MORAL CLAUSES IN CONTRACTS: AN IRAQI LAW PERSPECTIVE

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ABSTRACT

Purpose: In this research, I want to address the moral clauses in contracts concluded by employers with talents and celebrities to promote goods and services. I want to define the meaning and use of these clauses in USA, and answer whether they are acceptable in Iraqi law.

Theoretical framework: In USA, moral clauses used since the twenties of the last century and adopt widely in its sixties until now, it used in contracts relating provide work or service by a talent or celebrity and contracts of sponsorship. Moral clauses refer to conducts that talent prohibited from doing such as lying, violating laws, or corruption. Breaching of these clauses may result in termination of contract, or oblige talent to pay damages.

Method: This research follows a comparative analytical approach between the American and Iraqi laws regarding moral clauses, showing their meaning, importance and effects.

Result and conclusion: This research concluded that moral clause valid in Iraqi law, because it not violate public order or morals.

Implications of the research: The research provides a ground for talents, celebrities, contractors, and employers to be aware of their rights and duties regarding moral clauses, the way these clauses formulate in contract, and how to deal with breach of it.

Originality/value: Moral clauses not previously dealt with in Iraq, so this research paves the way for other researchers to delve into these clauses.

Keywords: Moral Clause, Talents and Celebrities, Construction Contracts, Breach, Termination, Damages.

CLÁUSULAS MORAIS EM CONTRATOS: UMA PERSPECTIVA DA LEI IRAQUIANA

RESUMO

Objetivo: Nesta pesquisa, quero abordar as cláusulas morais em contratos celebrados por empregadores com talentos e celebridades para promover bens e serviços. Quero definir o significado e o uso dessas cláusulas nos EUA e responder se elas são aceitáveis na legislação iraquiana.

Estrutura teórica: Nos EUA, as cláusulas morais são usadas desde a década de 20 do século passado e adotadas amplamente na década de 60 até hoje, sendo usadas em contratos relacionados à prestação de trabalho ou serviço por um talento ou celebridade e em contratos de patrocínio. As cláusulas morais se referem a condutas que os talentos são proibidos de praticar, como mentir, violar leis ou corrupção. A violação dessas cláusulas pode resultar na rescisão do contrato ou obrigar o talento a pagar indenização.

Método: Esta pesquisa segue uma abordagem analítica comparativa entre as leis americana e iraquiana com relação às cláusulas morais, mostrando seu significado, importância e efeitos.

Resultado e conclusão: Esta pesquisa concluiu que a cláusula moral é válida na lei iraquiana, pois não viola a ordem pública ou a moral.
Implicações da pesquisa: A pesquisa fornece uma base para que talentos, celebridades, contratantes e empregadores estejam cientes de seus direitos e deveres com relação às cláusulas morais, a maneira como essas cláusulas são formuladas no contrato e como lidar com sua violação.

Originalidade/valor: As cláusulas morais não foram tratadas anteriormente no Iraque, portanto, esta pesquisa abre caminho para que outros pesquisadores se aprofundem nessas cláusulas.

Palavras-chave: Cláusula Moral, Talentos e Celebridades, Contratos de Construção, Violação, Rescisão, Danos.

1 INTRODUCTION

In Iraq, some employers begin to use moral clauses in construction contracts as well as contracts of talents and celebrities, this research will help contractors to know their rights and duties through clarifying the relevant legal rules and recommending the method of including the moral clause in contracts. This will provide legal certainty to contractors and enable them to organize time while writing their contracts, and provide them with a reference to understand the law in relation to their field of work. This also avoids employers from falling into the trap of forced labor, which could lead to the closure of his project. (Klemens Katterbauer et al, 2022)

Artistic production companies and sports clubs enter into contracts with actors, authors, and athletes for producing cinematic and television works, writing and publishing books, and sports performance. In addition, the employers and commercial companies resort, ordinarily, to contracting with celebrities, such as athletes or actors, in order to advertise and promote their products or services (Caysee kamenetsky, 2017). In both cases, the employer is concerned with his reputation and development of his company or business; he is worry of any harm may occur because of the behavior of talents or celebrities with whom he contracted. This make employers and producers use in their contract what called "moral clauses" (Caroline Epstein, 2015).

The moral clauses refer to conducts prohibited to the debtor, such as sexually harassing workers or customers, cheating and fraud. Additionally, the film producer request the actor not to engage in any disgraceful behavior that exposes the reputation of the actor, and then the reputation of the producer himself, to harm, such as drug abuse, insulting the public, acting in a racist manner by writing on social media, or doing anything considered as a moral scandal.

Nowadays, development of the Internet and various social media has led to an increase the need to use moral clauses, as new media have spread in different ways than the means of the past, resulting in the rapid spread of information. Thus, talents behavior become under monitoring and scrutiny by the public more than ever passed (Caroline Epstein, 2015).

In a later development, the use of moral clauses expanded in other contracts, such as sponsorship contracts and employment contracts made between companies and executives. (Patricia Sánchez Abril and Nicholas Greene, 2017) We may also see moral clauses in contracts of another kind, according to need and development.

Moral clause has defined as "a contractual provision that allows one party the right to terminate an agreement based on conduct the party deems morally reprehensible". (Todd j. Clark, 2018) It defined also as "a contractual provision giving the contracting company the unilateral right to terminate the talent agreement, or take other punitive action against the individual, in the event the individual engages in reprehensible behavior or conduct that may negatively impact the public image of the individual and, by association, the public image of the contracting company". (Fernando Pinguelo & Tim Cedrone, 2009)
1.2 Research Objective

This research aim to review moral clauses in American law as to their history, meaning and Implications, and then to analyze legitimacy of these clauses in Iraqi law.

2 METHODOLOGY

This research adopting comparative method, by comparing moral clauses between American and Iraqi laws, dealing with its history, definition, types and evaluation, then, analyzing the general principles in Iraqi law to conclude the rules govern these clauses.

3 RESULTS AND DISCUSSION

3.1 Types of Moral Clauses

Recently, moral clause takes two forms: traditional and reverse. In terms of formulation, the moral clause may be explicit or implicit:

3.1.1 Traditional and reverse moral clause

3.1.1.1 Traditional Moral Clause

This clause is the well-known type defined above, i.e. the clause that the company or employer insert in the contract to be binding on the talent. (Todd j. Clark, 2018) It is noteworthy that the first case led to raising the idea of moral clauses in their traditional form related to the silent movie star "Roscoe Arbuckle" (Todd j. Clark, 2018) who contracted in 1920 with Paramount Pictures, a year later he was charged with the rape and murder of young actress "Virginia Rappe". After court hearing, the actor "Roscoe Arbuckle" acquitted, but his reputation harmed due to the spread of news and rumors, and he blacklisted by the filmmakers that negatively affected Paramount Pictures that lost millions of dollars. This case considered as the impetus that raised the question of including moral clauses in contracts of actors, athletes and other talents and celebrities. (Fernando Pinguelo & Tim Cedrone, 2009,)

3.1.1.2 Reverse Morality Clause

In a later development, the reverse moral clause has appear, which is a clause insert by talent into contract stipulating for itself to termination if the employer behaves in a way that affects talent reputation, such as violate his data or when employer benefit from talent name and pictures in an exaggerated manner. (Porcher L. Taylor III et al, 2010) In fact, not all talents and celebrities have enough negotiating power to insert a reverse moral clause, because employers can refuse these clauses depending on their strong economic position. (Caroline Epstein, 2015).

One of historical examples of reverse moral clause is the case of (Enron) company that based in (Houston), which is specialized in buying and selling natural gas; it achieved great success in this field at the beginning of the twenty-first century. The company had entered into a $100 million, 30-year contract with the Houston Astros in 1999 to name the new baseball stadium Enron Field for promotional purposes. Two years later, Enron fall in bankruptcy in a case described as the largest one in American history. As a result, Astros tried to remove the company's name from the stadium aiming to save its reputation (Taylor, et al, 2010).
This case trigger the need to using reverse moral clause, because Astros was in need to terminate the contract even though Enron not in breach of its obligations at the time of filing the action. Therefore, it was say that the existence of moral clause would have enabled Astros to terminate the contract with all Convenience and without the need to proving the breach by Enron. (Todd j. Clark, 2018)

Talents, nowadays, need to put reverse moral clauses in their endorsement contracts in order to protect their reputation from the unmoral behavior of the employers themselves, because of it gives the talent a mutual right to terminate the contract if the employer make abusive behavior. (Caroline Epstein, 2015) For example, when products that talent promotes are harmful to the environment and then lead to damaging his reputation, so countries and organizations put restrictions on advertising environmentally harmful products such as medicines (Anne Carolina de Paula Araújo et al, 2022). Talent may not be aware of the nature of damage, so he can put a reverse moral clause to protect himself from liability.

3.2 Explicit and Implicit Moral Clause

3.2.1 Explicit moral clause

This clause not only preventing the talent from violate the law, nor requiring him in general to comply with it. Rather it expressly states the actions that talent must refrain from, such as hatred, contempt, ridicule within society, or acts that lead to offense to society and ridicule public morals and violate decency. Additionally, this clause state that employers has the right to terminate the contract or demand damages if talent doing any of these prohibited acts. (Caroline Epstein, 2015)

Explicit moral clause enables the talent to understanding the acts that he must avoid in his life; this reduces disputes between the parties regarding the employer’s claim that talent committed a breach of moral clause whereas the talent deny. However, the disadvantages of this type of moral clause are that it makes negotiation between parties complex and difficult, which sometimes makes employers to give up some items of the clause because of their need to agree with talent under his insistence to deleting these items. (Caroline Epstein, 2015)

3.2.2 Implicit moral clause

It is a clause declare that talent must oblige by the laws and public morals in his behavior, which makes it ambiguous. (Caysee kamenetsky, 2017) In this clause, reference made to the applicable law to state the types of conduct prohibited to talent in general, such as any conduct harm employer or reduce moral value of talent himself. However, these duties exist whether or not an implicit moral clause insert in contract, because the law imposed them on each contracting party. In case of breach of implicit moral clause, the employer can request termination of the contract as well as damages. (Caroline Epstein, 2015)

When employers entered to endorsement contracts, they look at the high financial costs related to reputation, so the moral clause give them a form of protection. Moral clauses are negotiate aggressively because both parties want to be in best position: the talent wants a specific language, while the employer prefers a broad language to maximize the level of desired protection. Implicit moral clause gives the employer a lot of discretion to determine whether the talent's conduct fall within the prohibited one. (Zarriello A., 2015)

In order to control the employer's discretionary power over termination of contract based on talent's violation of implied moral clause, the US courts resort to two bases for assessing the employer's eligibility to termination: the implied obligation to good faith and fair dealing, and the violation of public order. If the talent challenges termination arguing that employer's
assessment of his breach was not appropriate, the court will refer to one of these bases to verify that termination of contract was in accordance with moral clause, or it is a breach of its contractual obligations. Although these two bases can referred together in the same case, some commentators say that they not provide adequate protection for talent according to the recent cases law. (Todd J. Clark, 2018)

Someone said that it necessary to resort a subjective test when verifying talent violation of moral clause, i.e. verifying whether the talent behavior occurred while he was practicing his private life or through his professional activity. Additionally, what he did after his conduct: did he apologize immediately or take lying and hiding the facts. (Caysee Kamenetsky, 2017)

It is noteworthy that implicit moral clause are not a new phenomenon in the entertainment industry; rather they align with widely followed moral clauses of the past. (Jihad Sheikha, 2019) The US courts have submitted this type of moral clause, dismissing allege that it broad and vague since talent did not knew exactly what it prohibits. In case of Nader v. ABC Television, Inc., for example, after Michael Nader arrested for a crime and his employer, the American Broadcasting Company, terminated his contract, Nader claimed that moral clause was vague and broad, but the court determined that Nader's arrest was a valid cause to triggering moral clause and terminating contract. (Jihad Sheikha, 2019)

3.3 Common Use of Moral Clauses in Contracts

3.3.1 Reasons behind common use of moral clauses

The use of moral clauses both in its traditional and reverse forms has become common for lawyers, especially in America, by contracts of talents in fields like television, motion picture, sports and advertising industries. (Noah B. Kressler, 2005) However, there is still little interest of it in other countries, such as Iraq. Laws did not specifically regulate the use of moral clauses nor the remedy for violating them, but most of these clauses do not violate law nor public order. Therefore, as a principle, parties may introducing in contracts. (Navin K., 2018)

In their contract, parties may indicate the remedy for violating moral clause, such as terminate contract or damages. Sometimes they not indicate for such a remedy. In both cases, the question arise about the legislative and judiciary position regarding moral clauses that seem increasingly use in this type of contract.

Moral clauses used in the forties of last century to verify the political orientations and statements of talents, so they were unlimited to behavior that violates morals. (Fernando Pinguelo & Tim Cedrone, 2009) This was because of the fear that was growing in America of the communist tide, which made the US Congress establish a special committee to follow up on activities that they regard as alien to American society, by which they mean, in particular, communist ideas. (Sarah D. Katz, 2011)

The members of this committee paid special attention to the Hollywood film industry, because they believed that these films are the main incubators for communist activities. (Todd J. Clark, 2018) After the committee summoned a number of actors for interrogation due to suspicions about their communist leanings, and some of them refused to appear before the committee, the artistic production companies began to include the moral clauses in its contracts with actors, and indicate their right to terminate contract if this clause violated. (Stephen M. Gallagher, 2016)

American courts admitted the validity of company's termination of talent contracts based on talent's failure to prove that he is not a communist, or his refusal to declare that he is not a communist. At that time, belonging to communism considered as a reason for triggering moral clause and terminating the contract with talent (Loew's, Inc. v. Cole 1950, 185 F.2d 641. 9th
Cir.; Twentieth Century-Fox Film Corp. v. Lardner 1954, 216 F.2d 844. 9th Cir.) (Haskell Murray, 2018)

3.3.2 Scope of moral clauses

Moral clauses cover contracts made with talents and celebrities such as actors, athletes, and authors, because of the conduct of talent or celebrity is sensitive to the employers, which are worrying about any behavior may harm the reputation of both parties, especially after the emergence of social media. (Caysee kamensky, 2017)

However, it is not yet clear the extent to which moral clauses can used in contracts not related to services provided by talents and celebrities, e.g., construction or other service contracts. Is it permissible for the employer to use moral clauses in construction contract to prevent the contractor from some behaviors that not directly related to the essential work? What is the legal position about violating these clauses? We have seen previously that moral clauses have expanded their scope in America and been used in sponsorships and employment contracts between companies and executives. (Patricia Sánchez Abril and Nicholas Greene, 2017)

The work carried out by construction contractor is not so sensitive that employer will concern about contractor behavior outside this work. If the contractor, for example, harassed a woman, caught a drunkard, or used drugs, this does not affect the reputation of employer nor the progress of works. However, it can said that contractor's behavior may harm the employer's reputation in special cases, for example, when the contractor is obligated to obtain administrative approval to getting building materials into work site, so he bribes public employee in order to facilitate this.

Some Iraqi government entities make contracts with contractors for building works or supplying materials, these contracts include moral clauses. Article (15-6) of the "Standard Bid Documents For General Competitive Tenders For the General of Executing General Works", prepared by Ministry of Planning, states that:

"If it became clear to the employer that the contractor exercises any of the administrative corruption, fraud or collusion or coercion practices or hindrance during the competition for the contract or its implementation, then the employer shall be entitled, and during the 14 days after the notice to the contractor thereby, to terminate the contract and to remove him out of the site and the application of the provisions of Article Fifteen as if the removal has been done under paragraph (15-2) (termination by the employer)"

We can suppose that moral clauses preventing the contractor, inter alia, from bribing public officials. However, we have not knew a position of Iraqi judiciary regarding such clauses, because we did not find court decisions in this regard. We want to study the value of moral clauses on the assumption of it seeing before Iraqi courts, whether they come in talent or construction contracts, is violating them consider a breach of the contract itself, or it will be without legal value?

3.4 Problems Relating to Moral Clauses

3.4.1 Non-determination of moral clauses

Some moral clauses are very loose and allow the employer to terminate contract according to talent conduct that he deems immoral, (Todd j. Clark, 2018), this may happen by acts that often occurring through social media.

Some moral clauses are so ambiguous that they can used abusively, thus the employer should not have solely the discretion to decide whether the accusations are valid in order to terminate the contract. On the other hand, implicit moral clauses may use by employers unfairly
if they want to get rid of the contract for any reason, citing moral violations. (Jihad Sheikha, 2019) Therefore, courts should deal with moral clauses fairly, that is, to appreciate all circumstances in which the conduct made by talent in order to reach its just judgment. (Sean M. Hanlon, 2006)

Conduct that is subject to "public condemnation", "Moral corruption", or similar concepts used in moral clauses is widely varying, and often has a relation with the prevailing social and political climate in the country as like as morality itself. Nowadays, employers want to be able to terminate the contracts not according to talent breach of moral clause, but according to their failure to predict how their products reach to the peoples that have changing desires. These are, however, commercial risks and employers cannot making talent responsible for, especially; when we know that many moral clauses are impose on the talents outside their true consent because of their weak negotiating position. (Caysee kamenetsky, 2017)

3.4.2 Violating freedom of expression

Freedom of expression is one of the basic rights established in national constitutions as well as in Universal Declaration of Human Rights, thus a person has the freedom to express his opinions and feelings within the limits of the law and without interference from the state or other persons. Article (19) of Universal Declaration of Human Rights state that:

"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers".

However, freedom of expression can restricted by moral clauses in order to protect the public. This restriction should be minimal, for example, an employer could not reflect his or her religious views or traditions within the moral clause to prohibiting talent from making permissible statements or conducts outside these views and traditions. (Porcher L. Taylor III et al, 2010)

Some moral clauses have a negative impact on freedom of expression, because of it might lead talent to be reluctant to express his opinion on a debatable manner or to take his own position on an important question if he feels a risk of terminating his contract when engages in this discussion. Talents will be at risk of being silence because of moral clauses, because of it give employer the power to monitor talent's behavior, words, and publications, whether inside or outside his work. (Caroline Epstein, 2015)

This not mean that talent escapes from all responsibility, rather he is responsible if he committed an illegal act or publicly admits that he has made immoral behavior. In this case, the harm may reach an extent that makes employer compelled to terminate his relationship with the talent. Hence, the terms of the contracts allow him to termination without the need to set vague and loose moral clauses. However, some commentators have argued that, even in this case, moral clauses not contradict with constitutional right to freedom of expression, nor with public order. (Daniel Auerbach, 2005)

3.4.3 Violating the right to privacy

Talents, as do all people, have the right to privacy. If, on social media, an event or post be common about the talent and the employer thinks that it violates the moral clause, the employer will intervene with talent privacy and investigates whether he actually made such an event or post. The right to privacy also guaranteed under Universal Declaration of Human Rights. Article (12) of Universal Declaration of Human Rights state that:
"No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks".

Accordingly, moral clauses may violate this right, because the claim that talent has breached moral clause will lead to interference in his private life. The employer will investigate, for example, statements, harassment, or racist behavior of talent. Rumors or suspicions may lead the employer to investigate the talent’s private life trying to prove his breach of moral clause, and this may lead to a violation of the talent’s rights in the privacy. (Patricia Sánchez Abril and Nicholas Greene, 2017)

3.5 The Value of Moral Clauses in Iraqi Law

The starting point is the idea that Iraqi civil code permit the obligation of not to do something, (Ghani Hassoun Taha, 1971). Article (69/1) of Iraqi Civil Code defines a personal right as:

"…a legal bond between two persons, a creditor and a debtor, according to which the creditor demands the debtor to transfer a real right, to do, or not to do".

Since moral clauses include obligations to refrain from various conducts by talent, this clause is valid as a principle unless it contrary to the law or public order or morals. Article (130/1) of Iraqi Civil Code stipulates that:

"It is necessary that the object of obligation is not forbidden by law, nor contrary to public order or morals, otherwise the contract is void".

Article (75) of the Iraqi Civil Code states that:

"It is valid for the contract to refer to anything else that is not forbidden by law or contrary to public order or ethics".

Iraqi civil code did not deal, in particular, with moral clauses, however it regulated the obligation of not to do something, as well as the clause of mutual termination of contract (Hassan Ali Al-Dhanoun, 1970).

We discuss, in the following, the nature of the obligation included by moral clause: Is it valid to be an obligation according to Iraqi civil code? Then, we show the clause for mutual termination of contract that parties agreed upon and its formulas, stating whether it is harmonize or not with moral clauses in question.

3.5.1 The nature of moral clause in Iraqi law

The content of the moral clause is the talent’s obligation of not to do something, this prohibited conduct of talent takes various forms according to each contract: it may be the refrain from violating laws, provocative statements on social media, consuming drugs and intoxicants, and etc.

The question arises: is this refrain deem valid obligation according to Iraqi civil code, so that employer can resort to contractual remedies if the talent violates it, or alternatively, it is merely a legal duty. A duty be an obligation if it met three combined criteria: the financial performance required of the debtor, the appointment of the parties, and the interest for the creditor. These criteria will discussed below.
3.5.1.1 Financial Performance

According to this criterion, a duty be an obligation if its subject matter is a performance of a financial nature, i.e. it has a financial content. This means that performance resulting from it has a financial value; even if the interest of creditor might be moral. (Muhammad Hassan Qassem, 2018) Thus, if a person oblige himself toward his neighbor, for example, not to play the piano in the evening in consideration of amount of money, this obligation has a financial nature, even if the neighbor’s purpose is to not hearing what is bothering him. This psychological comfort is a moral thing; however, the duty relating to it is an obligation. (Abd al- Hai Hijazi, 1982)

The performance will has a financial value when it can be estimate in money; hence, it considered a negative value owed by the debtor, and a positive value owed to the creditor who has the right to demand this performance. (Hamdi Abd al- Rahman, 2010)

The financial performance varies according to the times and societies, since it a result of prevailing considerations in society at the time of agreement. (Abd al- Moneim Faraj Al-Sada, 1974) In the past, for instance, a person who reads the Qur’an on religious occasions and funerals was not take wages for his work, this work not deemed a financial performance according to considerations in former society. Nowadays, however, those people take wages, herby their work became a financial performance depending on his suitability to be valued in money, and thus it became valid obligation. (Ismail Ghanem, 1966)

The financial performance criterion applies to the obligations contained in moral clauses in endorsement contracts, because the obligation of talent to refrain from some behaviors has a financial nature and value in all contemporary societies, including Iraqi society. This obligation can evaluate in money, although the interest that employer aim may be moral relating to his reputation.

3.5.1.2 Appointment of Parties

A duty is not an obligation unless its parties, creditor and debtor, are appointed. The obligation does not exist unless there is a specific debtor bears the burden to performance of this obligation and a creditor that can sue this debtor if he breaches it. Additionally, the appointment of the creditor may only be possible. (Muhammad Hassan Qassem, 2018) The obligation does not arise if the creditor is the public, the creditor must be a specific one person or more persons at the time of performance. (Abd al- Hai Hijazi, 1982) This criterion also applies to talent obligations in moral clauses; because of the debtor is definite person i.e. talent, also the creditor is a definite person, i.e. employer.

3.5.1.3 Interest of Creditor

The obligation does not exist unless a creditor has an interest that is fulfil through a debtor. As we mentioned, this interest may be financial or moral. This differs from other general duties, such as the duty of all people to refrain from violating the rights of others; these general duties have an interest but it for all people, i.e. for society, not for a specific person or persons. (Abd al- Hai Hijazi, 1982)

This criterion is also applicable to the talent obligation under moral clauses, because employer has an interest behind the performance of this obligation, i.e. behind the talent refraining from the conducts that the moral clause prevent.
3.5.2 Termination clause

In Iraqi civil code, the parties may insert in their contract a clause stipulates that the contract rescinded if one of them fail to performance his part. This is through the so-called "consensual rescission clause", that means that if one of the parties breach his obligations, the contract is terminated. The parties may agree that the contract rescinded without the need for notification or a court judgment. Article (178) of Iraqi Civil Code states that "It is permissible to agree that contract is considered rescinded on its own without the need for a court judgment when the obligations arising from it are not fulfilled. This agreement does not exempt from notification unless the parties expressly agree that it is not necessary".

In fact, consensual rescission clause is one of the most used clauses in bilateral contracts, because it make unnecessary for the party to file an action to ask termination when other party breach his part of contract. (Hamdi Abd al-Rahman, 2010)

The remedy of breaching moral clause in endorsements is the termination of contract, i.e. rescission in the terminology of Iraqi civil code. Consensual rescission clause must be express; (Samir Tanago, 2009) however, some commentators say that it could be implicit provide that using strongly phrase its content. (Muhammad Hussein Mansour, 2007) If the debtor, e.g. the talent, allege that he did not breach the contract, he may file an action. In this case, the court should investigate about the existence and content of consensual rescission clause, as well as the occurrence of breach by debtor. (Abd al-Majid al-Hakim, 2007)

If it proved that consensual rescission clause exists and the debtor has breached the contract, the court shall hold contract rescinded. The effect of court judgment varies according to the wording of the clause. If the clause states that breach makes contract rescinded on its own without the need for notification or a court judgment, the judgment will reveal the termination, i.e. the termination has taken place then the court judgment revealed and confirmed it. (Abd al-Majid al-Hakim, 2007) This is because the phrase (the contract rescinded without the need for notification or a court judgment) is the strongest phrase that parties can insert in their contract. (Ahmed Heshmat Abu Steit, 1954)

If consensual rescission clause states that the breach makes contract rescinded on its own, this phrase does not prevent the court from making a judgment that constitutes the rescission, because rescission is an effect of this judgment, i.e. rescission not occur previously but at the time of judgment. (Ghani Hassoun Taha, 1971) If the clause use the phrase only indicate that breach makes contract rescinded, this clause does not actually make anything, so notification is demanded as well as filing an action, because this is the weakest phrase can be placed in contract regarding the consensual rescission. (Abd al- Moneim Faraj Al-Sada, 1974) In last case, a court still has the right to reject the rescission, and rather, it can give the debtor an additional period. If the court convinced and make a judgment to rescind the contract, the rescission will be from the time of this judgment, i.e. the judgment will be the basis for rescission. (Abd al-Razzaq Ahmad al-Sanhouri, 1998)

All the mentioned above never contradicts the standards of moral clauses in USA, because the result is the same regardless of apparent difference.

If the talent breaches his contract by doing the prohibited conducts, he cannot compelled to specific performance, rather he oblige to pay damages. (Muhammad Shukri Sorour, 2008) This is because talent, when he doing the prohibited conduct, has inevitably breached his obligation, thus we cannot imagine oblige him to perform this obligation through specific performance, because this means that we return time that is an impossible thing. (Hassan Ali Al-Dhanoun, 2008; Muhlyiddin Ismail Alamuddin, 1994)

However, the courts in Iraq do not permit to cover damages unless the contract rescinded, if the employer ask damages rather than declare the contract rescinded, the court will
dismiss its action and requires him to ask for contract rescission. In its decision No. 3187/Appellate Body/2021 on 11/28/2021) Iraqi Federal Court of Cassation state that:

"… in bilateral contracts, if one of parties does not fulfill what was required of him in the contract, the other party, after notification, may request termination as well as damages if necessary… and because the plaintiff not doing that, and because the damages is one of the effects of the termination of the contract and a remedy for breach of obligation, the case must be dismissed for this reason".

If subsequently, an action is file to claim damages, the question of whether the rescission based on a valid clause will raise.

Finally, we must note that if it is possible to remove the effects of talent breach in relation to the future, he oblige to specific performance by forcing him not to do the conducts prohibited by moral clause. Regarding to the past, talent oblige to damages based on creditor request. (Abd al-Majid al-Hakim, 2009) In other words, the performance of contract in relation to the past become impossible due to the talent has doing the prohibited conducts; however, it is possible in relation to the future. Therefore, the employer can ask an order to oblige the talent to pay damages for his breach in the past, and obliging him to abide by the contract and refrain from prohibited conducts in the future. (Abd al-Baqi Al-Bakri, 1971).

Article (252) of Iraqi Civil Code states that:

"If the debtor obliges to not to do and breaches this obligation, the creditor may ask to removal of what occurred in violation of the obligation as well as damages, if applicable".

3.5.3 Moral clauses often consistent with Iraqi constitution

Iraqi constitution provides for the right to privacy, Article (17) of the Constitution of Republic of Iraq 2005 state that:

"First: Every individual shall have the right to personal privacy so long as it does not contradict the rights of others and public morals".

As to freedom of expression Article (38) of the Constitution state that:

"The State shall guarantee in a way that does not violate public order and morality: A. Freedom of expression using all means. B. Freedom of press, printing, advertisement, media and publication. C. Freedom of assembly and peaceful demonstration, and this shall be regulated by law".

However, these basic rights and freedoms are restricted so that they not violate public order and morals, and not conflict with others' lives and interests. Therefore, it can said that moral clauses prohibit talent from some conducts or statements which, in themselves, contrary to public order or public morals or inconsistent with the interests of others, are valid and binding for the talent.

Likewise, investigating the conducts of talent not a violation of the right to privacy, if these conducts are contrary to public order or morals, or inconsistent with the interests of others.

4 CONCLUSION

The research concluded that moral clauses in endorsement contracts of talents valid in Iraqi law, this law not prohibit these clauses because they not violate public order or morals. These clauses impose negative obligations to refrain talent from some actions. They are legal obligations because they contain the three criteria of obligation, i.e. financial performance,
appointment of the parties, and the interest of the creditor. In addition, the remedy of breach of moral clause is the rescission of contract; this remedy is according to the agreement through the consensual rescission clause, which is permissible and valid clause in Iraqi law. Therefore, in practical, a moral clause can be used in contracts of endorsements that are increasing in Iraq as a result of openness to the outside world, as well as many talents in Iraq are benefit from characteristics they enjoy to earn financial gain. All this is valid in Iraqi law because it consistent with rights recognized by the Iraqi constitution, i.e. freedom of expression and the right to privacy. Accordingly, we advise employers and talents or their agents to study the moral clauses well, whether they are traditional or reverse, in order that to achieving the interests of both parties.

On the other hand, moral clauses can used in construction contracts, because it not limit to specific contracts according principles of Iraqi law. The moral clauses that used in construction contracts are valid, because they impose negative obligations and involve the three criteria of obligation, so they are binding.

As for the scientific and academic point of view, this research opens the door for the first time in Iraq before researchers to deal with moral clauses. This will contribute to enriching legal research through comparison between Iraqi law and other laws and benefiting from what I have reached in this field, which provides opportunities for researchers to choose titles for their papers and dissertations related to moral clauses in contracts.

For future works, I recommend researchers to deal with moral clauses in terms of: what they are, their types that are consistent with Iraqi law and preferences of contractors in Iraq, the pragmatic tendencies of Iraqi judiciary. All in comparison with the laws of other countries that have known this type of clauses for a long time, such as the USA.

REFERENCES


Anne Carolina de Paula Araújo, Thiago Farias Nobrega, Viviane Souza do Amaral (2022). INTERNATIONAL AND NATIONAL REGULATIONS ON MANAGEMENT OF
Moral Clauses in Contracts: An Iraqi Law Perspective


Ismail Ghanem (1966). In the General Theory of obligations, Sources of obligations, 1st edn, Abdullah Wahba Library: Egypt


