Applying the Rule of Denial of Hardship on Imposed Conditions in Contracts

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Abstract

Today, based on social realities, the parties that want to sign a contract very rarely have equal conditions and advantages. One part has superior power and the other part is powerless and needy. With the abuse of this authority, the powerful part prepares his ideal terms, conditions, and obligations and imposes them to the other part. The other part has to accept all the contractual obligations unconditionally in order to satisfy his needs. The owners of businesses usually abuse the need of the other part and impose any kind of unfair conditions on them. In this regard, justice necessitates protecting and defending the powerless against the mighty. However, there are split ideas in the way of protection. The legislator can take measures to modify the conditions of contact if the balance of contractual arrangements is upset. The main question is that whether it is possible to apply the rule of denial on imposed conditions in contracts? And if yes, what are the results of applying the rule of denial on imposed conditions in contracts? Since there is no clear law in the Law of Iran about this, it has been tried to first examine the imposed conditions in contracts, and then do a case study on the rules of other countries and the religion Islam to reach a conclusion about the application of the rule of denial on imposed conditions in contracts.

Keywords: imposed conditions, hardship, the principle of autonomy, necessity, dissolution, modification, and cancellation principles.
Introduction:

The principle of justice and equality is one of the basic principles of Islamic law and it has a special place in the field of contract law. Different legal systems have also followed this principle, and in numerous cases, established and revised legal provisions. In fact, in these systems, justice and fairness prevent injustice and unfair practices by allocating the principle of freedom of contracts as no legal system can prevent injustice by mere reliance on the principle of freedom of contracts.

We believe that in Islamic jurisprudence, jurists have considered the principle of justice as one of the core principles in their deductions. Although the principle of autonomy and adherence to the provisions of private agreements and contracts are among the principles of consensus in most legal systems, based on justice and respect for fair treatment and good morals and public order, contracts with imposed and cruel conditions are not binding. Even in some legal systems the unfairness of these contracts gives the court the permission to prevent these contracts to be signed, modify them, or in some cases make them invalid.

Discussion

After signing the contract, the fulfillment of promises is difficult because of the inclusion of unfair and cruel conditions imposed. Although it is not impossible to remain committed in such circumstances, unfair terms and conditions of the contract make one the parties to be hurt. Such conditions are clearly found in continuous contracts. (Shahid, the formation of contracts and commitments, 98/1, Jafari Langroodi, 76)

In continuous contracts, factors such as inflation, fluctuating or rising cost of services and materials along with the conditions imposed at the time of signing the contract cause difficulties for one of the parties to the contract (Shaykh Tusi and Mohaghegh Helli, 283/2). In this way, implementation of such contracts in all circumstances is detrimental to one of the parties (Zahili, 301). The question which arises in such conditions is whether or not there are some ways to compensate for the loss or damage? Whether the contract is revocable (Mirza Qomi, 28) or terminable? (470, Sheikh Tusi, Alkhalf, 491/4) or whether the obligations should be modified? (Mirza Qomi, 444). It is obvious that modification is applicable in contracts that commitment is carried out continuously (Saada, 74/1; Sohnavardi, 718)

Modification has been accepted in international law of Iran (Article 5 of the statement of the Democratic and Popular Republic of Algeria) but except for the Law of the Sea in domestic law, there is no general rule about this issue in civil law and in general rules of contracts. In Jurisprudence, there is a famous rule acceptable to all Sunnite and Shiite scholars and is documented in numerous verses and traditions of the Holy Quran called the denial of hardship. This is a narrative reason which explicitly rejects hardship in Islamic law.

the foregoing verses and other verses and hadiths indicate that God rejects hardship. Holy jurists accordingly, have generalized the rule to be applied in all conditions when there is hardship making a commitment (Majlesi, vol. 2, p. 277). Among the reasons for the justification of the rule is that hardship verdict is a verdict which is too difficult to go through. A verdict too difficult to go through is unacceptable and evil. Divine legislator is
impossible to do evil, and rational impossibility is forbidden. What is banned by reason is banned by religion. Therefore, religion bans it.

The term hardship was first used in a reform in 1982, the Civil Code Article 1130, as well as in Article 9 of the relations between the lessor and the lessee in 1982, in addition, the draft of contract modification law in hardship has been developed and is being examined by the Chamber of Commerce, Industries, mines and Agriculture in Iran. While denial of hardship is explicitly accepted by legislator in divorce and unloading lease, why not accepting it in other cases.

First topic: the criterion of hardship in imposed provisions in contracts

First, it must be found out what kind of hardship is denied by Anecdotal and rational reasons. There is no consensus about whether hardship is personal or general. There are two ideas: some believe hardship is personal and some believe it is general. What is obvious is that the majority of jurists believe hardship is personal and not general. The first paragraph: personal criteria of hardship in conditions imposed in contracts.

Obviously some people believe hardship is personal and not general. They refer to Hadith about hardship in taking a bath and Vozoo (washing parts of body as preparation for saying prayers in Islam), as denial of hardship in these situations depends on specific cases and it is different from person to person and situation to situation. Therefore, hardship is personal and the judge or legislator should decide about it in specific conditions and for specific time (Bojnordi, 242, and Naraghi, 66). According to this view, before judging, first, the conditions and specific case of the person should be taken into account. If we believe it is general, then, there are responsibilities which are too difficult for some people, which is contrary to God’s mercifulness (Mirmohammadi, 1987, 15).

Second paragraph: General criteria of hardship in conditions imposed in contracts

In accordance with this theory, hardship is general (Katoozian, 2006, 390). According to this theory, hardship is applied out of wisdom not because of reasons (Bojnordi, 2010, 212, and Naraghi, 66). There are some Hadith in which denial of general hardship has been mentioned. There are some Hadiths (the prophet’s and Imam’s sayings) about Jihad negation of the old and the sick, negation of fasting for travellers, and so on which are in favor of general hardship. Which are referred to as wisdom behind verdict. In case of doubt between general or personal hardship, it is assumed to be personal hardship. It is because personal hardship is related to one particular case while general hardship is related to a whole. In other words, personal or general is a matter of less or more and in times of doubt between less and more, less should be taken into account (Farahi, 2011, 818). However, one of the leading jurists believes in general hardship (Karimi, 2014, p. 5).

Second topic: Hardship sentence in imposed provisions of contracts

Some people regulate such unfair contracts because they seek special privileges for themselves. Lawyers, as the main campaign fighting against such injustice, consider the non-inclusion of unfair provisions in contract among the prerequisite conditions of signing contracts. In addition, imposing unfair provisions on a party is far from justice. In such a
situation, in order to create justice, the principle of denial of hardship is introduced. In the Iranian legal system, there are some legal rules and principles referred to by legal writers in justification of the principle of denial of hardship (Katoozian, 1995, 101-103).

In spite of the fact that the provisions of contracts must be respected by both parties in all legal systems, the impact of imposed provisions in contracts is undeniable. In some contracts, there are some provisions which affect fulfillment of contractual responsibilities without making them impossible. In such situations, the principle of denial of hardship can jump into action and create balance and justice. The main issue is related to the consequences of the situation. Can the contract be modified or terminated? In a situation of hardship, one party is severely hurt as a result of the provisions imposed. Almost all legal systems agree that such a situation is unfair. However, they have different approaches in dealing with it. Some legal systems find the solution of the problem in terminating the contract. Some other think it should be modified. Still other legal systems believe it should be called invalid. In the Iranian legal system, in specific cases and often based on the principle of denial of hardship, it is stated that in such conditions, personal commitments should be modified or removed.

Although some have tried to use specific theoretical principles such as the implied condition of property (Shahidi, 2007, 144) or denial of hardship (Mohagheghdamad, 1999, 110) to explain the consequences of hardship in the legal system of Iran and propose solutions, the lack of consensus about the theoretical foundations and the proposed solutions has prevented the formation of a reliable applicable legal doctrine for judges in facing with such issues. Considering the issue of hardship is nothing news in Iranian legal system.

The first paragraph: annulment of hardship clauses in contracts

Since a contract containing unfair provisions is an example of abuse, if we can prove one party has abused his own autonomy and the other party’s need to impose unfair conditions, it is obviously an example of abuse of emergency (Ghasemiahd, 2005, P. 300). Although in Iran's law, there is no clear legal solution predicted for the issue of abuse of emergency, the Article 179 of the Law of the Sea can be used to make this matter applicable. In Article 46 of the Electronic Commerce Act, adopted on 10/17/2003 the ineffectiveness of unfair terms has been stipulated too. It says: 'the use of unfair terms and conditions against the rules is not effective.'

a) Invalidity of provisions containing hardship in contracts

Imposing unfair conditions in contracts out of ill will to abuse the emergency conditions of a needy party to impose an unfair contract on him is exactly like a surgeon who asks for large and unfair amounts of money before an operation which is a case of life and death. In legal systems of foreign countries, there are solutions to this problem; for example, Article 138 of the German Civil Code states such contracts where the neediness and emergency conditions of a person is abused are invalidated. In addition, article 21 of the Swiss obligations called such transactions in which the inexperience and emergency of a person is abused irrevocable (Sanhoori, 1998: 359). In French law, they tend to believe the cases of abuses of emergency occur out of ill will and the commitment is invalid (Katoozian, ibid: 513 ). Also, in the legal systems of Arabic countries including Egypt and Iraq, according to the general rules of fraud, in cases of abuse of emergency, the contract is terminated or considered an example of reluctance (Sanhoori, 352 : 1998).
Nullity theory that is invoked in English law is based on the theory of unreasonable transactions. One English lawyer (Trytl, 1995, p. 381), in explaining this theory states: This theory is like undue influence. Some other lawyers (Anson, 1986, p. 248), believe the nullity of such contracts is justified on the basis of equity theory.

In Iranian law, the issue of abuse of emergency has not been mentioned and there is no specific solution for it. Referring to Article 206 Civil law, some lawyers consider such contracts lawful and right (Emami 1995: 194, Adl 1357: 124, Haeri Shahbagh, 2007:164). However, according to the general principles of law and legal principles, some authors have proposed solutions. One lawyer believes unfair provisions automatically terminate the contract and make it invalid (Shahidi, 2007: 43).

B) The termination of provisions involving hardship as a result of termination by the hurt party

Although in Iranian law there is no legal document for terminating a contract containing unfair provisions imposed on one party, most lawyers and professionals use theoretical foundations such as the principle of denial of hardship (Mohaghegh Damad, 1999:110) to find a solution for this problem. Katoozian believes termination based on the theory of occurred cheating is more consistent with the soul of rules and justice, although occurred cheating is not among general rules of termination. It does not impose a new order on both parties and also it does not have the practical problems of modification (Katoozian, 1994:102). According to the principle of denial of hardship and its acceptance in law and precedent, some lawyers believe that wherever execution of the contract requires great difficulty, the requirements of the contract are removed and the commitment can be terminated. Referring to it, the right to terminate can be accepted in times of hardship (Mohagheghdamad, 1999: 110). In addition, the principle of “no hurt” has always been important for legislators. Some lawyers refer to this principle and believe the right to terminate contract must be accepted when the imposed provisions hurt one of the parties and cause costs and difficulty (Sadeghimoghadam, 1999:175). One lawyer (Safaei, 1972:129) believes: The contract contains no problem and is complete and there is not a case for nullity. The only problem is that the contract abuses the distress of the state of emergency of somebody to impose unfair provisions against him. In Article 21 of the commitment rules of Switzerland by accepting this view, the distress is granted the right of termination, provided that there is clear disparities and imbalances between what is received and what is paid, and the opposite side has abused the situation of emergency and the inexperience or immaturity of the other party (Vahedi, 1998, p. 8). In Article 1448 of the Italian Civil Code, it is stated that the right to terminate the contract is given to the distress if there is imbalance and abuse (Bari, 1992, p. 140). It seems this view is more consistent with Iranian law. Most rights granted to parties of a contract are based on unfair loss. Some believe that regardless of the fundamental objections against the theoretical basis above (Safari, 2009: 149-206), accepting the principle of denial of hardship as a solution is not consistent with modern and international rules. In addition, termination of contracts needs a stronger reason and the irrevocability of contracts cannot be ignored by referring to a theoretical basis which is without a doctrine. Moreover, the principle of denial of hardship is mostly for modifications not termination.
Second paragraph: modification of provisions containing hardship in contracts

The main method if unfair conditions are imposed is modification. Mere difficulty in fulfillment of the obligation cannot be acceptable to terminate the contact. However, termination in some cases is considered the perfect solution as sometimes modification is not possible or it is not able to compensate for unwanted losses since the effect of unfair conditions imposed are too adverse to be compensated. In such cases, the hurt party should be given the right to terminate the contract to avoid suffering further losses. In these circumstances, modification is not good enough. It is the responsibility of the court to recognize if modification can be good or not. It is done through investigating the severity of the conditions imposed, the nature of the contract and other factors. Generally, modification is prior to termination as it makes it possible to continue the contractual relations. Termination is only justifiable when modification is not possible or allowed. The other situation when termination is justifiable is when the two parties cannot reach agreement upon modification of the contract. This lack of agreement can be because of failure in negotiations or because warrantee does not agree with negotiation for modification. The main reason for the rejection of termination in hardship is that termination is a solution in impossible situations. Even lawyers who are in favor of termination believe termination should not be recommended when it is possible to match with the new requirements.

a) Modification of hardship conditions in contracts

Modification is not just done when commitment is difficult. The main aim of modification is creating balance in economic commitments and preventing loss. Some cases of modification support the warrantee for example in the case of gift of marriage, or house rent. In addition, legal modification in legal system of Iran is not just for making dramatic changes in the conditions. . Sometimes modification is recommended because of uneven conditions at the time of signing the contract (Article 179 of the Law of the Sea 1994). This kind of modification is different from modification because of hardship. Some cases of modification are consistent with hardship modification, for example modification of collective work contract or adjusting the rent on the basis of progress or decline in rent. The theory of modification of contracts has many fans at the present time. It is however, not a new concept as it has been referred to in Islamic jurisprudence (Toosi, Undated, P. 268).

b) Modification of the terms of hardship in contracts

Sometimes at the time of signing contract, some unfair and cruel provisions are imposed on one party that cause a lot of loss and heavy responsibilities and the contract is more like a means of abuse rather than a facilitator of commercial transactions. How can this loss be compensated?

The analysis of the issue reveals that modification is for changing the conditions of contract and creating balance in order to prevent obvious loss of a party caused by unfairness of the imposed conditions. Based on the agreement of both parties, it is the main solution which can be accepted in such conditions. The existence of unfair conditions make it difficult to stay committed. In such conditions, on the one hand, the parties want to continue the contract and on the other hand, the conditions are too difficult to accept. This is when modification can be used to create balance and justice. On the one hand, based on the principle of “keeping
promises”, all the promises made at the time of signing contract should be kept (Naraghi, 14). On the other hand, contracts are valid as far as the contents of them are not cruel. Tendency to traditions has made contracts irrevocable except in specific conditions. However, the same moralities which necessitate keeping promises consider compensation of losses prior to commitment and grants the loser the right to terminate the contract (Makarem Shirazi, 58/1). In Iranian law, modification of contract is an exceptional case. It is because according to Article 219, the parties or the judge cannot change or modify the contract (Ghasemzadeh, 2003:127). Therefore, if the inclusion of hard conditions imposed at the time of signing the contract makes implementation of commitment very hard, it would not affect the commitment and it should be implemented according to Article 219 of Civil Law (Jafari Langroodi, 1982:246). Some lawyers consider the solution of modification a secondary solution and believe the contract should be terminated in hardship (Katoozian, 1992: 107). Some others do not believe in judge’s autonomy to change the conditions of contract or reduce the obligations without the agreement of the parties (Shahidi, 2007:39-40). It seems that modification as the main solution for the situation of hardship is acceptable in Islamic Jurisprudence as the principle of “possibility” is used along with “keeping promises”. According to the principle of possibility, promises must be kept as long as they do not cause hardship. According to this principle, the commitment is reduced, but it is still there (Ameli, Shahideaval, 132); (Ehsaei, ebneabijomhooor, 1990: 47). The principle of possibility in Islamic Jurisprudence is based on imam Ali’s saying. According to this principle, if commitment to part of a contract is hard, the other parts stay intact (Moosavi Bojnordi, 1999:130). Therefore, what is reduced is not all the commitments but just the hard parts. So, it can be said that this principle just modifies the responsibilities and commitments.

Conclusion

Unfair conditions imposed on one side of contracts leads the person to the brink of destruction. In such conditions, sticking to the commitments and the obligations is not acceptable by any legal system. Provisions in contracts should be balanced and fair and both parties must reach consensus over them. However, it is only true about swap contrasts. There are many verses in Quran and many saying by our Imams which focus on the necessity of justice and fairness in all matters, especially in contracts and transactions. By justice, it is meant that in the religion of Islam, no oppressive legislation has been set and all transactions should be based on justice. The principle of justice and fairness is one of the basic principles of Islamic law. In transactions and contracts, both parties have to observe justice and fairness, both at the time of signing a contract and at the time of execution of it. Therefore, ignoring the principle of justice and imposing unfair conditions in contract is an obvious example of hurting others. Principle 40 of the Constitution also refers to this rule and considers Loss Prevention important. Based on the doctrine, in Additional contracts, because the document is prepared by the institutions and individuals are not involved in arranging the contract, in case of doubt in the contract, it should be interpreted in favor of the customer. If we believe that the principle of no loss can rule over the principle of keeping promise, why not believe in termination, invalidity, or modification of Additional contracts by applying the principle of denial of hardship? While legislator has clearly accepted the principle of denial of hardship about divorce and house rent, there is no reason to reject it in the case of imposing unfair conditions in contracts which disturb the balance and cause hardship. Therefore, considering the reasons and justifications mentioned in this article, it can be concluded the principle of
denial of hardship is applicable in contracts containing imposed conditions and as a result such contracts can be modified, terminated and invalidated.
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