
The Right of Contractor in Increasing His Wage in Construction Contracts: Guide of Iraqi Law for Local and Foreign Contractors as To Contracts That Based On a Lump Sum Wage and Specific Design

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Abstract

This paper presents the cases of increasing the wage in construction contract that based on a lump sum wage and specific design, we have shown that if contractor feels that he deserves more than agreed wage, he can ask the employer to increase it. Many local and foreign contractors entered in contracts of constructions do not know their rights, so we present this study to enlighten them and to analyze the relevant legal rules. We found that this case are an exception to the rule that says (the contract is the law of the contracting parties), so we analyzed its justifications and practical benefit. We have proven, that the Iraqi law does not deny the request for an increase in wage if there is a reason for it, because the contractor is supposed to receive a wage equal to the efforts he made for the benefit of employer, this in fact achieves justice. However, the request for an increase is not arbitrary, so the law accurately draws the conditions of increase so that not cause disputes between the parties.

Keywords: Construction contracts, wage increase, foreign contractors, lump sum wage, specific design.

1. Introduction

Construction contracts are regulate in Chapter One of Part Three from Iraqi civil code under the title (Al-Muqawalah), for the matters that not provided for in this chapter the rules of contract in the general part of obligations are applied. For government contracts there are special rules to be applied that contained in the instructions for implementing government contracts last issued No.2 (2014), as well as the general conditions for civil engineering contracts that issued by the Ministry of Planning in 1987, which is mainly taken from the rules of FIDIC.

1.1 The Wage Payable to the Contractor.

In the construction contract, the consideration that contractor deserved may be an amount of money, something else or a work performed for his benefit; however, it is mostly a sum of money called "the wage". The contractor is entitled to the wage agreed upon by the parties in contract, or modified by them later. However, the Iraqi law allows the contractor to request an increase the wage in certain cases to achieve justice and preserve the economic balance between parties. This increase binding to the employer. Our study deal with contractor right to request an increase the wage in construction contract that based on a lump sum wage and specific design.

1.2 Increasing The Wage In Contract Based On A Lump Sum Wage And Specific Design:

The parties of contract may agree to set the wage on lump sum and specific design, such as an agreement to build a house of a certain area and specifications for an amount of one hundred million dinars. The advantage of this way is that the parties know in advance the amount of the wage, but its disadvantages are it may push the contractor to economize the costs to come out with greater profits at the expense of the quality of work. Additionally, determining the wages on lump sum may harm the contractor because he may suffer large losses if prices or workers' wages rise before completing the work, as he cannot demand an increase in the wage because it is determined in advance.¹

2. The Principle Rule Regarding the Wage.

2.1 Respecting the Agreement.

If the parties agreed on specific design for a randomly determined wage, and then, because of the need of work, the contractor being in necessity to modify the design or add new terms to it, principally he has no right to demand increasing the wage. This is to respect the willingness of parties: the acceptance of employer to determine a lump sum wage explain that he want to avoid any surprises related to the increase in costs. On the other hand, the contractor's acceptance explains that he want to bear the consequences of any unexpected increase in labor costs as well as to benefit may raise from any potential decrease in these costs, such as lower prices of materials or wages of labor due to unemployment.²

2.2 No Increase In Wage Principally.

The principle, herby, is that the contractor not entitled to ask for increasing wage even if he introduces a modification to the design, whether or not this modification necessary and important, and even if the prices of materials or workers' wages have increased. The contractor cannot ask the increase in wage even if something unexpected happened that led to an increase in work costs, such as it becomes clear that the land is loose and requires additional work to stabilize it.³

Additionally, the contractor is not entitled for increasing wage if the costs of work increase due to an epidemic, demonstrations, increasing the transport prices for raw materials or workers, or the increasing in the prices of business insurance or the price of tax imposed on import of materials necessary to the work.⁴

3. Exceptions Cases Where Wage Can Increase.

For achieving justice between the parties of contract, the Iraqi civil code allows the contractor to request an increase in the wage in three cases when the contract based on lump sum wage and specific design. Article (877) set out the first and second cases, whereas Article (878) set out the third. Firstly, we will address the scope of application of Articles (877 & 878), and then explain the three exceptional cases of increasing the wage.

3.1 Scope of Articles (877 & 878).

3.1.1 Conditions of Applying Articles (877 & 878).

- (i) **Determination of wage definitively.** For requesting to increasing the wage under Articles (877 & 878) the contract must specified the wage in a lump sum and final manner that does not accept increase or decrease. In this case, only, the employer need to protect himself from surprised by the demand for an increase in wage. Articles (877 & 878) do not apply if the wage not definitively specified in contract, in other words, if the parties left an opportunity to increase or decrease the wage according to the actual work costs.⁵
- (ii) **Completeness of design.** The design agreed upon in contract must be complete not partial, i.e. it must include a comprehensive description covering all the works the contractor must doing. A design should be complete when agreed upon in contract, whether it embodied in drawings or plans.⁶
- (iii) **Clarity of design.** The design should detailed precisely, that is, the quantities of work required must appear in detail in the design. This follows that the design will not clear if it is limited to the general lines of work or only includes an approximate plan, because in these latter cases not possible to measure the specified wage on the quantities of work required to achieve the design because this design is almost unknown.⁷
- (iv) **Final design.** The design must be final, i.e. not subject to addition, deletion or change.⁸ If design is adjustable according to the parties agreement it will be fall within the general rules and not Articles (877 & 878), because these articles require that contract concluded based on a specific design agreed upon.⁹

3.1.2 Sub-contractors.

Articles (877 & 878) apply to relation between employer and original contractor, they not apply to the relation between original contractor and sub-contractor, because of each of original contractor and sub-contractor have an experience in their works.¹⁰ The original contractor not need the legal protection such as employer, this follows that if sub-contractor finds a need for modifying or adding to the design, here, the general rules of civil code shall apply, i.e. the sub-contractor may request to increase his wage without the need to make written agreement as it required between employer and original contractor.¹¹

3.1.3 Modification or Addition Outside the Scope of Articles (877 & 878).

If the contractor make modification or addition to the design out the scope of Articles (877 & 878), he may not claim compensation for what he spent based on these articles nor on the rule of unlawful enrichment, because allowing this will open the possibility of circumvention of the provisions contained in that legislative Articles.¹²

3.2 High Costs Attributable To Employer Fault.

3.2.1 Employer Fault That Cause The Necessity To Modify The Design Or Adding To It.

The Civil Code used the term (fault), but it does not mean negligence or intentionality, rather, it mean any act by the employer leads to high costs of work even if this act in good faith. The fault of employer may lead to the necessity to modifying the design or adding to it, e.g. incorrect dimensions of land or wrong information about the work the employer had given to the contractor. If the contractor discover the fault that be necessitated to modifying the design or adding to it, he may request to increase the wage in proportion to the costs needed for the modifying or addition.

Likewise, if contractor sets the design and begins his works, and then it appears that part of the land not owned to the employer. If the contractor, because of that, has to demolish part of the construction and re-design according to the new situation of land, he can ask to oblige the employer to increase the wages.¹³

3.2.2 Employer Fault That Causes Other Problems.

The employer's fault may lead to an increase in costs without having to modify the design or add to it; in this case, the contractor may request an increase in the wage too, because Article (877) did not limit the permissibility of requesting an increase to the case of modifying the design or adding to it. For example, the delay of the employer in obtaining a construction license, importing materials from abroad, or providing the land on which the construction shall built.

An employer shall also be in fault if he delays in providing the information necessary to start the work or provides incorrect information, e.g. if the contractor had promised to recover a sinking ship but employer delayed in providing him with information showing its condition at the bottom of sea or provided him with inaccurate information.¹⁴

3.3 Employer's Permission to Modifying the Design or Adding To It.

3.3.1 Factors of permission.

The contractor may need to increase the wage based on high costs without a fault of employer, in this case, he may not request this increase unless he obtains permission from the employer to make modification or addition to the design.¹⁵

The permission must include two factor: (1) the approval of the modifying the design or adding to it, and (2) the amount of the increase in the wage based on this modification or addition.¹⁶ The cause is that employer, when he prefer the way of lump sum wage; aimed to avoid the surprises might face him when fulfilling the works, this aim must be respected. Abstractly, the employer, in principal, do not obliged to pay any increase in the wage unless he make a fault, or on bases of his explicit acceptance and permission to contractor for the modification or addition.¹⁷

3.3.2 Necessity of writing.

According to Article (877) of Iraqi civil code the permission to increase the wage must be in writing, this not a condition for the validity of the agreement but only to prove it. It follows that the absence of writing does not mean the invalidity of agreement to increase the wage, but rather other acceptable evidence can use, such as testimony.¹⁸

However, if the original contract itself not written then the permission is not must be written too, in this case the contractor can prove the permission through testimony or presumptions. However, some commentators rightly criticize Article (877) of Iraqi Civil Code, saying that the permission must be in writing at all to prevent disputes regarding its proof.¹⁹

3.3.3 The Permission through Employer's Agent.

Employer may authorize his agent, on his behalf, for agreeing with the contractor to modifying the design or adding to it and increasing the wage. In this case, the agency must be private and stipulate that it is permissible to the agent for conclude an agreement of modification of design or adding to it and increasing the wage, this mean that general agency not sufficient for this purpose.²⁰

3.4 Unforeseeable Circumstances (Theory Of "L'imprévision").

3.4.1 In the contract specified for a lump sum wage based on a specific design, a change may occur in the economic circumstances after the time of the conclusion of contract and during its performance, which leads to an increase in the prices of raw materials or the wages of workers. Here, the principle is that this change does not give contractor the right to request an increase in the wage even if the performance of contract becomes difficult to him.

However, if the change leads to the collapse of the economic balance between the obligations of the parties, the court may order to increase the wage or terminate the contract according to Article (878) of Civil Code. This is an application of unforeseeable circumstances theory "L'imprévision" stipulated in Article (146/2) of Civil Code with some modification in its conditions and remedies. Article (878) of public order that the parties may not agree in advance as to contractor's waiver of his right to increasing the wage.²¹

3.4.2 Conditions for Increasing the Wage According To Article (878).

3.4.2.1 Non-Foreseeability.

The circumstances must be unforeseeable, i.e. not included in the accounts of the parties at the time of conclusion of contract. If circumstances foreseeable by the parties, or could have been foreseeable by the prudent person in the same position of them, Article (878) is not applicable. Additionally, it follows from the fact that the circumstances must unforeseeable that it cannot be disposed, otherwise, it is not permissible to the contractor to request an increase in wage whether the circumstances foreseeable or not.²²

3.4.2.2 Non-Presence in Time of Concluding The Contract.

Can contractor request increasing the wage if he discover, for instance, the existence of groundwater or ruins of an ancient underground city, which requires erecting the foundations in a manner different from what planned, or if he discover that prices of raw materials or work wages are already above their normal level at the time of the conclusion of contract?

Some commentators said that the existence of these difficulties is sufficient for application of Article (878), because of they considered as unforeseeable circumstances for the purposes of this article.²³ Others said that these difficulties do not fall within the scope of Article (878), and the contractor, if he discovers them, may not ask for an increase in the wage or termination the contract, rather, it gives him the right to annulment the contract upon the mistake about essential character of the work.²⁴

3.4.2.3 Collapse of Economic Balance of Obligations.

The circumstances must lead to a complete collapse of the economic balance between the obligations of the parties that the basis on which the financial assessment of the contract based being lack. In other words, these circumstances must make the performance financially very stressful for contractor due to

the significantly high costs of work. Whether circumstances led to this complete collapse is within the determination of court, which estimates it according to each case.²⁵

Whether the stressful met or not, the court must look at the transaction itself not at the contractor himself. If the contractor is wealthy or he has stored large quantities of work materials before the circumstance occurs, performance of contract remains stressful for him that he may request an increase in the wage or termination of contract.²⁶

3.4.3 Remedy For Fulfill Conditions.

The above conditions make Article (878) a special application of "L'imprévision" theory stipulated in Article (146/2), which give the contractor the right to request rebalancing to the obligations of parties.²⁷ However, we find that there is a difference between them in two respects:

3.4.3.1 Difference of Characteristics of Circumstances :

The theory of "L'imprévision" of Article (146/2) requires that circumstance be common and exceptional, i.e. it pervade everyone and rare.²⁸ Whereas, Article (878) says (circumstance that were not taken into account at the time of contracting) .The commentators say that although this condition is not set in Article (878) it is also required by it, because of, they say, this Article is merely an application of the theory of "L'imprévision" contained in Article (146/2).²⁹ However, there is no evidence of this view, we believe that Article (878) does not require the circumstance being common and exceptional; therefore it applies even if these two characteristics, i.e. common and exceptional, not present in circumstance.³⁰

3.4.3.2 Difference of Remedies.

Article (146/2) does not give the court the right to rescind contract if it proven that conditions of "L'imprévision" are met, but rather it gave it the power to rebalance the obligations of parties to a reasonable extent. As for Article (878) gives the court a broader authority, including its right to terminate the contract at contractor's request, or to order the employer to increase the wage. The court may find that the increase of wage is stressful for the employer while it does not relieve the stressful on the contractor, in this case it may held to terminate the contract.³¹

3.4.4 Suspend The Contract.

The court can merely suspend the contract for a certain period until ending the circumstance. For instance, the prices of raw materials raised significantly but for a temporary period, and these prices will fall again because the import will soon open. The suspension of contract must not cause serious harm to the employer, and the end of the circumstance must certainly expected in a short period.³²

3.4.5 Calculating the Increased Wage.

The court first excludes the usual costs paid by the contractor; unusual costs will divide in half between the two parties.³³ So, if the costs due to circumstance increased by (10) million dinars, the court excludes firstly usual costs such as two million dinars, the remain (8) million dinars divided between the parties, that is the employer shall pay the contractor (4) million dinars in addition to the original wage specified in the contract.³⁴

4. Conclusion

We conclude in our paper that contractor wage, which is determined as a lump sum and specific design, can increased if there is one or more of the cases determined by Iraqi civil code that we have clarified in section 3. This in favor of contractors whose their original wages not equivalent to the works they done, in particular if contractor was a foreigner who needs to understand the provisions of Iraqi law regarding the right to request an increase in the wages and the cases that give him this right. We have presented in our paper an adequate vision that these contractors can resort to when making contracts with Iraqi employer.

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Notes

¹ Tariq Kazem Ajil, Alwaset in Almuqawala, 1st Edition, Al-Sanhoury Library, Baghdad, 2016, p. 86.

² Ibid, p. 355.

³ Muhammad Labib Shanab, Explanation of the Provisions of al-muqawala, 1st Edition, Al-Wafa Legal Library, Alexandria, 2015, p. 279.

⁴ Abdul-Razzaq Ahmad al-Sanhouri, Alwaset in Explanation of the New Civil Code, vol. 7, 3rd Edition, Al-Halabi Publications, Beirut, 1998, p. 175.

⁵ Tariq Kazem Ajil, op. cit., p. 371.

⁶ Ismat Abdul-Majeed Bakr, Al-Wajeez in the nominal Civil Contracts, 1st Edition, Zain Publications, Beirut, 2015, p. 225.

⁷ Abdul-Razzaq Ahmad al-Sanhouri, op. cit., p. 173.

⁸ Muhammad Abdul-Rahim Anbar, Almuqawala - A Comparative Study between the Legislations of Arab Countries, 1977, p. 240.

⁹ Abdul-Razzaq Ahmad al-Sanhouri, op. cit., p. 173.

¹⁰ Muhammad Abdul-Rahim Anbar, op. cit., p. 240.

¹¹ Abdul-Razzaq Ahmad al-Sanhouri, op. cit., p. 174. Otherwise: Tariq Kazem Ajil, op. cit., p. 376.

¹² Abdul-Razzaq Ahmad al-Sanhouri, op. cit., p. 177.

¹³ Muhammad Labib Shanab, op. cit., p. 285; Tariq Kazem Ajil, op. cit., p. 341; Ismat Abdul-Majeed Bakr, op. cit., p. 225.

¹⁴ Abdul-Razzaq Ahmad al-Sanhouri, op. cit., p. 178.

¹⁵ Article (877) of Iraqi civil code, which states: (If the contract was concluded at a wage that was determined in lump sum on the basis of a design agreed upon with the employer, the contractor may not demand any increase in the wage even if there was a modification or addition in this design, unless that is due to a fault by the employer or if he is authorized by him...). And see the decision of the Kurdistan Court of Cassation No. 197/ Civil Commission/ 2006 on November 28, 2006, which states: (The plaintiff has no right to demand any increase, even if there is a modification or addition in this design, unless it is due to a fault on the part of the defendant or it is authorized by him, or the plaintiff has agreed with the defendant on

the wage for this modification or addition by written agreement (Article 877) and this is what is not present in the fact of the case...). Civil Judicial Encyclopedia, vol.3, p. 288.

¹⁶ Article (877) of an Iraqi civil code that stipulates (...or he is authorized by him and he has agreed with the contractor on its wage...).

¹⁷ Kamal Qasim Tharwat, *Al-Wajeez* in explaining the provisions of *almuqawala*, a comparative study reinforced by the decisions of the Court of Cassation, Volume 2, I 1, Al-Wissam Offset Press, Baghdad, 1976, p. 199; Muhammad Labib Shanab, *op. cit.*, p. 286.

¹⁸ Tariq Kazem Ajil, *op. cit.*, p. 344.

¹⁹ Ismat Abdul-Majeed Bakr, *op. cit.*, p. 226.

²⁰ Abdul-Razzaq Ahmad al-Sanhouri, *op. cit.*, p. 180, n.(2); Tariq Kazem Ajil, *op. cit.*, p. 344.

²¹ Kamal Qassem Tharwat, *op. cit.*, p. 203 n. (1); Tariq Kazem Ajil, *op. cit.*, p. 377.

²² Tariq Kazem Ajil, *op. cit.*, p. 368; Ismat Abdul-Majeed Bakr, *op. cit.*, p. 231.

²³ Abdul-Razzaq Ahmad al-Sanhouri, *op. cit.*, p. 182 n.(2); Kamal Qasim Tharwat, *op. cit.*, p. 203; Tariq Kazem Ajil, *op. cit.*, p. 368.

²⁴ Muhammad Labib Shanab, *op. cit.*, p. 299; Ismat Abdul-Majeed Bakr, *op. cit.*, p. 231. It seems that the Iraqi Court of Cassation adopts the second opinion, it say that (The occurrence of a rise in the prices of materials and labor was not among the unforeseeable, general, and unexpected circumstances stipulated in Article (878) of the Civil Code, because this rise was present and known to both parties at the time of the contract). No. 577/M1/1980 on December 28, 1980. Mentioned at: Dr. Ghazi Abdul-Rahman, *The Economic Balance of the Contract during Its performance*, Publications of the Legal Research Center, Baghdad, 1986, p. 86, n. (40).

²⁵ Tariq Kazem Ajeel, *op. cit.*, p. 370. The same is true of the Iraqi Court of Cassation Decision No. 1483 /1968 dated February 25, 1969. Mentioned at: Dr. Ghazi Abdul-Rahman, *op. cit.*, p. 86, n. (1).

²⁶ Kamal Qasim Tharwat, *op. cit.*, p. 207.

²⁷ *Ibid*, p. 204; Ghazi Abdul-Rahman, *op. cit.*, p. 115; Abdul-Jabbar Naji Salih, *Expiry of almuqawala*, PhD thesis submitted to the College of Law, University of Baghdad, 1979, p. 61.

²⁸ Abdul-Majeed Al-Hakim, *Brief Explanation of Civil code, Sources of Obligation*, Legal Library, Baghdad, 2007, p. 394.

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³⁰ In this side also: Kamal Qasim Tharwat, *op. cit.*, p. 203; Tariq Kazem Ajil, *op. cit.*, p. 368; Ismat Abdul-Majid Bakr, *op. cit.*, p. 230. It is noted that the draft Egyptian Civil Code included a text similar to Article (878) of the Iraqi Civil Code, but the Legislative Affairs Committee in the Egyptian House of Representatives introduced the words (exceptional, general) incidents, so Article 658 of the Egyptian civil code is a special application of the theory of "L'imprévision", were it not for the difference in the remedy as we see above. See: Abdul-Razzaq Ahmad al-Sanhouri, *op. cit.*, p. 182.

³¹ Kamal Qasim Tharwat, *op. cit.*, p. 201 n. (1); Tariq Kazem Ajil, *op. cit.*, p. 367.

³² Kamal Qasim Tharwat, *op. cit.*, p. 200 n. (1); Muhammad Labib Shanab, *op. cit.*, p. 302. Some commentators argue that the court cannot order an increase in wage, but only by amending the contract and reducing obligations or reducing the wage if it deems this solution appropriate. See: Ismat Abdul-Majeed Bakr, *op. cit.*, p. 237. However, there is no evidence to support this, which also contradicts the explicitness of Article (878), because it permits an increase in the wage not a decrease.

³³ Ghani Hasson Taha, *Al-Wajeez in the General theory of obligation*, Book One- Sources of obligation, Almaarif Press, Baghdad, 1971, p. 363.

³⁴ Abdul-Razzaq Ahmad al-Sanhouri, *op. cit.*, p. 185; Muhammad Labib Shanab, *op. cit.*, p. 302; Kamal Qassem Tharwat, *op. cit.*, p. 201 n. (2); Tariq Kazem Ajil, *op. cit.*, p. 374.