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المستحدث حول سلطة القاضي الفرنسي في تعديل العقد، قراءة في الأمر 2016-131.

What is new about the authority of the French judge to amend the contract Read the order 2016-131

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Summary:

The French judge did not have the authority to amend the contract before 2016, as the French legislator rejected the idea of amending the contract, and his argument for that was the necessity of respecting the principle of the sanctity of the contract.

Article 1134 of the French Civil Code was a landmark article in enshrining the principle of the binding force of contracts, and therefore the judge refused to amend the contract under any pretext.In many cases, the Court of Cassation relied on that article in order to reason its decision and confirm the binding force of the contract, and thus rejected intervention.The judge in order to amend the contract under any pretext.

This matter changed after the modernization of French legislation, as Order 2016-131 issued on February 10, 2016 included among its victims Article 1134 of the Civil Code, which entered into force on October 1, 2016.Article 1195, which was introduced by Order 2016, brought about 131 revolution in French civil law Which was an acknowledgment by the French legislator and the judiciary of the possibility of the judge intervening in order to amend the contract.

Keywords: French judge, binding force, contract modification.

Introduction:

French law was one of the strongest opponents to the idea of amending the contract under any circumstances, at least in the civil sphere.Although it used force majeure as a reason for terminating the obligation, it refused to amend the contract, which was followed by fatigue due to changing circumstances, for example, under the pretext of the binding force of the contract and its sanctity, which The French legislator has long called for it for a long time, and the Craponne case had a significant impact in embodying and clarifying the sanctity of the contract according to the French judiciary The rejection continued until the French Civil Code was amended in 2016.

Order 2016-131, issued on February 10, 2016, was a turning point in French legislation, which abolished Article 1134 of the Civil Code, which was the basis for enshrining the principle of binding force for contracts, and rejected any amendment to the contract no matter how circumstances changed.This is the article on which the French Court of Cassation relied in its famous ruling.Concerning the Craponne Canal, according to which the Court of Cassation prevented amending the contract as it refused to adopt the theory of emergency circumstances at the time Therefore, its abolition represented the birth of the theory of emergency circumstances in French legislation, which was confirmed by Article 1195, as the French legislator began to recognize the theory of emergency circumstances explicitly and definitively.

In contrast to the French Civil Code, which did not adopt the theory of emergency circumstances until recently, the French Administrative Code was the first to adopt the theory of emergency circumstances in order to amend the terms of the contract and did not adhere to the binding force of the contract.Perhaps the famous Bordeaux gas case, although it is not the only one, is the most famous in clarifying The position of the administrative judiciary regarding changing circumstances.

The question that arises here is the extent to which the French judge can intervene to amend the contract, and what is new after amending the French Civil Code.

This study aims to clarify the new recognized role of the French judge in amending the contract, especially

after the abolition of Article 1134 of the Civil Code, which was the basis for enshrining the principle of the binding force of contracts.

The importance of this study is evident in the necessity of striking a balance between the principle of the sanctity of the contract and the possibility of the judge intervening in order to amend the contract with the aim of restoring it to a reasonable extent, as the principle of the sanctity of the contract should not be an excuse to undermine the judge's authority to amend the contract.

Our study required an analytical approach by analyzing various articles of the French Civil Code, whether preceding or following the amendments that occurred under Order 2016-131.

In order to clarify what was mentioned above, we first touched on the possibility of the French judge intervening not in order to amend the contract, but rather to completely exempt the debtor from implementing his obligations in the event that it is impossible to implement the contract (first), and then we touched on the French legislator's categorical rejection of the idea of amending the contract (second), Let us then turn to the change of attitude of the French legislator, who for the first time allowed the judge the possibility of intervening in order to amend the contract (III).

I.Impossibility of performance of the contract by reason of force majeure in French law.

The contract can be affected in general by a change in circumstances, but this change in circumstances may lead to an absolute impossibility in implementing the contract, which is what the French legislator adopted when it exempted the debtor from his contractual obligations due to what is called "force majeure," in contrast to the emergency circumstance "imprévision". In the latter case, the French legislator before 2016 categorically refused to implement the theory of emergency circumstances.

The French legislator took into account the binding force of the contract, "force obligatoire du contrart," whereby it is considered that agreements that are legitimately formed acquire the argument of law before those who created them.

In order for force majeure to be implemented as a reason for the

expiration of the obligation without implementing the contract, according to the French judiciary, three elements must be present:

- Unexpected accident.

An irresistible (unavoidable) accident.

Foreign accident (beyond the debtor's control).

If these conditions are met and the will of the contracting parties has nothing to do with them, the contract may be terminated without its implementation, provided that the accident occurred after the conclusion of the contract, and the parties do not accept to bear the accident.

Article 1351 of the French Civil Code stipulates that in the event that it is impossible to implement the contract due to force majeure and the impossibility is absolute and permanent, the debtor is released from his obligation unless it is agreed otherwise that one of the parties will bear the consequences of the force majeure, or one of the parties has been warned.So in advance.

Second: French law and judiciary refused to amend the contract.

As was pointed out, if the French legislator had taken force majeure as a reason for terminating the obligation, the matter is different in the case of emergency circumstances, which the French legislator refused to take for a long time in order to allow the judge to amend the contract, and the refusal continued until the year 2016, which the legislator recognized.French theory of emergency circumstances for the first time.

In the same context, the Court of Cassation refused before this date to adopt the theory of emergency circumstances.Rather, it considered that the attempts made by the courts of first instance to amend the contract in order to recognize the theory of emergency circumstances by analogy with legislation that recognized force majeure were unsuccessful.

Perhaps the most prominent position of the French Court of Cassation, which demonstrated its categorical refusal to adopt the theory of emergency circumstances in order to amend contracts, is the Craponne case.

The Craponne Canal decision is represented by the famous decision issued on March 6, 1876 by the Civil

Chamber of the French Court of Cassation, which became a famous decision related to the principle of the sanctity of the contract and the binding force of the contract, in accordance with Article 1134 of the French Civil Code before it was amended by Order 2016-131.

The facts of the Craponne case go back to the sixteenth century, when a contract was concluded between the owner of the Craponne Canal, according to which he received compensation of three (03) cents in exchange for maintaining the canal and supplying water to a neighboring plain (la plaine de la crau).

The obligation of the owner and his heirs after him remained in place for three centuries since the conclusion of the contract.In the nineteenth century, due to the decline in the value of the currency, the value of the compensation became meager and insufficient for the expenses of maintaining the canal, so the heirs of the canal owner resorted to the judiciary in order to try to amend the value of the compensation obtained as a result of maintaining the canal.

However, the French Court of Cassation had a different opinion, as it ruled in the content of its decision referred to above that it is not within the jurisdiction of the judiciary to take into account the time factor and changing circumstances in order to amend the obligations of the contracting parties and introduce new clauses into the contract other than those that were agreed upon between the parties during Their conclusion of the contract.

Consequently, the Court of Cassation categorically rejected the possibility of judicial intervention in order to strike a balance between the obligations of the contracting parties that did not regulate the occurrence of emergency and unexpected circumstances.

In order to reason its decision, the Court of Cassation relied on the binding force of the contract in accordance with Article 1134 (recently repealed by Order 2016-131), which stipulates that contracts concluded in accordance with the law remain binding on the parties, and thus rejected the possibility of amending those contracts by the judge even in the event of fundamental changes.In circumstances that led to an imbalance in performance between the contracting parties.

Extrapolating the decision of the French Court of Cassation regarding the Craponne case, we find that this jurisprudence, although it actually refused to give the judge the possibility of amending the contract agreed upon between the parties to the same extent that it prevented one of the parties from evading his contractual obligations due to the circumstances that arose due to the long period that the contract took, The court's refusal was based on the principle of the sanctity of the contract and the binding force of contracts in accordance with Article 1134 of the former French Civil Code However, the same jurisprudence did not prevent the contracting parties from being able to anticipate these circumstances, as it stipulated that the contracting parties could have anticipated the occurrence of a similar matter and included in their contract mechanisms that allow the contract to be amended in the event of unforeseen emergency circumstances.

The court's decision did not prevent the possibility of the parties agreeing to amend the contract, but rather prevented the judge from doing so, as the contracting parties could add clauses to the contract if they wished, allowing the identification of possibilities through which the contract could be reviewed in the event of the emergence of unforeseen emergency circumstances that threaten the contractual balance.between the parties, or what is known as renegotiation (hardship).

The opinion of the French Court of Cassation regarding its failure to give the judge the possibility to amend the contract in order to balance the obligations of the parties may appear unfair, especially since this opinion does not take into account the economic reality of the contract Thirdly, the position of the French legislature on the power of the judge to amend the contract changed following Order 2016-131.

"We will no longer tell our students:

"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 ".

Whereas Order 2016-131 issued on February 10, 2016 included among its victims Article 1134 of the Civil Code, which entered into force on October 1, 2016.

In fact, Article 1134 of the French Civil Code was a landmark article in enshrining the principle of the binding force of contracts, and rejecting any amendment to the contract no matter how circumstances change.This is the article on which the French Court of Cassation relied in its famous ruling regarding the Craponne Canal, according to which the Court of Cassation prohibited amending the contract and thus It refused to accept the theory of emergency circumstances at that time.

After amending Article 1134, which prohibited any amendment to the contract and the obligation to implement it no matter how circumstances changed, it can be said that the French legislator began to recognize the theory of emergency circumstances explicitly and definitively, and gave the judge the authority to amend the contract in specific cases.

After the French legislator, along with the judiciary, were among the most vocal in rejecting the idea of empowering the judge and giving him the authority to amend the contract under the pretext of the theory of emergency circumstances, citing the principle of the sanctity of the contract enshrined in Article 1134, which calls for the necessity of the parties respecting the contract according to what was agreed upon, which is what the French Court of Cassation went to.In several decisions, perhaps the most prominent of which is the Craponne Canal case.

Article 1195, which was introduced by Order 2016-131, revolutionized the French Civil Code, which represented a recognition by the French legislator and the judiciary of the theory of emergency circumstances and empowered the judge and gave him the power to amend the contract, while amending Article 1134, which stipulated the binding force of the contract, which lasted from 17 February 1804 to October 1, 2016, the date of entry into force of Article 1195 and the new amendments under Order 2016-131.

Article 1195 referred to above stipulates that, if emergency and unexpected circumstances occur during the implementation of the contract that make its implementation difficult for one of the parties and he does not accept to bear it, the latter can ask the other party to renegotiate the content of the contract, while continuing to

implement his obligations during the contract.Negotiation stage.

In the event that negotiations are rejected or failed, the parties can agree to terminate the contract, on the date and under the conditions determined by the parties, or by their agreement request the judge to work on amending and adapting the contract.

In the event that an agreement is not reached within a reasonable period, the judge may, at the request of one of the parties, amend or terminate the contract on the date and conditions he specifies.

In fact, the French experience with contracts did not wait for the issuance of the legal text that allows contracts to be amended due to emergency circumstances, as jurists have developed several mechanisms that allow this in indirect ways, such as stipulating a renegotiation condition during the conclusion of the contract, for example, especially in some long-term contracts that are Subject to changing circumstances.

However, now, with the issuance of Order 2016-131, especially Article 1195, the theory of emergency circumstances, which has long been rejected by the French legislator and the Court of Cassation throughout history for a period of approximately 140 years, has become history, as the parties can demand that the contract be amended or even terminated without having stipulated that.In the contract.

We can attribute the French legislator's reluctance to recognize the theory of emergency circumstances as a mechanism for reviewing contracts that are affected by changing circumstances to his fear of giving exaggerated authority to the judge to intervene in amending the contract.

With the large number of complex and long-term contracts, there is a fear that the judge’s intervention to amend the contract will be unsuccessful, and if we know that this intervention will not be subject to the oversight of the Court of Cassation, which is satisfied with applying only the correct law, and since the legislator has given the judge the possibility of intervention, he has applied the law and there is no room for the court.Cassation to intervene here.

With the large number of cases and the judge’s lack of specialization and knowledge of all contracts, the fear of those who refuse to give the judge the authority to amend

contracts has increased.However, with the frequent change in the conditions for implementing long-term contracts from those under which they were concluded, it is no longer possible to withstand for long without developing the theory and recognizing the judge's authority to amend the contract.

Conclusion:

The French legislator tried for a long time to stand firm and resist the idea of giving the judge the ability to amend the contract, and this was due to the fear that the French judge would arbitrarily exercise his powers, replace the contracting parties, and amend the contract in a way that contradicts the will of the contracting parties.

In our study, we reached a set of results, which can be summarized as follows:

• The contracting parties can agree in accordance with article 1195 of the French Civil Code to exclude the authority of the judge from the modification of the contract, which is expressly provided for by the French legislature in the said article, which reads: "pour une partie qui n'avait pas accepté d'en assumer le risque".

• Unlike the French legislator, the two parties to the contract in Algerian legislation cannot agree to exclude the judge's intervention in order to amend the contract, such as agreeing that one of the parties will bear the consequences of the emergence of any circumstance and excluding the judge's intervention to amend the contract with the aim of eliminating fatigue, for example, unlike the French legislator, which enabled The parties must bear the consequences of risks and exclude the application of the theory of emergency circumstances, while Article 107 BC prohibits.M.C This is explicitly stated by saying: "Any agreement to the contrary shall be void," and 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.

Based on the findings, the following can be proposed:

• French legislation must clarify the nature of the new agreement reached by the parties after renegotiation, and indicate whether it constitutes a new contract or merely an amendment to the original contract that does not amount to a new contract, because the resulting results differ.

• The French legislator must give more guarantees to the weak party to the contract, who may be forced under certain reasons to bear the risks and exclude the intervention of a judge in order to amend the contract, despite being harmed by the requirement of this order.

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