, in order to impose the correct legal ruling on the case. The dispute before him, therefore, the judge gives the correct adaptation to the condition proposed by the parties. Is it a penal condition or not.() ?

The judge, in the process of giving legal adaptation to the condition before him, must investigate the common intention of the contracting parties, using the nature of the transaction and the circumstances and circumstances surrounding the contract. Examples of contractual conditions that have sparked controversy in French jurisprudence regarding their adaptation are the condition stipulated in the debt contract, which obligates the debtor to pay compensation. It is agreed upon on its amount if the debtor decides to pay the full value of the debt before its due date. Does it constitute a penal penalty or not? The French judiciary raised this controversy when the French Court of Cassation considered that this condition does not constitute a penal condition because putting this clause into effect is related only to the will of the debtor and that The calculation of this compensation is predetermined(Abu Steit, 2021,221)

Second: Monitoring the conditions for entitlement to the penalty clause

After the judge completes the first stage of research and ensures the legitimacy of the penal condition, that it does not violate the law or public order and public morals, and after the condition is properly legally adapted for the purpose of applying the appropriate ruling, he moves to the second stage, which is no less important than the previous legal stage. At this stage, it is required to verify the availability of legal conditions for applying the provisions of the penal clause, which represent the conditions for compensation due to error on the part of the debtor, the damage suffered by the creditor, and a general causal relationship linking error and damage, in addition to the condition of excuse (Grapevine.,2017, 108).

Since proof is the only legal means through which the contractual error on the part of the debtor, the damage suffered by the creditor, and the causal relationship between them is proven, the judge must ensure that the debtor's error is proven, whether his commitment to achieving a result or exercising care, and the burden of proof is determined according to the general rules in Proof: The creditor must prove the debtor's fault. The judge must also verify whether the damage is proven or not by denying the debtor and proving that no harm occurred

to the creditor, as well as the causal relationship between the error and the damage, as the judge of the matter makes sure that the debtor did not bear responsibility for himself by proving the cause. The foreigner to deny the error on his part, or that the damage was caused by the creditor himself, and also that he did not sever the causal relationship, otherwise the penal condition would be dropped, and otherwise the judge would prove that the debtor's responsibility existed after verifying his excuse (smsem, 2016, 32).

Third: Monitoring the conditions of excuses

It can be said that the excuse has a three-dimensional purpose. On the one hand, it aims to inform the debtor that the creditor has a confirmed interest in the immediate implementation of the obligation. On the other hand, it aims to give the debtor a final opportunity to implement the contract in kind. In the end, it gives the creditor the right to prove in an official manner that The debtor has not implemented his obligation, which enables the creditor to adhere to this implementation.

It is known that there are several ways to give a warning, including the usual way, which is a warning in an official paper through the minutes, or through a judicial declaration, or other legally recognized methods. Accordingly, the trial judge's oversight of the condition of the excuse and verifying it seems to be an easy matter, as it is sufficient for him to review the During the case file or what he receives from the creditor, evidence that he has notified the debtor, such as the official report signed by the court recorder, or notification of the arrival of a certified letter from the Postal Service, or a copy of the announcement issued in a reliable local newspaper (Al-Afishat, 2019, 23)

As for the judge's authority in this authority, it cannot be denied that it is one of the moral principles from which one cannot deviate, the duty to implement the contract and fulfill the covenant. Therefore, it is assumed that there is some justice in the contract. This is what made the legislator give it binding force, as the contract is binding whenever it is just or feasible. The contract derives its obligation primarily from its compatibility with the law, not from its compatibility with the will of the contracting parties. The contract is a tool regulated by the law to complete socially and economically beneficial operations. It is assumed that the contract concluded with the consent of both parties is fair and feasible. Therefore, it is binding, and this presumption protects the contract from arbitrary interventions by either the legislator or the judge, which may harm the stability of commercial transactions. However, this presumption is simple and refutable. It falls whenever there is an imbalance between the obligations of the parties.

We note in this regard that the judge's exercise of his activity in supervising the proof of eligibility conditions and the application of the provisions of the penal clause is one of the matters of fact over which the trial judge is independent through his wide discretionary authority granted to him under the law, and no one can comment on him in this regard except the Court of Cassation/Calling as long as He based his ruling on valid reasons.

The second requirement: Pictures of the judge's intervention in amending the penal condition
If the judge concludes that the basic elements upon which contractual compensation is based, or in other words the elements of civil liability, are available, which is that the creditor suffers damage and the debtor is held responsible for this damage, then the debtor is presumed to have made a mistake and the existence of a causal relationship between this act and the damage that

befell the creditor. It is also required that the debtor be given a warning in In cases where this excuse is necessary, the judge has the right to intervene and work to amend the amount of the penalty clause in proportion to the amount of damage caused. The amendment authority is represented by reducing the penalty clause if it is exaggerated, or working to increase its amount in the event that the debtor commits fraud, a serious error, or It shall not be adjudicated and the debtor shall be exempted from the penalty clause in the event that the creditor does not suffer any harm. We will explain these images as follows:

First: The judge's authority to reduce or increase the penal condition

The judge derives his authority to reduce or increase the penal condition through explicit legal texts contained in the legislation in question, according to which the judge is granted the authority to reduce the penal condition, if it is severe or if the original obligation has been partially fulfilled, and through the texts regulating the penal condition, in accordance with the legislation. Comparison shows us that the judge may reduce the penalty clause in two cases: the first is when the penalty clause is exaggerated to a large degree, and the second is when the debtor fulfills part of his original obligation.

Accordingly, the French, Egyptian, and Iraqi legislators granted the judge the authority to reduce the penalty clause if it was excessive, and this was confirmed by the Egyptian Court of Cassation in its decision, which stated: "...The existence of the penalty clause assumes that the compensation estimate is proportional to the damage suffered by the creditor." The judge must implement this condition unless the debtor proves that the estimate was greatly exaggerated. Likewise, it was stated in the decision of the Iraqi Federal Court of Cassation: "...the contractual compensation is not due if the buyer does not suffer any damage as a result of the seller's negligence, and the compensation may be reduced if the debtor proves that the estimate was excessive (Shehata, 2016, 33).

In light of the above, it becomes clear to us that in order to exercise his authority to reduce the exaggerated penalty clause, the judge must estimate the damage caused to the creditor as a result of the debtor's failure to fulfill his obligation, and compare it to the value of the penalty clause contained in the contract. If it becomes clear to him, through this comparison, that there is a lack of proportionality. Between the two values, and that there is a large exaggeration in the penalty estimate, he reduces the penalty condition, taking into account that this reduction is done within the limits of what eliminates the outrageous exaggeration only, and keeping the increase that is not exaggerated to a large or outrageous degree, that is, without reaching actual equality between the condition. The penal condition and the damage caused to the creditor, because the judge is not permitted to reduce the penal condition within the limits of the actual damage because that would mean wasting the will of the parties represented in the penal condition. Through this, the judge arrives at determining the amount to which the debtor is obligated as a penal condition, and is reserved for the penal condition. At the same time, it has a nature as a penalty for the debtor's breach of his obligation.

It is worth noting that the judge's authority to reduce the penalty condition is not limited to the condition agreed upon in the event of failure to implement the original obligation, whether in whole or in part, but rather extends to delay in implementation, as well as defective implementation.

As for the judge's power to increase the penal condition, if the judge has completed his oversight of the legality of the penal condition after verifying and verifying the availability of the previous conditions on which the responsibility of civilians is based, then he moves to the next stage, which is the stage of intervening in the penal condition, whether by increasing the amount of the penal condition or Reducing it, and Article (225) of the Egyptian Civil Code stipulates the judge's authority to increase the penal condition as follows: "If the damage exceeds the value of the agreed upon compensation, the creditor may not demand more than this value unless he proves that the debtor has committed fraud or a serious error," and as for According to the position of the French civil legislator, after adding the second paragraph introduced under the law issued in 2016 in accordance with Article (1231/259), which stated: "... Despite this, the judge may reduce or increase the penalty agreed upon if it is exorbitant or trivial with clear doubt. ".

Through this, we note that the French legislator has granted the judge the authority to increase the value of the penalty clause if it is trivial. The creditor must prove that the amount of damage exceeds the value of the penalty clause. If the creditor proves that, the judge will rule for him to increase it. However, if he cannot prove that, the judge will rule on the penalty clause as it is without an increase in its value. Hence, the French legislator granted the judge the authority to increase the amount of the penal condition just as he had to reduce it. The French legislator did not differentiate between the judge's power to reduce or increase the penal condition if this condition was exorbitant or trivial.(Nice, 2019, 403).

While the Egyptian and Iraqi legislators did not grant the judge the authority to increase the amount of the penalty clause, except in two cases, which are the case when the debtor commits fraud or a serious mistake that results in significant harm to the creditor only, and this is what is stated in the text of Article (225) of the Egyptian Civil Code, which stipulates However, if the damage exceeds the value of the agreed compensation, the creditor may not demand more than this value unless he proves that the debtor has committed fraud or a serious error. The aforementioned article matches the text of Article (3/170) of the Iraqi Civil Code, which stipulates: "But if the damage exceeds the value of the agreed upon compensation, the creditor may not demand more than this value unless he proves that the debtor has committed a serious act or mistake" ...

It is clear to us from these two texts that the principle is that it is not permissible to increase the penalty clause even if the damage to the creditor exceeds the value of the compensation contained in the contract under the penalty clause. The agreement of the contracting parties on the value of the compensation that is due to the creditor in the event of the debtor's breach of his obligation is obligatory to respect, even if the damage that befell the creditor exceeds that which the contracting parties can afford. However, as an exception to this principle, the Egyptian and Iraqi legislators allowed increasing the penalty clause in two cases, which are the case when the debtor commits fraud or a mistake. Serious, resulting in significant damage to the creditor.

Second: The judge's authority not to implement the penal condition

The basic idea on which the penalty clause is based is that it is a pre-arbitrary assessment of compensation for supposed damage resulting from delay in implementation or non-

implementation, and that it is subject by law to the general rules of compensation, as for its ruling, elements of error, damage, and a causal relationship must be present, so the damage is There, therefore, he is not worthy of the penal clause if compensation is stipulated in the agreement (), and therefore he is not worthy of the penal clause if there was no damage to the creditor, because damage is one of the elements of entitlement to compensation, so if there is no damage, then there is no damage, then compensation is due, and there is no place To enforce the penalty clause in this case

Conclusion

At the conclusion of this research, in which we discussed the judge's authority to amend the penal condition and its guarantees in Iraqi and comparative legislation by clarifying the definition of the penal condition and its characteristics, and then reviewing images that guide the judge to amend the penal condition, either by reducing it, increasing it, or exempting it according to the requirements of the reality of the situation surrounding its implementation. The contract is to achieve contractual balance, and based on the above, we have reached a set of results and recommendations, which can be summarized as follows:

First: the results

The judge's power to interfere with a contract is not a new issue, but was present in previous laws, such as Roman law, which created many means to protect individuals by interfering in their agreements by amending and terminating agreements that conflict with the principles of justice and fairness.

.2Giving the judge discretionary power to amend the penal clause of the contract ultimately leads to maintaining the balance of justice without imbalance and achieves justice in the stability of transactions.

.3The Egyptian legislator preceded the French and Iraqi legislators in regulating the provisions of the penal clause in terms of stipulating the judge's intervention in the penal clause by reducing or increasing it, or even implementing the penal clause and excluding it.

4Although the Iraqi legislator has regulated the provisions of arbitrary conditions and granted the judge the authority to rebalance the defective contract as a result of the arbitrary conditions contained in adhesion contracts, either by amending, canceling or exempting them, this treatment has become inadequate in light of the economic and technological development and what is included in the new contracts. Arbitrary conditions may lead to a contractual imbalance.

.5The Iraqi legislator and comparative legislation made provisions granting the judge the authority to amend the amount of the penal condition in order to be proportional to the damage actually caused by public order. Thus, it is not permissible to agree to exclude it or determine its scope.

Second: Recommendations

.The need for the Iraqi legislator to regulate contracts of adhesion that include arbitrary conditions in light of economic and technological developments and the resulting misuse of economic power by the powerful party to the contract. A modern and sufficient regulation to protect the adhering party so that it does not fall victim to abuse or exploitation when concluding contracts in its various forms. .

.2We hope that the Iraqi legislator will create a legal text that regulates the defects of exploitation and abuse, one of the defects of consent in contracts, according to specific cases.

.3We hope that the Iraqi legislator will amend the text of Article (170) of the Civil Code by clarifying who bears the burden of proof in the event that the debtor breaches his obligations and does not cause harm to the debtor as a result, following the example of the Egyptian legislator who clarified this issue and was decisive in it..

References

First: books

1. Saad Al-Sayyid Ibrahim, the Penal Code in Civil Contracts, a comparative study, 1st edition, Alexandria House of Books and Arab Studies, 2013.
2. Hamad Heshmat Abu Steit, The Theory of Commitment in the New Civil Law, Part 1, Sources of Commitment, Dar Al-Nahda Al-Arabiya, Cairo, p. 221.
3. Abdul Razzaq Ahmed Al-Sanhouri Al-Waseet in Explanation of the New Civil Law, Volume Two, Zain Legal Publications, Beirut, 2016, p. 8613.
4. Muhammad Nour Abdel Khaleq Shehata, The Authority of Adaptation in Criminal Law, Dar Al-Nahda Al-Arabiya, Cairo, 2000, p. 106.
5. Ibrahim Al-Desouki Abu Al-Lail: The Penal Code in Contracts and Legal Actions - According to Egyptian and Kuwaiti Laws, Dar Al-Nahda Al-Arabiyya, without a place of publication. 1982.
6. Ali, Saeed Al-Sayyid, The Principle of Payment by Non-Performance in the Contract, Al-Haram, Abu Amjad Printing House, 2002.
7. Hassan Ali Al-Dhanun: Explanation of the Iraqi Civil Law, Provisions of Commitment, Al-Ma'arif Press, Baghdad 1952.
8. Abd al-Baqi al-Bakri, Explanation of Civil Law, Part Three, Implementing Obligation, Baghdad, 1967.
9. Hossam El-Din Kamel Al-Ahwani: Reflections on the Penal Tape, Without Whose and Place of Publication, 2014.
10. Lafta Hamel Al-Ajili: Selected from the Judiciary of the Federal Court of Cassation, Civil Section, Part Five, Baghdad 2015.
11. Ibrahim Al-Desouki Abu Al-Lail, Damage Compensation in Civil Liability, Kuwait University Press, Kuwait, 1995.
12. Mustafa Al-Awji, Civil Law, Part One, Al-Halabi Legal Publications, Beirut, 2022.
13. Muhammad Shukri Sorour, Summary of the General Provisions of Commitment in Egyptian Civil Law, first edition, Dar Al-Arabi, Cairo 1985.
14. Second: University theses
15. Faisal Ibrahim Al-Afeishat, The Impact of the Penal Clause on Construction Contracting Contracts in Jordanian Law (Unpublished Master's Thesis). Mutah University, Mutah, Jordan, 2019.
16. Tariq Bahaa Al-Din Al-Ayashi, The Court's Authority to Amend the Penal Clause in Contracting Contracts (Unpublished Master's Thesis). Middle East University, Amman, 2016.
17. Third: Journals and research

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18. Abdul Majeed Al-Hakim, Abdul Baqi Al-Bakri, and Muhammad Al-Bashir, Provisions of Commitment, Part Two, Al-Sanhouri Legal and Political Science Library, Baghdad, 2015, p. 34.
 19. Radwan Al-Anabi, Technology Transfer Contracts and the Problem of Contractual Balance, published research, Al-Manara Journal for Legal and Administrative Studies, No. 18, 2017, p. 108.
 20. Murad Boudaya, Financial Contracts and the Corona Crisis, published research, Beit Al-Mashura Magazine, No. 13, Special Issue, State of Qatar, 2020.
 21. Jawad Kadhim Sumaisem, The Idea of Suspending the Implementation of a Lease Contract, a Comparative Study, Kufa Journal of Legal and Political Sciences, Volume 9, Issue 28, 2016.
 22. Mansour Hatem Mohsen, The relationship between the arbitrary condition and the penal condition: a comparative study, Al-Hilli Law Journal for Legal and Political Sciences, Volume 7, Issue 4, pp. 153-187.
 23. Zeina Qudra Latif, Thamer Jassim Muhammad, the penalty clause in players' professional contracts - a comparative study -, Journal of Legal Sciences, 2019, Volume 34, Issue 2.