

Research Article

# The Judge's Authority to Achieve Contractual Balance Through the Theory of Unforeseen Circumstances in Egyptian and Saudi Civil Law

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## Abstract

After concluding the contract and before its full implementation, if exceptional general incidents occur that could not have been anticipated and the occurrence of which results in the implementation of the contractual obligation, even if it is not impossible, becoming so burdensome for the debtor that it threatens him with a huge loss, the judge may, depending on the circumstances and after balancing the interests of the creditor and the debtor, restore the burdensome obligation to a reasonable extent. Under the theory and in accordance with the conditions, the judge goes beyond the limits of his traditional task, which is limited to interpreting the contract, by intervening to amend it. This is particularly true in the case of contracts with lax implementation, or so-called term contracts. If exceptional, unforeseen circumstances arise that make the performance of an obligation burdensome for the debtor and threatens him with significant loss without reaching the level of force majeure that makes the performance of the obligation impossible, the judge may intervene to balance the interests of both parties and amend the obligations arising from this contract to reduce the burden without causing significant loss. If the basic principle is that when the contract is concluded and its pillars and conditions for its validity are met, it has a binding force that prevents one of its parties from becoming independent or the judge from annulling or amending it. However, unexpected circumstances may arise during the implementation of the contract that disturb the contractual balance as a result of one of its parties being exposed to severe fatigue in implementing its obligation, which threatens it with a huge loss that goes beyond the usual limit in transactions. Here the question arises: Will the contract continue to be implemented in light of these circumstances? Or is it terminated? Or is there a possibility to restore the lost balance to it? This is what the theory of contingent conditions answers. The research aims to explain the role played by the theory of emergency circumstances in restoring contractual balance, clarifying the role of contractual negotiation, and explaining its importance in returning a burdensome obligation to a reasonable extent. Highlighting the role of the judge without harming the creditor. In this study, the researcher relied on the descriptive, analytical, and comparative approach by analyzing the legal texts in the Egyptian Civil Code or the Saudi Civil Transactions Law.

## Keywords

Contract-execution, Emergency Circumstances, Judge's Power, To Amend the Contract

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## 1. Introduction

The expression that the contract is the law of the contracting parties is not a metaphorical expression, but rather a real expression by which it is meant that the contract is the law that governs the relationship between the contracting parties, so the agreements that were concluded are valid and take the place of the law for those who concluded them. After the judge interprets the contract and determines its scope, all that remains is to oblige the contracting parties to implement everything it contains, as long as the contract has arisen as valid and binding. Accordingly, a judge may not annul or amend a valid contract, claiming that the annulment or amendment is required by justice. Justice completes the will of the contracting parties, but does not abrogate it.

This rule is not absolute, and is responded to as an exception in the Egyptian Civil Code and the Saudi Civil Transactions Law, which is called the theory of emergency circumstances. According to Article 147/2 of the Egyptian Civil Code and Article 97/3.1 of the Saudi Civil Transactions Law.

The researcher will be exposed to this study by clarifying the concept of the theory of emergency circumstances and the conditions for its application, the legal impact resulting from it, and finally the judge's authority to achieve doctrinal balance. We then follow this with a conclusion and recommendations.

## 2. The Concept of Emergency Circumstances Theory and the Conditions for Its Application

### 2.1. The Concept of Emergency Circumstances Theory

The Egyptian legislator and the Saudi regulator adopted the theory of contingent circumstances in legislative texts that permit judicial modification of a contract if certain circumstances arise during its implementation, causing the performance of the obligation to be burdensome for the debtor and threatening him with significant losses exceeding the usual limit. Judicial intervention aims to rebalance the contract by restoring the burdensome obligation to a reasonable extent, thus distributing the consequences of the emergency between the debtor and the creditor [1].

An emergency circumstance or incident is defined as any general incident subsequent to the formation of the contract and unexpected to occur at the time of contracting, resulting from an imbalance in the benefits generated by a contract whose implementation is delayed for a period or periods and the debtor's implementation of an obligation as required by the contract becomes extremely exhausting and threatens him with a huge loss that goes beyond the usual limit of merchant losses, such as the exit of a commodity that the debtor pledged to supply from the price and its price rises dramatically, un-

sually and unexpectedly [2]. Therefore, an emergency circumstance is not considered an incident that makes the performance of the debtor's obligation impossible; because if it had become impossible, the obligation would have expired, the contract would have been terminated, and there would have been no room for amending it [3].

### 2.2. Conditions for Applying the Theory of Emergency Circumstances

The Egyptian legislator [4] and the Saudi legislator (5) supported the application of the theory under specific conditions to give it a material formula that guarantees it a share of stability.

The theory assumes that the performance of a contract is delayed for a period of time, and when this period comes, then the conditions on which the contract balance was based at the time of its performance have changed suddenly due to an accident that was not within the power to predict, and thus it occupies the economic balance of the contract. Therefore, in order to apply the theory of contingent circumstances, we must be dealing with a contract of slow execution or a contract of duration. And that an exceptional general incident may occur in the period between the conclusion of the contract and the completion of implementation that is not within the scope of expectation. Finally, the implementation of the obligation becomes so burdensome that the debtor threatens a huge loss [6].

#### 2.2.1. To Be Dealing with a Contract with Slow Implementation or a Term Contract

To amend the contract due to emergency incidents, we must be dealing with a contract with slow implementation or a term contract. This is because the occurrence of general exceptional incidents that could not have been anticipated at the time of contracting requires that there be a period separating the issuance of the contract from its implementation. To apply the theory of emergency circumstances, it is not a condition that the mutual obligations be of lax implementation in opposition until after the emergency circumstance, but rather it is sufficient that there is an obligation of lax implementation on the part of one of the contracting parties until after the emergency circumstance and after that it becomes exhausting for the debtor [7]. Without regard to whether the corresponding obligation has been implemented or its implementation has been lax [8]. Accordingly, the theory applies to an immediate contract if its implementation is postponed by agreement of the two parties. Although such contracts do not, by their nature, extend over time, adding their implementation to a successive term or terms would allow new circumstances to occur that would make implementation exhausting. It also applies to a sales contract with an installment or deferred price with respect to future installments, and does not apply with respect to installments that occurred before the occurrence of the emergency

circumstance and the debtor failed to fulfill them until the time of the occurrence of the circumstance [9].

The basic principle is that there is no room for applying the theory of contingent circumstances to an immediate contract, because it is executed immediately upon its conclusion, and the obligations generated by this execution expire without leaving room for new circumstances to occur that affect the balance of the contract. However, according to the most correct jurisprudence, if the implementation of the contract is delayed for a reason foreign to the debtor, such as force majeure, and an emergency circumstance occurs that makes implementation exhausting during the delay, then the delay takes the form of a postponement, which entitles the debtor to demand the amendment of the contract and then implement the theory. However, if the delay is due to the debtor's fault, its consequences fall on him alone, and he may not demand that the contract be amended based on the impact of the circumstances that occurred on the contract that was delayed in implementation. There is a jurisprudential trend that limits the application of emergency circumstances to specific contracts, based on the fact that probabilistic contracts inherently assume gain and loss on the part of each party. The Egyptian Court of Cassation took this opinion and ruled that the theory of emergency circumstances is not achieved in deception contracts, as it inherently exposes the contracting parties to the possibility of a large gain or huge loss [10].

### **2.2.2. The Occurrence of an Exceptional Public Incident That Cannot Be Predicted or Confronted**

For the right to amend a contract to be based on the theory of contingent circumstances, an exceptional incident must occur. An exceptional accident is an unusual accident that rarely occurs. Cold waves in winter are a common occurrence and the resulting damage to vegetable crops cannot be considered an exceptional circumstance affecting a contractor's commitment to supply vegetables, but an unusual frost wave, in its severity and extent, can be described as an exceptional occurrence [11]. It is noted that some incidents are exceptional in nature, such as wars, earthquakes, and epidemics. Others are not exceptional in nature unless they reach a level of seriousness and become unusual, such as a severe rise in prices or an obscene decline [12]. The exceptional incident must be general [13]. An emergency accident is general if its impact affects a large number of people. If it is specific to the debtor, the theory does not apply no matter how much this incident affects the debtor's obligation. Therefore, exceptional incidents related to the debtor, such as bankruptcy, death, disruption of his business, or fire in his crop, are not sufficient to apply the theory [14].

An exceptional accident must be unexpected and could not have been predicted. If the accident could have been predicted or could have been predicted, the theory does not apply. The criterion here is an objective criterion. The point of non-expectation is that the ordinary person would not have been able

to expect it to occur if he had been in the circumstances of that debtor at the time of the contract, regardless of whether this debtor actually expected it to occur or not [15].

In addition to the fact that the accident is not possible, the accident should also be one that cannot be paid for, because the debtor is obligated to avoid accidents that prevent him from fulfilling his obligations if he is able to do so, even if these accidents are unexpected [16]. The trial court has the authority to assess the generality of the incident, and there is no oversight over it from the Court of Cassation as long as it based its ruling on valid reasons [17].

### **2.2.3. The Emergency Incident Results in the Implementation of the Obligation Becoming Burdensome for the Debtor**

The accident must make the debtor's obligation so burdensome that it threatens him with a huge loss; Because the accident that allows the obligation to be modified does not make the implementation of the obligation impossible, otherwise it would be a reason for the expiration of the obligation. Here the difference between an emergency incident and force majeure becomes clear. While they share the fact that neither can be expected nor can be paid, they differ in that force majeure makes the performance of an obligation impossible, while an emergency only makes performance burdensome. This difference in conditions results in a difference in effect. Force majeure causes the obligation to expire, so the debtor does not bear the consequences of its non-performance. However, an emergency does not terminate the obligation, but rather restores it to a reasonable extent, so the loss is distributed between the debtor and the creditor, and the debtor bears some of the consequences of the accident.

The fatigue that the debtor falls into as a result of an emergency accident is a flexible standard that does not have a fixed amount, but rather changes with changing circumstances. What is exhausting for one debtor may not be exhausting for another debtor. What is burdensome for a debtor in certain circumstances may not be burdensome for the same debtor in other circumstances. The important thing is that the implementation of the obligation threatens the debtor with a huge loss. It is worth noting that the usual loss in dealing is not enough, even if it results from an exceptional, general accident that cannot be expected. This usual loss is borne by the debtor without fatigue [18].

The loss criterion is an objective criterion in which the deal concluded in the contract is considered, and in view of the usual implementation circumstances, the loss is considered huge even if its total represents only a small percentage of the contractor's wealth, as long as it is considered so in view of the concluded deal. The loss is also considered realized as long as it appears from Calculating the value of the obligation after the new circumstances, even if the contractor's personal circumstances enable him to avoid this loss It is as if he had pledged to supply a commodity and then its price rose significantly, but he owned a factory that produced a large quantity

of this commodity sufficient to fulfill his supply commitment. The availability of this quantity does not prevent him from adhering to the application of the theory of emergency circumstances to amend his commitment in a way that increases the fatigue that resulted from its implementation in accordance with the agreement, if he did not own the goods he pledged to supply [19]. If the loss is realized in this way, the theory is applied even if the debtor is wealthy and this loss does not affect him [20]. The assessment of fatigue is within the discretionary authority of the trial court, and there is no oversight over it from the Court of Cassation as long as it has based its ruling on valid reasons [21].

### 3. The Legal Effect of Applying the Theory of Emergency Circumstances

When the conditions required by law in an emergency are met, the debtor at risk of loss may invite the creditor, without undue delay, to negotiate an amendment to the contract that would relieve him of fatigue. If an agreement is not reached within a reasonable period, the judge may, depending on the circumstances and after balancing the interests of both parties, restore the burdensome obligation to a reasonable extent.

#### 3.1. Inviting the Debtor to the Creditor to Negotiate

Unlike its Egyptian counterpart, the Saudi organizer obliged the contracting parties, while talking about the general exceptional circumstances in which implementing the obligation is not impossible but rather burdensome for the debtor, thus upsetting the contractual balance; to resort to negotiation first before resorting to the judiciary. Negotiation begins with the debtor, without delay, inviting the creditor to negotiate in order to circulate the contents of the contract, exchange suggestions and opinions to confront the emergency circumstance that hindered its implementation, amend its provisions, and reach a legally binding agreement. Negotiation is usually done by specifying terms and conditions agreed upon by both parties. This makes it easier for them to handle the situation to lift the huge loss from the debtor by adjusting the burdensome obligation and returning it to the reasonable extent without harming the creditor [22].

Negotiation is defined as a condition included by the contracting parties in the contract or stipulated by the legislator, according to which the parties are obligated to renegotiate when events of a certain nature occur that are independent of the will and expectations of the parties and result in a serious breach of the balance of the contract. This condition aims to amend the contract to keep pace with the new circumstances and restore the contractual balance that was disturbed by these circumstances.

To protect the creditor from the debtor's arbitrariness, the Saudi regulator obligated the debtor to invite the creditor to

negotiate after the emergency occurs, and not to delay this invitation without an acceptable excuse so as not to harm the creditor's interest. The basic principle is that requesting negotiation does not entitle the injured debtor to refrain from implementing the obligation, but rather he must continue to benefit from it unless the contracting parties agree to stop implementation pending the outcome of the negotiation [23].

Since negotiation is a path taken by the contracting parties to reach a rebalancing of the contract terms to confront the emergency circumstance by restoring the obligation that has become reasonably burdensome. It is equal to amending the terms of the contract or in a separate agreement. The important thing is that it be done in good faith, that the dealings between the contracting parties be conducted honestly and impartially, and in a way that keeps the exercise of the right within the useful goal for which the negotiation took place and to which both parties committed, so that it does not lead to harm to the other party, but rather both parties obtain their right honestly [24].

If negotiations take place between the contracting parties and they reach the desired goal, what they agreed upon becomes binding on them. If an agreement is not reached within a reasonable period, recourse must be had to the judiciary. Depending on the circumstances and after balancing the interests of both parties, the judge may restore the burdensome obligation to a reasonable extent.

#### 3.2. The Judge's Authority to Achieve Doctrinal Balance

According to the Saudi Civil Transactions Law, if negotiations between contractors are unsuccessful and they do not reach an agreement within a reasonable period of time, recourse must be had to the judiciary. According to the Egyptian Civil Code, if exceptional general incidents occur that could not have been anticipated and their occurrence results in the implementation of the contractual obligation, even if it does not become impossible, becoming so burdensome for the debtor that it threatens him with a huge loss, the judge may - without the case requiring negotiation - depending on the circumstances and after balancing the interests of both parties, restore the burdensome obligation to a reasonable extent.

If the rule is that the contract may not be annulled or amended by one of the contracting parties alone, because the contract is the result of two wills and what is concluded by two wills cannot be dissolved by one will, then annulling or amending the contract is the work of the contracting parties together, either by their agreement to do so when annulling or amending it, or by their agreement when contracting to give this right to one of them. The rules that apply to the compatibility of the two wills in creating a contract are the same as those that apply to the compatibility of the two wills in annulling or amending it [25], except that this rule is not absolute and there are some exceptions to it. There are contracts that

the law stipulates that one of the contracting parties may independently cancel, such as agency, deposit, and time contracts for which no period has been specified, such as company, rent, and employment contract. In some exceptional cases, the law may stipulate that the contract may be amended based on just considerations and finally that the burdensome obligation may be restored to a reasonable extent according to the theory of contingent incidents, according to which and in accordance with the conditions, the judge deviates from the limits of his traditional task, which is limited to interpreting the contract, if the force binding on him conflicts with considerations dictated by justice, then the judge is allowed to intervene to amend or annul it. This is especially true for contracts with lax implementation or what are called term contracts [26]. If exceptional and unexpected circumstances arise that make the implementation of the obligation burdensome for the debtor and threatens him with a huge loss without reaching the level of force majeure that makes the implementation of the obligation impossible, the judge may intervene according to the circumstances and with the aim of balancing the interests of both parties, to amend the obligations arising from this contract in a way that removes the exhaustion without causing the huge loss.

The judge has the authority to amend the contract by restoring the obligation that has become burdensome to a reasonable extent. When he chooses, within the limits of his discretionary authority, the appropriate way to address the situation he faces to remove every loss from the debtor's responsibility, he does not bear it for the creditor alone, but rather limits the enormity of this loss that will befall the debtor, and brings it to a reasonable extent by burdening the debtor with the familiar loss that could normally have been expected at the time of contracting. Anything more than that of an unusual loss is divided equally between the contracting parties, considering that this is more just in taking into account the balance between the interests of each of them, regardless of the debtor's personal circumstances, because the legislator has given the theory of emergency incidents a material formula and has not taken into account a personal or subjective standard, but rather has made its standard objective [27].

In order to restore the burdensome obligation to a reasonable extent, the judge may consider suspending the implementation of the contract for a period of time until the effects of exceptional incidents disappear. This occurs if these effects are temporary on the one hand, and the suspension of the contract's implementation does not cause significant harm to the creditor on the other hand. The judge may see the burdensome obligation reduced. If the contract is a sale and the debtor who is burdened is the buyer, the judge decides to reduce the price or exempt him from paying interest. The judge may see an increase in the corresponding obligation to reduce the debtor's loss, provided that he takes into account the interest of the creditor [28].

It is noted in the cases of reducing the burdensome obligation and increasing the corresponding obligation that the judge

does not return the obligation to a reasonable extent except in relation to the present, and he has nothing to do with the future because it is unknown. The effect of the emergency incident may disappear, and the contract will return to what it was before the amendment, and its full binding force will return. If the judge may restore the obligation to a reasonable extent, he may not terminate the contract based on the debtor's request, otherwise the effect of the emergency incident will be borne solely by the creditor.

The judge's authority to amend the contract is considered a matter of public order, and any agreement to the contrary between the contracting parties to exclude or restrict this authority is considered invalid, because if it had been permitted to waive this protection under a condition in the contract, it would have been an applicable condition in all contracts, and the implementation of the text would have been suspended in most contracts. The purpose of the text is to prevent the general waiver from adhering to the established protection, but if the contract condition focuses on a special organization for the face of a specific emergency circumstance or circumstances, then it is a permissible condition that must be respected, and negates the description of a lack of expectation for the emergency incident.

## 4. Conclusion

The study examined the impact of the theory of contingent circumstances on contract implementation as a means of ensuring its stability in the event of circumstances beyond the control of the contracting parties that could not have been anticipated and could not have been averted. It has been approved by the Egyptian legislator and the Saudi regulator, and it is a theory that does not entail terminating the contract, but only amending it according to the circumstances and after balancing the interests of both parties, so that the burdensome obligation is restored to a reasonable extent, whether that is through negotiation between the two parties or through the judiciary.

The study addressed theoretical provisions for emergency circumstances by addressing the conditions that must be met, which the Egyptian legislator and the Saudi regulator have adopted with legislative texts that allow judicial intervention to rebalance the contract by restoring the burdensome obligation to a reasonable extent. This requires that we be dealing with a slow-term contract or a term contract. In the period between the conclusion of the contract and the completion of implementation, an exceptional general incident occurs that cannot be expected, and the implementation of the obligation becomes so burdensome that the debtor threatens a huge loss.

The study addressed the implications of fulfilling the conditions of the theory: whenever the conditions required by law are met in an emergency incident; The debtor at risk of loss may invite the creditor without negotiating to amend the contract in a way that removes his fatigue. If an agreement is not reached within a reasonable period, the judge may, depending

on the circumstances and after balancing the interests of both parties, restore the burdensome obligation to a reasonable extent. Thus, the consequences of the emergency situation are distributed between the debtor and the creditor.

## 5. Results and Recommendations

- 1) The regulation provided by the Egyptian and Saudi legislators regarding the application of a theory of emergency circumstances is simple and clear, and constitutes an integrated theory in its application to contracts with lax implementation. Although the Saudi legislator has required negotiations between the contracting parties in order to reach a solution regarding the burdensome obligation before resorting to court.
- 2) The Egyptian judiciary - represented by the Court of Cassation - had a great role in supporting and applying the theory of emergency circumstances to restore the economic balance of the contract. As for the Saudi judiciary, there was no application by the Supreme Court of the recent issuance of the Civil Transactions Law.
- 3) There is no need for legislative intervention or prejudice to the existing texts in the Egyptian Civil Code or the Saudi Civil Transactions Law regarding the theory of emergency circumstances, because it in itself constitutes a legal basis on which the judiciary can rely, apply, and monitor its legitimacy in light of the current circumstances and new factors.
- 4) The theory of contingent circumstances establishes the balance between the actual performance of a contract and its performance by way of compensation. In performing the contract through compensation, the debtor is only obligated to compensate for the damage that would normally have been expected at the time of contracting. And here we are, thanks to the theory of contingent circumstances, deciding approximately that in real execution, so the debtor is not obligated to perform his contractual obligation in real execution except to the extent that would normally have been expected at the time of contracting, and whoever exceeds this expected amount does not bear full responsibility for it.

## Abbreviations

ECL	Egyptian Civil Law
SCTL	Saudi Civil Transactions Law
ECC	Egyptian Court of Cassation

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## Author Contributions

**Nahla Ahmed Fawzi El Barhimiy:** Conceptualization, Data curation, Methodology, Resources

## Conflicts of Interest

The authors declare no conflicts of interest.

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