



The Legal Protection of the Employer in the Contract of Contracting .

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Abstract

The contract of contracting is defined as an agreement wherein one party commits to creating something or performing a task in exchange for compensation provided by the other party. This contract holds significant importance in economic life, as it pertains to a broad segment of the local market and extends to global markets, falling under the domain of labor commerce. Due to its importance and widespread application across various sectors—whether public, represented by governments, administrations, and public utilities, or private, encompassing individuals, projects, and private companies—nations have implemented laws to regulate such contracts.

The regulation of mutual obligations and rights between the parties to this contract benefits both the contracting parties and economic stability at large. Among the guarantees and provisions concerning the contract of contracting is the protection of the employer. The Iraqi law, for instance, has introduced a set of guarantees to protect the rights of the employer, enshrined in specific articles of the Iraqi Civil Code.

The contract of contracting is complex, encompassing numerous details regarding the nature of the work, its quality, the raw materials used, their quality, how they are provided, and by whom. It also addresses whether the contractor will personally undertake all tasks or delegate some to another contractor (subcontractor). Additionally, the contractor's obligations include exerting customary effort, safeguarding the employer's assets, and adhering to the terms and specifications outlined in the preamble of the contract. The principle of decennial liability, which holds both the contractor and the architect responsible for any defects in the completed work for ten years after its delivery to the employer, is also integral.

All these guarantees fall under the broader category of employer protection within this type of contract. This paper will briefly discuss these aspects in detail, hoping to provide valuable insights for the reader.

Keywords: Contractor, Civil Law, Contract of contracting, Employer, Legal Protection.

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Introduction

The contract of contracting has been regulated by the Iraqi Civil Code in the first section of the first chapter of the third part, which pertains to contracts arising from work. The Iraqi legislator has defined and structured this contract by outlining its definition in Article 864, the contractor's obligations in Articles 866-872, the employer's obligations in Articles 873-881, subcontracting in Articles 882-883, and the termination of the contract of contracting in Articles 884-890⁽¹⁾.

The Iraqi legislator defines the contract of contracting in Article 864 of the Civil Code as follows:

"A contract whereby one party undertakes to create something or perform a task in exchange for compensation agreed upon by the other party⁽²⁾."

This contract takes various forms and applications based on its type, nature, and scale:

1. Type: The nature of the work varies widely—some fall under construction, others under services, transportation, and more.

2. Scale: The scale of work differs—some contracts are small, involving simple technical tasks like blacksmithing or carpentry, while others are large, encompassing major building projects, public structures, roads, and bridges.

3. Nature: The contract is not confined to a specific task or subject—some involve physical work, such as transporting people, publishing, or construction, while others are intellectual, like a doctor's services or a lawyer's consultation with a client.

Distinction Between This Contract and Others

Contract of contracting vs. Sale

The contract of contracting pertains to work, while a sale concerns the transfer of ownership. This distinction brings about certain consequences:

1. The benefits derived from the sale price are subject to the provisions of Article 572 of the Iraqi Civil Code, whereas the compensation in a contract of contracting follows general principles.

2. There are notable differences in the provisions governing the determination of compensation in a contract of contracting and the price in a sale—Articles 526-527 govern sales, while Article 880 pertains to contracts of contracting in the Iraqi Civil Code.

3. A significant distinction between these two contracts lies in the nature of the obligations: the contract of contracting is not binding for both parties. One party may dissolve the contract of contracting by providing fair compensation to the other for any damage incurred, through unilateral will, similar to an agency contract. In contrast, a sale contract cannot be dissolved unilaterally, except by mutual agreement.

Contract of contracting vs. Employment Contract

Upon examining both contracts, one finds a strong resemblance between them, as they both revolve around work. Both the worker and the contractor are obliged to perform their tasks for the employer in exchange for pre-agreed compensation. However, the primary and crucial criterion for differentiation is subordination: the worker is subordinate to the employer, working under their supervision and direction, and is bound by their instructions. In contrast, the contractor operates independently of the employer, bound solely by the agreed-upon outcome. The employer holds no authority over the contractor's methods; the contractor independently undertakes the work, selects the means of execution, timing, and technical teams, without interference or imposed opinions from the employer, provided the work proceeds according to the established agreement.

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Based on the foregoing, we will examine the following topics:

First Section: Protection and Its Effects

- First Requirement: Methods of Protection
- Second Requirement: Effects of Protection

Second Section: Beneficiaries of Legal Protection for the Employer

Chapter One: Legal Protection and Its Effects

The primary obligation arising from the contract of contracting, which falls upon the contractor, is the completion of the work they have committed to. The contractor is bound to execute the work in accordance with the specifications and conditions agreed upon, as well as the standards and traditions of the craft⁽³⁾.

The contractor, under the contract of contracting, pledges to the other party—the employer—that they will create something or complete a task in exchange for a specific fee⁽⁴⁾. It is generally expected that the contractor will personally undertake the work they have committed to. However, this does not mean that the contractor must always perform the work personally, unless the nature of the work requires personal involvement, such as in the case of an artist or painter. The work may necessitate the assistance of another contractor, and even when another contractor is engaged, the work is still considered to have been completed by the original contractor. The additional contractor is deemed a subordinate to the primary contractor and is thus responsible to the original contractor according to the general principles of vicarious liability⁽⁵⁾.

In practice, both the primary and subcontractors engage in the work to achieve the agreed-upon objective with the employer, ensuring the seamless flow and consistency of the project. The subcontractor performs the work at the designated site, ensuring the completion of the agreed-upon tasks.

To thoroughly explore this topic, we will address the following sections:

First Requirement: Legal Protection

The contractor is defined as the individual entrusted with a task, whether it involves the construction of buildings, the establishment of structures, or other fields of work. This applies regardless of whether the contractor provides the materials for the job or someone else, such as the employer, supplies them. In either case, the contractor is bound by the specific guarantees associated with their role⁽⁶⁾.

Moreover, it is not necessary for a single contractor to undertake the entire construction. The employer may engage multiple contractors, assigning different aspects of the project to each: one for the foundation, walls, and roofing; another for carpentry; a third for metalwork; a fourth for plumbing and infrastructure; a fifth for electrical work, and so forth⁽⁷⁾.

The primary role of the contractor is to construct the building according to pre-established designs and plans, which includes managing the execution of the work and safeguarding the materials and tools involved⁽⁸⁾.

Although the contractor operates independently from the architect from a legal standpoint, as each has a separate contractual relationship with the employer, their liabilities cannot be entirely isolated from one another due to their practical connection. According to Article 870 of the Iraqi Civil Code, the architect, who

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is contracted to design and oversee the construction, shares responsibility with the contractor, who is bound by a contract to carry out the construction according to the agreed design⁽⁹⁾.

Thus, the liability of both the architect and the contractor is contractual, stemming from a breach of their contractual obligations. This liability exists whether explicitly stated in the contract or implied by law, given that such obligations are inherent in any contract of contracting⁽¹⁰⁾.

If either the architect or the contractor is found liable, they are obligated to compensate the employer for damages caused by the collapse of the building or any defects in it. Compensation is determined according to the general principles of civil law, covering both actual losses and lost profits. This includes the costs required to rebuild the structure if it has collapsed entirely or to repair any damaged parts. However, compensation is limited to foreseeable damages at the time of contracting⁽¹¹⁾.

Unforeseen damages are not compensable unless there is evidence of fraud or gross negligence on the part of the responsible party. The court may, instead of awarding monetary compensation, order specific performance, restoring the situation to its previous state. The choice between specific performance and monetary compensation is left to the court's discretion⁽¹²⁾.

The subcontractor is not liable to the employer but rather to the original contractor⁽¹³⁾, as there is no direct contractual relationship between the employer and the subcontractor. Thus, the employer cannot directly claim against the subcontractor but must do so through the original contractor⁽¹⁴⁾.

If the contractor violates the agreed-upon specifications or the standards required by the nature of the work, and the employer proves such a breach, the contractor is liable for compensation without the employer needing to prove fault. The violation of these conditions constitutes the fault itself.

The contractor can only escape liability by proving an external cause, such as force majeure, a sudden unforeseen event, or errors attributable to the employer or a third party⁽¹⁵⁾.

In summary, the contractor's obligations can be outlined as follows⁽¹⁶⁾:

Liability for the Quality of Materials

When the contractor undertakes to provide all or part of the materials for the project, they are responsible for the quality of these materials according to the contract's terms or prevailing customs⁽¹⁷⁾. The contractor is undoubtedly responsible for the quality of the work and is obligated to complete it in the manner agreed upon in the contract. If no specific conditions are outlined in the contract, the contractor must follow industry standards and craftsmanship traditions relevant to the work⁽¹⁸⁾.

The contractor is liable for any defects in the workmanship that would be considered unacceptable by the standards of the trade. If a defect is hidden, meaning it cannot be detected by the employer even after accepting the work, or if there is a non-apparent breach of the contract's conditions, the contractor is still responsible for these flaws. The employer must notify the contractor of the defect upon its discovery⁽¹⁹⁾; failure to do so within the agreed time frame may imply the employer has waived their right to claim a warranty, as outlined in Article 875(2) of the Iraqi Civil Code.

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For visible defects or breaches of conditions that could have been identified at the time of delivery, if the employer does not object immediately, it is considered that they have waived their right to a warranty claim, as per Article 875(1) of the Iraqi Civil Code.

Article 875(2) further states:

"However, if the defects are hidden, or if the breach is not apparent and was not noticed by the employer at the time of delivery, but is discovered later, the employer must inform the contractor immediately upon discovery, otherwise, it is considered that the employer has accepted the work⁽²⁰⁾."

2. Protecting the Employer's Interests⁽²¹⁾

If the employer provides the materials for the project, the contractor must take care of them, adhere to technical standards during their use, and return any surplus to the employer, as they are entrusted with safeguarding the employer's interests. Should the contractor neglect this duty, resulting in damage, loss, or defect in the materials, they are liable for the consequences and must exercise the care of a prudent person⁽²²⁾.

If the contractor discovers defects in the materials that render them unsuitable for the intended purpose, they are obliged to inform the employer immediately, following the general principles of contract law.

3. Providing Necessary Tools and Equipment⁽²³⁾

The contractor is responsible for supplying the necessary tools and equipment to complete the work, unless otherwise agreed upon or dictated by custom. If the contractor also provides the materials, they are liable for the quality of these materials, as specified in Article 866 of the Iraqi Civil Code⁽²⁴⁾. If the materials provided by the contractor do not meet the agreed-upon specifications or have defects that diminish their value or usefulness, the contractor is liable, just as a seller would be for hidden defects in goods⁽²⁵⁾. The employer's right to claim for these defects expires six months after the delivery of the materials.

If it is proven that the contractor's work or materials are defective, the contractor is responsible for these defects. The employer does not need to prove that the defects were due to negligence or fault by the contractor, as the contractor's obligation to complete the work according to the contract and trade standards is an obligation of result. The contractor can only escape liability by proving that an external cause, such as force majeure, led to the defects⁽²⁶⁾.

The employer may accept the work with its defects without requesting repairs and may seek compensation for the resulting damages by reducing the contractor's payment by an amount equivalent to the compensation⁽²⁷⁾. Alternatively, the employer can demand specific performance, requiring the contractor to repair the defects, even if it necessitates redoing the work, provided this does not cause undue hardship to the contractor⁽²⁸⁾.

4. Completing the Work According to the Contract

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The contractor is obligated to complete the work according to the contract's terms. If the contractor breaches any of these terms, the employer may demand the contract's termination or immediate cessation of the work if repair is impossible⁽²⁹⁾.

If the contractor conceals defects or breaches through fraud, making it difficult to detect the issues, the employer may claim a warranty from the contractor starting from the date the defect is discovered and within three years of its discovery. This is because the contractor would then be liable for tortious conduct, and any claims would be barred after fifteen years from the date of the fraudulent act, according to Article 232 of the Iraqi Civil Code⁽³⁰⁾.

5. Liability for Damage or Loss⁽³¹⁾

The contractor is liable for any damage or loss resulting from their actions or workmanship, whether due to negligence or otherwise, similar to a contracting worker who is responsible for the entrusted property. However, if the damage is caused by an unavoidable accident, the contractor is not liable, following the legal maxim: "There is no liability for what cannot be avoided."

If the contract involves the construction of buildings or other permanent structures designed by an architect and executed by the contractor under the architect's supervision, both the architect and contractor are jointly liable to the employer for compensation for any total or partial collapse or any defect that threatens the stability and safety of the building for ten years from the time of delivery, unless the contract specifies a longer period, even if the defect or collapse is due to a defect in the land itself or the employer accepted the defect⁽³²⁾

.Second Requirement: Effects of Protection

First: Contract Termination

The general principle governing all contracts in the event of a breach is the termination of the contract according to Article 177 of the Civil Code. This method is not addressed in the general conditions for civil engineering contracts but instead focuses on dispute resolution in government contracts⁽³³⁾ through arbitration under Article 96 of the conditions. However, this does not preclude the possibility of terminating a government contract according to Article 177 of the Civil Code, as Article 72 of the general conditions for contracts, in the section on the applicable law, states that the contract is subject to Iraqi laws and instructions, and that the courts of Iraq have jurisdiction over all cases and disputes arising from the contract⁽³⁴⁾.

Second: Work Withdrawal⁽³⁵⁾

Work withdrawal is a specific method outlined in the general conditions for contracts as a means of dispute resolution, initiated unilaterally by the employer. This method is an exception to the general rules of contract termination in cases where one party fails to fulfill their obligations. Essentially, the employer has the option to withdraw the work from the contractor if the contractor fails to meet the agreed-upon terms of the contract. The employer may choose between contract termination, arbitration, or conciliation⁽³⁶⁾, but withdrawal is a more straightforward and less costly option. However, in practice, this method is not commonly used in commercial circles and is often ineffective in resolving disputes related to government

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contracts. In many cases, the employer resorts to the courts to file a lawsuit to compel the contractor to fulfill their obligations or to terminate the contract⁽³⁷⁾.

Second Section: Beneficiaries of Legal Protection for Employers

In addition to the aforementioned protections, employers are further safeguarded by the principle of *decennial liability*⁽³⁸⁾, which refers to the responsibility of the contractor and the architect for the building they constructed for a period of ten years, during which they are liable for any damage that occurs⁽³⁹⁾.

The legal effects of this liability, known as *decennial liability*, stem from the contract that binds the contractor to the employer⁽⁴⁰⁾, with its culmination being the delivery of the work. Consequently, there have been various interpretations and legal views concerning the nature of this liability—the responsibility of the architect and contractor in relation to the employer and the implications of delivering the work⁽⁴¹⁾.

Three main schools of thought have emerged⁽⁴²⁾:

1. First View: Decennial Liability as Tort Liability

Some French legal scholars argue that the completion and delivery of the work exhaust the contract's effects. Therefore, the contractor and architect should not be held liable beyond the delivery unless the law specifically dictates otherwise. This view suggests that any post-delivery liability imposed on contractors and architects is exceptional and legally imposed⁽⁴³⁾. However, this view has been abandoned by the French courts, which now assert that the original contractual obligation extends beyond delivery and that the ten-year liability period is only excluded if the defect is due to an unforeseeable external cause beyond the control of the architect or contractor.

2. Second View: Decennial Liability as Contractual Liability⁽⁴⁴⁾

Modern legal scholars contend that the delivery of the work does not terminate the contract, as delivery is a material fact rather than a legal act. While delivery may have legal consequences, these are limited to apparent defects, with the employer's acceptance of the work implying acceptance of such defects. However, hidden defects that could not have been discovered by the employer during delivery, even with due diligence, remain the responsibility of the architect and contractor⁽⁴⁵⁾.

3. Third View: Decennial Liability as Legal Liability⁽⁴⁶⁾

Another group of French scholars views decennial liability as a legal obligation imposed by the legislature, making contractors and architects liable for defects even after delivery. This liability is entirely based on legal provisions, and no other rules apply⁽⁴⁷⁾.

The Iraqi legislature, in the amended Civil Code No. 40 of 1951, has aligned with the second view, asserting that decennial liability is a contractual responsibility directly linked to the contract of work. However, to

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claim decennial liability, the lawsuit must be filed before the competent court within one year of the defect's discovery, as stipulated in Article 870(4):

"The warranty claim provided for in this article shall be extinguished one year from the time of the collapse or the discovery of the defect⁽⁴⁸⁾."

The individuals entitled to benefit from this warranty include the employer, the specific successor, and the general successor, as will be further explained.

First: The Employer

The primary beneficiary of the *decennial liability* is the employer, who enters into a contract with the contractor. The employer is the party most affected by any damage resulting from the collapse of the building. However, this right to compensation is not exclusive to the employer; it also extends to individuals such as the employer's legal successors who inherit the rights through succession⁽⁴⁹⁾.

The employer is the main beneficiary of the decennial liability because they are typically the ones who suffer damage due to the total or partial collapse of the building or defects that emerge, entitling them to seek compensation from the architect, contractor, or both⁽⁵⁰⁾.

It is not necessary for the employer to have personally entered into the contract; it suffices that the contract was executed in their name and for their benefit, even through an agent. If the employer loses their status, for instance, by selling, gifting, or transferring the property, they lose the right to file a decennial liability lawsuit but may still claim damages for any harm that occurred during their ownership.

Additionally, the employer may lose their status upon the final delivery of the work, especially in cases where the property was not built for their personal use but rather constructed for distribution, as is common in companies or cooperative building societies⁽⁵¹⁾. These entities act as the employer during construction and until final delivery but lose this status afterward, transferring the right to file a decennial liability claim to the individual members who receive the property, even if stated otherwise in the delivery records⁽⁵²⁾.

Second: The Specific Successor

A specific successor is defined as someone who inherits a specific property or real right, such as a buyer or a donee⁽⁵³⁾. If the employer sells the property and it later collapses or a defect emerges threatening the building's safety and stability, the buyer can file a lawsuit against the seller. The seller, in turn, may bring the contractor and architect into the lawsuit since the rights are transferred to the buyer according to the doctrine of succession in rights and obligations.

The buyer of the property can file two lawsuits⁽⁵⁴⁾:

1. A lawsuit for hidden defects against the seller based on the decennial liability under the sale contract.
2. A general lawsuit against the architect and contractor under French Law No. 12 of 1978.

Creditors of the employer may also benefit from this liability through what is known as an indirect action⁽⁵⁵⁾. The rationale for the specific successor's benefit from decennial liability lies in the fact that this liability is considered a legal protection closely tied to the ownership of the constructed property, independent of

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the original employer. This protection remains attached to the property and its ownership throughout the decennial liability period⁽⁵⁶⁾.

The specific successor may claim compensation from the architect or contractor, even if they cannot claim compensation from the predecessor, such as in the case of a donee who lacks the right to claim compensation from the donor. However, the right to claim decennial liability is transferred to the donee along with the property under the donation contract⁽⁵⁷⁾.

Third: The General Successor

The employer may enter into a contract personally or through an agent, in which case the effects of the contract are attributed to the principal, who retains the right to pursue a decennial liability claim if authorized⁽⁵⁸⁾.

The general successor inherits the entire estate or a share of it, such as half or a third, making them a general successor. The sole heir or a co-heir, as well as a legatee of the entire estate or a share of it, is also considered a general successor⁽⁵⁹⁾.

While the contract's effects are binding on the contracting parties, they also extend to the general successor, meaning that the rights arising from the contract pass to the successor upon the predecessor's death, barring any contrary indication in the contract, transaction nature, or legal provision. The general successor inherits the entire estate or a share of it, and this includes the heir and the legatee of a share of the estate.

It is natural for the general successor to be affected by the contracts entered into by their predecessor, as stipulated in Article 142 of the Iraqi Civil Code:

"The general successor is one who inherits another's entire estate or a share of it, such as half, a third, or a quarter, including the heir and the legatee of a share of the estate⁽⁶⁰⁾. It is natural for the general successor to be affected by the contracts entered into by their predecessor, as stipulated in Article 142 of the Iraqi Civil Code."

Conclusion

1. The Civil Code and related laws do not leave the employer in a contract of work without protection; they provide guarantees to safeguard the employer's rights in case of fraud or negligence by the contractor.
2. The law extends the scope of liability for the employer beyond the delivery of the work as stipulated in the contract, continuing up to ten years, holding the contractor and architect accountable under the employer's guarantee.
3. The scope of this liability cannot be avoided by the contractor, even if the work is subcontracted, as the original contractor remains responsible to the employer despite the subcontractor's involvement, due to the absence of a direct contractual relationship between the employer and the subcontractor.
4. This liability is not limited to the employer; it extends to both the specific and general successors, highlighting the importance of this guarantee in compelling the contractor to perform their work to the highest standards, thereby ensuring stability in the construction sector within the economic sphere.

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