



The Legal Implications of Applying the Theory of Force Majeure between Iraqi Law and the Vienna Convention.

¹Muslim Hassan Sabeeh kadhim , ²Dr.siamak Jafarzadeh, ³ Dr.reza nikkhah

¹Assistant Lecturer

Fin929.muslum.hasan@uobabylon.edu.iq

Urmia University, Faculty of Law, Private Law Department

corresponding author: Associate

²Professor .

S.jafarzadeh@urmia.ac.ir

Urmia University, Faculty of Literature and Humanities, Department of Jurisprudence and Islamic Law
(corresponding author)

³Associate Professor

R.nikkhah@urmia.ac.ir

Urmia University, Faculty of Literature and Humanities, Department of
Jurisprudence and Islamic Law

Abstract:

The theory of force majeure refers to an unusual or abnormal general state or a general material incident that was not anticipated by the contracting parties at the time of the contract. It causes a severe imbalance in the economic equilibrium that existed upon the contract's conclusion, making the debtor's fulfillment of their obligation threaten a significant and uncommon loss in transactions. Consequently, the debtor is not compelled to execute the obligation as stated in the contract but is instead relieved to a degree dictated by justice⁽¹⁾

The will of the parties alone determines the conditions of the contract, the obligations of the parties, and the resulting effects. However, this will may encounter unforeseen obstacles at the time of contracting, represented by unforeseen circumstances before execution, which lead to the debtor's significant distress or loss. In such cases, the judge may amend the contract by reducing the debtor's obligations, increasing the creditor's obligations, or suspending the contract's execution for a specified period if there is a likelihood of the temporary circumstance's cessation, such as a sharp rise in prices due to halted imports for a limited time. Naturally, applying this theory entails consequences that we will elaborate on in this study. Initially, we can state that if the conditions of the force majeure theory are met, it results in two main effects:

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First / Continuity of Contractual Obligations:

The primary goal of applying the theory of unforeseen material circumstances is to enable the contractor with the administration to fulfill their contractual obligations as long as it is possible and within their

¹ Bashar Hazbar Abbas, "The Theory of Force Majeure in Iraqi Civil Law," Faculty of Law and Political Science, University of Diyala, 2017, p. 9.

capacity to ensure the continuous and regular functioning of public services. Therefore, the contractor facing unforeseen material difficulties must continue executing the contract as long as it is not impossible. If the contractor halts execution citing these material difficulties, they are at fault and bear the consequences of this cessation. The administration may impose administrative penalties on them; however, they may be exempt from delay fines if these difficulties caused the delay⁽²⁾).

Second / Full Compensation for the Contractor:

The main effect of applying the theory of unforeseen material difficulties is granting the contractor with the administration who faced such difficulties the right to claim full compensation for all damages and expenses incurred in addressing these difficulties. This compensation deducts the losses caused by the contractor's own errors, such as neglect in studying the soil and site for the contract despite the administration providing information or failing to use modern technical means in executing the contract⁽³⁾). In Iraq, despite Article (12) of the General Conditions for Civil Engineering Works mandating the administration to pay additional reasonable costs verified by the engineer for exceptional natural conditions (excluding climatic conditions) or unforeseen artificial obstacles, Article (6 / First / C) of Instructions No. (1) for implementing Public Contracts Law No. 87 of 2004 only mentions extending the contract period if exceptional unforeseen circumstances occur that neither party could anticipate or avoid. Hence, we propose that the Iraqi legislator adds a provision to this article embodying the content of the previously mentioned Article (12) of the General Conditions. We conclude from the theory of unforeseen material circumstances that it is similar to the theory of force majeure in many aspects, primarily in restoring the financial balance of the contract after the occurrence of unforeseen, exceptional circumstances that lead to the contractor's distress and inability to fulfill their obligations without additional expenses, prompting the administration to compensate the contractor in both theories

The distinction lies in the source of the act prompting the application of the theory of unforeseen material difficulties, which requires that these difficulties be beyond the will of either the administration or the contractor. If the difficulties stem from administrative interventions, the theory of unforeseen material difficulties does not apply; instead, the theory of the sovereign act or the theory of force majeure applies as appropriate. Additionally, the application of the theory of force majeure requires a disruption in the contract's economics, unlike the theory of unforeseen material difficulties. The source of the circumstances may vary, whether economic, administrative, or natural, whereas unforeseen material difficulties pertain to natural phenomena alone. Thus, if the conditions of the theory are met and the theory of force majeure is established⁽⁴⁾, its effects will follow. Article (146) stipulates that the judge may reduce the burdensome obligation to a reasonable extent if justice so requires, exercising exceptional discretionary power to amend it. Therefore, it is essential to understand the nature and limits of this discretionary power concerning a contract contemporaneous with a force majeure event that exposed the debtor to significant loss, which we will discuss as follows:

First: The Nature of the Judge's Discretionary Power

When applying the theory of force majeure, the judge's discretionary power surpasses the traditional duties assigned to him concerning the contract, which include interpreting the contract, defining its scope, and classifying it within specified regulations. The judge adjusts the contract by modifying the burdensome obligation of the debtor to a reasonable extent, exercising broad freedom in determining the method to alleviate the debtor's distress from contract execution. The judge's authority in amending the contract is limited only by the necessity to balance the interests of the contracting parties, driven by the pursuit of

²) Dr. Abdel Azim Abdel Salam Abdel Hamid, "The Impact of Force Majeure and Material Hardships on the Execution of Administrative Contracts," no publisher, 1990, p. 185

³) Dr. Abdel Azim Abdel Salam Abdel Hamid, "The Impact of Force Majeure," op. cit., pp. 165-166.

⁴) Dr. Anwar Raslan, "The Theory of Unexpected Material Difficulties," Journal of Law and Economics, Nos. 3-4, Year 84, 1980, p. 124

justice in reducing the onerous obligation to a reasonable level, and not by personal discretion⁽⁵⁾. The Court of Cassation ruled that according to the second paragraph of Article (147) of the Civil Code, if the conditions required by law for an unforeseen event are met, the judge has the power to adjust the contract by reducing the burdensome obligation to a reasonable extent. While the judge exercises his discretion to choose the appropriate method to address the situation, he does not relieve the debtor of all loss but mitigates the severe impact on the debtor, sharing the unusual loss equally between the parties, ensuring a fair balance of interests irrespective of the debtor's personal circumstances. The legislator has given the theory of force majeure an objective form, rejecting subjective or personal criteria.

Second: The Extent of the Judge's Discretionary Power in Amending the Contract Due to Force Majeure

The judge intervenes to amend the contract and alleviate the debtor's burden to a reasonable extent, but his authority remains confined to fulfilling the conditions and objectives intended by the legislator. The judge's power to reduce the burdensome obligation includes temporarily suspending the contract's execution until the unforeseen circumstance ceases or increasing the counter-obligation. The judge may also reduce the onerous obligation itself. The necessity to maintain the contract to achieve its intended goals and to balance the parties' obligations requires granting the judge broad discretionary power to address the economic imbalance and reconsider certain contract terms, giving it a new status to achieve its intended purpose. If the conditions stipulated by the law in the theory of force majeure are met, the judge restores the economic balance of the contract by increasing or decreasing reciprocal obligations, as will be detailed as follows:

1. Increasing the Counter-Obligation to the Burdensome Obligation

In cases of a price increase of the subject matter of the obligation, the judge may raise the contractually agreed price so that the creditor shares part of the unforeseen increase in the price, while the debtor bears the expected customary increase⁽⁶⁾. The judge, within his discretionary power, can increase the obligation corresponding to the one that has become burdensome for the debtor, ensuring that only the unusual increase is distributed between the contracting parties. For instance, if the debtor commits to supplying ten tons of goods to the creditor at a price of five thousand dinars per ton, and prices rise due to exceptional events to ten thousand dinars per ton, the judge may raise the agreed price. In such a scenario, the price per ton might be adjusted to seven thousand dinars, reflecting an equal distribution of the five thousand dinar increase between the parties. The creditor then has the right to choose either to purchase at this new price or to rescind the contract. However, the debtor is obliged to fulfill the obligation according to the judge's contract modification. Notably, any adjustment only applies to the period during which the exceptional circumstance persists; once the circumstance's effect ceases and the contract period has not yet ended, the contract regains its original binding force⁽⁷⁾.

2. Reducing the Burdensome Obligation to a Reasonable Extent

The judge may reduce the debtor's burdensome obligation to an extent deemed sufficient to alleviate the obligation⁽⁸⁾. The judge cannot distribute the burden among the parties except for the unusual increase. For example, if a person commits to supplying another with one hundred tons of rice, but prices rise significantly due to exceptional events, the judge may reduce the quantity the debtor must supply to a reasonable extent, making the execution of the obligation less burdensome for the debtor. The creditor can

⁵) Yassin Mohammed Al-Jubouri, A Concise Commentary on Civil Law, Vol. 1, Sources of Obligation, Comparative Study, 1st ed., 2008, pp. 399 and following.

⁶) Ammar Mohsen Kazzaar Al-Zarfi, The Theory of Unexpected Events and Its Impact on Restoring Economic Imbalance in Contracts, Master's thesis, University of Kufa, Faculty of Law, 2015, p. 15.

⁷) Yassin Mohammed Al-Jubouri, op. cit., p. 4000 and following.

⁸) Abdul Razzaq Al-Sanhouri, The Intermediate Commentary on the New Civil Code: Theory of Obligation, Sources of Obligation, Part One, Dar Al-Nasher for Egyptian Universities, Cairo, 1952, p. 647.

then choose either to accept the judge's ruling or to rescind the contract without compensation⁹). The judge employs this reduction method to alleviate the burden and restore economic balance, especially when an increase in price threatens the debtor with a substantial loss, benefiting the creditor. According to the 1980 Vienna Convention, rescission is subject to the right holder's discretion. However, the debtor must notify the creditor of the rescission to inform them of the intent to rescind. Some scholars believe this requirement originates from German law¹⁰). Article 26 of the Vienna Convention states, "A declaration of avoidance of the contract is effective only if made by notice to the other party." This requirement is rooted in the principle of good faith, as rescission may impose heavy burdens on the other party. Knowledge of rescission allows the other party to avoid such burdens, such as incurring significant expenses due to unforeseen circumstances, which could be avoided if the rescission is known. Other scholars argue that the notification requirement stabilizes contractual relations between the seller and the buyer because if the creditor is unaware of the rescission, the contractual relationship remains despite the fundamental breach¹¹).

3. Restoring Balance by Suspending or Rescinding the Contract

If the balance between reciprocal obligations is disrupted, it can be restored by suspending the contract's execution or rescinding it, as follows:

1: Suspending Contract Execution Until the Exceptional Circumstance Ceases

An exceptional circumstance may be temporary, potentially dissipating in a short period. In such cases, the judge may order a temporary suspension of the contract's execution until the exceptional circumstance ceases, with the debtor remaining obliged to perform once conditions normalize. The debtor is only exempt from due compensation for the delay. If the judge ascertains that the exceptional circumstance is temporary and does not significantly harm the creditor, he may suspend execution until the circumstance's effect vanishes.

Despite the judge's discretionary power, he does not have the right to rescind the contract, as rescission would unfairly place the burden of the exceptional circumstances solely on the creditor. The fundamental principle of the theory is mutual sacrifice by both contracting parties. If the contract extends beyond the exceptional circumstance's effect, the contract regains its binding force¹²).

2. Rescission of the Contract

The general rule in applying the theory of exceptional circumstances does not permit the rescission of the contract but rather allows for its modification to a reasonable extent to restore balance to the contract without terminating it. However, in some cases, exceptional circumstances may render the contract's execution impossible, making its modification or temporary suspension futile. In such cases, rescission of the contract becomes the appropriate or only viable solution. The question then arises: what happens to the contract in this scenario?

Some legal systems allow for the rescission of the contract when its execution becomes impossible due to an exceptional circumstance that excessively burdens the debtor, making continued performance damaging. The Vienna Convention also refers to the possibility of rescission after granting the debtor an additional period to fulfill the obligation, during which the debtor fails to comply. Article 49 of the 1980 International Sales Convention states: "The buyer may declare the contract avoided (a) if the failure by the

⁹) Abdul Razzaq Al-Sanhouri, op. cit., 1952, p. 400.

¹⁰)

Abdul Aziz Jamal Mahmoud, Compliance Obligations in International Sales Contracts, Doctoral Thesis, University of Cairo, 1996, p. 391.

¹¹) Fatiha Ben Zrouk, Contract Termination According to the Vienna Convention 1980, Master's Thesis, Faculty of Law, University of Algiers, 2015, p. 56.

¹²) The Impact of Conditions on Civil Contracts: An Analytical Study in the Draft Law, article published on [attachedfile<w.w.walazhar.edu.ps](http://attachedfile.w.w.walazhar.edu.ps).

seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; (b) in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 63, or if he declares that he will not deliver within the period so fixed.

Similarly, Article 63 indicates that the seller may declare the contract avoided if the buyer's failure to perform any obligations constitutes a fundamental breach or if the buyer fails to pay the price or take delivery of the goods within the additional period fixed by the seller according to paragraph (1) of Article 63, or declares that he will not do so within that period⁽¹³⁾

As for the general rule followed in Iranian law when no grounds for rescission exist due to non-performance of contractual obligations, rescission is considered a unilateral legal act emanating from the will of the right-holder or their legal or contractual representative. This rule closely mirrors the provisions of the 1980 Vienna Convention in this regard, aiming to secure and protect the economic interests of both parties and the state. It also alleviates the burden on the courts, aligning international trade practices with Iranian law. However, what distinguishes Iranian law from international custom, as indicated by the convention, is that rescission under Iranian law does not require adherence to specific procedures. According to Article 449 of the Iranian Civil Code, "rescission occurs through any declaration or action indicative of it." It is evident that the right of rescission remains actionable and enforceable as long as it has not been waived by the right-holder. From an evidentiary standpoint, rescission necessitates its establishment and manifestation through all means indicative of the intention to rescind. Since rescission is regarded as a legal act, it must satisfy the conditions of capacity⁽¹⁴⁾. Although the right-holder does not need to approach the court to effectuate rescission⁽¹⁵⁾, if the court issues a rescission judgment, such a judgment is declaratory rather than constitutive (or confirmatory)⁽¹⁶⁾. Nevertheless, certain cases under Iranian law require a court decision for rescission, such as the Law on the Regulation of the Relationship Between Landlords and Tenants, which mandates that rescission in rental contracts covered by this law be judicial, as stipulated in Articles 12 and 14 of the aforementioned law. In these circumstances, the party seeking rescission must approach the court and request it, after which the court will decide on the rescission. Thus, the court's decision is not merely declaratory but constitutive of rescission. In contrast, under Iraqi law, rescission is judicial as per Article 177 of the Iraqi Civil Code, differing from both Iranian law and the 1980 Vienna Convention, where the contractual relationship is dissolved only through a court ruling. Consequently, the Iraqi legislator has bestowed a significant role upon the court in evaluating and ruling on rescission requests. However, in certain situations in Iranian law, rescission can only be judicial, aligning with Iraqi law. An example is the Iranian Law on the Regulation of the Relationship Between Landlords and Tenants enacted in 1977, which prevents creditors from directly rescinding the contract and instead grants this authority to the court. Finally, it is observed that the Iranian legislator's view and the Vienna Convention, which render rescission subject to the creditor's will, are more consistent with the requirements of international trade, unlike the Iraqi legislator's view, which generally prescribes judicial rescission. Therefore, it is suggested that the Iraqi legislator make rescission subject to the creditor's will, requiring them to issue a notice to the debtor to demand performance and granting the judge a secondary role in assessing and ruling on rescission. On the other hand, directing the creditor to notify the debtor of

¹³) Ali Khairi Jabr, How to Execute Termination After Fulfilling Contractual Obligations in Iraqi Law and the Vienna Convention 1980, paper published in the International Journal of Humanities and Social Sciences, Issue 37, 2022, p. 38.

¹⁴) Rehrami Ahmadi, Civil Rights (3), Contract Law and Its Amendments, 2nd edition, Tehran, Mizan Foundation, 2007, p. 376.

¹⁵) Katouzian, Civil Rights, General Rules of Contracts, Volume 5, 2nd edition, Tehran, Bahman Barna Publishing Company, 1996, pp. 69-70.

¹⁶)

Sherwai Abdul Hussein, International Trade Law, 2nd edition, Tehran, Human Sciences Research and Development Organization, 2017, p. 293.

Nahrini Fereidoun, The Nature and Effects of Contracts in Iranian Law, 3rd edition, Tehran, Kankaj Danesh Publishing House, 2011, p. 146.

rescission, as stipulated by the convention, is a suitable solution to minimize losses incurred by the debtor. Thus, it is recommended that the Iranian legislator, at least in international trade, make notification of rescission mandatory for its effects to take place, ensuring economic protection for international trade participants in the event of an unforeseen circumstance and aligning with international perspectives in this matter.

There are also a number of economic effects resulting from the application of the theory of unforeseen circumstances, as follows:

Preservation and Protection of Wealth:

Wealth circulates among people in various forms, such as investments. Contractual exchanges, exemplified by negotiation contracts, are a means of investment.

Disruptions in the execution of these contracts can cause damage, burdening one party. Preservation of wealth is a key objective of Islamic jurisprudence, which has established legal provisions to achieve and protect it. Wealth is vital to life, and thus its preservation is crucial, facilitated by legal principles like the theory of unforeseen circumstances, which is a legal doctrine applied when its conditions are met. The role of this theory in preserving wealth is significant. Wealth must be circulated among people or invested, and contractual exchanges are a key investment method. Disruptions in contract performance can result in severe losses for one party if the contract remains binding, potentially leading to significant and unmanageable losses, causing the harmed party to withdraw from the market due to bankruptcy or fear of further losses. Since it is unacceptable to risk one's wealth in unreliable exchanges, the theory of unforeseen circumstances offers relief from obligations in the face of significant losses, encouraging investors to engage in the market without fear. Therefore, the theory acts as a form of credit, reassuring investors and promoting market participation⁽¹⁷⁾

2- Protection of Fixed-Income Individuals from the Effects of Inflation:

Individuals with fixed incomes, such as employees and retirees, whose incomes are stable and without additional sources, are adversely affected by inflationary movements. For instance, if the government engages in deficit financing, expanding its issuance of currency, prices will rise. Consequently, these individuals will struggle to cope with increased prices due to their fixed incomes, resulting in severe hardships if they have financial obligations stemming from deferred contracts. If the theory of unforeseen circumstances is applied, and their obligations are adjusted to a reasonable extent, it mitigates the impact of inflation, preserving the purchasing power of their income. Conversely, if their obligations are not adjusted, their incomes will be significantly eroded by inflation, more so than if the theory of unforeseen circumstances were applied⁽¹⁸⁾.

3- Preservation of Infrastructure and Public Interests:

Infrastructure, such as public facilities including roads, bridges, hospitals, schools, and universities, is vital for the state. Thus, it is essential to maintain it to continue serving the public⁽¹⁹⁾. Typically, public procurement guidelines include clauses on force majeure and unforeseen circumstances as per procurement laws. For example, if the state contracts a builder to construct major roads, tunnels, bridges, government complexes, or hospitals, and a disaster occurs—such as a pandemic, flood, or earthquake—that causes significant damage, the builder might face severe losses. If the contractor is required to adhere strictly to contract terms and prices despite these changes, it could severely harm infrastructure and disrupt public interests. The application of this theory ensures a fair distribution of the damage burden between parties, thus protecting the interests of competent contractors and preventing the disruption of

¹⁷) Mahmoud Fadhel Mahidat, Jurisprudential Rules and Their Effects on Financial Transactions, Theory of Emergency Conditions

¹⁸) General Iftaa Department, Jordan, n.d., p. 23.

¹⁹)

public services⁽²⁰⁾ . Failure to adjust the obligations could drive competent contractors out of the market, replacing them with less reliable ones, potentially leading to increased prices for future contracts and compromising the state's ability to select qualified and trustworthy contractors. The theory of unforeseen circumstances can balance the burdens and maintain the quality and reliability of public projects, thereby safeguarding the public interest. These are some of the economic impacts derived from applying the theory of unforeseen circumstances to contracts with deferred performance, though there may be additional effects not covered here⁽²¹⁾ .

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²⁰) Mahmoud Fadhel Mahidat, op. cit., p. 24.

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