

## **Restrictions and conditions for amending the civil contract**

### **A comparative study between Algerian and French legislation.**

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### **Summary:**

The Algerian legislator was proactive compared to the French legislator in talking about the possibility of amending the contract, as the priority for the Algerian legislator was to develop legal texts that give the judge the possibility of amending the contract in order to remove the burden on one of the parties, while the French legislator procrastinated and did not allow the judge this authority, preventing him from amending the contract no matter what. Circumstances change.

The reason for the French legislator's delay in recognizing the possibility of amending the contract was his exaggeration in his commitment to the necessity of respecting the sanctity of the contract, as the mere thought of amending the contract is something that affects the stability of transactions according to him, and affects the legal security of those contracts, and he continued this approach for a long time and did not change his mind. Only recently under Order 2016-131.

**Keywords:** amendment, terms, contract, Algerian legislation, French legislation.

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### **Introduction:**

Most comparative legislation stipulates the necessity of respecting the principle of the sanctity of the contract, as the contract must not be amended except with the consent of both parties.

However, it may happen that circumstances arise that were not expected during the conclusion of the contract that make the implementation of the contract extremely cumbersome, which threatens one of the parties with a huge loss if the

implementation of the contract continues as it was initially agreed upon. Therefore, some mechanisms have been put in place to amend The corresponding obligations of the parties, taking into account respect for the sanctity of the contract and the principle of the authority of will, and avoiding termination of these contracts as much as possible.

By making a comparison between the Algerian and French civil laws, we find that the Algerian legislator was the first to develop legal texts that give the judge the ability to amend the contract in order to relieve the burden on one of the parties, while the French legislator procrastinated and did not allow the judge this authority, preventing him from amending the contract no matter how the circumstances changed, and he continued This approach has been in place for a long time and he did not change his mind until recently under Order 2016-131.

It should be asked about the restrictions and conditions that must be respected in order to amend the contract, and whether there is a difference between Algerian legislation and French legislation.

This study aims to clarify the most important restrictions and conditions that must be respected in order to amend the contract, especially since the French legislator was long overdue before accepting the idea of amending the contract, unlike the Algerian legislator, as we will explain below.

The importance of this study is evident in clarifying the difference between amending a civil contract between Algerian and French legislation, as the Algerian legislator

considers this matter to be part of the public order and it is not permissible to agree to violate it, unlike the French legislator, which gave the parties the possibility of agreeing to exclude the idea of amending the contract if one of the parties to the contract accepts By bearing the fatigue that may result from changing circumstances, he preferred that the judge not intervene to amend the contract.

In order to answer the problem raised in this article, two analytical and comparative approaches were relied upon, the first for the purpose of analyzing various legal texts, especially the Algerian and French civil laws, which touched on the idea of amending the contract, as well as returning to the conditions and restrictions contained in the Algerian and French legislation, as was done. Relying on the comparative approach in order to shed light on the most important differences contained in the two legislations concerned with our study.

In order to clarify what was mentioned above, we first touched on the conditions and restrictions contained in the Algerian Civil Code regarding amending the contract (first), then after that we talked about the French legislator's recognition for the first time of the possibility of amending the contract and the conditions for that (second), so that we finally conclude by talking about the stages that The process of amending the contract goes through according to the French legislator (third).

#### **First: Conditions for amending the contract in Algerian legislation.**

Article 107 BC touched on. M. C to ways to address the contract whose balance is disturbed due to changing circumstances,

clearly and specifically, and the definition provided by the article was restrictive to the authority of the parties, as it stipulated that: "however, if general exceptional incidents occur that could not have been expected and their occurrence results in the implementation of the contractual obligation, even if it does not become impossible, becoming burdensome for the debtor such that it threatens him with a huge loss, the judge may, depending on the circumstances and after taking into account the interests of both parties, return the burdensome obligation to the reasonable extent, and it shall be void." Any agreement to the contrary".

It is clear from the article that dealing with emergency circumstances by a judge is a matter of public order, so the parties may not agree that one of the parties will bear the emergency circumstances and take away the judge's authority to deal with this matter, unlike what is in force majeure, where the parties may agree that one of the parties will bear the consequences of force majeure.

If the rule is that it is not permissible for the parties to agree that one of the parties will bear the consequences of emergency circumstances, is it equal to that the agreement was during the conclusion of the contract, that is, before the occurrence of the emergency circumstance and the agreement that occurs after the occurrence of the emergency circumstance, and are there other means to address the emergency circumstance, such as amending the contract or agreeing to Terminating it, we will try to explain all of this below.

1.The parties agree in advance to exclude emergency circumstances before they occur.

It is clearly evident from the text of Article 107 BC.M.C: The parties may not agree during the conclusion of the contract or after its conclusion and before the occurrence of emergency circumstances to exclude it and for one of the parties to bear the full consequences of those circumstances.

Whereas, if the parties are allowed to do so, the strong party will automatically stipulate on the weak party the necessity of continuing to implement the contract under any circumstances, and to bear all emergency circumstances attached to the contract in a manner similar to what happens in contracts of adhesion, where one party dictates to another the terms of the contract.

2. Agreement subsequent to the occurrence of the emergency circumstance.

There is no dispute that the legislator's goal in preventing the parties from agreeing to exclude emergency circumstances and to continue implementing the contract even in the presence of these circumstances is to protect the parties, especially the weak party, from making decisions with uncalculated consequences, or taking them under the influence of the strong party in the contract. If so, what would happen if the parties agreed to exclude emergency circumstances after they have occurred.

The parties can agree to exclude emergency circumstances after they occur, in which case the parties are aware of the emergency circumstance and the extent of their ability to bear it. In addition, it is sufficient for the party affected by the emergency circumstance to continue implementing its contractual obligations until we are faced with an implicit agreement to bear the

emergency circumstance, so there is no harm. This should be in the form of a written agreement.

3. The parties agree to dissolve the contract that has become burdensome due to emergency circumstances (reasoning).

If the Algerian legislator prohibited, in Article 107, one of the parties from bearing the consequences of emergency circumstances alone, and it did not prevent the two parties from agreeing to terminate the contract, then this is considered a distribution of the consequences of emergency circumstances to the two parties to the contract of their own free will, and this is known as transfer.

He defines a contract as: "a solution to the contract by agreement of both parties, after the contract has been formed correctly, as it is done by an explicit or implicit offer and acceptance through which the contracting parties aim to dissolve the contractual bond even without a reason and without resorting to the judiciary".

Although the Algerian legislator did not explicitly stipulate the transfer, Article 106 BC.M.C It was frank and clear regarding the possibility of amending or terminating the contract by agreement of both parties.

4. The parties agree to amend the burdensome contract.

Article 106 of the Algerian Civil Code stipulates that the parties can agree to amend the contract concluded between them, and therefore there is no objection to the parties whose obligations have been exhausted as a result of emergency circumstances agreeing to amend the contract, as long as the other party accepts that amendment.

If the two parties to the contract have the right to terminate the contract by transfer, then a fortiori they have every right to amend it by introducing what both parties deem worthy of removing the burden on one of its parties or amending it radically to serve as a new contract, and this is called renewing the obligation.

The obligation is renewed in accordance with Article 287 BC.M.C In the event that the original obligation is replaced by a completely new obligation, which is intended to change the debt, and it may also be renewed by changing the debtor or creditor.

Renewal may take three forms:

A- Renewal by changing religion:

The debt may change through renewal, according to Article 287 BC.M.C by renewing or changing the place or source.

As an example of renewal in the subject of an obligation between contracting parties in a contract, it is possible to imagine concluding a contract between two parties in order for State A to export to State B a quantity of refined oil. It happens that a number of refineries in State A, the exporting country, are exposed to a sudden natural or human-induced accident, which makes From refining oil is stressful for the first party.

In order to relieve fatigue and ensure the continued implementation of the contract, the two parties agree to renew the obligation or merely amend it, because the contract is what allows us to know whether the obligation has been merely amended or renewed, according to the intention of the parties, out of respect for the principle of the contract, the law of the contracting parties.

Here, the two parties may agree, for example, to increase the amount of oil exported, provided that it is crude as compensation for exporting a smaller quantity repeatedly, as was the case in the beginning, or to agree to reduce the price.

**B- Renewal by changing the creditor:**

According to Article 287 BC.M.C: The renewal of the creditor can only be achieved by agreement of all contracting parties, the original creditor, the new creditor, and the debtor.

It is not enough for the new creditor to agree with the old creditor without the debtor's knowledge, because the debtor often prefers to remain in a contractual relationship with a specific creditor instead of another creditor.

As an example of changing a creditor in a contract, it is conceivable that there is an agreement between a tourism company and an airline in order to ensure the transportation of passengers to several countries around the world.

Some time after concluding the contract, the airline was exposed to great financial difficulties due to the Corona pandemic that struck the world, especially after many countries closed their airspace, which made implementing the contract exhausting for all parties.

After a period of discussions and searching for solutions to continue implementing the contract, the tourism company proposed to the airline to undertake the transportation of customers of another tourism company, especially since the destination of the second tourism company's customers has an open atmosphere and has not been closed.

The airline responded by accepting the order, and thus the contract was renewed by

agreement of everyone: the debtor (the airline), the first creditor (the first tourism company), the new creditor (the second tourism company), so to renew the creditor, all parties must accept that, which is what happened in this case.

**C- Renewal by changing the debtor:**

Contrary to what is indicated regarding changing the creditor in which the approval of all parties is assumed, changing the debtor can be limited to the approval of the creditor and the new debtor who replaces the old debtor even without the latter's consent, and the wisdom behind this is that the consent of the old debtor is not taken into account since he will be exempted from His obligations are borne by a new debtor, whose approval must be taken into account.

However, in the event that a new debtor agrees with the old debtor, the approval of the creditor must be obtained, who will be in a contractual relationship with the new debtor instead of the old debtor, and it will not be conceivable that this will be completed without the creditor's approval.

It is possible to imagine changing the debtor within the framework of a contract according to Algerian legislation, in the event that there is a contract between two parties to supply coal for heating, for example, and a war breaks out in a certain area and transporting coal becomes exhausting for the debtor, which prompted him to stop supplying the creditor with coal.

In order to ensure the implementation of the contract, another party intervenes and agrees with the creditor to replace the old debtor (the previous financier with coal). In this case, an agreement between the creditor and the new debtor (the new party that

guarantees the supply) is sufficient without the need for the consent of the previous debtor (the previous supplier with coal. Who was exhausted by the war).

The new debtor's assumption of the contract despite the atmosphere of war may be a form of propaganda for the company or country, especially if the country of the parent company is the one causing the war, for example.

D- A lawsuit to return the burdensome obligation to a reasonable extent.

According to the text of Article 107 BC.M.C: A party whose obligation has become burdensome, which threatens him with a huge loss if he continues to implement it, may file a civil lawsuit before the judiciary in order to restore the obligation to a reasonable extent that eliminates or reduces the fatigue resulting from the contract.

The debtor must prove the existence of the emergency circumstance, and fulfill all the conditions required for this, including generality, exceptionalism, and non-expectation, in addition to being exposed to a huge loss due to this circumstance.

Second: Conditions and restrictions for amending the contract according to the French legislator.

Before the implementation of the theory of emergency circumstances in French law, contracting parties often resorted to adopting multiple mechanisms to avoid contracts being affected by changing circumstances, especially long-term ones, which are more exposed than others to changing circumstances, and with the French legislator at the time not addressing the theory, it was often resorted to For each

of the renegotiation conditions, the arbitration requirement, the price review requirement, and the supply and demand mechanisms,...

Among the French laws that also preceded the emergence of the theory of emergency circumstances, we find some special laws that sought to protect one of the parties to the contract from any change in circumstances, by requiring that any contract between certain parties include a clause stipulating the necessity of negotiation in certain cases, such as changing economic conditions If we take, for example, in this regard, the Hamon Law (la loi hamon) of March 17, 2014, which introduced several amendments to the Consumer Protection Law, including the requirement to add a clause in all contracts related to the supply and distribution of agricultural and food materials regarding the possibility of renegotiation in the event that economic conditions change suddenly.

In order to implement the theory of emergency circumstances according to Article 1195 of Order 2016-131, the following conditions must be met:

1- Circumstances change suddenly and unexpectedly from what they were at the time of concluding the contract:

According to the article, the circumstances that occurred in the contract must be unexpected when concluding the contract, so this condition usually applies to contracts that pass a long period between their conclusion and implementation.

2- A change occurs that makes implementing the contract cumbersome:

In order to activate the theory of emergency circumstances, it is not enough for the accident to be sudden and unexpected, but rather the sudden accident or emergency circumstance must make the implementation of the contract burdensome and costly for at least one of the parties.

If the change, even if it is sudden, does not reach an extent that makes implementing the contract burdensome, then there is no room for demanding the implementation of the theory of emergency circumstances in order to amend or terminate the contract.

It is also worth noting in this case that the French legislator has come very close to the theory of force majeure, as it is known that if the implementation of the contract becomes impossible, the obligations of the parties will expire without the need for compensation, and this is confirmed by Article 1307-02.

The similarity between force majeure and emergency circumstances in accordance with Article 1195 is that the latter gives the parties the possibility of agreeing to terminate the contract and even gives the judge the right to terminate the contract if the two parties to the contract do not reach an agreement that guarantees the rebalancing of contractual obligations, as the article stipulates that:

"if the parties do not reach an agreement within a reasonable time limit, the judge can at the request of one of the parties amend or terminate the contract on the date and on the terms he determines...."

3- The party affected by the change in circumstances does not accept to bear the risks:

The last condition is that the party harmed by accidents and unforeseen circumstances that significantly affected the parity of payments does not accept its full tolerance for risks.

The question raised here is how the affected party can accept to bear the risks.

Here it must be noted that this acceptance often occurs during the conclusion of the contract, where a clause is added, for example, stipulating that a specific party bears any circumstance that may occur during the implementation of the contract, even if it was not expected, as the French Civil Code did not prevent this, unlike the Algerian legislator, which It considers the article on emergency circumstances to be part of public order and prohibits any agreement that violates it.

Third: Stages of amending the contract in accordance with Article 1195 of the French Civil Code.

If the three conditions mentioned above are met, the contracting parties can activate several mechanisms that allow the exhaustion to be lifted in accordance with Article 1195, starting with the possibility of amending the contract up to its termination and termination, whether by agreement of the parties or by a judge's ruling, and these means can be summarized as follows:

The first stage: requesting negotiation of the contract.

The party affected by the change in circumstances, according to which compliance with what is stated in the contract has become a burdensome matter, may submit a request to the other party requesting a renegotiation of the terms of the contract.

This request is not a new matter, as even before the French legislator recognized the theory of emergency circumstances under Article 1195, the two parties could have amended the contract as long as the amendment would be with the consent of both parties, but what was new in the article was giving new mechanisms to the injured party in the event that the creditor expressed His refusal to enter into negotiations to amend the contract.

This is what protects the affected party from the arbitrariness of the creditor, who will often reject the idea of renegotiation as long as he benefits from the situation, and will not accept entering into negotiations to change the terms of the contract, especially if he is in bad faith.

**The second stage:** The contracting parties agree to terminate the contract or their joint request to amend it from the judge.

Finally, what is credited to Article 1195, which introduced the theory of emergency circumstances into the French legislative system, is that it mentions and prompts the contracting parties not to forget to establish mechanisms in order to address emergency circumstances in the event that they occur, otherwise the judge will intervene to do so.

Conclusion:

The parties to the contract often find themselves forced to amend what was initially agreed upon, as unexpected circumstances may arise that make implementing obligations cumbersome, if not impossible.

In order to avoid these consequences, an attempt is usually resorted to to amend the contract in order to relieve the fatigue imposed on both or one of the parties to the

contract, but this matter is not easy, as classical jurisprudence is clashed, which calls for the necessity of respecting the sanctity of the contract, as even thinking about amending The contract is something that affects the stability of transactions, according to them, and affects the legal security of those contracts.

But saying that the legal security of the contract will only be achieved by absolute respect for the terms of the contract, and not amending the contract no matter how circumstances change, is rejected, as the stability of transactions and the preservation of the contractual relationship will not be achieved if the contracting parties are obligated to implement the contract in the same form in which it was concluded despite the change in circumstances surrounding the contract, Achieving legal security and respecting the principle of good faith requires the possibility of exceptions to the binding force of contracts as a result Amending the obligations of the parties is better than keeping these contracts unimplemented due to the impossibility of implementing them.

As a result, our study, related to the theory of emergency circumstances in the field of international trade contracts, has produced a set of results, which we can summarize as follows:

- The Algerian legislator considers the matter of amending the contract due to changing circumstances to be part of the public order, so the two parties to the contract cannot agree to exclude this possibility, such as if it is agreed in the contract that one of the parties will bear the consequences of the emergence of any and

the exclusion of the judge's intervention to amend the contract with the intention of removing fatigue, for example, as Article 107 BC prohibited. M.A: This is explicitly stated by saying: "Any agreement to the contrary shall be invalid." This is contrary to what is stated in the case of force majeure, where the debtor can bear the consequences of a sudden accident or force majeure.

• Unlike the Algerian legislator, the French legislator gave the contracting parties the possibility to agree to bear the risks and exclude the possibility of amending the contract, as he linked the activation of this mechanism to the fact that no party may bear the consequences of the emergency circumstance, which is what was stipulated in Article 1195 of the French Civil Code: "pour un partie qui n'avait pas accepté d'en assumer le risque"

Based on the results reached, we propose amending the Algerian Civil Code, as the Algerian legislator was not successful when he used the word *réduire* in Article 107 BC. M.C, as it is not always conceivable that the fatigue that may befall the parties in the event of emergency circumstances will be addressed by reducing the obligations of a particular party, as it is possible that removing the fatigue from the debtor party will pass through increasing the obligations of the creditor, the French legislator was precise in choosing his words when he used in Article 1195 of Order 2016-131 is the word *réviser*, not *réduire*, and this is what indicates reviewing the contract by increase or decrease Therefore, the Algerian legislator must remedy the matter.

### **Marginalization**

1- Order 75-58 containing the Civil Code, op. cit., Article 107.

Article 178 BC states: M. C as:

"it may be agreed that the debtor will bear the consequences of a sudden accident or force majeure"

2- Abd al-Razzaq al-Sanhouri, *Al-Wasit fi Sharh al-Civil Law*, previous reference, p. 531.

3- Abd al-Razzaq al-Sanhouri, the mediator in explaining civil law, the same reference and place.

4- I said, I said, the source of the seller's and buyer's exchange: so they annulled the sale after contracting it

5- The two sellers said: They broke their deal.

Al-maani website

6- <https://www.almaany.com/ar/dict/ar-ar/%D8%AA%D9%82%D8%A7%D9%8A%D9%84/>

Accessed on 09/23/2024 at 10.31

7- Ali Najida, *The General Theory of Commitment, Book One, Sources of Commitment*, Dar Al-Nahda Al-Arabiya, Cairo, Egypt, 2005, p. 286.

8- Article 106 BC states: M.A: "The contract is the law of the contracting parties, so it may not be annulled or amended except by agreement of both parties or for reasons determined by the law".

9- Muhammad Muhyiddin Ibrahim Salim, *The Theory of Emergency Circumstances between Civil Law and Islamic Jurisprudence*, previous reference, p. 380.

10- Article 287 BC states: M.C as: "The commitment is renewed"

- 11- By changing the debt if the two parties agree to replace the original obligation with a new obligation that differs from it in its place or source
- 12- - By changing the debtor if the creditor and third parties agree that the latter will be a debtor in place of the original debtor, provided that the original debtor is discharged without the need for his consent, or if the debtor obtains the creditor's consent with a foreign person before he is the new debtor.
- 13- By changing the creditor if the creditor, debtor and third party agree that the latter will be the new creditor.
- 14- La loi no 2014-344 du 17 mars 2014 relative à la consommation, dite « loi Hamon » du nom de Benoît Hamon, alors ministre délégué à l'Économie sociale et solidaire et à la consommation, est un texte de loi français ayant pour objet de renforcer les droits des consommateurs.
- 15- Art 1307-02 Créé par L' ordonnance n°2016-131 du 10 février 2016 - art. 3 disposer :
- 16- « Si elle procède d'un cas de force majeure, l'impossibilité d'exécuter la prestation choisie libère le débiteur ».
- 17- Art 1195 (Modifié par L'ordonnance n°2016-131 du 10 février 2016 - art. 2 entré en vigueur au 1 octobre 2016) disposer :
- 18- ".....ou exigeur d'un commun accord au juge de marché à son adaptation. A défaut d'accord dans un délai raisonnable, le juge peut, à la demande d'une partie, réviser le contrat ou y mettre fin, à la date et aux conditions qu'il fixe".
- 19- L'ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations consacre et pose les conditions de la révision pour l'imprévision (C. civ., art. 1195, tel qu'issue de l'ordonnance). Cette disposition entre en vigueur le 1 er octobre 2016 ; les contrats conclu avant cette date demeurent soumis à la loi ancienne.
- 20- <https://www.legifrance.gouv.fr>  
Consulté le 29/10/2024 un 23h21.
- 21- Art 1134 (version en vigueur du 17 février 1804 au 1 octobre 2016) disposer :  
"Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites.  
Elles ne peuvent être révoquées que de leur consentement mutuel, ou pour les causes que la loi autorise.  
Elles doivent être exécutées de bonne foi « »
- 22- Fabrice Patrizio, avocat associé du cabinet Archers, Théorie de l'imprévision : A quoi sert le nouveau article 1195 du Code civil ? le monde du droit, le magazine des professions juridiques, 15/09/2016.
- 23- L'imprévision, mal aimée historique du droit français, est désormais consacrée par la réforme du droit des contrats.
- 24- ".....S'en est donc fini du rejet de principe posé par l'arrêt historique « Canal de Craponne » en date du 6 mars 1876 concernant la révision du contrat pour l'imprévision. 140 années de jurisprudence au cours desquelles

aucune considération de temps ou d'édition ne pouvait permettre au juge civil de modifier la convention des parties au motif que la force obligatoire des conventions s'impose aux parties et au juge.

25- En retard sur ses voisins, la France était l'un des derniers pays d'Europe à ne pas reconnaître la théorie de l'imprévision en matière civile. En effet, la multiplication des contrats de longue durée dans un environnement économique de plus en plus instable a conduit à la consécration de la révision judiciaire du contrat pour l'imprévision tant au travers des projets européens de droit des contrats qu'avec les avant-projets de réforme...

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