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JUSTIFICATIONS FOR THE DOCTRINE OF EXCUSE FROM CONTRACT: AN OVERVIEW OF THE POSITION UNDER AMERICAN LAW AND IRANIAN LAW

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Abstract- The doctrine of impracticability of contract and other similar doctrines are known as the doctrine excuse from contract. It is an exception to the principle of sanctity of contract, which is a primary principle of contract law. There are four theories that justify this exception. They are the theories of Implied Term, Good Faith, Unjust Enrichment and Abusing Rights. This paper is an attempt to overview these underlying theories with particular reference to US and Iran.

Index Terms: theory of abusing the rights, theory of good faith, theory of implied term, theory of unjust enrichment

I. INTRODUCTION

The principle of binding is one of the principles that has been accepted in the present world and supplies the security and stability of legal relations. However, this principle has some exceptions. One of the exceptions of the principle of binding of contract is the change of circumstances of contracts which was taken from the rule of "*Rebus Sic Stantibus*". "*Clausula Rebus Sic Stantibus*" is a Latin phrase which means "thing thus standing". The principle of *Rebus Sic Stantibus* has different names and legislative enactments in various countries. For example, In United States it is known as "doctrine of impracticability" meaning excuse in performance of a duty. In Iran, it is the doctrine of "fundamental change of circumstances". In Switzerland, it is known as the "doctrine of impossibility without fault". In England it is known as "doctrine of frustration of purpose of contract. In France, it is the "doctrine of force majeure" and "Wegfall der Geschäftsgrundlage" in Germany. All of them are known as the "doctrines of excuse".

This paper intends to explain the general theories that the judicial procedures in different countries consider as the basis for accepting and justifying the doctrine of doctrine excuse and which is well known in all the major legal systems of the world. This is considered with particular reference to the doctrine of "fundamental change of circumstances on contracts" in Iran and the doctrine of "impracticability of contract" in U.S. There are four theoretical sections which include the theory of implied term, the theory of good faith, the theory of unjust Enrichment and the theory of abusing the of rights.

II. THEORY OF IMPLIED TERM

Theory of Implied Term is one of the main theories of the change of circumstances in contracts accepted by most legal systems. According to this theory, in all the long-term contracts between the parties there is an implied condition stipulating that their commitments are to be executed under the terms and conditions governing the contract once the contract was signed. Consequently, if a major event, such as an unpredictable economic crisis or war changes the circumstances agreed when signing the contract, this implied term theory will allow the party aggrieved to be entitled to terminate the contract or to request modifying it [1].

Historically, the theory must be rooted in the Church's laws and religious beliefs of the Christian theologians, particularly St. Thomas Dakn's assertion. In this regard, he declares that the promisor is not unfaithful to his promise if he avoids fulfilling the promise in case the circumstances have changed [2]. By the Implied Term Theory as an implicit requirement and as the basis of doctrine of excuse of contract, it is meant that the parties adhere to the contract and are committed and obliged to its contents according to reasonable conditions. In this regard, if unpredictable events change these reasonable conditions imposing undue harms on one of the parties, the party can then be exempted by referring to this implied condition which states that he will be obliged to the contract in case the conditions and circumstances remain stable and unchanged.

Again, under this theory, the implicit and not explicit provision in the contract is that if the current reasonable conditions is changed and for such a change the committer becomes aggrieved, then he is no longer committed to the contract. This is the case because if he was able to predict the new circumstances, he would not make himself committed to the contract or he would have proposed new conditions [3].

In other words, the parties have been inclined to perform the deal by referring to this implied condition while the parties' inclination is closely linked with this implicit

requirement based on which stable conditions during the contract period make the contract practical. Based on the abovementioned approach, if the contract is supposed to conform to the common intention of the parties, it should be accepted that this subject has been the topic of the common intention based on which the contract has been concluded. Nonetheless, if the existence of such a condition cannot be considered as the basis of the real primary agreement, its origin must be then considered as the custom convention of the deals so that such a condition should be regarded as part of the requirement for long-term contracts.

In this regard that the Implied Term Theory can be considered as a suitable basis for the doctrine of excuse particularly in Iran and the U.S, two different perspectives are observed in Iran: regarding the first viewpoint, there is a group of individuals who disagree with considering this theory claiming that the basis of this theory is incorrect. Firstly, they maintain that this implied agreement to which this requirement is attributed is not dependent on any reasons. Subsequently, how can we claim that both parties consider the basis as the circumstances and conditions at the time of the contract until its full implementation will not change?

Secondly, in all the gratuitous long-term contracts, even in normal circumstances, there is the possibility for the prices to go higher or lower; therefore, each party would anticipate exploiting from any incidences. Henceforth, the parties are required to stipulate it explicitly if their intention was that a change of circumstances and currency fluctuations would have no impact on their liabilities while their commitments and obligations change in line with changing circumstances and conditions. Moreover, the reason for their silence is that the contract must be performed in a manner that it was firstly signed [4]. In accordance to the perspective of these jurists, implicit condition based on the parties' common will does not imply a change in the contracts' circumstances and conditions.

On the other hand, some jurists have considered the implied requirement on a legal and suitable basis for this discussion. Some pose that undoubtedly, it is necessary for the parties of the contract to observe such a condition like the other conditions of the contract. This is because it is a common requirement in concluding the contract or it is the compromised implicit referent as being mentioned in the conclusion and should be considered as the explicit conditions in the deal, although it is not clear and the parties are not aware of such a fact [5]. Obviously, this condition remains valid and influential until it does not conflict with either the explicit or implicit will of the parties; otherwise, whatever both parties compromise with will be respected accordingly [6].

Consequently, after investigating the arguments of cons and pros of the Implied Term theory, there would be less hesitation in the lack of possibility to refer to the Implied Term theory. The truth is that the proponents of the theory advocate the Implied Term Theory based on conscience and for justifying the contract.

Finally, it can be said that the implied term theory is accepted in jurisprudence as the suitable basis of the change of circumstances in Iran. This means that if the common circumstances at the time of contract conclusion change due to the occurrence of unforeseen events, or make the implementation of contract burdensome, or yield losses, the committer can terminate the contract referring to this implied requirement considering that the provision to accept the contract has been the stability of conditions when the contract has been signed [7].

In the Judicial procedure of the U.S, the doctrine of impracticability of contracts, and termination of contract as well as adjustment of contract concerning with change of circumstances on contracts after conclusion of contract therefore it is justified, by referring to the implied term theory and as well as the parties' will. Nonetheless, some jurists believe that referring to the theory of implied term is restricted to the cases where fulfilling the contract is financially or legally impossible [8]. In the U.S. law, the belief once was that the basis for the doctrine of impracticability of contract and the doctrine of frustration of purpose of the contract is based on the implied term theory. This means that in every contract there is an implied condition stating that extraordinary circumstances and hardship would never occur. However, the *Restatement (second) contracts* rejected this analysis following the *Uniform Commercial Code*. Based on these two laws, the main issue is whether or not the lack of occurrence of such conditions and circumstances has been the basic assumption of the contract. Then the judge should recognize the actual will of the parties considering the type of contract and its provisions and then to realize the main assumption based on which the parties have concluded the contract [9].

III. THEORY OF GOOD FAITH

One of the main theories for justifying the doctrine of excuse of contracts has been referring to the Good Faith theory. According to the ones who advocate this theory, when the obligation of the committer becomes heavy and unbearable due to unanticipated circumstances, then it is against Good Faith of the creditor to enforce the indebted. In other words, urging the committer to fulfill the contract while the economical balance of the contract has been thoroughly changed would be then a behavior against the Good Faith which should be evaded accordingly.

Indeed, the principle necessitating Good Faith in the contract performance is the result of a connection between the law and ethics. It is also for observing this connection that both parties are required to act while having Good Faith demanding the contract to be performed accordingly. [10]. In consequence, the committer should not be expected to undertake the contract during difficult and irresistible conditions while discarding the changing circumstances and conditions as well as demanding a precise execution of the contract in such changed circumstances which is considered as a behavior against Good Faith.

This theory is now in use in the legal and judicial procedures in some countries and is a suitable basis for justifying the doctrine of excuse of contract and similar doctrines. For instance, in the German judicial procedures, it is said that both parties need to treat each other having "Good Faith" and ask each other to execute the contract accordingly [11]. Therefore, the basic principle, on which the change of circumstances in contracts in the Germany law is based, is referred to as the principle of Good Faith. The origin of such a principle has been one of the verdicts of the Court on 28 November 1923. The fundament of such a decision was the principle of Good Faith which was valid despite its conflict with the statutory law.

Additionally, this principle has been predicted in Article 242 of the German Civil Code. This article provides that: the indebted is to perform the contract in good faith. As a result, insisting on executing a contract which has no economic value due to the relative inequality of the commitment and the mutual commitment which is inconsistent with the principle of Good Faith [12].

According to the law of Switzerland, although justifying the change of circumstances and conditions of the contract is done in various ways, the same interpretation is typically followed. Moreover, the Swiss lawyers regard the demand of claiming the right while the balance of the two parties has been disturbed as to be against Good Faith. It is also said in the judicial procedures that it is incompatible with the rules of Good Faith in the contracts to pay the debt with the money that has lost its value [13].

In the laws of some other countries the theory of Good Faith has been underlined considering change of circumstances and conditions in the contracts. Nevertheless, in Iranian laws, on the assumption that we can infer the task related to the " performance of Good Faith " of the contract from the law, it would be difficult to implement this rule against the principle of binding of contracts obligation and commitment of both parties to the contracts' provisions. Indisputably, no one has the right to cheat and dissemble the social relations. The contractual relationship is not beyond the scope of this rule.

Under Iranian laws, this theory would be demanding to implement this rule against the principle of binding contracts (obligation of contract) and commitment of both parties to the contracts' provisions on the assumption that it can infer the task related to the "performance of good faith" of the contract from the law.

Under U.S. law, the theory of Good Faith has been referred to for justifying the contracts impracticability and frustration of purpose of contract. For example, in the official interpretation of comment 6 related to Article 2-615 in the *Uniform Commercial Code*, there is consideration of the relationship between concepts related to Good Faith and commercial criteria in a way nearly similar to the German law method [14]. Article 2-615(comment 6) *Uniform Commercial Code* states that: "In situations in which neither sense nor justice is served by either answer when the issue is posed in flat terms of excuse or no excuse, adjustment under the various provisions of this Article is necessary, especially the sections on good faith, on insecurity and assurance and on the reading of all provisions in light of their purposes, and the general policy of this Act to use equitable principles in furtherance of commercial standards and good faith"[15].

IV. THEORY OF UNJUST ENRICHMENT

The principle of Unjust Enrichment is one of the fundamental bases of law and it is based on justice, fairness, and natural rights. According to this principle, no one can exploit the others' wealth or act without the permission of law or the existence of contract and becoming wealthy while bringing loss to others. In case the person's possessions and wealth increase unfairly while imposing loss on others, once there is no legal or contractual basis for this, then considering the justice rule and in order to sustain the social discipline and respecting the individuals' rights, the user has to return exactly the wealth he has obtained by this way to the aggrieved or substitute that money.

According to this theory, in the long-term contracts, because of the nature of the contract, it is possible to predict the fluctuations in the value of substitutes; rather, one of the main functions of such contracts is to remain immune from future harm or even making benefits. Therefore, by referring to the contractual loss, it cannot claim the implementation of the contract or trouble in continuing it. Occasionally, in such contracts the balance of the committing obligations gets very unbalanced because of hazardous incidents as a result of performing such a contract bringing affluent wealth and windfall profits for one side whereas it brings unreasonable hardship and difficulty for the other party. According to the discussed theory, although the contractual obligations are to be performed, demanding uncommon profits resulting from unusual external events is something beyond the contractual requirements and are considered as an unjust exploitation of

the mutual agreement [16]. In this case, unnecessary usage or becoming Unjust Enrichment can be merely referred to in situations where there is no contractual relationship between the parties. Following that, in the case where a person obtains benefits, or rights or resources from the other party according to a contract, adding up to his wealth in this way, his benefit is not without legal reasons or directions while his being wealthy is not considered to be illegal and unfair. In such a situation, the user is not required to return the resources or compensate the value of the benefit he has not earned whereas the other party is not entitled to claim or sue referring to the theory of the Unjust Enrichment. This is the case because earning such a benefit is a result of the change in the contract conditions and its legal origin is the very contractual relationship between them. Therefore, the benefits gained through the change of circumstances should not be enlisted as instances of use without reason or Unjust Enrichment. Consequently, this theory is not a suitable basis for the doctrine of change of circumstances of contract in Iran.

Unlike the English law, in the American law, although the theory of Unjust Enrichment is accepted as an independent legal entity that can be the basis for claims in some cases, the American judicial procedure has stated that if there is a contract, it cannot be referred to the Unjust Enrichment principle[17]. However, in situations wherein the contract between the parties has been cancelled or terminated, the party against whom the contract has been terminated attempts to demand extradition. Due to the loss of the contractual relationship, in this case the extradition lawsuit is taken before the courts and can be only based on theory of Unjust Enrichment.

V. THEORY OF ABUSING THE RIGHTS

Using a right which damages the other party would be prohibited according to a secondary principle called "prohibition of abusing the rights". In this regard, some jurists interpret the abuse of rights as follows: Abuse of Rights is the case in which an individual does a permissible work in his own jurisdiction but aims at hurting others and not to meet the needs and eliminate the loss from him [18]. Some jurists also consider the theory of Abusing Rights as the basis for the doctrine change of circumstances in contracts. They believe that executing the contract while the contract conditions and circumstances have changed from the time of signing the contract is against justice and the Good Faith principle. If the change of contract conditions and circumstances is so that the other party has to pay for fulfilling his commitments more money than the anticipated in the contract or he goes through hardship to repay his debt, then performing all obligations required under the new contractual position is an abuse of the contract situation leading to the party's bankruptcy or financial distress. Therefore, to prevent loss of the committer, the judge can modify the obligations or at least consider a deadline or installment in his favor [19].

In other words, whenever a creditor, makes the committer to perform the required commitments on the basis of the previous provisions of the contract while denying to accept modifications of contractual terms, he is then committed abusing the right; yet, the ethics and justice does not allow anyone to use his legal right until harming the others and causing injustice. The criticism of the adversaries of this assertion hinges around interpreting the concept of abusing the right as well as its constructing elements.

To sum up, it can be said that for the application of the principle of "prohibition of abusing the right", few requirements are needed: First and foremost, the individual must be at the position where he can use a legal and legitimate right. Another one is that implementing that right should not lead to hurt and aggrieve someone. Finally, one fundamental aspect is also using the right has been meant to aggrieve and hurt the aggrieved person [20]. By carefully examining the concept of abuse of the right as well as its constructing elements, it is clear now that this theory is not a suitable basis for justifying the doctrine of change of circumstances of contracts in Iran because of the following reasons:

Firstly, by demanding the commitment of execution, which is a contractual right, the other party is not directly aggrieved.

Secondly, the main source for the damage to emerge is not one of the parties but the occurrence of unexpected events and circumstances as well as the change in circumstances and conditions; therefore, the causal relationship between the doers' act and the aggrieved which is necessary does not indeed exist.

Thirdly, the right holder does not use it to aggrieve the other party so that he himself would not be sentenced abusing the right. For that reason, it can be difficult to claim that someone, who does not intend to harm and merely seeks to gain benefit through the opportunities and incidents, does abusing the right [21].

In the world's judicial systems, this theory has not been welcomed as the basis for the change of conditions and circumstances implying that this theory cannot be referred to.

VI. CONCLUSION

Finally, after examining the presented theories such as the theory of Implied Term theory, theory of Good Faith , theory of Unjust Enrichment and theory of Abusing the Rights as bases for justifying and acceptance of doctrine of excuse of contract in various legal systems , particularly in U.S and Iran. It may be concluded that the theory of Implied Term and theory of Good Faith are accepted as the bases for the doctrine of excuse in contracts by most legal systems. The

implied term theory is accepted in jurisprudence as a suitable basis of the change of circumstances in Iran. And in U.S this theory was already used as a basis for the doctrine of impracticability. However, the *Restatement (second) of contracts* rejected this analysis following the *Uniform Commercial Code*. Based on these two laws, the main issue is whether or not the lack of occurrence of such conditions and circumstances has been the basic assumption of the contract. Under American law comment (6) of article 2-615 *Uniform Commercial Code*, theory of Good Faith is a suitable basis for the justification and acceptance of the doctrine of Impracticability. Contrary to this, the Iranian law does not accept this theory as basis for doctrine change of circumstances in contracts. Rather, as mentioned above, Iran takes Implied Term theory as the basis.

Whatever may be justification for their respective theories, the common ground for both jurisdictions is that the theory of sanctity and the Impracticability/ Change of Circumstances form a complete whole to regulate the contractual relationships of the contracting parties, which all concerned, such as the parties, lawyers and judges, should take note of.

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