

**RESEARCH TITLE**

**Contractor responsibility in Iraqi law**

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**Abstract**

This research aims to study the contractor's responsibility resulting from the contracting contract in the Iraqi Civil Law, the researcher followed both the descriptive and the analytical approaches. The study found that the contracting contract is considered a consensual contract that is binding on two sides and creates obligations for the contractor that entails his responsibility in the event of a breach thereof. The study also found that the contractor's responsibility towards the employer is to fulfill his contractual obligations, which is the contractual responsibility, and the responsibility for the building's structural safety, which is the warranty responsibility. The study recommended that the Iraqi legislator adopt the theory of emergency circumstances that make the implementation of the contract difficult, not impossible, and deny the contractor's responsibility in this case. The study also recommended that the Iraqi legislator deny the contractor's responsibility if the error occurs as a result of a defect in the land, because studying the safety of the land and its tolerance for construction lies at the heart of the engineer's work, not the contractor's.

**Key Words:** Contractor Responsibility, Iraqi Law

## introduction

Creating a good economic environment in which individuals enjoy the freedom to work on the one hand and the freedom to act on the other hand is not based on legislative permission to work on the one hand, or to act on the other hand, meaning that the legislative silence from which the permissibility of work and behavior is deduced is not sufficient to create a good investment and economic environment. That contribute to building countries.

In order to solve the above-mentioned problem, it was necessary to have explicit and clear legislative intervention to control the work and investment environment on the one hand, and to regulate it on the other hand. This is what the Iraqi legislator followed in the civil law with regard to the contracting contract, as he regulated this according to clear and unambiguous legal texts.

Accordingly, the contracting contract is considered one of the civil law contracts, as the term “contracting” is customarily and usually applied to works related to construction, “construction, construction, and the associated annexes related to engineering and consulting works, implementation works, and others.

However, this does not necessarily mean that the contracting contract is bound by the limits set by prevailing custom, because the legal text by which the Iraqi legislator defined the contracting contract is much broader than the limits set by custom.

Hence, one of the principles of control and organization that the Iraqi legislator has stated in the legal rules related to this contract is the contractor’s responsibility for implementing this contract, and his responsibility after completion of implementation. If the contractual responsibility is what governs the contractor’s work during the implementation of the contract, then the warranty responsibility is what governs the guarantee. This work will continue after implementation.

In addition to the above, the Iraqi legislator sought to find a balance between the two parties to the contracting contract. If it had established this responsibility in certain cases, then in parallel, it exempted the contractor from this responsibility in other cases, without this leading to a disruption of the legal and financial balance that the legislator decided. Iraqi parties to the contracting contract.

On this advanced basis, this research deals with the contractor’s responsibility in the contracting contract, guided by the legal texts that specifically address this responsibility and its organization in the Iraqi civil law.

## Importance of the research

The importance of studying the contractor’s responsibility in the Iraqi civil law appears in the necessity of creating a legal investment environment that contributes to Iraq’s urban and economic renaissance, and demonstrating the effectiveness of the legal texts that the Iraqi legislator came up with in creating this environment, as well as protecting the contractor from the risks that could Objected to him as a result of the responsibility imposed on him in the civil law, in parallel with not harming the interest of the employer, with the aim of developing the legal rules that govern this responsibility, so that this research will be a building block in the renaissance and legal, economic and investment development in Iraq.

## Research problem

The research problem appears in a main question from which many sub-problems are branched that the researcher answers through this research, as follows:

The main question: Do the legal texts that govern the contractor's responsibility in the Iraqi Civil Law provide protection for both parties to the contract in a way that contributes to achieving a good economic environment that contributes to the renaissance of Iraq?

:This main question branches out from a group of sub-questions as follows

1. What is the nature of the contracting contract?
2. What are the cases in which the contractor's responsibility is determined, whether during or after implementation?
3. What are the cases in which the contractor is exempted from the responsibility stipulated in the Civil Law?
4. What is the nature and type of responsibility imposed on the contractor in the contracting contract?

## **Research Methodology**

In studying the contractor's responsibility resulting from the contracting contract in the Iraqi Civil Law, the researcher followed both the descriptive approach, as he clarified the legal rules that govern this responsibility in accordance with the legislative guidance decided by the Iraqi legislator in the law to clarify the position of the Iraqi legislator on this responsibility. Then he also resorted to the analytical approach, as he analyzed and criticized the legal rules that govern this responsibility with the aim of creating and creating the legal rule that achieves the collective satisfaction of Iraqi society, considering that the legal rule is the result of collective needs.

## **Research plan**

We address this research in two requirements, where the first requirement was titled The Legal Nature of the Contractor's Responsibility, while the second requirement was titled Provisions of Contractor Responsibility, and we divided each requirement into two branches, where the first section of the first requirement was titled The Concept of the Contracting Contract, while the second section of it It was entitled Types of Contractor Liability in Iraqi Law.

As for the second requirement, we have divided it into two sections as well. In the first section, we address the penalty resulting from the contractor's responsibility, and in the second section, the absence of the contractor's responsibility.

## **The first requirement**

### **The legal nature of the contractor's liability**

Studying the contractor's responsibility in Iraqi law requires first determining the legal nature of this responsibility, and giving it the correct legal description that applies to it from the types of liability specified in the Iraqi civil law. If the purpose of this research is to clarify the contractor's responsibility in Iraqi law, then this can only be done by It is presented as a basis for controlling this responsibility in the second requirement of this research.

In addition, the above can only be accomplished by defining the contracting contract and clarifying its concept first, whether it is a contract binding on one side or a contract binding on two sides. This is because the basis of the above is determining the nature of the contracting contract.

## First branch

### The concept of a contracting contract

As we discuss the definition of the contracting contract in the first clause of this section, then in the second clause we discuss the elements of the contracting contract as follows.

**First - Definition of the contracting contract:** The Iraqi legislator was the first to define the contracting contract, as he defined it in the Iraqi Civil Law No. 40 of 1951, specifically in Article 864 thereof, as it stipulated the definition of the contracting contract as: “A contract in which one party undertakes to make something or He performs work in exchange for a wage promised by the other party <sup>1</sup>” .

It is noted from the previous article that the contracting contract in Iraqi law is one of the contracts that focuses on the result, and not on the work itself, meaning that it is not legally possible to give the legal description based on the basis that a contract is a contracting contract once the work agreed upon is carried out and the implementation of it begins. It is necessary to achieve the result agreed upon between the two parties to the contracting contract. If the contractor implements the contracting contract without reaching the previously agreed-upon result, the contracting contract is considered defective in its element related to the necessity of achieving the result, and the contractor's responsibility is fulfilled in this case. <sup>2</sup>

It is also noted that the Iraqi legislator expanded the concept of the contracting contract, as the prevailing custom is based on the contractor providing the work and material necessary to carry out the work. However, the Iraqi legislator was not limited to this aspect only, but rather he considered the contract in which the employer provides the material for this work. In which the contractor's role is limited to carrying out the work he is assigned to do, it is also considered a contracting contract, and in this case the contractor is called a joint employee. <sup>3</sup>

It can be concluded from the above that the employee is not asked about the work guarantee, given that the employer is the one who supervised the work and it was done with his advice and under his supervision. However, in the case specified by the first paragraph of Article 865 of the Iraqi law, the contractor is asked about the guarantee according to the guidance of the text. The law, because the employer's submission of his materials does not negate the contract's legal status, given that the contractor is obligated to perform the required result without the employer's intervention. <sup>4</sup>

The Egyptian legislator did not deviate from the definition that the Iraqi legislator came up with for the contracting contract, as it came with the same definition, so Article 646 of the Egyptian Civil Code of 1948 defined it as: “A contract whereby one of the contracting parties undertakes to make something or perform work in exchange for a wage that the other undertakes to undertake. .<sup>5</sup>”

As for the Lebanese legislator, he defined the contracting contract in Article 646 of the Lebanese Obligations and Contracts Law as: “A contracting contract or industrial license is a contract according to which a person commits himself to completing a specific work for another person in exchange for a compensation appropriate to the importance of the work. <sup>6</sup>”

<sup>1</sup>Revision of Article 864 of the Iraqi Civil Code -

<sup>2</sup>Khawla Kazem Muhammad Al-Maamouri, Responsibility of the Contractor and Subcontractor, Babylon University Journal for Humanities, Volume 24, Issue 1, 2016, p. 3

<sup>3</sup>Review of Article 865 of the Iraqi Civil Code

<sup>4</sup>Khawla Kazem Muhammad Al-Mamouri, Responsibility of the Contractor and Subcontractor, previous reference, p. 4 -

<sup>5</sup>Egyptian Civil Law

<sup>6</sup>The Lebanese Law of Obligations and Contracts -

It can be concluded from the previous definitions that the contracting contract is a consensual contract binding on two parties, meaning that this contract is one of the compensation contracts whose most important characteristics are profit and loss, meaning that the contractor seeks, by completing the work entrusted to him, to achieve a financial profit, in addition to that the contracting contract is considered a contract of Disposition contracts, because this contract arranges mutual obligations between the two parties to the contract, where the employer is obligated to pay the wage, while the contractor is obligated to perform the work in the required manner, or to provide his materials and perform it in the required manner.<sup>7</sup>

It should be noted that what distinguishes the contracting contract from a private employment contract, or from day labor in which it is required to achieve a result, is the element of direction and supervision, and the independence of the will to implement, meaning that the contractor does not receive direction or supervision from the employer, and his will to carry out the work in the manner What is required is independence, and the role of the employer is limited to monitoring to ensure that the work is properly carried out in the required manner without interfering in it, for fear of making an unavoidable mistake, in contrast to the private employment contract in which the employer fully supervises the work to be done, which is what We take it based on all previous definitions, as they overlooked this matter.<sup>8</sup>

Accordingly, we can conclude with our own definition of the contracting contract as: a consensual contract in which the employer is obligated to provide wages, and in which the contractor is obligated to provide the work or work and its materials in accordance with the conditions agreed upon in advance without the direction or supervision of the employer.

## **Second: The elements of the contracting contract**

The contracting contract is considered a consensual contract binding on two sides, like the rest of these contracts, in the presence of the general elements of the contract required and stipulated by law. These pillars are consent, place, and reason. These three conditions must be met together in order for the contracting contract to be valid. We will discuss these conditions in detail as follows:

### **The satisfaction element**

Satisfaction in the contracting contract is represented by the meeting of the will of the employer with the will of the contractor, such that this meeting takes place through the compatibility of both the offer and acceptance. The Iraqi legislator expressed this explicitly in the text of Article 77 of the Civil Code, where it stated: "The offer Acceptance is both words used customarily to create a contract. Any explicit word is an offer, and the second is an acceptance."<sup>9</sup>

On this basis, the offer and acceptance in the contracting contract are preceded by negotiations between the two parties to the contract based on determining the basic features of the contract, so that the work, its type, duration, nature, and method of implementation are agreed upon in advance, and everything related to achieving the desired result. The consideration is considered an essential pillar of compensation contracts. Under which the contracting contract falls, however, not specifying it in the contracting contract does not make the contract invalid on the basis that the legislator intervened in advance and determined it, as the first paragraph of Article 880 of the Iraqi Civil Code stipulates that: "If the rent is not determined in advance or determined by "It is an approximate aspect, and its determination

<sup>7</sup>Fakhr al-Din al-Husseini, Contracting Contracts in the Iraqi Civil Law, Babylon Press, Baghdad, without date of - .publication, p. 12

<sup>8</sup>Ibid., p. 13 -

<sup>9</sup>Review of Article 77 of the Iraqi Civil Code



must be referred to the value of the work and the contractor's expenses.<sup>10</sup> .

It should be noted that we believe that the wage in the contracting contract is considered one of the pillars of this contract, because the character of the contracting contract is linked to receiving the wage for the work to be done on the one hand, and on the other hand, the nature of the contracting contract requires the existence of obligations on both parties to the contract, including the wage, and therefore the intention. The legislative text of the first paragraph of Article 880, Iraqi Civilian, is not the completion of the wage as one of the pillars of the contracting contract, but rather the protection of the contractor from some cases in which the wage is not mentioned and the competent judiciary gives the contract the description of an enterprise. This is an exception to the original, and the exception should not be taken as a rule. General.

In addition to what is mentioned, all defects that affect consent must be applied in the contracting contract, such as lack of capacity, coercion, fraud, deception, and other defects that nullify consent or invalidate will, and thus require termination of the contract by agreement or judgment.

### **The reason element**

The reason is one of the pillars of consensual contracts that is a matter of controversy, as jurisprudence differed as to whether the reason can be considered a pillar of the contract, or is it considered a pillar of obligation. The difference between obligation and contract is that commitment is a stage prior to the contract and continues with the conclusion of the contract. Until the end of the contract, the obligation revolves around the reason motivating the obligation, and it is legally called the motivating or directing reason, as the reason motivating the contract in the sales contract is the intention of ownership for the buyer, and the desire to obtain the price for the seller, and in the contracting contract, the reason for the obligation is to perform the work. The purpose for which the reason was directed must be legitimate and not in violation of the law and not in conflict with public order and public morals.<sup>11</sup>

It should be noted that the Iraqi legislator considered the reason to be one of the pillars of the obligation, not the contract. This was explicitly stated in Article 132 of the Iraqi Civil Code, which stated: "The contract shall be void if the contracting parties commit without a reason, or for a reason prohibited by law and contrary to public order and morals."

It should be noted that the difference between counting the reason as one of the pillars of the obligation, or one of the pillars of the contract, is the effect resulting from the loss of the element of the reason, as it results in invalidation if it is one of the pillars of the obligation, as indicated in the previous Article 132, or if it is a pillar of the obligation. Elements of the contract: The effect of missing the element of reason or violating the law is the absence of the contract.<sup>12</sup>

### **The subject matter element**

Unlike consensual contracts that are binding on two parties, the subject matter in the contracting contract rests on two elements, whereas the subject matter in the rest of the contracts is focused on one element. For example, the subject matter of the sales contract is the right of ownership, while the subject matter of the contracting contract focuses on the work to be performed. And the wages payable to the contractor are owed by the employer.

<sup>10</sup>10 Ahmed Abdel-Al Abu Qurain, General Provisions of Contracting Contracts, 1st edition, Ain Shams University, - Faculty of Law, Egypt, 2003, p. 33

<sup>11</sup>11 Mansour Al-Qadi, Civil Law, Private Civil and Commercial Contracts, 1st edition, Al-Banan Publishing and - Distribution, 2004, Lebanon, p. 458

<sup>12</sup>12 Review of Article 132 of the Iraqi Civil Code

Referring to the Iraqi Civil Law, we find that it did not discuss the location element in the contracting contract with regard to the work to be performed. Therefore, the location element on which the obligation is focused is required to be legitimate by law, and not to be in violation of the system and public morals. For example, if the work is focused on A contracting contract to establish or build a factory for an industry within a residential neighborhood, and the law prohibits the construction of factories within the boundaries of residential neighborhoods, so the subject of the contracting contract related to the work, i.e. building this factory, becomes illegal, based on the explicit prohibition contained in the law against building factories within residential cities.<sup>13</sup>

In addition to the above, it is required that the subject of the contracting contract related to the work be existing or at least likely to exist in the future, and that it be clearly defined or capable of being appointed. It is not valid to contract for an unspecified contract, as the contractor is obligated to carry out everything that the employer asks of him without Specifying, because in this case the contractor turns to an employee or employee, because the difference between the contracting contract and the employment contract, as well as the contractor's freedom to implement it without the supervision and direction of the employer, is specifying this work specifically and explicitly, because it may be the work that is requested from the contractor. It is against the law, such as agreeing to trade weapons or narcotic or prohibited materials.<sup>14</sup>

As for the second element of the work, which is the wage that the employer provides to the contractor, it stipulates all the conditions that apply to the work element, provided that the wage is not required to be specified in the contracting contract, as Article 880 of the Iraqi Civil Code stipulates that: "If the rent is not determined in advance or is determined approximately, its determination must be based on the value of the work and the contractor's expenses."<sup>15</sup>.

This is the trend that we do not support, since if the wage in the contracting contract is an element of the contract, and is not an independent element in itself, then not specifying it violates the general rules on the one hand, in addition to the fact that its absence and lack of specification makes the element of the contract in the contracting contract lose an important element of its elements. Which leads to the absence of the corner of the shop, which ultimately leads to the contracting contract not being established in the first place due to the loss of the corner of the shop. Therefore, it was necessary to stipulate in Iraqi law that the contracting allowance must be determined in a clear, explicit and specific manner.

## Second section

### Types of contractor liability in Iraqi law

Liability in civil law is generally represented by one of two types. The first is contractual responsibility, or the responsibility to guarantee the contract, as the Iraqi legislator called it. This type of responsibility is only achieved in consensual contracts binding on two sides that arrange mutual obligations between the two parties to the contract. As for the The second aspect of responsibility is tort liability, and this is not the focus of this research.

However, there is a third type of responsibility stipulated in a certain type of contract and not in others, which is the responsibility of the ten-year guarantee, as is the case in a contracting contract, where the party who commenced the work remains a guarantor of the safety of his work for the period specified by law.

<sup>13</sup>Khawla Kazem Muhammad Al-Mamouri, Responsibility of the Contractor and Subcontractor, op. cit., p. 15

<sup>14</sup>Fawaz Saleh, Voluntary Sources of Commitment, Damascus University Publications, Faculty of Law, 2021, p. 156 -

<sup>15</sup>Review of Article 880 of the Iraqi Civil Code

Accordingly, we will discuss this section in two sections. In the first, we will discuss the contractor's contractual responsibility, and the second is the contractor's responsibility in the ten-year warranty, as follows:

### **First - Contractor's Contractual Liability**

Contractual liability arises as a result of breach of one of the obligations imposed by the contract on the contracting parties, as if one of the parties breaches any obligation imposed on him, contractual liability is fulfilled, meaning that the scope of this liability is during the period of implementation of the contract until the moment it is completed. The contract, and it is in the contracting contract during the period of construction of the agreed-upon building until the moment it is received from the employer, so that this responsibility is a penalty for the party who violates its contractual obligations.<sup>16</sup>

Therefore, this responsibility in the contracting contract can be on the employer if he breaches his obligations, and it can also be on the contractor, meaning that it is a mutual responsibility, and this responsibility does not exist unless there is a valid contract that arranges mutual obligations on its two contracting parties.

It should be noted that the Iraqi legislator stipulated this type of liability in Article 168 of the Iraqi Civil Code, where it states: "If it is impossible for the party bound by the contract to perform the obligation intentionally, he shall be sentenced to compensation for not fulfilling his obligation, unless it is proven that the impossibility of implementation arose from a foreign cause." He has no hand in it, and the same applies to the ruling if the obligor is late in implementing his obligation.<sup>17</sup>

It is concluded from the preceding article that the contractor who does not implement the obligation imposed on him by the contracting contract, or delays in implementing it, or implements it in a manner other than what was agreed upon with the employer, becomes obligated to compensate the employer for the error he committed as a result of his negligence or breach of his contractual obligations.

It should be noted that the Iraqi legislator did not stipulate the contractor's contractual responsibility as soon as the error occurred on his part. Rather, this error must be proven first, and the contractor must insist on not repairing it if it is repairable. Therefore, the contractor stipulated that the employer must warn the contractor as soon as he becomes aware of the error, the contractor will attempt to correct it, as Article 869 of the Civil Code stipulates that: "If it appears to the employer during the course of the work that the contractor is performing it in a defective manner or in violation of the contract, he may warn him to change it to the correct method within an appropriate period determined by him. The term has expired without a contractor returning to the correct method, and the employer may request either termination of the contract or entrusting the work to another contractor at the expense of the first contractor, whenever the nature of the work permits this<sup>18</sup>".

On this basis, the scope of contractual liability is the apparent defects that can be observed during the period of implementation of the contract until the moment of delivery. If delivery is completed and the employer receives it from the contractor, there is no room for contractual liability to be fulfilled, because the employer is supposed to have inspected the work in a manner that clears up ignorance. He confirmed the implementation conditions, and he no longer has any recourse against the contractor for any apparent defect after he received the work from him<sup>19</sup>.

<sup>16</sup> Muhammad Hatem Al-Bayyat, Contractual Responsibility, research published on the Arab Encyclopedia website <https://arab-ency.com.sy>

<sup>17</sup>Article 168 of the Iraqi Civil Code

<sup>18</sup>Article 869 of the Iraqi Civil Code

<sup>19</sup>Muhammad Hatem Al-Bayyat, Contractual Liability, op. cit -



As for hidden defects, structural defects, or those related to engineering designs, they fall under another type of liability that we explain in the second clause of this section.

It should be noted that if the warning is one of the conditions for the establishment of contractual liability, then it cannot exist unless its elements are fulfilled, and the first element of contractual liability is the error that violates the terms of the contract, whether that is related to implementation or other legal matters agreed upon in the contract. For example For example, the contractor's delay in delivering the project beyond the period specified in the contract is considered a contractual error that gives rise to contractual liability. This is also the case if the project was implemented in accordance with other than agreed upon conditions or if he neglected some of them <sup>20</sup>.

As for the second pillar of contractual liability, it is damage. It should be noted that damage is not presumed within the framework of contractual liability, meaning that it falls on the employer to prove that the damage occurred to him as a result of the contractor's mistake. Contractual liability is not achieved merely by the contractor's breach of his contractual obligations. Rather, it must From the occurrence of fixed, certain and immediate harm to the employer <sup>21</sup>.

As for the third and final pillar of contractual liability in the contracting contract, it is the causal link between the contractor's error and the damage caused to the employer. It should be noted that the causal link between the error and the damage within the framework of contractual liability is assumed, meaning that the employer is not obligated to prove it. Once the contractor's mistake and the damage are proven What happens as a result of this error is that the causal link is generally established <sup>22</sup>.

## Second - Guarantee Responsibility

The ten-year guarantee responsibility is a creation of the legislator, and even if it is specific to the contracting contract, this does not prevent it from being applied in any other type of consensual contracts, and the basis of this responsibility is an element of administrative control related to public safety. Considering that the contracting contract focuses on the construction of residential buildings, public facilities, etc., meaning that it was necessary to oblige the contractor to take great care of his work in order to preserve public safety, and on this basis, the legislator obligated the contracting company to guarantee its work for a period of ten years after handing over the project to the employer, from Any danger that could lead to the demolition of buildings and facilities, whether this demolition is partial or complete <sup>23</sup>.

It should be noted that the responsibility of the guarantee does not fall on the contractor alone, given that he is the one who implemented the contracted project. Rather, it may extend to the engineer who carried out the engineering designs related to the building if it turns out that the demolition is due to an error in the engineering design and not in the method of implementation. It may fall on the engineer supervising the project if it turns out that he neglected his work, and thus the scope of warranty responsibility is hidden defects that the employer cannot see <sup>24</sup>.

The Iraqi legislator has stipulated this responsibility clearly and explicitly in the Civil Code, where Article 870 stipulates that: "The architect and contractor shall be liable for any total or

<sup>20</sup>Muhammad Hatem Al-Bayyat, Contractual Liability, op. cit

<sup>21</sup>Muhammad Hatem Al-Bayyat, Contractual Liability, op. cit

<sup>22</sup>Muhammad Hatem Al-Bayyat, Contractual Liability, op. cit

<sup>23</sup>Khawla Kazem Muhammad Al-Mamouri, Responsibility of the Contractor and Subcontractor, previous reference, p. - 17

<sup>24</sup>p. ,Khawla Kazem Muhammad Al-Mamouri, Responsibility of the Contractor and Subcontractor, previous reference - 18

partial demolition that occurs within ten years of the buildings they have constructed or other fixed facilities that they have erected, even if... The demolition results from a defect in the land itself, or the employer has permitted the construction of the defective facility, unless the contracting parties wanted this facility to remain for a period of less than ten years, and these ten years begin from the date of completion and delivery of the work, and any condition intended for exemption shall be null and void. Or limit this guarantee <sup>25</sup>.

The position of the Iraqi legislator regarding warranty responsibility is evident in the following points:

1. The liability for the ten-year warranty is fulfilled as soon as demolition occurs in the building, whether the demolition is complete or partial, within ten years from the date of delivery.
2. The warranty responsibility is imposed even if the defect is due to the land being unsuitable for construction, given that studying the suitability of the land lies at the heart of engineering work with regard to construction.
3. The employer's permission for engineering or implementation defects does not affect the warranty liability unless the period of use of the building to be constructed is less than ten years after delivery.
4. It is not permissible for the two contracting parties to agree in the contracting contract to limit or exempt from warranty liability in the contracting contract, and every condition stipulating this in the contract is void.

It should be noted that the warranty liability falls after one year from the date of the demolition and the discovery of the defect. This liability does not affect the criminal liability that may be incurred once the demolition occurs, given that the basis for each of the two liabilities is different from the other.

## **The second requirement**

### **Contractor's liability provisions**

Proving the contractor's liability based on a contractual error, or warranty responsibility, is based on specific provisions in the law. The provisions that relate to contractual errors that can be avoided are different from those provisions related to errors that cannot be avoided. The Iraqi Civil Code includes many provisions that It guarantees the rights of both parties to the contracting contract. It explicitly stipulates cases where liability is established, methods for dealing with it, and the penalties resulting from it, whether the penalty is cancellation, compensation, restoring the situation to what it was, or implementation at the contractor's expense.

In addition to the above, the Iraqi legislator stipulates some exceptional cases in which, if they occur, the contractor can be exempted from the responsibility resulting from him, given the special nature of those cases that led the contractor to make a mistake.

Accordingly, we will explain the provisions related to the contractor's liability resulting from his error in the contracting contract in the following two sections as follows:

### **First branch**

#### **The penalty resulting from the contractor's responsibility**

The Iraqi legislator has specified a set of penalties for a contractor who violates one of the duties imposed on him by the contracting contract. These penalties are cancellation, implementation at the contractor's expense, repair of the defect, or cash compensation, and we explain them as follows:

<sup>25</sup>Article 870 of the Iraqi Civil Code

**First - Annulment:** **Annulment** means the disappearance of the legal bond created by the contract between the contracting parties, and its complete termination, so that the contracting parties return to the state they were in before the contract was concluded. Thus, the most important conditions required for annulment to be applied as a contractual penalty is that the contract was previously concluded in a correct legal manner, and here lies the difference between The invalidity of the contract and its cancellation, since the cancellation of the contract requires that it be valid from a legal standpoint, but the mistake of the contracting party is the one who arranged the cancellation, while the invalidity of the contract is that the contract is void from the ground up and has no legal existence, even if it has a physical existence <sup>26</sup>.

Cancellation can be either judicial or contractual. Judicial cancellation is when one of the contracting parties resorts to the judiciary requesting that the contract be canceled because the other contractor violated some of his or her contractual obligations. As for contractual cancellation, it occurs in cases where the contracting parties agree to cancel the contract explicitly and immediately, without the need for excuses, and without the need for excuses. Resorting to the judiciary in certain and special cases agreed upon by the contracting parties in the terms of the contract <sup>27</sup>.

It should be noted that the Iraqi legislator stipulated termination in the contracting contract in some cases in which the contractor violates his contractual obligations towards the employer, so he adopted the system of contractual termination without resorting to the judiciary in the event that the contractor is late in starting the work, or in the event of a delay in implementation such that there is no hope of completion. Work on the specified delivery date, as Article 868 of the Civil Code stipulates that: "If the contractor is late in starting the work, or is so late in completing it that there is no hope of doing what should have been done within the agreed-upon period, the employer may cancel the contract without waiting for the deadline to arrive." "Delivery" <sup>28</sup>.

It also permitted judicial annulment in other cases, as Article 869 stipulates that: "If it appears to the employer during the course of work that the article is being carried out in a defective manner or in violation of the contract, he may warn him to change it to the correct method within an appropriate period specified by him. term without the contractor returning to the correct method, the employer may request either to cancel the contract or to entrust it to .another contractor at the expense of the first contractor <sup>29</sup>"

## **Second - Implementation at the contractor's expense**

Implementation at the contractor's expense is one of the administrative contractual penalties that the administration resorts to in the contracts it concludes with persons of private law. It is one of the administration's means of implementing the obligation in kind, carried out by the administration itself at the expense of the contractor who violates one of his contractual obligations. Under his financial responsibility <sup>30</sup>.

We note that the Iraqi legislator included this penalty within the framework of the contracting contract, even though it is a private law contract. This was explicitly stipulated in Article 869

<sup>26</sup>26 ,Fawaz Saleh, Dissolution of the Contract, research published on the Arab Encyclopedia website - <https://arab-ency.com.sy>

<sup>27</sup>27 ,Fawaz Saleh, Dissolution of the Contract, research published on the Arab Encyclopedia website - <https://arab-ency.com.sy>

<sup>28</sup>28 Article 868 of the Iraqi Civil Code

<sup>29</sup>29 Article 869 of the Iraqi Civil Code

<sup>30</sup>30 Muhammad Adnan Baqir al-Jubouri, Commitment to Guarantee in the Contracting Contract, Master's Thesis, - .University of Babylon, Iraq, 2007, p. 66

of the Iraqi Civil Code, as shown above. It should be noted that it is not possible to resort to this type of contractual penalties. In the contracting contract, except in cases where specific implementation is still possible. However, in other cases where specific implementation is not possible and useless, this penalty cannot be resorted to <sup>31</sup>.

It should be noted that, in light of this penalty, the employer may seize all machinery, installations and equipment belonging to the original contractor, for use in implementation at his expense. Thus, the employer is placed in the position of agent between the original contractor and the new contractor, so he must supervise the work and endeavor to complete the work. Working in a way that achieves his interests and does not harm the original contractor, and his basis for this is the provisions of the Civil Code, based on the general rule that stipulates that there is neither harm nor harm.

### **Third - Repairing the defect**

It is also called compensation in kind, and it is one of the penalties resulting from contractual liability and tort liability, and on this basis it does not include warranty responsibility in the contracting contract, and compensation in kind means restoring the situation to what it was before the damage occurred, and on this basis Repairing the defect is one of the reasons for performing contractual obligations in kind, and this is considered the origin of the contractual obligation. As for the rest of the contractual penalties, they are an exception to this previous principle, and on this basis it leads to erasing the damage from the foundation and removing it as if it had never occurred, unlike compensation for a consideration, which aims to Repairing the damage without removing it completely. <sup>32</sup>.

It should be noted that the Iraqi legislator adopted the system of compensation in kind or :repairing the defect explicitly in the Iraqi Civil Code, where Article 869 stipulates that the contract may be canceled immediately if correcting the defect in the method of .....“ implementation is impossible <sup>33</sup>” .

It must be mentioned that the Iraqi legislator obligated the contractors in the contracting contract to resort to this method in the event that the implementation defect was minor and could not lead to not benefiting from the agreed-upon work as intended, as the second paragraph of Article 869 stipulated that: “Provided that the defect In the method of implementation, if it does not significantly reduce the value of the work or its suitability for its intended use, then the contract may not be terminated ”.

### **Fourth - Monetary compensation**

or compensation in return, which aims, as we mentioned above, to compensate for the damage without removing it altogether. This type of compensation can be either material, represented by cash, or moral. With regard to moral compensation, the competent judiciary is the one who decides it, and is represented by publishing the ruling, or affixing it. In a specific place, or under arrest, or imposing guard <sup>34</sup>.

Cash compensation can either be agreed upon, or decided by the judiciary if it is not agreed upon in the terms of the contract. On this basis, the employer has the right to request cash compensation from the contractor who is negligent in his work in all cases that result in harm to him, as a result of poor implementation or delay. In which, or the demolition of buildings and fixed facilities, in the event that the contractor refrains from providing compensation in kind, or in other cases in which the employer requests cash compensation directly <sup>35</sup>.

<sup>31</sup>Ibid., p. 67 -

<sup>32</sup>Fawaz Saleh, Dissolution of the Contract, previous reference -

<sup>33</sup>Article 869 of the Iraqi Civil Code

<sup>34</sup> Fawaz Saleh, Compensation, research published on the Arab Encyclopedia website - <https://arab-ency.com.sy>

<sup>35</sup> Fawaz Saleh, Compensation, research published on the Arab Encyclopedia website - <https://arab-ency.com.sy>

It should be noted that there is nothing legally preventing the combination of compensation in kind and cash compensation together for the same mistake committed by the contractor. For example, if the constructed building is demolished before the expiry of the ten-year period determined by the warranty responsibility, the employer has the right to request compensation in kind for this demolition. He also has the right to request cash compensation for the period during which the building was defective if he proves that this defect did not enable him to benefit from the building in the manner determined by the intended purpose of its construction<sup>36</sup>.

On this advanced basis, cash compensation includes both types of liability in the contracting contract, as it includes contractual liability and warranty liability alike.

## **Second section**

### **Absence of contractor liability**

The legal rules stipulated in the Iraqi Civil Code, which required the contractor to be responsible for breaching his contractual obligations in the contract, and which required him to guarantee for a period of ten years on the other hand, are the same legal rules that denied the contractor contractual responsibility or warranty responsibility on the other hand.

This is due to the fact that the rules of civil law do not aim to protect one of the parties to the contractual relationship in contracts binding on two sides, including the contractual contract. Rather, they aim to protect both parties to the contractual relationship alike. This is because the legal rules were not legislated to protect a specific individual to the exclusion of the rest of the masses of citizens. Rather, they It was established to protect all citizens.

On this aforementioned basis, the contractor's responsibility is eliminated in the contracting contract despite the breach of one of his contractual duties, and despite the demolition of the building during the warranty period specified by the texts of the Iraqi Civil Law. However, the absence of responsibility is not an absolute absence, but rather certain conditions must be met in order to say Thus, force majeure and a sudden accident are among the reasons stipulated in the Iraqi Civil Law to deny the contractor's responsibility. We explain them in the following two items as follows:

### **First - Force Majeure**

It should be noted that force majeure is one of the external causes that are outside the framework of the contractual process, and with which, if it occurs, it is not possible for the contractor committed in accordance with the provisions of the contract to perform the obligation imposed on him by this contract, and it is the same in this case that The obligated party in this case is the creditor or debtor on the basis that contracts binding on two sides create mutual obligations on both sides of the contractual process<sup>37</sup>.

The effect of force majeure is limited to the element of the causal relationship among the pillars of civil liability. This connection is severed by the fault of the obligated contractor and the harm caused to the other party to the contract, so that it paralyzes the will of the obligated party and even nullifies it, which prevents him from performing the obligation imposed on him by the contract. An example of this is That the contractor is unable to construct the agreed-upon building due to a terrorist group taking control of the project site and declaring this area a military operations zone by the competent authorities<sup>38</sup>.

<sup>36</sup> Fawaz Saleh, Compensation, research published on the Arab Encyclopedia website - <https://arab-ency.com.sy>

<sup>37</sup> Hawazen Abdul Mohsen Abdullah, The Concept of Force Majeure and its Effects on Contract Implementation, - Kuwait International Law School Journal, Issue 2, 2021, p. 505

<sup>38</sup> Ibid., p. 506 -



It should be noted that force majeure can arise as a result of nature or as a result of human intervention. Examples of force majeure that arise as a result of nature include earthquakes, floods, the spread of epidemics, diseases, snow, and other natural accidents. As for force majeure that arises as a result of human intervention, perhaps its most prominent example is wars.

It is necessary to mention that the Iraqi legislator adopted the theory of force majeure within the framework of the contracting contract, as the contractor is exempted from contractual responsibility and warranty responsibility in the event that the fault or demolition in the building is due to force majeure of which he does not indicate, as stipulated in the second paragraph of Article 886 of the Civil Code. The Iraqi State stipulates that: "If implementation is impossible for a force majeure reason, the contractor shall only be compensated to the ...extent that the employer has benefited from it, as stated in Article 889 <sup>39</sup>"

Also, Article 872 of the Iraqi Civil Code stipulates that: "The architect and contractor shall waive the warranty stipulated in the previous two articles, if it appears from the circumstances in which the building defects were revealed that these defects arose from reasons that were .not expected at the time the building was erected <sup>40</sup>"

It should be noted that the issue of assessing force majeure is up to the competent court, but the conditions for achieving force majeure are summarized in the following two conditions:

### **The impossibility of anticipating force majeure**

This case means that the sudden accident is characterized as something that is unexpected for both parties to the contract, and for the most prudent and cautious people. This means that it is not enough for the sudden accident to be unexpected for the contractor and not the employer, or both of them. Rather, it must be It is unexpected for the majority of people. The fall of rain in the winter is not considered a sudden accident, nor is the high temperature in the summer. In general, this issue is one of the objective issues that the judiciary decides upon with a judicial ruling that represents the title of truth and justice <sup>41</sup>.

### **The impossibility of paying force majeure**

meaning that the contractor must not be able to continue implementation. Whenever it is possible to continue implementation even if it is difficult, this event cannot be described as force majeure, and the impossibility of payment must be general, meaning that it must not It is related to the contractor himself. Indeed, any other contractor cannot pay this accident and continue with implementation <sup>42</sup>.

On this basis, it is not enough for the force majeure to be unexpected, but it must also be impossible to pay, such that it paralyzes the contractor's will, so he cannot do anything about it to avoid it.

### **Force majeure must be outside the contract**

On this basis, if the cause of the occurrence of force majeure is the contractor himself through his negligence and poor judgment, then responsibility for him is not excluded even if the previous two conditions are met.

<sup>39</sup>Article 886 of the Iraqi Civil Code

<sup>40</sup>Article 872 of the Iraqi Civil Code

<sup>41</sup>Abd al-Majid al-Hakim, Al-Mawjiz fi Sharh al-Civil Law, Part One, Sources of Obligation, National Library, - Baghdad 2007, p. 538

<sup>42</sup>Abdul Majeed Al-Hakim, previous reference, p. 539 -

## **Second - The expiration of contractual responsibility without warranty responsibility with delivery**

The contractor's delivery of the project contracted with the employer is not a case of absence of responsibility for it, on the basis that the employer may refuse to receive the project because of a visible defect in it, except that the employer, in the event that he receives the project and inspects it, Thus, he is prohibited from recourse against the contractor later for any of the apparent defects, given that handing over the project to the employer has ended the contractual relationship, and the responsibility to guarantee remains in place until the period specified for it expires. Likewise, if the employer refuses to receive the project, the contractor will excuse him for receiving the project within A specific and appropriate period. If he refuses to receive the project, the contractor's responsibility for apparent defects will be removed by the end of the notice period.

The Iraqi legislator explicitly adopted this trend in the text of the first paragraph of Article of the Civil Code, where it states: "When the contractor has completed the work and 873 placed it at the disposal of the employer, he must hasten to inspect it as soon as possible according to what is usual, and he must receive it without any necessary harm." If he refuses, without a legitimate reason, to inspect or receive it despite being invited to do so by an official warning, the work will be considered to have been delivered to him <sup>43</sup>".

## **Conclusion**

The Iraqi legislator regulated the contracting contract in the Iraqi Civil Code and devoted a special chapter. This chapter included all the legal provisions that govern the dealings of individuals under this contract. Among these articles were special provisions that stipulate the contractor's responsibility for apparent errors and defects committed by the contractor during the period. The validity of the contract, as well as hidden defects that could appear after the .employer receives the agreed upon project

It must be mentioned that the Iraqi legislator did not mean by this that the employer is the weak party in the contract and decided to protect him. On the contrary, the employer is also responsible. Rather, the goal is to protect the private and public interest alike.

As for protecting the private interest, it is represented in guaranteeing the rights of the employer who has fulfilled all of his contractual obligations imposed on him by the contracting contract against the erring or negligent contractor who has violated his contractual duties. As for protecting the public interest, it is represented in two parts. The first part is based on creating an integrated legal system based on Adding a kind of protection and sanctity to contracts regulated by civil law, so that individuals do not refrain from dealing with each other because their rights are not protected, in addition to the fact that the contracting contract focuses on the construction of buildings, residential homes, etc. Therefore, the contractor's breach of his contractual obligations imposed by the contracting contract means endangering the life of People are at risk due to the collapse of buildings.

On this advanced basis, we have reached a set of results and recommendations, which we explain as follows.

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<sup>43</sup>Article 873 of the Iraqi Civil Code

## Results

1. The contracting contract is considered a consensual contract that is binding on two sides and creates obligations for the contractor that entails his responsibility in the event of a breach thereof.
2. The contractor's responsibility towards the employer is to fulfill his contractual obligations, which is the contractual responsibility, and the responsibility for the building's structural safety, which is the warranty responsibility.
3. The contractor's contractual liability and warranty liability are excluded in the event of force majeure, because it is a circumstance external to the contract that could not have been expected or prevented.
4. The Iraqi legislator organized the provisions of the contractor's responsibility resulting from the contracting contract according to explicit and clear texts so that they do not raise any problem when applied.
5. The framework of the contractor's contractual liability during the period of contract implementation is that it ceases as soon as the employer receives the project with regard to hidden defects. As for hidden defects, the liability remains in place until the end of the warranty period.

## :Recommendations

1. We recommend that the Iraqi legislator adopt the theory of emergency circumstances that make the implementation of the contract difficult, not impossible, and deny the contractor's responsibility in this case.
2. We recommend that the Iraqi legislator deny the contractor's responsibility if the error occurs as a result of a defect in the land, because studying the safety of the land and its tolerance for construction lies at the heart of the engineer's work, not the contractor's.
3. We recommend that the Iraqi legislator establish engineering and consulting departments in local administrations whose mission is to issue the necessary licenses after ensuring the safety of the land for construction, and other licenses indicating the safety of the building for use in exchange for specific financial fees in order to preserve public safety.
4. We recommend that the Iraqi judiciary be strict in implementing the warranty responsibility against the contractor, so that this strictness supports the construction of sound buildings that achieve the urban renaissance of Iraq.

## Reviews:

1. Ahmed Abdel-Al Abu Qurain, General Provisions of Contracting Contracts, 1st edition, Ain Shams University, Faculty of Law, Egypt, 2003.
2. Khawla Kazem Muhammad Al-Maamouri, Responsibility of the Contractor and Subcontractor, Babylon University Journal of Humanities, Volume 24, Issue 1, 201.
3. Fakhr al-Din al-Husseini, Contracting Contracts in Iraqi Civil Law, Babylon Press, Baghdad, without date of publication.
4. Fawaz Saleh, Voluntary Sources of Commitment, Damascus University Publications, - Faculty of Law, 202.
5. Abdul Majeed Al-Hakim, Al-Mawjiz fi Sharh Al-Civil Law, Part One, Sources of Commitment, National Library, Baghdad 2007
6. Mansour Al-Qadi, Civil Law, Private Civil and Commercial Contracts, 1st edition, Al-Banan Publishing and Distribution, 2004.
7. Fawaz Saleh, Dissolution of the Contract, research published on the Arab ,Encyclopedia website<https://arab-ency.com.sy>
8. Fawaz Saleh, compensation, research published on the Arab Encyclopedia website

- <https://arab-ency.com.sy>
9. Hawazen Abdul Mohsen Abdullah, the concept of force majeure and its effects on contract implementation, College Journal Kuwait International Law, Issue 2, 2021
  10. Muhammad Hatem Al-Bayyat, Contractual Liability, research published on the Arab Encyclopedia website <https://arab-ency.com.sy>
  11. Muhammad Adnan Baqir Al-Jubouri, Commitment to Guarantee in the Contracting Contract, Master's Thesis, University of Babylon, Iraq, 2007
  12. Iraqi Civil Law
  13. Egyptian Civil Law
  14. Lebanese Obligations and Contracts Law