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TÍTULO: El impacto de la fuerza mayor en la responsabilidad extracontractual en la legislación iraní.

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RESUMEN: La fuerza mayor es uno de los temas que ha estado por mucho tiempo en la jurisprudencia de Imamian. Analistas del código civil iraní han interpretado los artículos "227" y "229" de la ley civil iraní como fuerza mayor. El legislador en ambos artículos establece las condiciones bajo las cuales el deudor está exento del pago de daños y perjuicios. Estos artículos mencionan la externalidad, la incapacidad de prever y la inevitabilidad como rasgos de fuerza mayor, pero no imponen aspectos como los principios y excepciones de fuerza mayor. Se reveló que los juristas de Imami han dividido la fuerza mayor en dos tipos: excusas generales y excusas específicas. El veredicto en la ley civil de Irán en relación con la fuerza mayor solo se completa cuando el legislador expresa el impacto de la fuerza mayor en las responsabilidades extracontractuales.

PALABRAS CLAVES: fuerza mayor, responsabilidad extracontractual, exención, indemnización.

TITLE: The impact of force majeure on non-contractual liability in Iranian law.

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ABSTRACT: Force majeure is one of the issues that has long been in the Imamian jurisprudence. Commentators of Iranian civil code have interpreted the articles "227" and "229" of Iranian civil law as force majeure. Lagislator in the two abovementioned articles state the conditions under which the obligor is exempted from payment of damages. These articles have mentioned externality, inability to foresee and inevitability as traits of force majeure, but do not impose other aspects, such as the principles and exceptions of force majeure. It was revealed that the Imami jurists have divided the religion of force majeure into two types of general excuses and specific excuses. The verdict in Iran's civil law in relation to force majeure is only complete when the legislator expresses the impact of force majeure on non-contractual liabilities.

KEY WORDS: force majeure, non-contratual liability, exemption, compensation.

INTRODUCTION.

Force majeure is one of the factors influencing contractual and non-contractual liability in domestic law and international law that is mentioned in contractual relations. Regarding the background of the force majeure, it is certain that in French law, it was first introduced in Napoleon's code, and in the sacred law of Iran, the history of force majeure returns to several hundred years ago. Force majeure is one of the oldest and most acceptable contractual excuses that legal systems have mentioned it different with distingushed names and in different centuries. In the common law, force majeure is called frustration.

In general, in the explanation of force majeure, it should be said that incidents that cannot be prevented and avoided and make it impossible to perform a contractual obligation, and it is mentioned as the removing of liability, are considered force majeure. Foreign views have considered force majeure as an overwhelming incident that is typically unpredictable for the parties of the contract and it is suspended or cancelled by detecting court.

According to the history of force majeure on its effects in contract and non-contractual liability, it should be noted that justice and human purity do not impose heavy burden of obligations that are beyond the power of obligor and performing such an issue is not compatible with fair and good intention. In other words, accidents and natural or abnormal events that have the condition of force majeure should have an excuse for non-fulfillment of the obligation and the exception on the enforceability of the contract.

In general, force majeure has been so effective that some consider sanctions and its effect as force majeure and refuses to implement contract and justify it.

In the sacred Islamic law of force majeure means non-requiring to fulfill obligation and abandon the obligations of obligor in the contract. If we examine the force majeure, then the positive and imperative rule is ruling on force majeure, in which case, its imperative rule is non-requiring obligation and its positive rule is disputed among the jurisprudents. However, in some of the laws, force majeure has been referred to as contractual liability.

In Iranian law, the dignity of referring force majeure is where a debt has been on debtor, and he resorts to force majeure in order to get rid of it. This debt can be due to contractual obligations or non-contractual liabilities. Of course, the cases of referring force majeure in contractual liability are more than its resort in non-contractual liability. The reason should be sought in the burden of proof of the dispute in each case, because in non-contractual liabilities, the proof of the pillars of liability, whether the entry of damage, fault, and the causal relationship between the two previous pillars, is

generally in responsibility of claimant, not the reader. The present study intends to examine the impact of force majeure on non-contractual liabilities in Iran's law and determine its limit.

DEVELOPMENT.

The concept of force majeure.

In Persian dictionary, force means "power" and majeure means "dominant", "tampering" and "dominant" (Moein, 2002: 668).

The "force majeure" is a term apparently used for the first time in the French Civil Code (Napoleon Code).

Force majeure is a term in French law, first used in French civil law, and then in other countries, the same influence or translation has become customary.

Force majeure can be defined as follows: an unpredictable and uncontrollable incident that makes contract execution impossible and may lead to suspension or termination of the transaction. Force majeure is a term derived from French law, which seems to have been used for the first time in the French Civil Code (Napoleon Code), and over time the same word or translation used in other countries as well as in international law (Jafari Langroudi, 1993: 287).

In the Jurisprudence of Imamaiye, the topics of the force majeure have not gone away in the view of the jurisprudents and are foreseen in two terms: "general excuse" and "special excuse". A particular excuse is specific to a person, such as illness and general excuses is outside the person and more natural, such as earthquake and flood (Jafari Langroudi, 1993: 287).

Since the general and special excuse mean the force majeure and they have exactly the same effects, everywhere we say the force majeure, it also includes the general and special excuse. Force majeure is similar with general and special excuse in terms of the nature, conditions, and effects, and the force majeure is different from in some works that cannot be discussed.

In common law, the term "force majeure" is usually not used, but the issues and cases of force majeure are raised under the title of "frustration of contract" or "impossibility". These legal entities are theoretically different from the force majeure and in particular, they have a broader scope than force majeure. However, in the common law countries, these ideas reach results that are more or less similar to the results of the force majeure.

Moreover, the force majeure is used in the international economic contracts that these countries conclude, and they even mention it in English legal dictionary terms. In the legal dictionary of the "Blaks" we read: "Overcoming or inevitable forces. This condition is common in construction contracts for supporting parties of the contract. In the case where a part of the contract cannot be implemented as a result of a cause beyond the control of the parties and cannot be avoided by proper care" (Safa'i, 2007: 395).

The term force majeure referred to in some of our country's laws, such as 227, 229, and 615 of the Civil Code, is a French translation of the "force majeure" in French law. Force majeure has two general and special meanings: in French law, the force majeure implies two meanings: general meaning and specific meaning:

General meaning.

In general meaning, force majeure means an inevitable and unpredictable foreign incident (Isaiy Tafareshi, 2007: 195). That is, any external event (beyond the scope of the committed power) is unpredictable and unavoidable, which impedes the fulfillment of the obligation. Force majeure in general meaning includes a third-party act and a committed act that has two of these definitions. In general, it can be said an incident which cannot be related to the obligor (Article 227 of the Civil Code), including whether it is related with the scope of the activity and is considered to be an unplanned incident or merely due to external factors and apart from the obligor.

In fact, general force majeure is any unexpected and unavoidable external incident (outside the scope of obligor power) that impedes the fulfillment of the obligation. Force majeure means third party action and committed act that will have two of the above-mentioned descriptions.

It is noteworthy that the force majeure is also different in the general meaning with term "work of God". This term only includes abnormal incidents that have natural causes and occur without human intervention, whereas the force majeure has a broader meaning and includes some incidents caused by human action. In the customary legal system (common law), the term (force majeure) is usually not used, but force majeure issues and cases are raised under the title of "frustration of contract" or "impossibility". These legal entities are theoretically different from the force majeure especially since they have a broader scope of force majeure. However, in the common law countries, these ideas reach results that are more or less similar to the results of the force majeure (Safai, 1985: 112).

Special meaning.

Force majeure in this sense is in fact an unpredictive and inevitable incident (non-attributable to a particular person and solely from natural forces).

In another definition of force majeure, it is stated: "What is unpredictable and inevitable, and put the obligor in the state of non-power in fulfilling his obligation, or causes the exemption of obligor to compensate that is to the committed person (Ja'fari Langroudi, 2007: 553).

The dignity of referring force majeure is where a debt is on debtor and he resorts to force majeure to escape from it. This debt can be due to non-performance of contractual obligations or non- Force majeure in the special meaning is an anonymous incident (attributable to a particular person and solely from natural forces), unpredictable and inevitable. However, force majeure in general meaning is an incident that cannot be related to the obligor (Article 227 of the Civil Code of Iran), whether it relates to the field of activity and "unexpected incident", or is solely due to external factors and separate from obligor, and if we will see it if the failure to fulfill the obligation arises from the

fault of obligor, the force majeure will not be realized, and in the today's rights, there is no difference between the force majeure and the unexpected incident (Safa'i, 2007: 396).

Article 79 of the Convention and its effects on international sale should point out that by referring to other articles of the Convention, it is determined that the scope of liability contained in Article 79 is limited and affairs such as the loss of goods during carriage and defective goods have been excluded from the scope and have been raised and determined in the Convention under different titles. Article 79 discusses the effects for the party who has not executed the contract and is silent about the consequences and effects that it brings to the other party (Safai, 2007: 397).

These two issues are closely related, and Article 79 should be studied in relation with the provisions of the commutative liability theory, Principles 67 to 70 of the Convention. Principle 66 only includes loss that isn't caused by action or abandonment of action of the seller. Therefore, this principle may apply in cases where non-execution is caused by an obstacle outside the scope of authority and control of the seller. In such a situation, the buyer's duty is determined directly by the Principles 66-69.

Iran's civil law, although not expressly referred to as force majeure but in Article 227, speaks of an external cause interpreted by its commentators as "force majeure". According to these articles, proving the qualities of the aforementioned, whether foreign, inability to predict and inevitability, only will cause the exemption from liability, but the duty of the principle of obligation and contract was not specified (Nagizadeh Baghi, 2011: 27).

What is certain is that if it is established, the failure to perform or delay the obligation by the obligated party is due to force majeure, he will not be required to compensate the damage, as damage cannot be attributed to him.

Force majeure and non-contractual liability.

In existing laws and texts on civil liability, there has been no debate about force majeure, in other words, although the legislator has considered the foreign cause in exemption from contractual liability, Articles 227 and 229, and other legal texts. But it leaves this important issue in the discussion of liability outside of the contract, and typically refers to the concept of the effects and conditions of force majeure to fulfill obligation; Although it is common that at the outset to discuss force majeure and its effects on non-contractual liability, they present a summary of the discussion and then discuss it directly (Katouzian, 1999: 479).

The importance of force majeure in non-contractual liabilities.

Usually, debtor undertakes a certain outcome in the contractual liabilities, and if he does not fulfill the obligation, he must resort to the existence of the external cause and the force majeure to prove his faultless, but in the non-contractual obligations, which are not often the obligation of the person to fault, it is sufficient to prove faultlessly for the dispute defendant, and the defendant is usually not required to prove the form of the force majeure to escape from liability, and it has diminished the application of the resort due to the force majeure in non-contractual liabilities (Katouziyan, 1999: 478).

Although this is admissible, today it is faced with significant exceptions; the expansion of a system of liability based on pure liability and the type and closeness of the liability systems based on fault to the legal system of compensation, based on the rule of harm, this separation is over. In other words, the importance of discussing force majeure to discuss non-contractual liabilities can be categorized as follows:

A) The theoretical fragmentation of separating compulsory and contractual liability and the tendency of legal scholars to unify the basis of liability in recent years (Hashemians, 2008: 34).

B) The acceptance of the system of pure responsibility in some legal systems, including the legal system and the effectiveness of resort to the force majeure to relieve responsibility.

C) There are many exceptions to the system based on the fault in various legal systems, such as the provisions as the first article of the Compulsory Insurance Act in Iran, or the discussion of the responsibility of the physician by a patient who cannot prove irresponsibility other than referring to the force majeure (Yazdekhasti et al, 2015; Bakhyt et al, 2018).

However, today the talking about force majeure in non-contractual relationships is not without mode, and it seems to be increasing with the increasing desire for a system of pure liability. In short, it is necessary to point out that in Iran's law, with all the differences that exist, all three of the conditions mentioned in French law can be accepted and the incident must be external, unpredictable and inevitable, in order to be a force majeure. Of course, it has been pointed out that the force majeure has a certain meaning and observes conventional human being (Antúnez, 2001; Zare, 2015).

The basic point is that what is central in the force majeure discussion is the impossibility of assigning the action to the subject, and all the conditions, circumstances described in various legal systems are indicative of this point; therefore, it cannot be mentioned general rules for all cases, but it should examine, in relation to each incident and event, whether the causality relation is established among the action caused loos and the loss happened? And is an incident an important to prevent the obligor from fulfilling his obligation?

Force majeure causing the incident alone.

Under this assumption, the custom does not consider the defendant liable, even if the law assumes responsibility for him (Katouzian, 1999: 480); for example, whenever a flood causes a car to move and causes damage from a car collision with a shop, it should not be considered the driver responsible. Also, if the electrical connection causes a home fire and due to the fire, the neighbor's house is burned, the landlord should not be liable.

The only exception to this general rule in the legal system of Iran and Imamiyeh jurisprudence is "usurpation". According to Article 315 of the Civil Code, whenever a designated property is removed in any form, the usurper is responsible; even if someone is ignorant to be usurped and the property is lost to him due to the force majeure, he is responsible because his possession is liable and aggressive. This rule is based on the jurisprudential principle of "الأحوال بأشق يؤخذ الغاصب".

In foreign law, examples of such liability can be found in real terms, such as the fact that the air traffic controller seems to be in charge of passengers in accordance with the Guatemala Protocol, even against losses caused by force majeure (Hosseini Nezhad, 1991: 84).

The reason for this is the protection of passengers in cases where most of the accidents are due to force majeure, and the best way to compensate for the damage are large air companies whose profits from passenger transportation are very large and because airline accidents are less than other incidents due to the high standard, so it is not unreasonable to assume the absolute responsibility of the force majeure to such air companies.

Force majeure in Iran's domestic law.

As discussed in the section on foreign law, some of the professors, inspired by the theory of general and partial cause, have followed the debate in French law and have matched the same theory in Iranian law. Prior to entering the discussion, a brief presentation of the views of these professors is presented.

In the discussion of the community of force majeure with fault of defendant, the question arises as to whether force majeure disconnects causality, or whether all responsiblities are for defendant, or liability is divided? In this regard, two theories of "full liability" and "reduction of liability" are stated by lawyers (Isa Tafaroshi, 2007: 207).

The rule of issue based on the theory of liability reduction.

Followers of this theory, inspired by the second part of Article 14 of the Civil Liability Code and Article 335 of the Civil Code, believe that the defendant is liable only to compensate for a portion of the loss, since his fault was with force majeure, so that another part of the damage without compensation remains and there is no reason for the dendant to tolerate the power of force majeure; for example, if a severe flood damages a dam that is built without respecting technical principles and non-standard materials, it destroys the property and causes damage, in this case, the maker is the culprit and responsible, but since his fault is with force majeure, he is only responsible to pay a part of damage and other damage will remain without compensation (Issa Tafareshi, 2007: 208).

It is clear that this vote is based on the theory of partial causality and the division of liability and the causality relation because the general causality theory does not in any way result in the division of liability.

The rule of issue based on the theory of complete liability.

Another viewpoint in this regard is that if force majeure has been ignored with fault of defendant and liability will be entirely for the one who causes damage. In other words, force majeure doesn't remove the causal relationship between the fault of defendant and the damage. In justifying this view, this is argued: “Law isn't searching for all the causes making harm. The rational consequence of the fault theory, which is accepted as the principle in civil liability law, is that the prosecutor, from among all the circumstances that provided the basis for the loss of damages, investigates a group that is caused from the fault; Therefore, in the case of personal fault with the force majeure, damages are caused, only the cause which knows its rights is the fault, which has a moral causal relation with loss; therefore, he must be liable for the compensation of all damages and ignored the effect of the foreign incident” (Katouzian, 1999: 492).

This viewpoint is based on the general causation theory, which considers causality undividable. Judicial procedure in one case where the fault of defendant is the ordinary and main cause of creating damage makes the full responsibility for him. The description of the case is that due to rain and flood water inside the canal, it will be damaged to the house of plaintiff, and the expert will announce the reason for the water flood lack of dredging of canals of water from municipality. Branch 28 of the legal court 1 of Tehran, in the 291 Judgment, dated 2000, considers the fault of defendant causing damage and condemns the defendant to pay all damages regardless of the force majeure (Legal Court Judgments, 1995: 130).

Jurists in jurisprudent books have mentioned examples that some jurists considered them as proving full liability theory; two of them are examined here:

Example 1: Liquids are usually kept in a container with a closed door, so that it is prevented from pouring it. But if someone opens the door of the container and then it overturns by the sun and events like this by wind and storm, and pour the contents inside it, there are two comments about the opener liability:

1. The door opener is responsible because between opening on the side and the loss of property, there is no arbitrary action of the wise subject who interrupts the relationship between them and the wind and the sun do not have the ability to be responsible, so the full responsibility is with the opener. Of course, if opening container door doesn't cause loss, as if the container is in the room and accidentally a bird enters the room and overturns it, the responsibility is not for opener, because in causation, the causative action should normally cause loss, not by chance (Bojnourdi, 1999: 42).

2. In the responsibility of the opener, it is doubtful, and the correct promise is lack of responsibility because the wind and the sun have been steward of loss and, despite the steward, they are not responsible. The determination of Saheb Javaher on the correct promise is that in the causality of the

opener of the container, we are in doubt and we do not know if he intends to waste or not? The principle of innocence also requires that he not to be responsible.

The full responsibility that is referred in the first view cannot justify the full responsibility of force majeure with the fault of defendant because, if the wind and sun radiation are predictable, it is considered as natural conditions of the loss not its cause and the title of force majeure does not apply to them, because one of the conditions of force majeure is the unpredictability of the incident.

In addition, it is unpredictable in the case that wind and entering a bird to the room that caused the container to be overturn and its contents to be wasted, the cases referred are considered the examples of force majeure. In this case, the non-responsibility of the opener is considered (Bojnourdi, 1999: 43).

Example 2: The flood brings a stone alongside the well that was digged to the bottom, and the pedestrian will fall the well due to collision with that rock.

Saheb Jawaher says that it is correct that the digger is responsible, because his action is aggressive. (Najafi, 1981: 147). In this example, it is implied that the effect of the external incident and the force majeure is ignored when accompanied by the fault, and the responsibility of all the damage is to the digger of the well (Katouzian, 1999: 492).

The conclusion is in vain because, firstly, the responsibility of the digger in the preceding example is from the customary doctrine of damage to the digger. Hence, if instead of the force majeure, a person puts a stone on his property and the other digs a well near it, the digger is responsible, not the one who put the stone, because the custom attributes damage to the person who has acted aggressively; neither the one who put the stone or the one allowed to do the action; second, Saheb Jawaher in another example expressing the issue of force majeure clearer explains the division of responsibility. He says: Whenever someone digs a well and the other put a stone next to another

stone that has flooded to the well, and these two stones cause a person's foot slip, and as a result, he will fall into the well and be injured, two promises in this issue can be raised:

1. The person who puts the stone should compensate half the damage, and the other half will be wasted (the theory of total liability reduction), but Saheb Jawaher believes that the first promise agrees with the justice and the principle of innocence. So, he tends to the theory of the division causality, not the general causality; therefore, the conclusion is not correct in his example in the above example (Katouzian, 1999: 100).

It seems that according to the fact that the force major has entered the legal system of Iran more than the legal system of France, the general rules observing human causes and force majeure in the Iranian system are also applicable, but it seems that it can raise the assumptions of problem precisely, for example, we know that in order to realize the loss, three pillars are involved: the "action of the subject", "the existence of harm" and "the causal relation between action and loss".

Regarding to this division, the following assumptions in force majeure intervention is in the realization of loss:

A) Force majeure is the cause of the subject's action. In other words, the force majeur causes the subject to do the discretion and cause loss. This assumption in legal systems is generally discussed under the heading of urgency, and rather than considering fault in the realization of liability as condition, it has different rules about the role of emergency. Usually, in fault-based systems, they regard urgency as the resolover of liability and, in purely liability-based systems; urgency is not considered the resolover of liability.

(B) Sometimes the force majeur interrupts the causal relationship and is no longer a relationship between the subject and the loss. In other words, the main cause of the loss is the force majeur and the subject has no role in the damage. In these cases, doubt does not attribute the harm to the subject and should not be considered responsible, as the driver stops his car in the right place and the flood

takes it along with him and cause damage. On this assumption, the vehicle will not be the fault. This assumption is basically out of the discussion of this section.

C) The third assumption that is the main place of the conflict is where the action of the subject and the force majeur will jointly cause loss; i.e, two actions and two relations of causality is assumed, and the two subjects are simultaneously caused loss and the force majeure as a subject caused damage. In this assumption, various states are predictable:

1. If the force majeure is so strong that, on the assumption of non-fault of the subject, it is sufficient to the objection of damage, in other words, in such a multiplicity of causes, cause of the subject to be so weak that it does not play a role in the accident, this mode should be considered joining to the mode (b) that in fact the force majeur interrupted the causality relationship, the subject could not be responsible; for example, if the dam was not built on the basis of engineering principles, and if the flood is happened and it is so strong that, assuming that the dam was better and the engineering principles were also built, it did not resist; here the engineer should not be liable. Also, where a driver is discreet and there is also a severe snowfall, if the snow is so severe that driver could prevent the incident, he should not be responsible.

2. If the force majeure is established, but the subject's fault is also so strong that the assumption of lack of force majeure is incidental, the subject will certainly be responsible; for example, on a slippery road, a driver with such a speed drives, for example, on a slippery road, a driver drives in such a speed that, even if the road was not slippery, it is typically an accident, depending on the type of vehicle and driver's skill, the driver is responsible for the damage due to the participation of force majeure.

3. If the force majeure action is associated with the action of the subject, in such a way that both causes loss, and if it is not one, it would probably not cause loss, it would seem that all the burden of liability is on the subject. It seems that the reason for this is that if the subject did not take

precautions in these cases and did not commit a fault, the force majeure alone could not object loss; in fact, the force majeure was avoided for the subject person, and the guilty person practically has changed the avoidable action an inevitable action due to its fault.

4. If the force majeure action is accompanied by the action of the subject, both of which cause loss, and each of them is sufficient to cause loss, on the assumption that it can calculate, for example, a person rolls a stone, and floods are also accompanied and the stone would cause damage, while both rolling and flood to move the stone was enough. It seems that in this assumption, it should not doubt in the responsibility of the subject, because in fact, the force majeure has a secondary aspect, and since the subject's action is sufficient to realize the loss, he must be liable.

On the other hand, the difference between the two recent cases, where with the subject, there is another subject, is clear, since about the participation and companion of the second authorized subject, he is also involved in causing damage as the first subject, and the division of responsibility is logical; but dividing liability with God action does not seem reasonable, at least from a legal point of view.

CONCLUSIONS.

The impact of force majeure in contractual liability arises further, because according to a legal rule, which is renowned as the principle of necessity, no contract can be terminated and interrupted, but in accordance with the contract, the parties to both contracts are required to fulfill their obligations in the same way as included in the contract, and if one of them violates their obligations, they must pay damages to the opposite party.

Basically, the parties to the contract also try to properly fulfill their obligations in order to reach the contract consideration; sometimes, due to the causes that are beyond their control and authority, they are unable to fulfill their obligations and, as a result, commit violation or delay in the fulfillment of their obligations.

Legally, justice requires that any breach and contravention of the contract which cause damage to the other party is compensated and if there are other guarantees for it, to be executed but if the breach of contract is due to causes that is out of the authority and will of the offender, condemning him to compensation is a kind of injustice.

Force majeure is one of the causes which would practically lead to a violation of contractual obligations and, as a result, the loss to the other party was not intended in loss, it is no longer liable. Force majeure is also effective on non-contractual obligations. According to Imamiyah jurisprudents, causing non-contractual damages by the human factor along with the force majeure is a multiplicity or community of causes and it is not the type of cause community because both sides of the incidents are independent and each one has the capacity to cause damage as much as it has.

There are four theories with the jurists of Imamiyeh about the responsibility for paying damages. There are four theories with the jurists of the Imamiya: the theory of guarantee causing prior, the theory of liability for all things and the right to choose the victim, the theory of interference, and the theory of the guarantee causing potent, these theories are stated in details and it cannot be considered a view as a principle matching all forms and modes.

Among these views, most potent theories are more powerful in causation and it is adaptable to more cases. If the potent is not established and the human factor is equal to force majeure in impact, or if it is unequal and the effectiveness of both is established, the verdict of sharing the guarantee is more justified. In this case, paying half the damage is with the human subject and the victim will not have the other half of the damage.

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