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Doubt about the Common Will of Contracting Parties as a Path to Judicial Jurisprudence in Iraqi and Tunisian Legislation: A Comparative Study

Ibrahim Khaled Abdullah [a], Fathi Al-Hamedi [b], Ziad Tariq Ibrahim [c]

[a] *Sfax University Faculty of Law, Tunisia. E-mail: ibrahim.ka1995@gmail.com*
[b] *Professor, University of Sousse, Faculty of Law, Sfax University Faculty of Law, Tunisia. E-mail: fethielhemdi@yahoo.fr*
[c] *Sfax University Faculty of Law, Tunisia. E-mail: Zeyad.albaitar@uosamarra.edu.iq*

Abstract

The contract is a tool for exchanging interests between the parties, and when it is concluded between them, each party is obligated to implement the obligations contained in it without increase or decrease in accordance with the principle of the contract, the law of the contracting parties, which is considered one of the results of the principle of the authority of the will, and that this will is the source of the binding force of the contract, so the basis in The issue of contract formation is that the contracting parties have complete freedom to determine the subject of the rights and obligations between them as long as it does not violate public order, public morals, and peremptory rules in the law, in addition to not affecting the interest of one of the contracting parties at the expense of the other contracting party. It is not fair for the content of the contract to be determined based on The will of one party over another, as the idea of contracting must express the common will of the contracting parties, which must be free from any defect of will, which in turn leads to no disparity in the rights and privileges of one party at the expense of another, and then the contract has been taken into account. A manifestation of contractual balance through contractual balance through balance and equality between the contracting parties in terms of the rights and obligations that the contract assigned to its parties.

Under the title of interpretation of the contract and the semantic disclosure of the contractual content, it was mentioned under the title of Chapter (513) of the Tunisian Journal of Obligations and Contracts, in which it was stated: "If the words of the books are clear, then the meaning does not matter." Chapter (515) of the magazine also stated that: "The lesson is in Expression through purposes, not apparent words and structures." Likewise, what is stated with the same meaning in the text of Article (155) of the Iraqi Civil Code, which states: "1- What matters in contracts is the purposes and meanings, not the words and buildings. 2- The principle in speech is the truth, but if the truth is not possible, it becomes metaphorical." However, ambiguity may occur in the contract when the phrases used do not express the common will of the contracting parties. This is in the event that the phrases of the contract are unclear and surrounded by ambiguity and contradiction. This case shows the need to interpret the contract with the aim of arriving at the common will of the contracting parties. If this is not possible, the general rule is It indicates that doubt is interpreted in the interest of the debtor, and we will discuss this rule with all its terms and conditions in this research.

Keywords: Rule, Doubt.

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The Introduction

The contract is a tool for exchanging interests between the parties, and when it is concluded between them, each party is obligated to implement the obligations contained in it without increase or decrease in accordance with the principle of the contract, the law of the contracting parties, which is considered one of the results of the principle of the authority of the will, and that this will is the source of the binding force of the contract, so the basis in The issue of contract formation is that the contracting parties have complete freedom to determine the subject of the rights and obligations between them as long as it does not violate public order, public morals, and peremptory rules in the law, in addition to not affecting the interest of one of the contracting parties at the expense of the other contracting party. It is not fair for the content of the contract to be determined based on the will of one party over another, as the idea of contracting must express the common will of the contracting parties, which must be free from any defect of will, which in turn leads to no disparity in the rights and privileges of one party at the expense of another, and then the contract has been taken into account. A manifestation of contractual balance through contractual balance through balance and equality between the contracting parties in terms of the rights and obligations that the contract assigned to its parties.

Research Importance

In this research, we try to understand as much as possible the important role played by the judge in the process of interpreting the contract in general, interpreting the will of the contracting parties and the common intention between them, and how to apply the rule of interpreting doubt in favor of the debtor as a general rule or exceptionally, according to what is stated in Iraqi and Tunisian legislation.

Research Problem

If the judge is unable to reach the true intended meaning of ambiguous expressions that have more than one meaning after consulting all methods of interpretation in order to clarify the meaning intended by the contracting parties, and he remains in doubt about the truth of that meaning and does not arrive at a preference for one meaning over another despite his search for... The common will of the contracting parties. The assumption in the case that we are about to address is that the ambiguous phrase has more than one meaning, and the judge remains in doubt about the truth of the meaning intended by the contracting parties and there is no way for him to give preference to one meaning over another due to the multiplicity of possible interpretations of the phrases in dispute. Here several questions arise regarding this. The situation is: What is the solution that the judge must reach in the face of this situation? What is the criterion used to guide one meaning over other meanings? Is the standard, if any, valid in all contracts without exception?

Research Methodology

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

Search Plan

The first topic: Interpreting doubt in favor of the debtor as a general rule

The first requirement: The concept of the rule of doubt is explained in the interest of the debtor and the justifications for its application

The second requirement: The second requirement: Justifications for the rule

The second section: conditions for applying the rule and means of controlling it

The first requirement: Conditions for applying the rule of interpreting doubt in favor of the debtor

The second requirement: aspects of control imposed on the judge's interpretation of the terms of the contract.

The First Topic: Interpreting Doubt in Favor of the Debtor as a General Rule

The Iraqi legislator stipulated in Article (166) of the Civil Code that: "Doubt shall be interpreted in the interest of the debtor," while the Tunisian legislator referred to it in Chapter (529) of the Code of Contracts and Obligations, which stated: "In case of doubt, the interpretation shall be in what is easier for the debtor." With his right hand." From the

previous texts, it becomes clear to us that the general rule approved by legislators is that the interpretation in case of doubt or suspicion is in the interest of the debtor. So what is meant by this rule, and what are the justifications for acting on it:

The First Requirement: The Concept of the Rule of Doubt is Explained in the Interest of the Debtor and the Justifications for Its Application

The rule of interpreting doubt in the interest of the debtor is one of the peremptory rules that the judge must adhere to, otherwise his ruling will be subject to reversal. In this regard, part of jurisprudence says that "the rule of doubt is interpreted in the interest of the debtor with the exception of contracts of adhesion, in which it is not permissible to the interpretation is harmful to the interest of the submitter, as it is a binding legal rule in interpreting the contract. If the judge violates it, he will overturn his ruling. Determining the meaning of doubt and when it can be said that doubt exists is also a matter of law that is subject to the oversight of the subject court (Al-Sanhouri, 1998, 971).

Contrary to the previous jurisprudential opinion, jurisprudence and jurisprudence in France believe that Article (1162) of the French Code is not obligatory and does not have the capacity to be binding. Rather, it is a directive to the judge, and therefore if he violates it, his ruling is not permissible to be overturned. This opinion is justified by saying that as long as the original rules are of a non-binding nature, it is natural that its exceptional rule is non-binding. In this regard, the jurist Jacques Gastan says that the interpretation directives according to the Court of Cassation are merely advice given to the judge. In other words, the judge can refer to them, but he is not obligated to adhere to them, and this has been the case since the year (1807). Ruling that there could be no violation of Articles (1157, 1158, 1161) BC, French, which rather contained advice given to judges regarding the interpretation of contracts..... Since that time, the doctrine of the Court of Cassation has not changed. The Social Chamber of the Court of Cassation has confirmed This initial solution was vetoed again in 1981, given that Articles (1156 and 1161) of the French Code formulate rules that do not have a commanding nature for the interpretation of agreements, and the possibility of denying them alone is not sufficient to give the possibility of veto. In the same year, the Chamber of Commerce ruled that Articles (1161) 1162, 1163) Qom is French and has no commanding character (dress, 2008, 53).

According to what was stated in the Iraqi Civil Law, we find that the Iraqi legislator, through what was stipulated in Article (155/1), stated that the original rule that he adopted gave preference to the inner will at which the contracting parties met and did not prevail over the apparent will, if it differed from the first, and it follows from this that the basis The legal necessity of excluding the common will or giving preference to the hidden will over the apparent will of the contracting parties in the two cases of interpretation of the clear and ambiguous clause of contracts is (155/1) of the Iraqi Civil Code. In addition, the Iraqi legislator combined the hidden and apparent will by devoting a general principle in the first rule. Interpretation requires that the inner will prevail over the apparent will in interpreting contracts, and this applies in the case of doubt regarding the identification of the will of the contracting parties.

Likewise, the Tunisian legislator has made this rule one of the fundamental rules that regulate the authority of the judge responsible for interpreting contracts in accordance with what is stated in Chapter (529) of the Code. This rule must be defined and the justifications for its application are made, and this is what we will discuss in this section, according to the following:

The First Section: The Concept of the Rule (Interpretation of Doubt in the Interest of the Debtor)

To confront the state of doubt in understanding the meaning of the ambiguous phrases, the legislator came up with a solution and established a precautionary rule that includes an objective standard that the judge must resort to in order to uncover the ambiguity that has plagued the contract phrases if he is unable to reach the common intention of the contracting parties. This is stipulated as we indicated in Article (166). of the Iraqi Civil Code and Chapter (529) of the Tunisian Code, which stipulates that doubt should be interpreted in the interest of the debtor.

If something is presented that calls for interpreting the contract and doubt remains surrounding the joint will of the contracting parties despite the implementation of the interpretation provisions mentioned above, then this doubt is interpreted in the interest of the debtor and not the creditor. This is a basic rule that most codifications have adopted, and it refers to the fact that the principle is in the discharge and the creditor must evaluate Evidence of the existence of his debt, given that he claims something that contradicts this principle. If a doubt remains and the creditor does not succeed in removing it, then the debtor has the right to benefit from it) (Al-Saadi, 2018,9).

What must be taken into account is that doubt means that there is room for the judge to interpret the contract and it is not considered an impossibility of interpretation, because accepting this means that the existence of the contract and its absence are equal and this is illogical, as it is logical to say that there is a framework for interpretation and it is on an objective basis depending on the requirements and requirements of justice. Therefore, devoting the rule of doubt

to be interpreted in the interest of the debtor requires that the interpretation of the contract be not impossible on the one hand, and on the other hand, it is not possible on a single basis that does not accept doubt (Bakr, 2019, 400).

Accordingly, the scope of application of this rule is if there is doubt about identifying the common intention of the contracting parties, just a doubt that the interpretation of the contract ranges between multiple aspects, each of which is possible, and there is no preference for one aspect in any way. However, if the interpretation is impossible and the judge is unable to clarify even one aspect of interpretation Whatever the aspect of doubt in it, this is evidence that there was no common intention of the contracting parties when they met, but rather each of them wanted something that the other did not want, so the contract was not concluded. On the other hand, the doubt must be something that cannot be cleared, so if the judge is able to reveal the common intention For the contracting parties - no matter how difficult it is and if he is able to remove the doubt, he must interpret the contract in accordance with this common intention, even if the interpretation is not in the interest of the debtor (Tanago, 2009,137).

Section Two: The Concept of the Debtor

The problem may arise regarding the meaning and concept of the debtor mentioned in the rule, as the broad meaning of the debtor is determined according to the nature and type of the contract or legal action. When it comes to contracts binding on one side, the debtor is always the obligated party, but when it comes to contracts binding on both sides, what is meant by the debtor is not always limited to the debtor. In the obligated party, as the seller may be the debtor of the debtor, likewise in contracts binding on both sides, both parties may be a creditor and a debtor at the same time. For example, in a sales contract, the seller is a creditor for the price and a debtor for the delivery, and the buyer is a creditor for the delivery and a debtor for the price. If a dispute arises about the place and time Delivery of the thing sold and the inability to reach the common intention of the contracting parties requires the judge to implement this rule for the benefit of the debtor, who in this example is the seller and not the buyer, and he is also a creditor in receipt .(The fryha, 2017, 251)

If the rule of interpreting doubt is in favor of the debtor, we find the scope of its application in that the debtor may be the seller or he may be the buyer. However, this matter does not apply absolutely, as we find in the legislation different positions on this matter. The French legislator has a position that he enshrined in the text of Article (1602). French law, different from what was adopted by the Tunisian and Iraqi legislators, and this is explained as follows:

The French legislator is the general rule established by Article (1162) BC stipulating that doubt be interpreted in the interest of the debtor. However, the exception to this rule came in what was included in Article (1602) BC. French M.D., which states that "ambiguous terms in the contract of sale shall be interpreted in favor of the buyer against the seller." This means that whenever there is an illusion or ambiguity in the contract of sale, the doubt is interpreted in favor of the buyer against the seller as he is the stronger party in the contract, as he is the one who dictates the terms in the contract. The contract, in addition to the fact that he is more knowledgeable about the thing sold than anyone else, and therefore he must explain everything he has come into contact with (Egyptian, 2003, 305).

Accordingly, French law views the buyer as a permanent debtor, and thus interprets the doubt in his favor and not in the interest of the seller. However, French jurisprudence linked the application of the exception contained in Article (1602) French BC to two conditions: 1. The judge's inability to reach a common intention. For the seller and buyer in the sales contract. 2. To apply the exception, the conditions contained in the sales contract must be familiar. Otherwise, if they are exceptional conditions, the judge must refer to the general rules to interpret these conditions in the interest of the seller As for the Iraqi legislator, the general rule he adopted is to apply what was stated in Article (166) of the Iraqi Code by interpreting the doubt in the interest of the debtor.

Since the labor law mainly aims to achieve the interest of the working class as it is the weakest party, it therefore does not establish equality between the worker and the employer, but rather stands by the worker and not the employer, due to the economic and social disparity between the worker and the employer in order to establish a kind of balance between them in the contractual relationship. This is the distinctive feature of most of the articles regulating that relationship, and based on this, the judge interprets the provisions of the Labor Law when in doubt, always in the interest of the worker, whether he is a creditor or debtor in the contract, provided that the condition is ambiguous or has more than one meaning. This is considered a departure from the general rule of interpretation that stipulates To explain the doubt in the interest of the debtor.

The Labor Law is also subject to its interpretation in its own rules that are consistent with the purpose and goal of its provisions, which is to protect the worker, and that interpretation is consistent with the legislator's intent in most labor legislation, as well as the rules of justice that are resorted to to supplement the shortcomings in the legislation, which require standing by the weak party and doing justice to it .(Abouda, 1983, 153).

On the other hand, if a dispute arises over the method and place of delivering the price and the judge is unable to reach the common intention of the contracting parties, he must apply the rule of interpreting doubt in favor of the debtor. The debtor in this example is the buyer and not the seller, because the latter is the creditor of the price, but when it comes to non-performance. The obligations of the contract, each part of which is on the side of one of the contracting parties, such as the seller who violates the obligation to deliver at the agreed upon time and place, as well as the buyer who violates the agreed upon method of payment, and the judge was unable to determine the common intention of the contracting parties, so the judge interprets the doubt in favor of the one who bears the burden and obligation regardless. About his position in the contract, whether he is a creditor or debtor, and this is nothing but a dedication to the spirit of justice that the legislator has enshrined from the rule of "doubt should be interpreted in favor of the debtor" (Honorary,2000,345), which most legislation has adopted.

The interpretation of the adhesion contract for the benefit of the insured when there is doubt about the meanings of intent and against the one who drafted it is based on the fact that the latter is wrong in formulating it in ambiguous and ambiguous terms. This solution in interpreting doubt against the drafter in adhesion contracts has been considered an effective solution in interpreting these contracts and effective in protecting the party. The obedient one, which is what was approved by the Jordanian legislator in the Civil Code, Article (240), the Algerian legislator, Chapter (112), and Article (1162) of the French Civil Code.

As for the oath stipulated in Chapter (529) of the magazine, "When in doubt, the interpretation should be in what is easier for the debtor." However, this protection is not absolute, as the Tunisian legislator surrounds doubt with some guarantees to the creditor represented by the oath (), and the oath stipulated in Chapter (529). It is the exploratory oath that the judge directs on his own initiative to one of the two opponents, and it is not surprising that it is adopted in this regard because ambiguous books are the beginning of an argument, as defined in Chapter (447) of the Journal, and open the door as the beginning of proof for its completion by an incomplete means and thus the evidentiary nature of this chapter is revealed, except that The judge is not obliged to direct it, as the truth may appear to him from the interpretation that it is in the interest of the debtor, so he does not necessarily resort to directing the exploratory oath (Ahwan, 1992,386)

The Second Requirement: Justifications for the Rule

Also, the reality is that the rule of interpreting doubt in favor of the debtor is a rule whose roots go back to Roman law, where the stipulator was always the creditor, and it has been transferred by most modern legislation, as settled by jurisprudence and the judiciary (), and this rule is based on several considerations and logical justifications that we can summarize as follows:

Section One: The First Justification

The principle is acquittal and the exception is obligation, as the general rules in the law stipulate that the principle in a person is acquittal and the exception is obligation. It is not permissible to expand on the exception because the interpretation must be directed towards that the intention of the obligor is to commit within the narrowest scope permitted by the terms of the contract, so there is agreement between the will of the creditor and the will of the debtor. It can only be interpreted within the limits of this scope.

Also, the creditor is responsible for proving the obligation since he is claiming something contrary to the original: the presence of doubt about the obligation in terms of its extent and reality means that the creditor is unable to prove what he claims in a broad manner, so the judge takes the narrow extent of the obligation that is in the interest of the debtor, considering that this extent alone is what Evidence was based on the agreement of the two wills in it, and this is required by the general rules of proof (Honorary,2000,529),

Section Two: The Second Justification

The creditor is the party that dictates the obligation to the debtor. The rule in the contract is that the creditor is the one who dictates the obligation, not the debtor. If he dictates it in a vague and ambiguous way, he bears the consequences and the obligation must be interpreted in favor of the debtor as he is the weak party, since the creditor, who is the strong party, could have made the obligation clear when Drafting the terms of the contract so that there is no room for doubt about them.

Also, the debtor is the weak party in the obligation. Legislation, jurisprudence, and jurisprudence have established the protection of the weak party in the contractual relationship and at all stages of the contract, including the interpretation of the contract. The judge, while interpreting the contract, must take into account the protection of the interest of the weak party in the contractual relationship if he doubts the interests of the weak party in the contractual relationship.

Ambiguous phrases contained in the contract, and to take as the inability of the weak party to formulate any of the terms of the contract and thus interpret the doubt in favor of the debtor) .The fryha, 2017, 251)

The Second Section: Conditions for Applying the Rule and Means of Controlling it

If the judge finds himself within the scope of applying the rule, he applies it and interprets the contract binding on one side for the benefit of the obligated side, and interprets the contract binding on both sides for the benefit of whichever of the contracting parties is indebted in the obligation he interprets. The interpretation is sometimes in the interest of one of the contracting parties and at other times in the interest of the other, and if there is doubt as to the obligation Excusing the debtor: This doubt is in his favor and the creditor must notify the debtor. If there is doubt as to whether the penalty condition is due in the event of delay except in the event of non-performance, or is not due except in the event of non-performance, then the condition is not due except in the event of non-performance. Non-performance. If the debtor is obligated to construct certain roads without specifying how these roads will be constructed and who is obligated to maintain them, the debtor may follow what is easiest for him. Likewise, if the commission is stipulated upon completion of the deal and it is not stated when it is paid, payment will be made when the deal is executed, not when it is concluded. Through this section we will examine the following:

The First Requirement: Conditions for Applying the Rule of Interpreting Doubt in Favor of the Debtor

There are a set of conditions that must be met to implement the rule of doubt interpretation in favor of the debtor stipulated by the Tunisian legislator and the Iraqi legislator, and these conditions are represented by the following:

The First Section: There is Doubt about Identifying the Common Intention of the Contracting Parties

There is no justification for the judge to apply this rule if the terms of the contract are clear in meaning. Rather, he must apply the provisions of the contract even if they are not in the debtor's favor. However, if the terms of the contract are ambiguous in that they include multiple aspects, all of which are possible, without preference for one aspect over another, and the judge creates doubt about These phrases result in the inability to resolve the hesitation that is borne and caused by the terms of the contract. The judge must implement this rule to reveal the ambiguity and give the phrases the true meaning, taking into account the interest of the debtor.

To say the opposite is that he interprets the terms of the contract despite their clarity or despite reaching the common intention of the contracting parties in the event of ambiguity of the phrases for the benefit of the debtor on the pretext that they are unjust or arbitrary, then he will have distorted, mutilated and diverted the phrases of the contract from their true meaning, which exposes his ruling to veto .(Zaki, 1949, 56).

Another condition is that interpretation is not impossible. The existence of doubt does not mean the impossibility of interpreting the contract, but rather it means that there is room for its interpretation. The rule of interpreting doubt in the interest of the debtor is united by saying that interpreting the contract is not impossible and at the same time it is not possible in one respect that does not admit of doubt. However, if interpretation is impossible There would have been a presumption that there was no common intention of the contracting parties, and therefore the contract would not have been concluded.

It is assumed that the doubt is something that cannot be cleared, because if the judge discovers the common intention of the contracting parties, he must interpret the contract in accordance with this intention, even if the interpretation is not in the interest of the debtor.

If the judge is not justified in applying custom and the principles of Islamic Sharia because there is a legislative text, then by analogy and a fortiori he should not take a step forward and apply precautionary standards in interpreting the contract without following and exhausting all the basic standards that reveal the common intention of the contracting parties and proving their deficiency in Reaching this intention, because the rule of interpreting doubt in favor of the debtor is a precautionary rule, which must not be resorted to except after the basic standards of interpretation have been exhausted, and if the judge applies otherwise, it is necessary to overturn the ruling .

The second section: The State of Doubt Remains Despite the Exhaustion of the Criteria for Interpretation and the Availability of Good Faith

If doubt persists as to the common intention of the contracting parties, and it is proven to the judge that it is impossible to determine one of the many aspects he has reached, he may resort to the rule of interpreting doubt in the interest of the debtor (Al-Saadi

It is also required that the debtor is not the one who caused the doubt due to his bad faith, as some jurisprudence believes that the judge must take into account the principle of good faith in the first place when applying the rule of

interpreting doubt in favor of the debtor. However, the ambiguity in the contract must not be caused by the debtor's bad faith. His intention and his mistake, and in this case the interpretation is in the interest of the creditor, and this is what is required by the considerations of justice that dictated this legal assumption of interpreting doubt in the interest of the debtor.()

The principle of good moral nature prevents a contractor from reaping benefits or interests to which he is not entitled, and the Tunisian judiciary provides, despite the minority, judicial material based on the principle of good faith (), including the signature of a guarantor to guarantee a company's debt, believing that the bank will obtain two other signatures to guarantee the same. The debt, and when the debtor was unable to pay, the bank pursued the guarantor to pay all of the debt, and raised his mistake in the dimensions of his guarantee, and in the legal dimensions of the guarantee due to the contract's reference to Chapter 130 of the French Commercial Code, and he believed that the chapter was taken from Tunisian law, but the court of first instance obliged him to pay. He refused his defense, so he appealed, again adhering to his arguments in the first instance, so the Court of Appeal ( ) partially responded to his claim and obliged him to pay only a third of the debt, "because it is neither fair nor honest in contracts for the appellant to use his demand for the entire debt as a pretext for ascertaining the payment of the entire debt, including his share of it." Which he did not suspect that he would bear it, and nothing in the contract or law exempts him from it, especially since he would pay it even if the other two guarantors agreed with him in the contract of guarantee, and it is also not fair, nor good faith in contracts as well, for the appellant to be involved in paying the entire debt while depriving him of the possibility of recourse. against the other two guarantors due to the failure of the creditor bank to obtain their signature".

Accordingly, if it becomes clear to the judge that the debtor was the reason for the ambiguity of the terms of the contract, this is considered a grave error that reflects the bad faith of its owner, and therefore it is logical to interpret the contract against the interest of the debtor and in the interest of the creditor. Conversely, what applies in this case to the debtor undoubtedly applies to the creditor. ( )

Section Three: When the Rule of Interpreting Doubt Conflicts with the Rule of Exemption from Responsibility or Warranty

The rule for interpreting doubt in the debtor's interest may conflict with the rule for the condition of exemption from civil liability or warranty, so what rule should the judge give preference to? In this regard, a part of jurisprudence believes that there is no wisdom in applying the rule of interpreting doubt in the interest of the debtor if the condition that raises doubt would reduce the burden of responsibility, such as the condition of exemption from responsibility or cancellation of the guarantee. The person responsible for compensation is the beneficiary of the condition of exemption from responsibility, and the seller. He is the beneficiary of the condition of dropping the guarantee, while the one harmed by these conditions is the creditor and the buyer.

Interpreting the doubt in favor of the debtor of the obligation, i.e. the responsible person or the seller, leads to a reduction of responsibility or an exemption from the guarantee, which harms the other party based on an ambiguous condition. Since the principle is that the determination of responsibility was made in accordance with what the law stipulates, deviating from that principle can only be with conclusive evidence. Also, the burden of proving the condition that violates the general rules falls on the person who claims that, and he must establish the evidence with certainty.

Therefore, a side of jurisprudence favors the view that what is meant by the debtor is the person whom fulfilling the condition would harm him. Ambiguity surrounds the condition, not the obligation, and therefore the interpretation of the condition is in the interest of the one whose presence harms him. So, doubt about the interpretation of the condition of exemption from responsibility is in the interest of the harmed person because it is Who is harmed by exempting the responsible person from responsibility, and the doubt is interpreted in favor of the buyer if the condition is related to the cancellation of the guarantee, even though the debtor in the obligation is the seller because the buyer is the one who is harmed by the condition.()

On the same subject, another side held that if the ambiguous phrase exempts a person from an obligation imposed on him in accordance with general rules, then the doubt is interpreted in the interest of the party who is harmed by the condition, who is the creditor in this obligation, but in this case, he is a debtor in the condition( ) .

An example of this is that a condition is included in the lease contract that exempts the lessor from responsibility for infringement by others. If this condition comes in a general form such that there is doubt as to the type of intended infringement, it must be interpreted as meaning that what is intended is to follow the rule of law, so the lessor is only exempted from responsibility. Regarding the physical infringement issued by third parties without the legal

infringement, this interpretation takes into account the interest of the party who is harmed by the condition, which is the tenant, even though he is the creditor in the obligation of the guarantee that falls on the lessor in the lease contract .()

We, in turn, support this opinion, as the rule for narrow interpretation of exemption from civil liability takes precedence over the rule for interpreting doubt in the interest of the debtor, as the rules of debtor liability in this case result from a commitment to the rule of law.

The Second Requirement: Aspects of Control Imposed on the Judge's Interpretation of the Terms of the Contract

Issues of fact are not immune from the oversight of the Iraqi Court of Cassation and the Tunisian Court of Cassation, and issues of law are not always subject to their oversight. This can be understood because the two previously mentioned courts impose their authority to supervise the trial judge in interpreting the contract by ruling on the facts of the case, but rather on the ruling issued in the case. These courts exercise oversight through various means.

The rule that interpreting the contract is within the jurisdiction of the trial judge does not necessarily mean that the higher court (the Court of Cassation and the Court of Cassation) does not intervene, which always has the right to monitor the extent to which the trial judge respects the rules and conditions for the practice of interpreting contracts stipulated in the law, as this oversight is represented in the case of clarity of the phrase The contract in overturning the ruling: If the subject judge deviates from the apparent meaning of the contract phrases to another meaning under the pretext of interpreting them, that is, under the pretext of searching for the will of the contracting parties, then the deviation from the clear contract phrase - in this sense - is considered a distortion of it, which requires the ruling to be overturned, because it is not permissible for the subject judge to invoke the issue Searching for the will of the contracting parties in order to give another meaning to the phrase contrary to what it indicates, as this would have deviate from the nature of the contract that was intended by the contracting parties. On the other hand, oversight is achieved in confirming the clarity of the contract phrase if the arbitrator claims it is ambiguous, as the issue of clarity is relative and varies from one person to another. However, the Court of Cassation has the jurisdiction to monitor the application of the law and is responsible for distinguishing the clear from the ambiguous.

The Court of Cassation also has the authority to monitor the extent to which the trial judge applies the rule of interpreting doubt in favor of the debtor. If the trial judge's interpretation of the terms of the contract is an interpretation that leads, as a result, to harming the interest of the obligated debtor, his ruling must be overturned.
It is known that judicial oversight over the interpretation of the contract, represented by the oversight of the Court of Cassation/Castry, which are two courts of law and not subject courts, is limited to monitoring the application of the law, meaning that the oversight of the trial judge is limited to issues of law and not issues of fact, and according to the above, it must be done before speaking. Regarding aspects of oversight over the interpretation of the contract, determining what is meant by exposure to issues of fact and law, which are involved in the interpretation process, according to the following:

The First Section: Distinguishing Between Issues of Fact and Issues of Law in General

Since the case consists of all the disputes raised by the opponents among themselves regarding its factual and legal issues, the judge examining the case must verify the validity of its facts, then apply the legal rule that is appropriate to what his father has proven of the validity of the facts, and then issue his ruling based on what he applied. Of those facts.()

If the distinction between factual issues and legal issues is almost useless before the Court of Appeal, because the appeal transfers the case to it as it stands, where the Court of Appeal has the authority to verify the alleged facts and impose the rule of law that must be applied to it, then the distinction between factual issues and legal issues is of great importance before the Court. Cassation/catchment, because the basic principle is that the Court of Cassation/Classification is a court of law whose function is to monitor the correct application of the law without examining the factual issues. Based on that, it is necessary to determine what are considered legal issues that fall under the oversight of the Court of Cassation/Catchment, and what It is considered one of the realistic issues that fall outside that oversight.

The distinction between issues of fact and law is considered one of the most ambiguous and difficult issues. What makes the matter more difficult is that the jurisprudence of the French Court of Cassation does not provide us with a clear criterion for this distinction. Rather, it is understood from this judiciary that it is considered an issue of law that the Court of Cassation has subjected to its oversight, and that it is considered an issue of fact. She took him out of her control. Despite the difficulty of distinguishing between reality and law, jurisprudential standards and methods

prevailed in an attempt to distinguish between them. Jurisprudence in general extracted the most important of these methods, which we summarize as follows:

The first method: This method is crystallized in tracking the stages that the dispute passes through before the judge, which consists of three stages: the stage of verifying the existence of the alleged facts, as jurisprudence holds that matters of fact depend on matters that must be proven before the judge by establishing evidence for them, and then leaving them to the judge. To examine the facts, and to extract what is confirmed and concluded from them in the case, relying on established evidence, using his experience in his interpretation of the facts proven to him by evidence, and wasting away the unproven ones due to insufficient evidence, unlike the case with matters of law, as they are not a subject of proof before the judge, and jurisprudence has gone to The judge's mental activity at this stage is focused on the facts, and thus he is not subject to the supervision of the Court of Cassation/Casution.

The second is the stage of searching for the legal definition of the facts that the judge has proven. Defining the facts is considered the basic function of the adjustment, and it is imposed as an objective axiom independent of the will of the opponents as well as the judge. In theory, the judge cannot accept a wrong adjustment even if the parties agree to Moreover, he must precisely specify the facts presented before him. At this stage, in order to apply the law, the judge describes the dispute in a legal manner, that is, adapting it, and adapting the facts in a particular dispute boils down to a comparison between the premise of the legal rule on the one hand, and the facts presented in the dispute on the other hand. This process of comparison and the result that the judge arrives at indicates that there is a correspondence between reality and the law, and this process is called adaptation.()

The third stage is the stage of drawing the legal consequences that the law arranges for adaptation, which results in resolving the dispute. If the comparison between the assumed legal rule and the facts presented results in a complete match between reality and the model of the legal rule, the judge applies the legal consequences resulting from the legal adaptation by applying the rule of law to the dispute. What was presented before him in accordance with this adaptation, and the proponents of this method concluded that reality and what is considered one of its issues are not completely immune from the oversight of the Court of Cassation, but rather are subject to exceptional oversight, and he took this method for the lack of soundness of its results, in addition to that it is a stressful method that requires stopping at every stage to investigate. What are considered issues of fact and what are considered issues of law, and in the end, you are unable to provide a criterion for this distinction.()

The second method: This method was advocated in particular by some jurisprudents in Italy and Germany, and some Egyptian jurists also advocated it. It is summarized in: the idea of judicial reasoning or judicial logical analogy. This idea is based on the fact that the judicial ruling is in fact a logical result of a specific judicial analogy or reasoning. Its major premise is the legal rule applicable to the dispute, its minor premise is the established facts and the legal adaptation to them, and finally the result is “the ruling,” which is the result of applying the major premise to the minor premise, i.e. applying the law to the facts (). According to supporters of the idea of judicial reasoning, the judge is required to perform the following operations:

- Determine the applicable legal rule.
- Identifying the facts in dispute and giving them appropriate legal adaptation.
- Deducing the extent of the applicability of the applicable legal rule to the incident that was proven to him.

If the judge made a mistake in the major premise by making a mistake in applying or interpreting the legal rule, then the ruling is tainted by a violation of the law. However, if the judge made a mistake in the minor premise, this is in one of two ways, either in terms of not verifying the facts of the case. In this case, he is not subject to The judge is subject to the supervision of the Court of Cassation due to the error being related to the facts, or in terms of the error in adapting the facts, and in this case the judge is subject to the supervision of the cassation because the error in the adjustment is considered to be in the application of the law (), but if the ruling is due to not taking the necessary result, the error is in the result of the analogy, that is, in Based on two valid premises, it is nothing more than an error in the law that requires oversight by the Court of Cassation.

A side of jurisprudence criticizes the two theories, and thus the theory of judicial reasoning does not differ much from the theory of tracking the judge’s activity, as both of them are concerned with describing the judge’s activity in the case, and searching at every stage for what is considered to be issues of fact and what is considered to be issues of law ()

Section Two: Means of Monitoring the Judge’s Interpretation of the Contract

The Court of Cassation and Cassation exercises oversight over the judge’s interpretation of the contract through various means that we can summarize as follows:

The first is: the court of cassation's monitoring of the extent to which the trial judge respects the rules of interpretation. The rule that interpreting a contract is within the jurisdiction of the trial judge does not necessarily mean that the court of cassation does not interfere, which always retains the right to monitor the extent to which the trial judge respects the rules and conditions for the practice of interpreting contracts stipulated in the law, as This oversight, in the case of the clarity of the contract phrase, is represented in overturning the ruling if the judge of the matter deviates from the apparent meaning of the contract phrases to another meaning under the pretext of interpreting them, that is, under the pretext of searching for the will of the contracting parties. Deviation from the clear contract phrase - in this sense - is considered a distortion of it, which requires the ruling to be overturned, because It is not permissible for the trial judge to invoke the issue of searching for the will of the contracting parties until he gives another meaning to the phrase contrary to what it indicates, as he would have deviate from the nature of the contract that was intended by the contracting parties. On the other hand, oversight is achieved in confirming the clarity of the contract's phrase if the arbitrator claims its ambiguity (). The issue of clarity is relative and varies from one person to another, but the Court of Cassation has the jurisdiction to monitor the application of the law and is responsible for distinguishing the clear from the ambiguous.

The Court of Cassation also has the authority to monitor the extent to which the trial judge applies the rule of interpreting doubt in favor of the debtor. If the trial judge's interpretation of the terms of the contract is an interpretation that leads, as a result, to harm the interest of the obligated debtor, his ruling must be overturned. The Court of Cassation also has the authority to monitor the extent to which the trial judge adheres to the rule of interpreting doubt in the interest of the compliant party. In contracts of adhesion, this control consists of achieving unity of interpretation for similar contracts.

Second: The Court of Cassation/Castry's monitoring of the sufficiency of the reasons, as it is subject to the supervision of the Court of Cassation/Casution on the sufficiency of the reasons relied upon by the trial judge in adopting a certain interpretation, and the requirement to return them to what is established from the facts of the case. The process of justification is summed up in listing the facts of the case, extracting the correct ones from them, evaluating it, and implementing the rule. legality in this regard, provided that there is a close logical connection between the ruling's operative part and its reasons, as listing the facts of the case is considered an essential procedure so that the (Cassation/Court) Court can understand it.()

There is no doubt that if the trial judge has full authority to obtain an understanding of the facts in the case, then the Court of Cassation has the right to monitor this understanding, and since there is no way to achieve this oversight except in terms of the reasons for the contested rulings, it is inevitable for the trial judge to justify his ruling in the manner in which He convinces the Court of Cassation that he was not wrong in obtaining this understanding, and every ruling in which the trial judge does not explain how the understanding of the reality of the case was obtained, what his evidence was in obtaining it, and what he followed in how to infer this evidence, then it is a ruling devoid of reasons or has no basis in law. Which necessitates his ruling being overturned.

Dr. Ahmed Fathi Sorour says in this regard, "Part of French jurisprudence holds that the contested ruling is considered deficient in its legal basis if the reasons it contains are unlimited or incomplete, which does not allow the Court of Cassation to verify the extent of the correctness of the ruling in applying the law." This defect is due to a lack of reasons for the ruling related to the reality rather than the law, and this defect can be diagnosed in the insufficiency of the data provided by the ruling about the incident, which is necessary for deciding on the application of the law.()

Accordingly, the Court of Cassation/Consequence extends its oversight over the trial judge, and this oversight consists of monitoring the ruling issued by the trial judge and the extent of his commitment to reasoning and drawing his conclusions from sources that actually exist, not illusions, and are not inconsistent with the established circumstances of the dispute.()

Third: The court of cassation/consequence monitors the extent of the trial judge's commitment to adapting the contract. As we have indicated, adjusting the contract is based on a set of facts that the trial judge extracts and refers to the law to determine the type of contract, then applies to it the legal rule that suits him. The judge adapts the disputed contract from On his own initiative, even if the opponents did not ask him to do so, because he cannot decide the dispute without adaptation, and since the judge of the matter in his adaptation of the contract was only making a comparison between the effect to which the will of the contracting parties was directed, as he extracted it from the contract, and the abstract essence of the contract as stipulated by the law, then His work in air conditioning is considered a legal matter and is subject to the supervision of the Court of Cassation/Call.

The French Court of Cassation ruled that the issue of interpreting contracts is a matter of law, and based this on Article (1134) of the French Code, where it said, "the agreements between those who concluded them stand in the place of

the law, but the contract gives the contracting parties the status of the law." Those who are being addressed: Since the interpretation of the law is considered a matter of law, the interpretation of the contract must also be so. However, it soon rejected this opinion and considered the interpretation of contracts to be a matter of fact, not a matter of law, and not subject to the oversight of the Court of Cassation. This was in accordance with two decisions issued by it. On 12/2/1808 and 1/3/1809, she said, "The law is a private law and not a law. Although Article (1134) likens it to a law that is similar to the laws issued by the contracting legislative authority, it does not become and apply to all persons in the state. Since the authority of the Court of Cassation is limited to looking into the conformity of provisions with the laws, it cannot look into the ambiguity of contracts and their conformity with the intention of the contracting parties, and thus it was considered that the interpretation of contracts is a reality that is not subject to the control of the Court of Cassation.

The Iraqi Court of Cassation went on to say that: "Jurisprudence and the judiciary have established that the trial court has full authority to interpret disputed contracts, conditions, and restrictions, and with this authority it has the right to change the apparent meaning to something other than it, on the condition that it explains in its ruling why it changed the apparent meaning to something different, and how it reported it." That wording has the meaning that I was convinced of and assumed to be what was intended by the contract, so that it becomes clear in this statement that it took reasonable considerations in its interpretation, and what I concluded from it is rationally valid".

If the judge of the matter arbitrarily makes this conclusion, despite the clarity of the will and the absence of anything that contradicts it, by obtaining from the contract something that is not from it in reality, then he will adapt this collection in a manner that is inconsistent with what the law actually intended, even if it appears to be consistent with the wrong understanding of the facts (), and thus the This adaptation is subject to the supervision of the Court of Cassation/Call.

Accordingly, the Court of Cassation extends its oversight over the trial judge in the following cases:

- If the contract phrase was clear, but the trial judge deviated from it by interpreting it to identify the will of the contracting parties, then it is considered to be in violation of the law without causing him to depart from the apparent meaning to something different. In this case, he is subject to the supervision of the Court of Cassation/Cass because this falls within the core of its jurisdiction.
- If the trial judge interprets the contract in a certain way and his criterion for this interpretation is that the literal meaning of the words must be taken into account by the common intention of the contracting parties, then he is considered to be in violation of the law and is therefore subject to the supervision of the Court of Cassation/Castry.
- If the trial judge interprets the contract and then adapts the contract and gives it a legal description that is not consistent with his interpretation, as it is considered a violation of the provisions of the law, then he is subject to the supervision of the Court of Cassation/Cass because explaining the nature of the contract is one of the issues of law in which the trial judge does not have independence.

What justifies this oversight is the court of cassation's keenness for the trial judge to respect the joint will of the two parties on which the contract is based in its formation and interpretation. Therefore, the trial judge may not - under the pretext of interpreting the contract - replace this will with an imaginary will for which there is no evidence, thus modifying the legal effects of the contract. The order Which affects the interests of individuals and the stability of transactions.

In order for the Court of Cassation to monitor/comment on the trial judge with regard to the obligation to adapt the contract and determine its legal description, procedural and objective conditions must be present, and what concerns us in this regard is the fulfillment of the most important objective conditions, which are that the arbitrariness in adapting is based on written conduct, and that the ruling includes a contrary interpretation. to the will of the contracting parties.

Conclusion

At the conclusion of this research, through which we discussed the judge's discretionary power to interpret the will of the contracting parties to achieve contractual balance between the parties to the contract, and based on the above, the study reached a set of results and recommendations, which can be summarized as follows:

First: The Results

1. The general rule approved by legislators is that the interpretation in case of doubt or doubt is in the interest of the debtor.

2. The Jordanian and Tunisian legislators made the rule of interpreting doubt in the debtor's interest one of the peremptory rules that the judge must adhere to, otherwise his ruling is subject to cassation.
3. It is assumed that the doubt is something that cannot be cleared, because if the judge discovers the common intention of the contracting parties, he must interpret the contract in accordance with this intention, even if the interpretation is not in the interest of the debtor.
4. In light of the disagreement in jurisprudence regarding the possibility of adopting the criterion of distinguishing between reality and law to determine the scope of judicial oversight, as this idea was revealed to be ambiguous, jurisprudence decided that matters of fact are not immune from the oversight of the Court of Cassation and Cassation, and that matters of law are not always subject to its oversight, and it concludes that pure reality and the law Research does not exist in legal truth.
5. In order for the Court of Cassation to monitor/comment on the trial judge with regard to the obligation to adapt the contract and determine its legal description, procedural and objective conditions must be present, and what concerns us in this regard is the fulfillment of the most important objective conditions, which are that the arbitrariness of the adaptation be based on a written act, and that the ruling includes An interpretation contrary to the will of the contracting parties.

Second: Recommendations

1. We hope that the Iraqi legislator will reconsider the rules of interpretation that he mentioned in the Iraqi Civil Code in wording and substance, which he derived from the Journal of Judicial Provisions, and choose the appropriate ones and exclude what is not appropriate, while noting not to go overboard with it.
2. The judge in Iraq and Tunisia, when interpreting the expression of will, must not stop at the physical expression only, but must research all the facts and circumstances accompanying the contract to determine their will at the moment of concluding the contract.

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