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CONSUMER RIGHTS IN THE RESIDENTIAL REAL ESTATE LOAN CONTRACT

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ABSTRACT

Housing loans play an essential role in solving housing problems in Iraq. These loans are among the most significant and profitable services provided by banks to their customers. However, customers become the weaker party in any concluded contract with banks and thus their protection becomes so essential. This study addresses the problem of the imbalance between the parties in the residential real estate loan contract. For this purpose, this study adopts the analytical method by analyzing the provisions of Iraqi legislations relating to consumer protection. The study found that the existing Iraqi's legislations don't provide adequate protection for the consumer in the residential real estate loan contract. And there is a necessity to issue a specific law to protect the consumer in this contract.

INTRODUCTION

The right to housing is one of the fundamental human rights which is recognized at the international and national levels. At the international level, the Universal Declaration of Human Rights of 1948 is the first document that explicitly stipulates this right by stating "everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing, and medical care and necessary social services" (Article 25/1 of UDHR, 1948). This declaration is considered as the basis for the development of human rights to housing. In 1966, this right was

stipulated in the international covenants including the International Covenant on Economic, Social, and Cultural Rights (ICESCR) of 1966, where the first paragraph of Article XI-1 states that “the States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.”

In Iraq, despite the financial resources of the country, official reports indicate that the Iraqi citizens suffer from lack of housing and poor housing conditions which do not meet international standards. According to a report by the National Committee for Population Policies in 2018, the growth of Iraq's population has increased rapidly due to the population policies adopted by the government before 2003. This report indicates that nearly half of Iraq's population (48.05%) is living in “poor” accommodations due to insufficient and small-sized rooms or lack of facilities (National Committee for Population Policies, 2018). Also in 2018, the report of the Socio-Economic Survey of the Family conducted by the Ministry of Planning and the World Bank revealed that 70.9% of the population of Iraq owned their housings while 12.8% of the housings are occupied by more than one family (8.6% occupied by two families while 4.2% are occupied by three or more). Approximately 21.7% of the population suffered from overpopulation in which three or more persons were required to share one room. In addition, the spread of random and unplanned housing has clearly reflected the shortfall of infrastructure at the national level (Socio-Economic Survey of the Family, 2018).

Due to the high significance of housing as a necessity of life, the Iraqis are so keen to obtain a house. However, a house is not easily obtainable for most people due to the rapid increase in population that is not accompanied by a corresponding increase in house supply (Al-Taie, 2015). According to the official website of the United Nations agency in Iraq, the Iraqis have been undergoing great pressure to obtain appropriate housing in spite of population increase which reached 32 million in 2007. This number is more than ten times the population in 1927, and it is expected to reach 50 million by 2030. And in facing the demand for accommodation, the Iraqis are forced to search for different means to enable them to purchase a house including resorting to bank loans (Rahim, 2017).

Consequently, due to the economic and cognitive differences, the consumer becomes the weak party in a contract. In this case, consumer protection is considered among the basic duties of the contemporary state (Hussein & Jafar, 2005). The consumer used to deal with the public sector which does not seek to make a profit in order to satisfy his personal needs. However, this situation has changed nowadays because the consumer deals with the private sector which seeks to achieve higher profits at the expense of the consumer's interests. All of this generates a real and urgent need for a legislative intervention to protect consumer rights (Hussein & Jafar, 2005). This protection aims to achieve contractual balance and then empower the consumer to make an informed decision. This would help to stabilize the transactions (Abo Orabi, 2009). In doing so, the right to access to information

and the right to protection from the unfair terms are considered essential rights for the consumer. As Barrel-Vinnalls states that: "Consumer law tends to avoid imbalance by focusing on two principal aspects: lack of information and the control of unfair terms" (Barrel-Vinnalls, 2010).

In Iraq after 2003, activities and services of banks have developed and expanded to different fields such as loan provision for housing purposes. And bank loans have become the best way to purchase a house for most Iraqi citizens (Al-Taie, 2015; Rahim, 2017). However, the balance cannot be achieved between the parties of the residential real estate loan contract (hereinafter referred to as RREL) because there is no special act providing specific remedies for the consumer in this contract. The existing legislations relating to the RREL and the consumer are Real Estate Bank Act No.161 of 1976, Central Bank Act No. 56 of 2004, Banking Act No. 94 of 2004, Iraqi Consumer Protection Act No. 1 of 2010 and Iraqi Housing Fund Act No 32 of 2011. These laws are general and do not address essential issues in consumer contracts such as lack of information and addressing unfair terms. Thus, they don't provide adequate protection for the consumer.

Based on the above, this study examines the key problems faced by consumers in the RREL namely the inability of consumers to access the necessary information which could enable them to make the right decision before contracting, and the inability of the consumers to negotiate the terms of the contract. These problems affect the contractual equality between the contracting parties. And this requires an in-depth study to clarify the possible remedies to protect the consumer in this contract.

Consumer right to access to information

In present, the complicated forms of goods and services revealed a new formula of contractual imbalance known as a cognitive imbalance. This type of imbalance occurs between the supplier who knows all the details concerning his goods or service and the consumer who has no idea about these details. Therefore, the consumers, in this case, fail to gather sufficient information that could enable them to compare and make a decision based on the price and quality (Al-Sarhan, 2013). Asymmetry in the allocation of information, together with personal and market conditions, may lead to an inequality of bargaining power between contracting parties (Cicoria, 2003).

Several reasons have combined and led to the emergence of the cognitive imbalance phenomenon between the contracting parties. One of these parties is a professional in his field, who has sufficient information about the contract, while the other party is an ordinary person who is not aware of the basics. Hence, the first party becomes stronger from an economic point of view because he obtains the relevant information to the contract. Here is a new transformation of the adhesion contracts as it is no longer limited to economic aspects (Musa, 2000). In this context, Ahmed states that "the inequality between the contracting parties is not confined to the economic side as in the case of the adhesion contracts because it also includes the inequality to access

relevant data and information of the contract” (Ahmed,1996). Another view argues that the information gap between the contracting parties has widened due to the development of societies, making the weak party only recognizable in the knowledge field but not in the economic area (Abdul Baqi, 2008).

Lack of information would lead consumers to wrong choices (Lee & Hogarth, 1999). The rules of the civil act do not require obligating the contracting party to provide his partner with relevant information to the contract. This is because every party has to seek information alone about various aspects of the contract. Later, the legislature and judiciary realized the necessity of the consumer to get that amount of information that would enable him to decide contently (Al-Sarhan, 2013). The essential step to empower consumers is by providing them with the necessary information about goods and services which they can use to make informed decision. The information also helps them to understand their rights and how to practice them when problems arise. Businesses are the first and main source of information for most consumers (Empowering and Protecting Consumers, 2012).

On the other hand, the logical basis for information obligation is represented in the inequality of information between contracting parties in B2C, which can be interpreted as the unequal bargaining power in terms of knowledge. In this context, Howells states that “consumers have less information than traders, and so have difficulty in making decisions that reflect their true preferences” (Howells, 2005). Therefore, the disclosure systems become an essential factor in the consumer protection systems (Hamilton & Gillies, 2003).

There are two types of information obligations. The first one arises in the pre-contracting phase known as the pre-contract obligations, while the other one occurs after concluding the contract, and is called the post-contracting obligations (Howells, 2005). Both obligations aim to provide the consumer with the necessary information on the contract. Information obligation does not aim to uphold the interests of some people (consumers) at the expense of another people (producers or service providers). However, its ultimate goal is to achieve a contractual balance and equality between the two parties which could lead to the stability of transactions (Abo Orabi, 2009). In this regard, Al-Desouki refers to the significant role played by information obligation in achieving the contractual balance. He mentioned that "the contracting justice is threatened when inequality of information arises. Therefore, aiming to redress the inequality, the information obligation obliges the informed party to inform the other one.” (Al-Desouki,1985).

Hence, in facing the obvious difference between the parties, in the extent of knowledge of the important aspects related to the contract, many legal systems developed their own remedies to protect the weak contractual party i.e. the consumers (Cicoria, 2003). To secure the situation, various means were applied, such as providing ‘passive protection’ to prevent false and misleading advertisements for goods and services, while other means offers “positive protection” through providing necessary information to the consumers (Abo Orabi, 2009). According to Al-Sarhan, “the significant

progress in this area is judicial creativity of the obligation that makes the supplier subject to the accountability if he does not provide his client with complete, clear, and understandable information before signing the contract to allow him in making a informed decision.” Therefore, the aim to bridge the gap between the information of the consumer and the supplier is to create cognitive balance (Al-Sarhan, 2013).

The most significant type of contracts that requires such obligation is the sales contract which imposes on the seller to disclose all the core information relating to the contract. The core information includes mainly the characteristics and quality of the goods or service provided (Al-Mahdi, 1990). Ignoring or omitting such information requires cancelling of the contract, or the ability to be cancelled by the consumer especially for serious contracts such as the loan contract (Al-Jamal, 2002). This obligation is also applicable on the service providers as they have to clarify the potential risks to their clients (Sadiq, 1999).

Certainly, such information is critical for a customer to decide whether to sign and accept the terms of the contract because his bargaining power increases against the supplier. Ardic and Mylenko noted that disclosure of useful information to the mortgage borrower prior to signing is crucial, and it would be effective only to the extent that it can be comprehensible (Ardic & Mylenko, 2011). This is because the obligation to provide information is based on ethical considerations such as goodwill, honesty, and cooperation (Ma’arif, 2012). The different legal systems endorse such obligation in one way or another (Musa, 2000).

The French legislator in the Consumption Act No. (93-929) of 1993 has imposed two types of obligation on suppliers. The first obligation is general and it is applied on all the consumption operations, while the second one concerns specific operations such as credit operations (Ma’arif, 2012). In the Consumer Protection Act No. 31.08 of 2011, the Moroccan legislator followed the French legislator by imposing a general obligation of information. According to Article 3 of this act, every supplier is obliged to provide the consumer with the basic characteristics of the goods or services and provide the information that will help the consumer to make informed decision based on his/her needs and ability. Also, Article 76 of this Act imposes a special obligation to specific areas, including the loan contracts. Therefore, it requires every advertisement related to the loan contracts to be informative and transparent, including the identity and address of the lender, the amount of reimbursement and the number of installments, and others. (Moroccan Consumer Protection Act, 2011)

At the European level, the European Union strategy heads towards emphasizing the information rules of the consumer. This legislative method occurs within the concept of legislative intervention. It requires certain types of information that must be provided for the consumer to reduce the imbalance of knowledge between the two parties in the contractual relationship B2C. This, in turn, fills the information gap, and ensures that consumers have the

ability to make informed decisions when conducting their transactions (Howells & Wilhelmsson, 1997).

Therefore, at EU level, two directives relating to the information obligation with respect to real estate loan have been implemented. They are the “Directive 2008/48/EC of the European Parliament and of the Council on Credit Agreements for Consumers” and the Mortgage Credit Directive (2014/17/EU) (MCD) also sometimes referred to as the Directive on Credit Agreements Relating to Residential Property (CARRP), which came into force on March 21, 2014. The purpose of these directives is to ensure all consumers who purchase a property or obtain a loan are adequately informed and protected against the risks. The main provisions for those directives include pre-contractual and contractual information.

On the contrary, in Iraq, the provisions of the Iraqi Consumer Protection Act No. 1 of 2010 (hereinafter referred to as ICPA) are general without any specification regarding the information which must be provided to the consumer in a consumption contract. Also, there is no clear provision in the Iraqi Civil Act No. 40 of 1951 that imposes such an obligation to ensure protection that can be obtained through information obligation in RRELC. Therefore, there is a need to impose the information obligation upon the supplier. This is because it would help consumers to protect their own interests by identifying the goods or services closest to their preferences especially when a company is unable to provide information voluntarily. As Howells and Wilhelmsson argued that “there are no sufficient incentives for traders to volunteer information, so the law needs to require that the information be provided. Once this information is provided consumers can protect their own interests by selecting the goods or services closest to their preferences” (Howells & Wilhelmsson, 1997).

With regard to the RRELC, any information relating to this contract is significant, and the bank should disclose them. And the consumer has the right to claim compensation if he proves that the bank failed to provide him with sufficient information, or this information was incorrect. Thus, the information obligation is an effective way to protect the rights of the consumer by achieving a kind of equality and parity in knowing the content of the concluded contract. And this mitigates the imbalance between the parties concerning information relating to the residential real estate loan contract.

Consumer right to protection from unfair terms

The unfair term is the term that gives an unfair advantage to one of the contracting parties at the expense of the other party (Trakic, 2015). It is defined as “the term which unilaterally imposed by one of the contracting parties upon the other, resulting in an obvious imbalance between the rights and obligations of the parties represented by the unfair advantage obtained by the stronger party which it forms a burden on the other party without necessity” (Ahmed, 2008). This term is unfair because it is based on differences in economic superiority or legal and technical experience between

the two parties. This often results in an obvious imbalance in the contract between the rights and obligations of the parties of the contract (Abdul Baqi, 2008).

Consumption contracts are considered an ideal field for the suppliers to exploit their outstanding position on the consumers through the terms which they include in the contracts. In such situation, the consumer has only to be subjected to these conditions which unreasonably favor the interests of suppliers. Consequently, imbalance occurs due to the inequality between the two parties. Therefore, unfair terms are considered a burden on consumer's obligations in the consumption contract as they are unjust terms that affect consumer consent (Ramsay, 2012). In this regard, Bin Azzoz states that "consumption contracts are considered the most imbalanced contracts. Due to its widespread, the concept of contractual balance is needed as a means to protect the weak party in the contractual relationship in the modern era" (Bin Azzoz, 2014).

The logical relationship between the protection from unfair terms and the inequality in bargaining power is that the stronger party i.e. the supplier imposes the terms of the contract and the weak party i.e. the consumer has only the right to accept or reject the contract. Since the contract is a consensus between two wills, therefore the will plays an essential role in the contract in terms of determining its terms and effects (Yaqop, 2005). Accordingly, the will is the source of the binding force of the contract. This means that what is agreed by the parties shall be binding on them, and a third party can not interfere to amend the agreed terms based on the principle of the binding force of the contract (Article 146 of the Iraqi Civil Act, 1951).

In this context, the free will dominates on all sources of commitment. Consequently, it is not right to restrict the impact of the contract because a contracting party is abused as long as he accepted this contract. However, issues such as social solidarity, abuse of rights, and the rules of justice and public order should not limit the principle of the autonomy of will (Al-Sanhuri, 1981). Yet the recent developments, especially the economic ones, led to several changes. The industrial revolution led to development of the manufacturing and distribution operations of goods and services, leading the nineteenth century a fertile ground for the growth of adhesion and consumption contracts. These contracts are offered in a form of standard contracts prepared in advance by the suppliers (Amin, 2008).

These standard contracts become an integral part of the daily transactions for traders and consumers alike (Mańko, 2013). These contracts have non-negotiable terms proposed by the supplier to the other party i.e. the consumer on the base of "take it or leave it." These terms can be used extremely against consumers because their rights may be restricted or limited by it (Amin, 2013). Such contracts are used in daily transactions such as public transport contracts and in more complicated cases such as residential loans or mortgages (Mańko, 2013). As a result, the RRELC contains many unfair terms that contradicting the interest of the consumer. For example, the Mosul Bank for Investment and

Finance includes conditions in their contracts such as “the bank has the right to change the rate of interest”, “interest will not be returned when you pay the loan amount before due date” and “the whole loan amount will be payable at once with Interest when the borrower fails to pay any installment on time” (Contract No. 3600/2013). As well as the conditions contained in the loan contract issued by the Credit Bank of Iraq such as “the Bank has the right to change the loan conditions at any time.” In this context, Mehta argues that:

“It was most unfair to expect the consumer to sign a contract which gives the other party the absolute discretion to vary any of the terms already agreed upon. Yet this is what consumers are subjected to when they sign their housing loan agreements with the banks. The bank’s loan documentation always provides for the bank the freedom to vary their interest rate at any time” (Mehta, 2012).

On the other hand, the contracting party to these contracts aims to obtain certain advantages such as the necessary information relating to the contracted service or good, while the consumer has to analyze this information to identify the potential risks. Also, these contracts are effective in terms of cost due to they save the cost of individual drafting of the contract and thus money and time in any bargaining over the contract terms (Mehta, 2012). This is why these terms are called ‘unfair terms’ as they offer immense advantages for suppliers at the expense of consumers (Amin, 2008).

Under these circumstances, the legislations attempted to address the imbalance of the contract caused by unfair terms even if they need to interfere in the principle of will autonomy. This need necessitates the judiciary to modify or cancel these terms according to the requirements of justice (judicial technique) or by enacting special laws to address these terms and limit them (legislative technique) (Ahmed, 2008). The Iraqi legislature has implemented this judicial technique by addressing the unfair terms within the scope of adhesion contracts through the provisions article 167 of the Iraqi Civil Code No. 40 of 1951. This article states that “With a contract of adhesion which has been concluded which contained unfair terms, the court may amend or relieve the adhering party of the obligation to perform these conditions in accordance with the principles of justice, every agreement otherwise will be null and void.”

However, the way that the Iraqi legislature chose to address unfair terms does not provide proven protection for the consumer. While the legislations which chose the second way to address the unfair terms by issuing a special legislation (such as the Moroccan legislature) grant the consumer proven protection. The Moroccan legislature in the Consumer Protection Act No. 31.08 of 2011 states that the unfair terms, between the supplier and the consumer, are any term aims or causes a significant imbalance between the obligations and the rights of the parties at the expense of the consumer. Then it mentioned, for example but not limited to, what is considered as unfair terms.

At the European level, the issue of unfair terms made the national courts and legislatures to implement the measures aiming to combat such terms. Hence, in order to achieve coordination of such measures in consumer contracts, the EU enacted Unfair Contract Terms Directive (UCTD) in 1993 (Mańko, 2013). This directive is considered the most significant legal framework in the field of consumer protection (Howells & Wilhelmsson, 1997). A list of potentially unfair terms is included in an annex to the UCTD. However, the list is indicative and non-exhaustive because it does not create a presumption of unfairness.

Consequently, the national legislatures took different approaches to implement a list or lists of unfair terms. Some countries issued a “blacklist” of terms which are always considered as unfair such as Austria. Other countries have a “grey list” which is assumed to be unfair, but the presumption may be refuted such as Poland. While some countries, such as Germany, have two lists i.e. a “grey list” which presumed to be unfair and ‘black’ one which considered as always unfair (Mańko, 2013).

Therefore, stating the unfair terms explicitly in the law will provide effective protection for the consumer against such terms. This is because the consumer then does not need to prove that this term is unfair, and the court has no discretion to decide that the term is considered as unfair as long as it is stated in the act. And this will facilitate the task of the judge when determining such terms. Accordingly, the researchers believe that it is necessary for the Iraqi legislator to amend ICPA by adding a special part addressing unfair terms to protect the consumer rights in general.

CONCLUSION

Based on the above, it is clear that the consumer is considered a weaker party regarding his/her ability to bargain within an unequal relationship. Consequently, in order to ensure effective protection for the consumer, the Iraqi legislator must include a set of obligations in the ICPA, such as the information obligation and some restrictions i.e. blacklist of unfair terms in this act. The purpose is to avoid applying the general rules of commercial contracts on the RRELC. This is because these contracts consider the contracting parties are equal in bargaining power.

In Iraq, there are no specific acts or regulations to protect consumers in the RRELC. The existing Iraqi's legislations do not include any provisions on consumer protection in the RRELC. Therefore, the general rules of civil code which adopt the principle of the will autonomy are applied. And in light of the inadequacy of general rules in the Iraqi Civil Code No. 40 of 1951 to protect the weak party in the consumer contracts from unfair terms, the researchers believe that it is necessary to organize these terms in the ICPA to provide the consumer protection against such terms in the RRELC.

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