



Research Article

The Regulatory Frame of Modification Clauses in Palestine and English Law

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Abstract: This study aims to highlight the spread use of modification clauses in market transactions, and the negative consequences resulting from this use through the representation of the interests of one contracting party to the detriment of the interests of the other. The study begins with focusing the definition of modification clauses and detects also many examples which are selected from the market. It then moves to examine how the general principles of contract law in Palestine and English law recognize the use of these terms to finally conclude the need to legislate special rules to deal with the use of these terms.

Keywords: Modification Clauses, Unfair terms, Bargaining of power, Contractual balance.

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INTRODUCTION

The contract can be defined as a correspondent of intentions between two or more parties in which they agree to create legal obligations. The formation, the modification and the termination of any contract requires the agreement of its parties as well.¹ For example, if you do contract with a real state owner to hire his place, law requires both of you must agree on core terms such as the duration of the contract and the remuneration which the tenant will pay. Say also you concluded a credit agreement with a bank with an agreed percentage of interest. In both examples, the contracting parties must respect what they agreed on and nobody has the right to change the terms of these contracts individually.

In contrast, Practical reality indicates the spread of specific contract terms which authorizes one contracting party to change the terms of the agreement individually (Modification Clauses). For example, in the above-mentioned examples the real state owner may provide a contract term which enable him to raise the Property rental up to specific percentage and the bank may provide similar terms which enable him to raise the interest rate individually as well.²

The important question which arises here is that, what is the legal value of the use of Modification clauses in terms of the

general principles of Palestinian law compared to the common law legal system? The answer of this question will be the target of research in this paper.

The Objective of Modification Clauses

In terms of the general theory of contract law, the best practice of making contracts requires that both contracting parties do agree on the creation, the modification and the termination of the agreement.³ This reality is not always respected in market transactions especially when the bargaining of power between the contracting parties is not the unbalanced. In many cases, the weak party may lack the power to negotiate the terms of the agreement on which the other contracting party drafted in advance for many customers. To enable one contracting party to change the terms of the agreement individually is allow him to abuse his right to the detriment of the other party. This type of term can be presented in many categories of clauses, on which each has a different meaning and function. The use of modification clauses indicates the power of one contracting party to:⁴ identify the object of the contract; determine the fee of the contract, change that fee, change any contract term individually, and finally terminate the contract individual. This type of terms brings up three different rights: (1) the right to terminate the contract either it has a determined duration or not; (2) the right to change the contract terms individually; (3) the right to decide the supplied goods or services are in conformity with the contract.

¹ P. S. Atiyah, *An introduction of the law of contract* (Clarendon Press: Oxford 1989) 319.

² Art. 1102 of the French civil code provides that: *a contract is synallagmatic or bilateral where the contracting parties bind themselves mutually towards each other*; see also H G Beal, *chitty on contract, General principles*(26th Sweet and Maxwell, London) 576; W T Major, *Law of Contract* (7th Pitman publishing: London 1988) 65.

³ See M J Trebilcock, *The limits of freedom of contract* (Harvard university press: Cambridge 1993) 188. M. Hesselink, *The politics of a European civil code* (Kluwer law international: London 2006) 55.

⁴ M Hesselink, *The politics of a European civil code* (Kluwer law international: London 2006) 57.

Examples of Modification Clauses

In market transactions, many terms indicate the use of these clauses, namely:

- The seller of cars provide that what are provided in advertisings, written standards, catalogues and the offered cars are not binding for him at the time of performance. Therefore, the seller keeps the right to modify the advertised characteristics of the sold items. This right comprises the right to change engines qualifications, frames and other modifications which the producer provides;
- The seller of cars may provide that offered prices in newsletters and catalogues are provided approximately, and real prices will be nominated by the seller at the time of delivery;
- The seller of home furniture provide that offered and advertised sizes and shapes are not binding the seller, and he keeps the right to change these specifications individual while the purchaser does not has the right to reuse the delivery of these goods as long as it indicates the same purposes;
- The telecommunication company provides its right to change the agreed speed of the internet, and the customer has no right to ask the reduction of his obligation in case of the reduce of the agreed speed;
- The telecommunication company provides its right to change the terms of the agreement individual as it deems necessary, and the evaluation of that necessity belongs to its own absolute powers;
- The provider of the service keeps the right to raise the charge of that service at any time individual by giving written notice to the customer;
- The tourism company keeps the right to change the terms of the agreement individually in necessity cases, and it keeps the absolute power to evaluate that necessity either;
- The tourism company may also provide its right to terminate the contract individually if its personal requires that;
- The Bank keeps the right to alter the rate of interest individually, while the customer has no right to indicate any objection once he received the notification of that change from the Bank;
- The real state agency provides tenant right to terminate the contract if he sends the former three months written notice, while the agency can terminate it at any time, by giving him a minimum 15 days written notice;

The Regulatory Frame of Modification Clauses in Palestinian Law

First, The general principles of contract law Palestinian law in Palestine which are provided by (*EL-Majalla*) code which is dates back to 1876, *the two contracting parties may, by mutual agreement, rescind the sale after the conclusion of the contract.*⁵ Rescission takes place by means of offer and acceptance.⁶ These rules recognizes contract terms which enable the contracting party to end the contract of an undefined period if the other party is in a serious breach. The right to cancel where the other contracting party is not at fault, with liability only to return prepayments, may also be acceptable in two cases: the first case if this right is not discretionary, while the other takes place when circumstances make it impossible or impractical to continue in performing the contract.⁷ Certain other conditions, should be explained in the contract clearly and specifically, would also be

⁵ Article (190) of (*EL-Majalla*) code

⁶ Article (191) of (*EL-Majalla*) code provides the following example: One of the contracting parties states that he has rescinded or cancelled a sale and the other states that he has agreed thereto; or one of the parties tells the other to rescind the sale and the latter states that he has done so.

⁷ See articles (147) and (149) of the Palestinian Draft of Civil Code.

required.⁸ For example, industrial disputes with the supplier's own employees, equipment breakdown, or transportation difficulties and the supplier should be required to find out and inform the consumer as soon as possible if such circumstances do apply and explain the reasons for the proposed cancellation.⁹ The contract for an indefinite period would also be terminated by either party, by giving a notice of a reasonable length.¹⁰ In contrast, suppliers may have the right to end the contract without notice where there are "serious grounds" for immediate termination or if the agreement provides that right. This authority is not unrestricted; it may be invoked in circumstances in which there is a real risk of loss or harm to the supplier or others if the contract continues for even a short period.¹¹ However, balancing the relation between both contracting parties requires that, some clear indications and explanations, regarding the nature of any "serious grounds" for cancellation without notice, have to be provided in the contract. If these circumstances and conditions are not clearly provided in the contract, sellers may abuse their right in using and interpreting these sorts of terms.

Second, the general principles of contract law prohibit the unilateral modification of contract terms. A contractor is not entitled to control the substance of obligations which arise under the contract.¹² This rule was emphasized by the Egyptian cassation Court which decided that, *a contractor is not authorized to unilaterally modify contract terms, without approving the counter party or without a clear provision in law.*¹³

With regard to the right of the contracting party to modify the price term individually, price is a core contract term of a contract, so it must be fixed and modified by the agreement of both contracting parties. Art. 85 of the Palestinian Draft of Civil Code stipulates that: the price of a sale *must be* recognized by the agreement of both contracting parties.¹⁴ Contract terms which authorizes the contracting party to modify the price term individually is not in harmony with the principle of private autonomy, because the consent of the other contracting party is not represented. Therefore, this term is void while the remaining of the contract is valid if possible. This rule was emphasized by the Egyptian cassation Court when it annulled the contract in general because the contracting parties did not agree on the price

⁸ M. Fayyad, 'The Transportation of the European Directive 85/374/EEC of Product Liability into Palestine and Jordan: Is it Adaptable to Islamic Law?', *Global Journal of Comparative Law* 1 (2) (2012): 194.

⁹ In home improvement and similar Contracts which provide that the Supplier or his agent will carry out a survey and may cancel if structural problems are found that make work impracticable, the (EC Court) considers that, if the term is to be fair, it should provide that the survey should be carried out within a stated reasonable time and that written reasons for cancellation should be given. See R Rashwan, *the impact of the economic circumstances on the regulatory enforcement of the contract* (1st without publisher: withpiut place of publishing 1994) 83

¹⁰ M. Fayyad, 'Misleading Advertising Practices in Consumer Transactions: Can Arab Lawmakers Gain an Advantage from European Insight?', *Arab Law Quarterly* 26 (3) (2012): 287.

¹¹ M. Fayyad, 'Fundamental Breach of Contract in Terms of the UN Sales Convention and Emirates Law: A Comparative Legal Study', *Arab Law Quarterly Journal* 33 (2) (2019): 109.

¹² This principle is stipulated in article (147) of the Palestinian Draft of Civil Code which provides that, *agreements lawfully entered into take the place of the law for those who have made them. They may be revoked only by mutual consent, or for causes authorized by law*

¹³ M. Fayyad, 'Classification of Contractual Agreements in Comparative and Islamic Jurisdictions: Does it Make Any Sense?', *Arab Law Quarterly* 27 (3) (2013): 203.

¹⁴ Article (1853) of the (FC Code) which stipulates that, *it is complete between the parties and ownership is acquired as of authority by the buyer with respect to the seller, as soon as the thing and the price have been agreed upon, although the thing has not yet been delivered or the price paid*".

of the delivered goods, but rather they agreed to authorize the seller to recognize it. The only exception of this rule takes place when the consent of the seller is limited by a maximum ceiling of price, or the price is ruled by administrative regulatory decisions.¹⁵

Third, the general principles of contract law in Palestine require the contractors to agree on the subject matter of the contract. Arts. (197:200) of (*EL-Majalla*) code require some clear conditions for the valid subject matter of the contract, namely: it must be in existence; capable of delivery; property of some specific value and known to the purchaser.¹⁶ The identification of the subject matter of the contract occurs through its distribution in a way which makes it clear to be distinguished from others.¹⁷ If it is in present at the place of contract, it would be enough to be mentioned.¹⁸ If that subject matter was known to the purchaser, description would not be required.¹⁹ In addition, that subject matter must be the particular thing with reference to which the contract is concluded.²⁰ According to the Palestinian draft of Civil Code, the subject matter of the contract must be clearly definitely and determined, or determinable at the time of making the contract.²¹ this is a core condition for the formation of valid contract.²² Art. 130/2 of this draft provides also that obligation must be a thing determined at least *as to its kind*. It adds that the quantity of the subject matter of the contract *may be uncertain*, provided it *can be determined*.²³ This can be concluded as to say that Palestinian law does not require the accurate description of the subject matter for the validation of the contract, and this may authorize the seller to determine whether the supplied goods or services are in conformity with the contract.²⁴

The Regulatory Frame of Modification Clauses in English Law

The general principles of contract law in English law recognizes the agreement of contract terms which authorize one contracting party to modify the contract individually with specific conditions, namely:²⁵ it has a limited conclusion as long as it does not change the balance of the agreement dramatically, The authorized party is obliged to notice the other contracting party

with any change and that other party has the right in this case to end the agreement if he dies not agree with that modification.²⁶

About the right to amend the price term, the law does not give that authority if the change is significant to the amount that it is proven that the other contracting party would not agree it at the time of the conclusion of the contract. In addition , the recognition of these forms of terms would be acceptable if the other contracting party would keep the right to terminate the contract without penalties.²⁷ In general, this authority can be reasonably acceptable where the level of this change is specified before concluding the contract and the variation of price has to be within narrow limits.²⁸

Finally, English law recognizes that the subject matter of the contract must be *accurately described* before the conclusion of the agreement. The seller or supplier is obliged to deliver what actually was agreed on. If this description is not fully accurate, the seller has to deliver *a moderate quality product*.²⁹

CONCLUSION

This study detects the spread use of modification clauses in local markets in Palestine. The aim of these terms is to enable the contracting party to modify the terms of the agreement individually regardless the acceptance of the other contracting party. The use of these terms damages the balance of the relation between the parties of the agreement because the authorized party can impose his will upon the other contracting parties. Since the general principles of contract law in Palestine recognize the common use of these terms, so they do not ensure sufficient protection for the weak party in comparison with others applicable in English law. The later provides the right of the other contracting party to terminate the agreement if he is not satisfied with this amendment. In contrast, the modification of the price terms individually has different rules in both laws as well; in palatine law the contracting party is not authorizes to make any change of this term and any contract term empowers him to do so is null and void, while in English law he is only authorized to make this change in case it is reasonable and within the range, if existence, which is agreed in the contract.

REFERENCES

1. Atiyah, P. S. (1989). An introduction of the law of contract (*Clarendon Press: Oxford*).
 2. Beal, H G. (1988). Chitty on contract, General principles (26th Sweet and Maxwell, London) 576; W T Major, *Law of Contract* (7th Pitman publishing: London).
 3. Fayyad, M. (2012). 'A glance at unfair terms in consumer transactions in Arab legal systems and Islamic law: what Arab lawyers can learn from the European experience?', *International Journal of Private Law* 5 (2) (2012): 209.
 4. Fayyad, M. (2012). 'Misleading Advertising Practices in Consumer Transactions: Can Arab Lawmakers Gain an
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- 15 M. Fayyad, 'A glance at unfair terms in consumer transactions in Arab legal systems and Islamic law: what Arab lawyers can learn from the European experience?', *International Journal of Private Law* 5 (2) (2012): 209.
 - 16 Articles (197; 198; 199 and 200) of (*EL-Majalla*) code
 - 17 Article (201) (*EL-Majalla*) code; this article provides the following example: specific quantity of red corn, or a piece of land bounded by specific boundaries. If these are sold, the nature thereof is known, and the sale is valid.
 - 18 Article (202) (*EL-Majalla*) code; this article provides the following example: The vendor states that he has sold a particular animal. The purchaser sees that animal and accepts it; the sale is valid.
 - 19 Article (203) (*EL-Majalla*) code
 - 20 Article (204) (*EL-Majalla*) code; this article provides the following example: A vendor, pointing to a particular watch, states that he has sold it. Upon the purchaser accepting, the vendor is bound to deliver that identical watch. He cannot put that particular watch on one side and deliver another of the same sort.
 - 21 Article (85) of the the Palestinian Draft of Civil Code.
 - 22 A Soltan, *the resources of obligations in the Jordanian civil law* (The Jordanian University Publications: Amman 1987)28
 - 23 Article (130/3) of the the Palestinian Draft of Civil Code
 - 24 M. Fayyad, 'Measures of the Principle of Good Faith in European Consumer Protection and Islamic Law, a Comparative Analysis', *Arab Law Quarterly* 28 (3) (2014): 216.
 - 25 See G Teubner, *Legal Irritants: Good faith in British Law or how unifying law Ends Up in November Divergences* (1998) 11 Modern law Review 61.
 - 26 M. Fayyad, 'Organization of Contractual Agreements in Islamic Law, a Comparative Legal Study with Western Legal Systems', *European journal of Social Science* 55 (1) (2017): 48.
 - 27 E Houndous, *the reception of the directive on unfair terms in consumer contracts by member states* (1995) 3 European Review of private law 246.
 - 28 A Zogrood, *the hotel obligations of civil responsibilities in the face of the tourist or the customer, a comparative legal study* (1993) 28 the Journal of legal and Economic researches 32.
 - 29 E M Weitzenbock, *Good faith and fair dealing in contracts formed and performed by electronic agent* (2004) 12 Artificial Intelligence and Law 86. L Hawthorne, *Abuse of right to dismiss not contrary to Good faith* (2005) 17 SA mercantile Law Journal 218. N Lockett and M Egan, *unfair terms in consumer agreement, the new rules explained* (Chancery law publishing Ltd: England, 1995) 45.

- Advantage from European Insight?,' *Arab Law Quarterly* 26 (3).
5. Fayyad, M. (2012). 'The Transportation of the European Directive 85/374/EEC of Product Liability into Palestine and Jordan: Is it Adaptable to Islamic Law?', *Global Journal of Comparative Law* 1 (2).
 6. Fayyad, M. (2013). 'Classification of Contractual Agreements in Comparative and Islamic Jurisdictions: Does it Make Any Sense?', *Arab Law Quarterly* 27 (3).
 7. Fayyad, M. (2014). 'Measures of the Principle of Good Faith in European Consumer Protection and Islamic Law, a Comparative Analysis', *Arab Law Quarterly* 28 (3).
 8. Fayyad, M. (2017). 'Organization of Contractual Agreements in Islamic Law, a Comparative Legal Study with Western Legal Systems', *European journal of Social Science* 55 (1).
 9. Fayyad, M. (2019). 'Fundamental Breach of Contract in Terms of the UN Sales Convention and Emirates Law: A Comparative Legal Study', *Arab law Quarterly Journal* 33 (2).
 10. Hawthorne, L. (2005). Abuse of right to dismiss not contrary to Good faith 17 *SA mercantile Law Journal*.
 11. Hesselink, M. (2006). The politics of a European civil code (*Kluwer law international: London*).
 12. Hesselink, M. (2006). The politics of a European civil code (*Kluwer law international: London*).
 13. Houndous, E. (1995). The reception of the directive on unfair terms in consumer contracts by member states 3 *European Review of private law*.
 14. Lockett, N., & Egan, M. (1995). Unfair terms in consumer agreement, the new rules explained (*Chancery law publishing Ltd: England*).
 15. Rashwan, R. (1994). The impact of the economic circumstances on the regulatory inforcement of the contract (*1st without publisher: without place of publishing*).
 16. Soltan, A. (1987). The resources of obligations in the Jordanian civil law (*The Jordanian University Publications: Amman*).
 17. Teubner, G. (1998). Legal Irritants: Good faith in British Law or how unifying law Ends Up in November Divergences 11 *Modern law Review*.
 18. Trebilcock, M. J. (1993). The limits of freedom of contract (*Harvard university press: Cambridge*).
 19. Weitzenbock, E. M. (2004). Good faith and fair dealing in contracts formed and performed by electronic agent 12 *Artificial Intelligence and Law*.
 20. Zogrood, A. (1993). The hotel obligations of civil responsibilities in the face of the tourist or the customer, a comparative legal study 28 the *Journal of legal and Economic researches*.