

Contractual compensation: An Iraqi law perspective

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Given the complexity of the issues relating to compensation as a remedy for breach of contract, Iraqi law, namely the Iraqi Civil Code no. 40 of 1951 which is the law regulating the general provisions for the origins of obligations, has addressed the matter of compensation and placed the general rules upon which the courts rely in connection with relevant claims filed before it. In this article we address the rules upon which compensation is awarded and other issues relating to compensation such as liquidated damages.

Pursuant to the Iraqi Civil Code, compensation is not owed should any of the following conditions be met:

- The relevant obligation became impossible to fulfil;
- The debtor failed to fulfil the obligation due to foreign cause of force majeure;
- The fulfilment of the obligation was deemed to be overburdening; or,
- The other party failed to fulfil its obligations as well.

The creditor may insist on specific performance of the contract, provided that the relevant obligation is inappropriate or impossible unless done by the debtor, the creditor may resort to the court to oblige the debtor to perform and the debtor will face have to paying a deterrent fine “threatening” penalty in the event of failing to abide. If the debtor insists on not performing, the court shall determine the compensation amount to be paid by the debtor, and to take in consideration the losses suffered by the creditor and the intransigence of the debtor.

Contractual parties may agree the compensation amount when they enter into a contract or afterwards. If the parties fail to agree the amount of compensation and the law does not specify the amount, the court shall have the power to assess the amount of compensation. If there is no agreed amount of compensation in the contract, or by law, then the court can estimate it based on the principle of “loss of profit or occurred losses” as a result of non-execution or delay. The damage compensation should cover the expected direct damage of either loss of profit or occurred losses, unless the debtor has committed a fraud or a gross error, then the compensation for the direct damage shall be for the expected and unexpected damages. In case of estimating and assessing the compensation by the court, the latter shall refer this matter to specialized experts to assess at their discretion.

If the parties agreed a compensation amount in their contract, i.e. liquidated damages clause, and the debtor was successful in proving that the losses suffered by the creditor were less than the agreed upon amount, the court may reduce the relevant amount to correspond with the actual damage suffered. Any agreement attempting to restrict the court’s power to review such a clause shall be deemed null. It is also important to note that the creditor may not claim for compensation more than the agreed upon liquidated damages amount, even if the actual damages exceed that amount unless the creditor proves that the debtor has committed a gross error or fraud.

The compensation when the object of the obligation is cash money

If the object of the obligation is an amount of money, which was disclosed at the time when the obligation arose, and there was a delay in payment of the money by the debtor, there will be interest charged

against the debtor for the delay. The interest will be calculated at 4% in civil matters and 5% in commercial matters. In addition, the parties can agree the interest to be assessed against delay of payment but the interest shall not exceed 7%. If the interest exceeds the cap of 7%, then the court will reduce it to 7%.

The interest would be payable at the maturity of the debt (legally or by agreement) and the creditor is not required to prove that any damages were suffered due to the delay in payment. The creditor may claim additional compensation if the creditor proves that it suffered damages which exceeds the interest amount and due to fraud or harmful act of the debtor.

Legal notice requirement

Iraqi law requires a creditor to send a notice demanding payment except in certain circumstances (see below). The creditor and debtor may also agree that the debtor shall be deemed notified as of the due date without the need for the creditor to serve a written notice on the debtor.

There is no need to send a notice of demand to the debtor in the following cases:-

- If the parties agreed that the debtor's contractual obligation is due once the creditor's contractual obligation has been performed and the creditor does perform or the debtor's contractual obligation is to be performed at a certain time and that time has passed;
- If the contractual obligation of the debtor is to abstain from doing something and the debtor breached this obligation;
- If the contractual obligation is to restore something the debtor was aware was stolen or received unlawfully; or
- If the debtor stated in writing that he is not willing to fulfil his contractual obligations.

Limitation of liability

Iraqi law permits the parties to agree to limit or exclude the debtor from contractual liability arising from the failure to perform its obligations except the liability that arises from his/her fraud or gross error. Moreover, the parties may not agree to exclude liability for fraud and gross negligence committed by employees of the debtor. Additionally, the parties may agree that the debtor shall not bear liabilities arising from an act of god or force majeure.

Penalties (Delay penalties)

The Iraqi Government Contracts' law No. 87 of 2004 (The "Government Contracts' law ") and the Enforcement of the Government Contracts' Instructions No. 21 of 2014/2008 (The "Government Contracts' Instructions ") have addressed the delay penalties in the governmental contracts and provided that the same should be imposed against the contracting party if the party has delayed in fulfilling its contractual obligations provided that the maximum amount of the delay penalties shall not exceed 10% of the relevant contract value. The delay penalties are further adapted to be a financial penalty imposed by the administration against the contracting party for breaching the general laws. Delay penalties are a manner through which the administration obliges the contracting party to pay its obligations in due time.

Iraqi courts, including the Court of Cassation, have confirmed that the delay penalty is a penalty behind which is a security/guarantee in terms of obliging with the contracting obligations.

The delay penalty is also a contractual penalty and conventional compensation which shall not be imposed unless stipulated in the relevant contract between the non-governmental contracted parties. Being a conventional compensation; the same shall be imposed without further excuses (unless otherwise provided therein), whereas the Iraqi courts rule for imposing the delay penalties once the delay and the occurred damage as a result thereof are proven to have had taken a place for reasons other than force majeure or foreign cause.

For non governmental contracting parties, the delay penalty is a contractual penalty and conventional compensation shall not be imposed unless stipulated in the contract. The Iraqi courts will rule regarding the imposition of the delay penalties once the delay and resultant damage are proven to have taken place for reasons other than force majeure or foreign cause.

Conclusion

In summary of the above, the compensation in accordance with the Iraqi law is one of the following, which are subject to the conditions defined by virtue of the law:

- Compensation ordered by court: Compensation is assessed by the competent judge in his discretion to hold a party liable their breach of contract or delay in performance;
- Liquidated damages: Where the parties agree on the compensation amount prior to the dispute the court will respect the parties' agreement but may reduce the amount if the actual losses are less than the agree upon amount; or,
- Legal compensation: Iraqi law provides for certain compensation by law such as interest on non-fulfilment of obligations related to cash money.

Notwithstanding the above, a party's contractual liability may be exempted should the parties agree on exemption or limitation, noting however that the liability arising from fraud or gross negligence cannot be exempted.