

## MITIGATING CONTRACTUAL LIABILITY: AN ANALYTICAL STUDY OF ITS PROVISIONS AND MECHANISMS IN IRAQI CIVIL CODE

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### **Abstract**

This study examined the mitigation of contractual liability. Specifically, it analyzed the provisions and mechanisms for mitigation in Iraqi Civil Code. Moreover, it addressed the concept of contractual liability and the legal basis upon which it is based. It then reviewed the means by which this liability can be mitigated, whether through contractual agreements or legal texts that permit or limit its scope.

Furthermore, it focused on analyzing the relevant legal provisions and the extent to which it is permissible to agree to mitigate contractual liability, based on the general rules of Iraqi Civil Code. It also examined the restrictions imposed by the legislature to protect the weaker party in the contract and the extent to which mitigation is consistent with general principles.

Significantly, this study concluded that mitigation of contractual liability is a legal mechanism aimed at achieving flexibility in contractual transactions. However, it is also subject to restrictions that prevent total exemption from liability in cases of gross negligence or fraud. Furthermore, the provisions related to exemption vary depending on the nature of the contracts and their parties.

**Keywords:** contractual liability, mitigation of liability, exemption from liability.

### **1.Introduction**

Individuals within societies are bound by multiple legal relationships that result in certain obligations. The law regulates these relationships in a manner that ensures stability in transactions and achieves justice in society, through the legal rules established by the legislator in this regard, as well as the customs followed among them. Therefore, a breach by one of the parties to these legal relationships may arise, inevitably entailing liability. Considering that the provisions of this liability are not a matter of public order, a clause or condition may be added to the same contract or in a separate agreement that increases or reduces contractual liability. Accordingly, the provisions of this agreement must be followed as long as they are valid, comply with the law, and do not violate public order and morals, based on the principle that the contract is the law of the contracting parties.

#### **1.1.Research Significance**

The importance of studying the mitigating conditions for the provisions of contractual liability stems from the fact that such conditions exist in many contracts today, given the prevalence of the individual approach, which often does not restrict the freedom of the parties. It also affirms the principle that the contract is the law between the contracting parties, which makes the contract the law governing the relationship between its two parties. This in turn reinforces the principle of

freedom of contract, which allows individuals to create whatever contracts they wish, including agreements to mitigate liability.

### **1.2.Problem Statement:**

The Iraqi legislator never neglected the subject of contractual liability. Rather, it supplemented this subject with numerous restrictions and exceptions stipulated in the rules of civil law and other laws as they pertain to this matter, to protect the weaker party and prevent fraud or gross error on the part of the contracting party benefiting from the condition. Therefore, the Iraqi legislator placed several restrictions on these agreements regarding conditions that mitigate or aggravate contractual liability.

Thus, the research problem can be summarized in the following questions: Is it permissible for a person to absolve himself of his liability by an agreement prior to its occurrence? Are the conditions amending contractual liability considered conditions associated with the contract, or can they be considered a different category?

## **2.Methodology**

In studying the provisions related to mitigating the rules of contractual liability, the analytical and comparative approach, whenever necessary, are used.

### **3.Conditions and forms of contractual liability:**

Within the framework of examining the nature of mitigating conditions and explaining their forms, it is obvious that mitigating conditions take many forms, and the debtor's liability is mitigated by them. This is in contrast to the general rules if such a condition is not present. These conditions may appear in the form of transforming the type of obligation from achieving a specific result or purpose to an obligation to exercise diligence, or to the degree of diligence exercised by the creditor. They may also take the form of a reduction in the limitation period, or they may also appear in the form of a partial exemption from liability. Therefore, it is necessary to define mitigating conditions and explain their forms to determine the validity of these forms.

#### **3.1. The Nature of Mitigating Conditions for Contractual Liability:**

Definitions of mitigating conditions vary, but they all revolve around a single meaning, even if they differ in wording. Some have defined it as a condition that seeks to limit the liability of one of the contracting parties by specifying the damages that are compensated for as a result of breach of contract and to a certain extent, which is known in English law as a limitation of liability condition. It does not completely exempt one of the contracting parties from liability, but instead sets a limit or level for the maximum liability (Ali & Saleh, 2017). Others define it as an agreement that reduces the guarantee. This type of agreement is common in practical life, which in turn either addresses the acts that require the guarantee and reduces them or focuses on the amount of compensation and reduces it (Taha, 1970). In this respect, Dr. Suleiman Marcus believes that it means lifting part of the liability from the debtor and limiting his liability to the remaining part (Markus, 1988).

We note that some definitions limit mitigating conditions to reducing the amount of compensation or setting a level for the damages that can be compensated for. Although they are often implemented in practice, they appear in many forms.

Therefore, it can be said that agreements or conditions mitigating contractual liability are those conditions that regulate the effects of liability arising from a breach of a contractual obligation in a manner other than those regulated by the general rules stipulated in the law. This is achieved by mitigating liability, such as reducing compensation to the extent of the damage it warrants, e.g. a

smaller amount of compensation is required for the responsible party to pay, or reducing the period within which a liability claim may be filed, setting a shorter period than the statutory limitation period for such a claim. In addition, mitigating the degree of care and the type of obligation imposed by the general rules also reduces the degree of care and the type of obligation imposed by the general rules.

### **3.2. Forms of Mitigating Conditions:**

Contracting parties may include whatever they wish in their contracts, particularly mitigating conditions. The party with the power to exempt also has the power to mitigate, but subject to specific conditions and restrictions that vary from Iraqi law to other laws. In principle, agreements to amend the provisions of contractual liability are permissible and valid, provided they do not violate public order and morals, and do not include a primary or essential obligation in the contract, or other restrictions, which we will discuss in detail. Regarding mitigation conditions, their forms must be studied to determine their validity. This is what we will discuss in the following.

#### **3.2.1. Agreement to transfer the type of obligation:**

An agreement to amend and mitigate liability is achieved through an agreement between the contracting parties that the debtor will not be liable unless the creditor proves that the debtor failed to exercise the required care, even though, in principle and under general rules, he is responsible for achieving a result. If it is agreed that the debtor will not be liable for his actions, which are purely error-free, such an agreement leads to the obligation being transformed from an obligation to achieve a goal to an obligation to exercise diligence, and the creditor must prove an error on the part of the debtor, even if it is trivial (Al-Sanhouri).

This agreement can also be made in the form of proof—shifting the burden of proof—by agreeing that the burden of proving fault is shifted to the creditor. Such an agreement results in the debtor not being liable for their own faulty actions. Consequently, the creditor does not benefit from the presumption of non-performance, since, under general rules, the debtor is considered liable for failure to perform his contractual obligation, even if he is not at fault. This agreement thus leads to the same result: the debtor is liable for failure to exercise due diligence, not for the failure to achieve the result. These forms are considered valid and permissible, as they are based on the freedom of the contracting parties to structure their contracts as they wish and include the terms they agree to, as long as they do not violate public order and morals (Amro, 2022). It is worth noting that such a condition leads to the nullification of the contract and deprives it of its most important effect. Such results may be apparent in relation to the exemption clause. While they are considered impermissible, they are implicit in the mitigation clause, especially in this form.

#### **3.2.2. Agreement to mitigate the degree of care:**

The obligation to exercise care (or the obligation to exercise a means) represents the debtor's duty to exercise due diligence in fulfilling the obligation without requiring him to achieve the result the creditor hopes to achieve. However, the debtor may only be required to exercise this degree of care, the degree of which is usually stipulated in the contract or the law. In such cases, the debtor has fulfilled his obligation if he exercises this care, even if the intended purpose is not achieved. If his care in his personal affairs is less than this, he must exercise the care of an ordinary person in fulfilling it (Al-Sadi & Hassan, 2022). This care is average, as deduced by the trial judge from the nature and type of the work. The required care, which negates contractual error, is the care exercised by a person like the debtor placed in the same external circumstances that surrounded the debtor during the fulfillment of the obligation (Tanago, 2009). This care is according to the experience that the debtor possesses and his practice of his profession (Talaba, 2019). The basis

of care is what the vigilant debtor provides from among his colleagues in terms of knowledge in the circumstances surrounding him while practicing the work, taking into account the established scientific principles and traditions of the profession and regardless of the issues on which the people of this profession differ (Talaba, 2019).

Jurisprudence holds that such agreements do not raise a problem in distributing the burden of proof, as the burden of proof remains on the creditor. Furthermore, the commitment to this condition requires proof of a failure to exercise the agreed-upon diligence, not the diligence required by law. Rather, it raises a problem related to interpreting the will of the parties themselves (Fadel, 2022). However, the problem arises in determining the extent of the diligence exercised by the debtor in his personal affairs. This diligence varies from person to person. There would be a careful person who exerts more diligence in his personal affairs than someone of average diligence. It is impossible to accurately determine the extent of this diligence, which renders the dispute in this matter settled in favor of the debtor, who will evade his obligation through claims that may be false, which will cause him to be lax in fulfilling his obligation (Iraqi Civil Code).

### **3.2.3. Partial Exemption from Liability:**

Partial exemption from liability means an agreement to partially exempt it from liability related to a portion of the liability arising from the obligation or part of the obligation. However, this distinction is in reality formal and has no impact on the provisions applicable to both (Anil Salam, 2003). We can apply the same provisions to total and partial exemptions from liability (mitigation agreement). This form is valid and permissible under the law, provided that the partial exemption clause does not violate public order or morals and does not include a substantive obligation in the contract. An example of partial exemption is agreeing on a specific amount of compensation, limiting it to a certain percentage of the damage incurred by the creditor. In service contracts, it may be agreed to limit the service provider's liability to the agreed-upon fee (Zaki, 1990).

## **4.Exceptions to Conditions for Mitigation of Contractual Liability:**

There are two exceptions to mitigation clauses, which can be considered general exceptions applicable to all agreements and conditions: fraud and gross negligence. While the debtor can exonerate himself for minor negligence, he cannot exonerate himself if he commits a gross error or fraud, because fraud nullifies everything. Therefore, these exceptions must be addressed within the framework of agreements or conditions for mitigating contractual liability, and their impact must be explained if they are issued by the debtor personally, as well as if they are issued by persons employed by the debtor to implement the contractual obligation, as explained below.

### **4.1.Fraud:**

Fraud has been defined in several ways. Some Egyptian jurisprudence has held that it is a type of intentional error committed with the intent to harm others. The intent to deceive is always hidden, such that if it were to become apparent, the harm would not occur. Collusion is not required. Furthermore, fraud is inferred when a person concludes an action or takes a procedure that is not based on the good faith required when conducting transactions, and intends to harm others, such that if the third party to whom it is directed had known, they would not have accepted it and would not have proceeded to conclude the transaction. Others have defined it, according to the traditional concept of fraud, as any act or omission that leads a person to evade their duties and obligations, which they would otherwise be expected to perform with the care and diligence of an ordinary person (Talaba, 2019).

Traditional jurisprudence has adopted this concept, which equates fraud with intentional error, and considers both to express the intent to commit the act and the pursuit of the resulting consequences. The modern approach has expanded the concept of fraud, with the French Court of Cassation adopting a broader approach, considering that the deliberate failure to perform a contractual obligation constitutes fraud, even in the absence of the debtor's intent to harm the other contracting party (Marcus, 1988). This is indicated by Article (2/452) of the Egyptian Civil Code, which states: "2- The seller may not invoke the one-year limitation period if it is proven that he intentionally concealed the defect through fraud." This is also included in the second paragraph of Article (570) of the Iraqi Civil Code, which states: "The seller may not invoke this limitation period due to the passage of time if it is proven that concealing the defect was fraudulent." (Al-Dhanoun, 2006). Legislation has unanimously ruled out the permissibility of agreeing to amend the provisions of contractual liability by mitigating or exempting them if these agreements are based on fraud or gross negligence. The Iraqi legislator permitted, in Article (2/259) of the Iraqi Civil Code, an agreement to exempt from contractual liability. Therefore, it is a fortiori permissible to mitigate liability, as we mentioned earlier, since whoever has the power to exempt also has the power to mitigate liability. However, the said article added in its second paragraph that exemption and thus mitigation are not permissible in the event of fraud or gross error on the part of the debtor in all forms of mitigation conditions, regardless of the legal basis upon which these forms are based, i.e., forms of mitigating conditions. It states: "It is also permissible to agree to exempt the debtor from all liability arising from the failure to perform his contractual obligation, except for that which arises from his fraud or gross error...". Therefore, it is a fortiori impermissible to mitigate liability. This is also stated in Article (759) of the Iraqi Civil Code: "Any agreement that includes an exemption or limitation of the warranty against exposure or defect shall be null and void if the lessor fraudulently concealed the cause of this warranty." Therefore, any condition in the contract shall be void if fraudulently committed by the debtor, regardless of the condition.

#### **4.2.Gross Error:**

The term "gross error" refers to the failure to perceive or anticipate what every individual should or should necessarily perceive or anticipate. In the words of the jurist Potier, "It is an error that would not be committed by the least intelligent, discerning, and careful person." Dr. Suleiman Markos also defined it as "what would not be committed by a person of little intelligence and care, and it amounts to fraud." (Marcus, 1988).

As for intentional error or deliberate error, it is noted that it is greater in degree and gravity than gross error, because the former inevitably and certainly involves malicious intent. This intent is directed toward harming others. As for gross error, it is not necessary for malicious intent to accompany it. In other words, we may be dealing with a gross error without the perpetrator intending to cause harm or bring about harmful consequences resulting from their positive or negative stance. It was logically necessary to note what this distinction between gross error on the one hand and intentional error on the other hand leads to, which is the distinction between gross error and fraud, as long as fraud is intentional in itself (Al-Ardi, 2020). However, we find in Roman proverbs that gross error is equivalent to fraud. Many French legal scholars have taken this Roman proverb as a rule that must be accepted, and the French judiciary, in turn, has taken it, headed by the Court of Cassation. The jurists who go to take this rule explain that on the basis that it is very rare for the affected party to be able to establish evidence that the perpetrator intended to cause him harm, that is, his intention. For this reason, the legislator was satisfied with making gross error a presumption of this intention and of the perpetrator's deception and intention.



In this sense, Dr. Hassan Ali Al-Dhanoun argues that there is no doubt that sound logic dictates that the occurrence of a gross error constitutes a presumption of the perpetrator's fraud and bad faith. However, this presumption is not a legal presumption, but rather a judicial presumption that guides the judge in each single case. There is no link between gross error and fraud or intent; they are two different types of error unless the law explicitly provides for this (Al-Dhanoun, 2006). The legislator may sometimes intervene to equate fraud and gross error in the judgment. In Iraqi Code of Civil Procedure No. 83 of 1969, the Iraqi legislator referred to this situation in Article (286) when it stipulated that either party to the dispute may file a complaint against the judge, the court panel, or one of its judges in the following cases: 1. If the defendant commits fraud, deception, or a gross professional error while performing his duties in violation of the provisions of the law, out of bias, or with the intent to harm one of the parties. This is particularly the case of altering the statements of opponents or witnesses, or concealing documents or papers valid for reliance in the judgment. According to the above article, we find that among the reasons for filing a complaint against a judge is the latter's commission of fraud, deception (swindling), or gross professional error (Omar, 2002) when considering a case in which the complainant is one of the parties, in violation of the provisions of the law or motivated by bias toward the other party in the case to the detriment of the complaining party. An example of this is the judge's collusion with one of the parties to issue a judgment in his favor without justification (Al-Mahmoud, 2019). Article 494 of the Egyptian Civil Procedure Code also states that "Judges and members of the Public Prosecution may be sued in the following cases: 1- If the judge or member of the Public Prosecution commits fraud, deception, treachery, or a gross professional error in their work..." The above article specifies the cases in which a judge may be sued exclusively. If one of the cases stipulated in this article does not exist, it is not permissible to file a complaint against the judge for the actions he performs in his capacity as a judge, and it does not include his responsibility as an individual (Wali, 2017). We note that the legislator in the above articles has equated fraud and gross error in the ruling, in terms of the resulting effect, as grounds for litigating judges for actions they commit during their work.

In French law, it is noted that Article (505) of the repealed Code of Civil Procedure (amended by the law issued in February 1933) allows for a complaint against judges for fraud, deceit, treachery, or gross professional error committed by them. The same principle is also observed in the new French Code of Civil Procedure issued on December 5, 1975 (Abu Alwafa, 2015), which considered it a ground for litigating the judiciary and equated it with fraud, deceit, or treachery. The reason for this is that the judiciary previously required proof of fraud or deceit on the part of the judge to accept a complaint against judges. Such a claim was not accepted even in cases of proven gross error on the part of the judge. Therefore, the legislator intended to add gross professional error alongside fraud and deceit to make things easier for litigants (Al-Dhanoun, 1988). The legislator treated gross error in the same way it treated fraud, that is, the legislator equated gross error with fraud in the ruling. As for the French judiciary and its position on this equation - that is, between fraud and gross error - it rejects this equation as a general rule. But it excludes two cases from it, namely the case of agreements exempting from contractual liability and the second related to the abuse of the right to defense before judges.

Thus, the French law has equated fraud with gross negligence with respect to the conditions for exemption from contractual liability, as well as the conditions for mitigation. Dr. Al-Dhanoun notes regarding the French law that it recognizes the validity of the conditions for mitigation of contractual liability within the limits of minor negligence. Serious negligence, however, is linked

to fraud, whether the agreement involves exemption from liability or mitigation. This means that an agreement to mitigate liability is considered void in the case of gross negligence. The contracting party who has failed to fulfill the obligation is obligated to fully compensate the affected party, regardless of this agreement, as if there had been no condition or agreement to amend the provisions of liability, as the French Court of Cassation states (Al-Dhanoun, 1988). However, the Civil Chamber of the aforementioned court makes an exception in a special case, which allows a condition for mitigation of liability even in the case of gross negligence. It also permits it in the case of minor negligence, namely, transportation by rail, provided that this condition is solely in the interest of this chamber (Al-Dhanoun, 1988). Consequently, it recognized the validity of the liability mitigation clauses contained in the low-fare tariff, even if the carrier committed a gross error in implementing the contract, based on the fact that these tariffs determine in advance the consequences of the carrier's unintentional error, even if it was gross. The sender would have voluntarily agreed to limit the carrier's liability to the limits set forth therein in exchange for a reduced fare. This ruling was widely criticized by some jurists, particularly since this court (the Court of Cassation) did not justify this exception. It merely stated that in this case, there was no room to equate gross error with intentional error and treat them equally. This ruling, as is clear, clearly favors the railways. In this context, it is necessary to clarify the position of the Iraqi legislator in the Transport Law, which explicitly nullifies any condition that exempts or mitigates the liability of the carrier or any of his subordinates (Iraqi Transport Law). It is noteworthy that the French law did not distinguish between gross negligence committed by the debtor and gross negligence committed by his subordinates, as did Iraqi and Egyptian lawmakers. The ruling distinguished between fraud committed by the debtor or by the persons employed in the implementation of the obligation, as previously explained. The Lebanese lawmaker followed the French law and did not distinguish between gross negligence committed by the debtor personally and the negligence of his subordinates, as they are equal in the ruling, which is nullity (Al-Hakim, 1967).

In this regard, in order to exempt the contracting party or mitigate his contractual liability, in accordance with the conditions of exemption or mitigation, the contracting party must commit to implementing the contract in accordance with the principle of good faith. If this is not the case and gross negligence or fraud is present during the implementation of the contract, this will lead to the nullity of these conditions. This leads to a degree of intent to harm the other contracting party. With regard to gross negligence, the possibility of harm is realized, which is a degree of intent to harm, as is the case with negligent error. Thus, the elements of tortious liability are present, and the application of its provisions requires the invalidation of the conditions for exemption or mitigation of contractual liability in accordance with the provisions of the law. For example, if gross negligence is present on the part of the air carrier, it is obligated to pay full compensation, in accordance with the general rules, without the compensation specified in the Warsaw Convention (Warsaw Convention, 1929).

A Court of Cassation decision stated, "If Article (25) of the Warsaw Convention on Civil Aviation, before its amendment by the Hague Protocol, requires that a judgment awarding full and unlimited compensation be made, provided that it is proven that the damage claimed for compensation arose from the carrier's fraud or an error on its part that the law of the court before which the dispute is brought deems equivalent to fraud, and if the error equivalent to fraud, according to Egyptian law, is the gross error stipulated in Article (217) of the Civil Code, then in order to award full

compensation to the carrier airline, a gross error must have occurred on its part. The burden of proving this error falls on the plaintiff, and the trial court is also responsible for assessing the availability of evidence to prove it." (Talaba, 2019)

## **5.Conclusion**

### **5.1.Results**

1. One of the most important restrictions imposed by the Iraqi legislator in including conditions for amending the provisions of contractual liability is that these conditions do not violate public order and morals, because agreements that amend the provisions of contractual liability are limited to liability alone and do not extend to the obligation and its content.
2. The Iraqi legislator has made the conditions for mitigating and aggravating contractual liability void in the event of fraud or gross negligence on the part of the party for whose benefit the agreement was concluded.
3. The Iraqi Civil Code and the laws under study, based on the principle of the sovereignty of the will and the rule that the contract is the law of the contracting parties, permit agreement to aggravate and mitigate contractual liability, even if this is not explicitly stated. This can be inferred from the text of Article (259), which relates to amending the provisions of contractual liability. This is not permissible in tortious liability, which is considered a matter of public order and the parties may not agree to otherwise.
4. The Iraqi legislator and the laws under study prohibit agreement to mitigate contractual liability in some contracts due to their special nature and several other reasons.

### **5.2. Recommendations:**

1. We propose to the Iraqi legislator the necessity of establishing specific controls and restrictions in the cases where exemption is permitted, and a fortiori mitigating contractual liability for the actions of third parties employed by the debtor to perform his contractual obligation. This should not be permitted in an absolute manner, as this would lead to collusion or negligence on the part of the debtor in selecting the persons employed to perform the contractual obligation, especially since exemption and mitigation are permitted even for fraud and gross negligence.
2. We call upon the Iraqi legislator to invalidate conditions mitigating contractual liability for a fundamental or primary obligation in the contract, as well as those that are inconsistent with or contradictory to the contract's provisions. Accordingly, the text should be as follows: "Any condition that defeats the intended purpose of the contract or exempts or mitigates the debtor's contractual liability arising from his breach of one of the fundamental obligations in the contract shall be void."
3. We propose that the Iraqi legislator include an explicit provision prohibiting agreements that mitigate contractual liability in the event of physical harm to the other party, i.e., the contracting party not benefiting from the condition, following the example of the Lebanese legislator, which has prohibited such agreements and excluded the human body from such agreements. Accordingly, the provision should state: "Any condition that exempts or mitigates the debtor's contractual liability resulting from physical harm to the other contracting party shall be null and void."

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