

Provisions for perishing the sold property before delivery and its implications

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Received: 08/08/2023 ; **Accepted:** 14/01/2024 ; **publication:** 28/01/2024

Abstract

(is one of the important and " *Destruction of Sale before Delivery*" The topic active topics generally in civil law and especially in the sale contract. The importance of this topic is explained in terms of various aspects. First, it takes place too much in the practical life. Second, it represents the core of sale contract and all the rules of sale contract is about this topic. This topic concerns with the destruction that happens in a period between making sale contract and before its delivery to a buyer.

A number of juristically lawful theories and others of Islamic Sharia have appeared which tackle and arrange the destruction rules of sale before

delivery. These theories are differentiated in how they tackle the destruction

rules of sale before delivery according to the bases of these theories. These affect the lawful legislations. So, the last one is different also from others in the way of its arrangement and tackling the rules of destruction.

Keywords : the majeure force ; sudden state; sale; commitment ; The Promise.

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I- Introduction :

On this Buyer, Seller, Seller, Seller, Seller, Seller, Seller. , what is the judgement in this case?. The party who bears the consequences of the loss faces the consequences of the loss.

The legal loss has an independent and separate existence from the material loss, just as the material loss may be total or partial, so is the case with regard to the legal loss, and it may occur in whole or in part. And material destruction can also occur and the issue of bearing the responsibility arises because of it. The legal destruction occurs and the issue of bearing the responsibility arises because of it.

In order to address this problem, several legal and jurisprudential theories emerged, derived from Islamic jurisprudence, to regulate (the provisions of the destruction of the sold property before delivery and its implications). Before delivery because of the difference in the foundations and rules upon which these theories are based. Accordingly, the stances of the legislations came to be contradictory, turbulent, and different from one another, due to the difference of those legislations in adopting these theories.

The importance of the subject of the study:

The subject (provisions of the perishing of the sold item before delivery and its implications) is of great importance in legal studies on the one hand and in practical reality on the other hand. The method of the comparative study was adopted in this research, comparing our study with the Egyptian civil law and the French civil law. We have dealt with a study (provisions of perishing sold before delivery and its implications) in Iraqi laws (civil, commercial and transportation).

Research method:

In view of the importance of the subject and its relevance to human economic and social life, and the lack of detailed texts explaining the subject (rulings on the perishing of the sold before delivery and its implications), so I decided to discuss this subject according to the analytical and comparative approach and the Iraqi civil law approach that is derived in a group from the Islamic jurisprudence approach. Thus, the Iraqi civil law was the focus of this study with a comparison between the Egyptian civil law and other Arab laws and the French civil law, taking into consideration the position of other legislations and the position of Islamic jurisprudence whenever required. This study is accompanied by a study of the jurisprudential opinions that were raised regarding the questions that were raised in this regard, and the analysis and weighting of what is considered appropriate for the issue in question, supported by a search of judicial decisions, in which we will try as much as possible to cover all the research terms as the woman who reflects the truth of the study with its analysis and comment on it. and extract legal principles from it.

Analytical approach:

It sheds light on the legal texts related to the subject of the research, focusing on the terms contained therein, and the extent to which these terms correspond to the objectives of the legislator and their consistency with the texts contained therein.

The comparative approach:

The Iraqi civil law was adopted as a basis for this study, in comparison with most of the Arab civil laws, such as the Egyptian civil law and the corresponding laws taken from the French civil law, as well as other Arab laws taken from Islamic jurisprudence.

The first topic

The concept of destruction in Iraqi and comparative legislation

We begin by explaining the concept of perishment in the Iraqi legislation first, then in the French law secondly, and finally we deal with the concept of perishment in the Egyptian law.

The first requirement

The concept of destruction in Iraqi legislation

We discuss the concept of perishing in Iraqi legislation through the provisions of the Iraqi Civil Law, Trade Law No. (30 of 1984) and Transportation Law No. (80 of 1983).

First branch

The concept of destruction in the Iraqi civil law

The Iraqi Civil Code regulated the provisions of perishment in many of its texts and articles, but despite that, it did not establish a clear and specific concept of perishment. Referring to the texts of the Iraqi civil law, we note that the Iraqi legislator regulated the ruling on the destruction of the sold item before delivery in Article (547) in its first and second paragraphs. He regulated the case of the loss of the contracted upon in the nettings in general in Article (179), as the Iraqi legislator dealt with the ruling on the loss of the contracted object in the first paragraph if the contracted object was under the hands of its owner. As for the second

paragraph, it stipulated the ruling on the loss in the sale contract if it was before delivery, as it made the responsibility of bearing the risk of loss on the seller before delivery .⁽¹⁾ The Iraqi legislator could have been satisfied with the text of the first paragraph of Article (547), but the Iraqi legislator organized the case of the loss of the sold before delivery again in Article (179) in the second paragraph thereof, since the last article is broader in scope.

And in Article (426) the Iraqi legislator regulated the state of expiry of the obligation by the impossibility of its implementation, as it stipulated that (if the thing is transferred to the hand of someone other than its owner, with or without a contract, and it perishes without transgression or negligence, then if the hand is a guarantee hand, the thing perishes on the owner of the hand, even if it is a trust hand The thing perishes on its owner), and it is noted on the text of this article that

The Iraqi legislator distinguished between the loss in the hands of the guarantee and the loss in the hands of the trust, and he did not clarify whether the loss meant here was by force majeure, or by the creditor, or by the debtor, or by the action of a third party, or by the act of the thing sold Himself .⁽¹⁾ And force majeure is every external accident of the object materially, such as the power of volcanoes, and that force majeure makes the implementation of the obligation impossible, and that force majeure exempts from responsibility, while Article (197) dealt with the case of the loss of usurped appendages. And in regulating the provisions of earning without reason, the Iraqi legislator obligated the possessor in bad faith to guarantee the thing if it perishes or is damaged in the second paragraph of Article (233). And in Article (301) the Iraqi legislator regulated the case of perishing in the optional obligation, as it stipulated that (if the option of appointment is for the debtor and one of the two things perishes in his possession, he has the right to oblige the creditor With the second, if they both perish, the contract is dissolved, and if the debtor is responsible for the perishing, even in relation to one of the two things, then he is obligated to pay the value of the last thing that perished). Within the framework of regulating the provisions of the deposit, the Iraqi legislator dealt in Article (355) with the case of the loss of the deposit due to the negligence or transgression of the depositary. And in Article (356) in the first paragraph thereof, the Iraqi legislator regulated the case of the destruction of the eye in the hands of the usurper. In all of these texts, the Iraqi legislator remained silent about defining the concept of perishment contained in this law, which regulated the provisions of perishment in different contracts.

In Article (386), the Iraqi legislator regulated the destruction of the thing at the time of deposit. The loss was mentioned in Article (397), when it dealt with the ruling on the loss of the debt in the hands of the messenger (the carrier) before the creditor took possession of it. The loss was mentioned in Article (518) within the framework of the Iraqi legislator's organization of the sales contract in the first chapter of the first chapter, and the Iraqi legislator distinguished in the second paragraph thereof between defect and destruction, except that the Iraqi legislator did not put a defining limit to distinguish between defect and destruction, nor did he set a specific concept of destruction or defect. In Article (564), the legislator regulated the case of the loss of the thing sold after delivery in the hands of the buyer and the case of a decrease in the price, as it made the buyer responsible for the loss of the thing sold after delivery. The loss was mentioned in Article (625), as it regulated the case of the loss of the donated money and the case of the donor guaranteeing the loss. The destruction was mentioned in Article (686/2), as the legislator dealt with the case of the destruction of the eye before Receipt and after the contract within the framework of its organization of the loan contract. Within the framework of the legislator's organization of the lease contract, the Iraqi legislator dealt in Article (751/2) with the case of total physical loss, and in the second paragraph, he dealt with the case of partial loss, but the Iraqi legislator did not explain what is meant by loss, whether it is total or partial, and what is the criterion for distinguishing between them. The loss was mentioned in Article (801/1) in the framework of its regulation of the lease of agricultural lands, as it stipulated that (the loss of crops before harvesting requires the wages of

(1) Jaafar Al-Fadhli, Al-Wajeez looks at civil contracts (sale, lease, barter), University of Mosul, Directorate of Dar Al-Kutub for Printing and Publishing, 1989, p.

101.

(2)See, Hamid Mustafā, Obligations and Contracts in Islamic Sharia, Baghdad, Al-Ahly Press, 1943-1944, p. Al-Fadli, Al-Wajeez in Civil Contracts (Sale, Rent, Barter), University of Mosul, Directorate of Dar Al-Kutub for Printing and Publishing, 1989., p. 101. See Muhammad Suleiman Al-Ahmad and Hala Miqdad

Suleiman Al-Ahmad, The Impossibility of Executing the Obligation for a Foreign Reason, a research published in the Journal of Comparative Law , Issue 29, 2001., p.

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the previous share of the rent) without specifying what is the loss that leads to damage or destruction (the crops).

In Article (854), the legislator dealt with the case of the loss of the deposit with the depositary. In Article (870), the legislator regulated the guarantee of the engineer in case the building was totally or partially demolished. In Article (887/1) the legislator regulated the destruction or injury of the thing due to a sudden accident before handing it over to the employer.

In the deposit contract, the legislator regulated the obligations of the parties to the contract in Article (956), Article (958) and Article (962), without knowing the loss contained in the text of the article, or whether the intended loss is total or partial loss, and whether it is physical or legal.⁽¹⁾ Destruction was mentioned in Article (1258 P.1), which dealt with the case of the termination of the usufruct right with the loss of the thing. In Articles (1297) and (1298), the legislator organized the case of the loss of the mortgaged property, but did not indicate when the property is destroyed, so whether the property is destroyed by its total or partial destruction. And Article (205).⁽²⁾ These two articles dealt with the case of the loss or damage of the goods with the depositary due to a foreign cause. The legislator distinguished between loss and damage, except that the legislator did not indicate the criterion that separates them (3). The loss was mentioned among the general provisions for international sales contained in the Trade Law. With regard to the FOB sale contract, the legislator stipulated in Paragraph (Ninth) of Article (299) that (The seller bears the expenses incurred by all the goods and the risks to which the entire ship is exposed), except that the legislator.

He did not indicate what the risks the ship was exposed to, and it is clear that the Iraqi legislator stressed the responsibility of the debtor when he made the seller responsible even for the partial loss of the goods. However, after the time in which the goods pass the ship's barrier at the designated port of shipment, the risks are transferred to the buyer according to the text of paragraph (Second).) of Article (300) of the Law With these same provisions, the legislator dealt with the issue of bearing risks, including perishing in the sale contract (CIF). The legislator placed the risks on the buyer after delivery or before delivery, so the responsibility lies with the seller, according to paragraph (4) of Article (305), although the legislator, as usual, did not indicate the nature of these risks. This same provision was mentioned in paragraph (fourth) of Article (311) that regulated the provisions of the sale (FAS) and in the FAS sale contract, the seller is obligated to deliver the goods alongside the ship.

international. As for sale on condition of safe arrival, it can be said that the text of Article (330) that came within the provisions of sale on condition of safe arrival is the only text in the Trade Law that differentiated between total loss and partial loss without knowing what is meant by each of them or laying down a criterion to differentiate between them.

And if we turn to the rules issued by the International Chamber of Commerce that regulated the provisions of international sales known as (Incoterms), which regulated (thirteen) types of sales, it is noted that they all share some of the obligations of both parties (the seller and the buyer) and differ in some others, especially with regard to determining The time at which the sold goods are delivered to the buyer, and the associated determination of who is responsible for bearing the risks of the goods, i.e. the risk of their destruction, and the obligation to pay the related expenses with it .⁽¹⁾

The Hague Convention, in Article (97) of the Unified Law, adopted the theory of linking between the delivery of the goods and the transfer of the risk of perishing when the delivery took place and was in

(1)See Hassan Ali Al-Dhanoun, Explanation of the Iraqi Civil Law, Contracts Named Sales Contract, Baghdad, Al-Rabitah Press, without a year of printing.

2(See the text of Article (204/2) (The depositary is not responsible for the loss or damage to the goods if this arose from a force majeure or from the nature of the goods or how they were packaged) and Article (205) stipulates (if the goods deposited were subjected to rapid damage and the depositary was unable to Receiving instructions from the depositor about what should be done with regard to them, the depositary may request the court to permit him to sell them according to the method it specifies.

(3)See Muthanna Muhammad Abd, The Destruction of the Sold Before Delivery, pg. 4, PhD thesis – University of Baghdad – 1428 AH, 2007 AD.

(1) (1)See Mahmoud Samir Al-Sharqawi, International Commercial Contracts, A Special Study of the International Sale Contract of Goods, second edition, Cairo,

Dar Al-Nahda Al-Arabiya, 2002, p. 183. See also Ali Hassan Younes, Commercial Contracts, Dar Al-Fikr Al-Arabi, without a year of printing, p. 37.

conformity with the contract. As for the (Vienna) agreement, this issue was organized in Articles (66) to Article (70), and the loss was mentioned in Article (68), which stipulated that (the responsibility for the loss of the goods passes to the buyer from the time of the conclusion of the contract...).

The loss was also mentioned in Article (66), which stipulated that (the loss or damage to the goods after the risk has passed to the buyer does not exempt him from his obligation to pay the thing unless the loss or damage is due to the act or default of the seller). Indeed, from the text of this article, it came as a synonym for the text of Article (68), so the legislator differentiated between the term loss and damage, but he also did not set a criterion to differentiate between them, and what is meant by damage? And why did the legislator mention it next to destruction? .

Article (68/1) of the agreement states (if the sale contract included the transfer of goods and was not obligated to transfer possession of them in a specific place, then the risk of loss is transferred to the buyer by transferring possession of the goods to the first carrier for the purpose of sending them to the buyer in accordance with what is stipulated in the sale contract) and it is noted through Previous Provisions The provisions of the agreement and the provisions of the Iraqi Trade Law did not enlighten us with the concept of perishing and defining its nature and types. ⁽²⁾.

The second requirement

The concept of destruction in comparative legislation

We divide this requirement into three branches, the first in the concept of perishment in French law, the second in the concept of perishment in Egyptian law, and the third in the concept of perishment in the Journal of Judicial Rulings.

First branch

The concept of perishing in French law

If we review the texts of the French civil law, we will find that the French legislator, like the Iraqi legislator, regulated and dealt with the provisions of perishing the thing sold before delivery without specifying its nature and concept. The two parties, and with this commitment, the creditor of the obligation becomes the owner of the thing, and he must destroy it from the time in which delivery must be made to him, even if the delivery did not actually take place unless the debtor was previously warned to deliver, then the one who bears the loss in this case is the debtor) and the text of this article is specific to the sale contract. It is clear from this that the French legislator linked the liability of perishing to the transfer of ownership, so the buyer is Owner of the sold property and bears its consequences from the time of conclusion of the contract. This ruling, which was unique to the French legislator, and was followed by some comparative legislation, including the law of obligations and contracts and the Lebanese one, meaning that as soon as the sale takes place, the buyer becomes the owner of the thing sold.

The buyer must pay the price of the perishable item sold to the seller even if it did not perish because of the buyer ⁽¹⁾.

But the question that arises here is what is meant by perishing mentioned in the text of this article, and what is its nature and type? The text of this article did not answer this question. As for Article (1722), it stipulated that (if the leased property perishes entirely by force majeure during the lease period, the contract is canceled on its own and by the force of law (2). But if the thing is partially destroyed, the lessee may accordingly The circumstance is either a request to reduce the value of the rent or to cancel the contract, and there is no room for compensation in both cases). Distinguish between the total loss borne by the lessor and the partial loss In which the tenant may, depending on the circumstances, either request a reduction in the rent value or cancel the contract. This ruling is in application of the rule of perishing the thing on its owner. As for Article (1790), it states that (if a worker is hired to do work on something provided by the lessor, and the thing perishes in the hands of its owner before handing it over to the worker, then it is not permissible for this employee to

(2)Looking at the laws that regulated international sales and their position on the theory of doom in general, d. Mahmoud Samir El Sharkawy. A special study of the contract for the international sale of goods, Cairo, Dar Al-Nahda Al-Arabiya, 2002, pg. 195

(1)See Abdel Moneim El-Badrawy, Contract of Sale in Civil Law, first edition, Egypt, Dar Al-Kitab Al-Arabi Press, 1957, pg. 425. See. Anwar Sultan, Named Contracts (Explanation of the Sale and Barter Contracts), first edition, Alexandria, Dar Al Thaqafa Press, 1951, p. 265 et seq.

(2)See Muthanna Muhammad Abd, *ibid.*, pg. 130.

claim compensation). Objects in the optional obligation and if the perishment is due to a foreign cause, then the obligation does not expire, but its place is determined in the other thing. Or because of a defect in the construction...) The fire caused by a foreigner led to the destruction or destruction of the building mentioned in the article. As for Article (1624), it states that "guarantee for all or part of the sale that is damaged or defective before taking possession of it shall be on the seller or on the purchaser according to what is decided in the book of Contracts and Obligations) and Article (1867) of the French Commercial Code stipulates that (if one of the partners undertakes to put a certain thing in the collection of the company's money, then this thing perishes before it is placed in the company's money, then the company is dissolved) It is clear from the foregoing that the French legislator is like the Iraqi legislator He regulated the provisions of perishment in many of his legal texts, but despite that he did not specify its nature or meaning, leaving the issue to the jurisprudence that defines perishment.

Section two

The concept of destruction in Egyptian law

If we review the texts of the Egyptian civil law, we find that there is a great similarity between the texts of the French civil law and the Egyptian civil law, except that the Egyptian legislator contradicted the French legislator in Article (437), as this article stipulated that (if the thing sold perishes before delivery for a reason that the seller has no control over, whoever dissolves it sale and the purchaser recovers the price, unless the loss is after the buyer's excuses to take delivery of the thing sold). That is because the Egyptian legislator linked the liability of perishing to the delivery and not to the transfer of ownership, and that was taken The rules of Islamic law that link the liability of perishing to delivery and not to the transfer of ownership.⁽¹⁾

The loss contained in this article is the loss outside the will of the debtor (the seller) and he had no hand in it, as it leads to the termination of the contract and the return of the contracting parties to the state they were in before the contract. And Article (502 / f) of the Egyptian Civil Code mentioned another provision for perishing in the gift contract, as it stipulated that (the request to return the gift is rejected if one of the following impediments exists..... (f) if the gifted thing perishes in the hands of the donor or donee whether the perishing was due to his action or a foreign accident that he had no hand in, or due to use. Doom in WordPress Article (504) in its first paragraph provides a provision related to the destruction of the thing seized, as it stipulates that (if the donor takes possession of the thing donated without mutual consent or litigation, he shall be responsible before the donee for the loss of the thing, whether the loss is due to the donor's action, or because of a foreign person who has no control over him, or due to use). The destruction was mentioned in the text of the first paragraph of Article (584) in the article (the lessee is responsible for the fire of the leased property, unless he proves that the fire arose from a cause that he has no support for). Article (591) refers to perishing when its first paragraph stipulates that (the lessee must return the leased property In the condition in which he received it, except if the object has been destroyed or damaged due to a reason he has no control over. And in Article (615) the Egyptian legislator regulated the destruction of crops in leased agricultural lands, as it stipulated that (if the tenant is prevented from preparing the agricultural lands or from sowing them, or if all or most of the seeds perish, and that is due to force majeure, the rent, in whole or in part, according to the circumstances, will be reduced). This is unless there is an agreement stipulating otherwise.) The legislator expressed the total or partial destruction by the phrase all or most of it. In the scope of the borrowed contract and with regard to the obligations of the borrower, the second paragraph of Article (641) stipulates the following: (In any case, the (borrower) is a guarantor of the loss of the thing if the loss arose as a result of an accident

sudden or force majeure, and he could have avoided it by using ...), this text applies in the case of total loss only, because according to this text, the borrower is considered responsible for the loss of the thing because he is obligated to preserve it and take care in that, and the borrower is responsible for the loss The thing, even if the loss occurred by force majeure or by a sudden accident, and it was in his power to avoid it if he used something from his private property, because he chose to save what he owned.

Despite this, this text is like the previous one, as it was limited to mentioning destruction without specifying its nature and meaning. Article (887) stipulates that (if the thing perishes due to a sudden accident before handing it over to the employer, the contractor is not entitled to claim neither the price of his work nor the

(1)Abd Al-Razzaq Al-Sanhouri, Al-Waseet in Explanation of Civil Law, Part Four, considers contracts that fall on ownership (sale and barter), Alexandria, Manshaat

Al-Ma'arif, 2004, p. 611.

refund of his expenses, and the loss of the work material is on the one who supplied it). Handing it over to the employer led to the forfeiture of the contractor's right to claim the price or expenses that he spent on the thing throughout the work, provided that the loss is on whoever supplied it from both parties .⁽¹⁾.

Section III

Journal of Justice Judgments

The magazine dealt with the provisions of perishing in the sales contract in Articles (293-299) and stipulated the case of the perishing of the thing sold before delivery in Article (293) as it stated (If the thing sold perishes in the hands of the seller before the buyer takes possession of it, it perishes from the seller's money and nothing is on the buyer) and it is clear that the text This article relates to total loss only. This is because he did not refer to the case of partial loss on the one hand, and made the loss a guarantee of the seller in general on the other hand. The liability of perishing in the Code of Justice is on the debtor, and he did not refer to the state of legal perishment stipulated in other laws. As for Article (294), it dealt with the case of the loss of the thing sold after delivery, and set a provision different from the provision of Article (293). As it placed the responsibility of perishing on the buyer and not on the seller, except that the magazine did not explain what is meant by perishing and what is its type, and the same is the case in

The rest of the articles are in the Code of Justice. Article (298) states that "what the buyer has received on the purchase price, which is that the buyer takes money from the seller to buy it with the name of the price, if it perishes or is lost in his hand. He is obliged to pay the same amount to the seller, which is what is called selling on the purchase price.) So this article made the loss payable to the buyer in the case of naming the price, except that the aforementioned text did not indicate whether this ruling includes all types of loss?.

(If the thing sold perishes with the seller by his own action, or by the act of the seller, or by a heavenly blight, the sale is invalid...) This article shows that the ruling adopted by the magazine and Murshid Al-Hiran is the same, which is to make the loss that afflicts the thing sold before delivery from the guarantee of the seller (1). Article (767) and Article (398) of Murshid Al-Hiran dealt with the provisions of perishment after delivery and before delivery, but we did not find a single text that defines perishment, defines its types, or sets a criterion to distinguish between them.

The second topic

Types and sections of perish

Types of perish:

Destruction is divided into two main categories, then the types of perishment vary from these two types, which are as follows:

The first section: the division of destruction according to its nature, and it is divided into:

(1) Legal loss. (2) Physical loss.

The second section: the division of destruction according to its generality and comprehensiveness, and it is divided into:

(1) Total destruction. (2) Partial loss.

However, these types and divisions are intertwined with each other, so that the legal perishment may be total or partial perishment, and the physical perishment may be total or partial perishment, as we will see.

The first requirement

Divide the loss according to its nature

The loss is divided according to its nature into two types of loss, which are the legal loss and the physical loss. We deal with these two types as follows:

First branch

Legal doom

The judiciary, law, and jurisprudence differed in determining the legal loss, and each of the judiciary, law, and jurisprudence dealt with a form or a case of legal loss, without setting a comprehensive definition that prevents legal loss in general. Therefore, we will address the concept of legal loss in the judiciary and jurisprudence, and before that we will set a criterion to distinguish between legal and material loss.

First, the criterion for distinguishing between legal and physical loss:

(1) See Muthanna Muhammad Abd, *ibid.*, pg. 145.

The criterion for distinguishing between legal perishing and physical perishing is related to the substance or the subjectivity of a thing, because the material perishing means the annihilation, destruction, or demise of the subjectivity and matter of the thing in whole or in part, so material perishing is represented in the demise, smashing, destruction, or annihilation of the thing, such as the shattering of glass and the destruction of a house. Either in legal perishing, the subject matter of the obligation or the subjectivity of the thing or its material is still present, but dealing with it or delivering it to the buyer collides with the text of the law or a legislative or administrative procedure that prevents dealing with it or confiscates it, and it may be in the form of losing the thing, losing it, plundering it, or delay in its delivery. hand it over and others ⁽¹⁾. The material loss is that which focuses on the subjectivity of the thing sold and its substance, while the legal loss is focused on the benefit of the thing sold.

Secondly, the concept of legal loss in the judiciary:

Legal doom is the result of the judiciary, as it appears in judicial applications more than in legislative applications. Despite this, the judiciary in Iraq or the comparative judiciary did not define a definition of legal doom, but rather organized and dealt with cases of legal doom and its provisions in general. The Court of Cassation ruled in one of its decisions that (the lease contract was terminated on its own due to an order issued by the Municipality Presidency to vacate the rented café, and then the municipality demolished the first floor of the café after it was inclined to collapse. Therefore, this decision to demolish the café made the rented premises in the judgment The mortal because

In this case, the tenant will not be able to benefit from the rent due to this demolition). From this decision, it is noted that the demolition of the café is a physical loss, but since the demolition was due to a judicial decision, force majeure is represented here by the judge's decision to demolish the café. The demolition was issued by the judiciary. And it also decided in another decision (that the municipality is not responsible for not handing over the shops to bid on them because the tenants in these shops have put the rent allowances to the notary public after the bidding and thus it was legally impossible to hand over the municipality - due to the continued validity of the lease contracts for these shops, so the validity of the lease contracts is considered a legal impossibility prevented between the municipality and fulfillment

The legal impossibility that corresponds to the legal loss was represented here in the form of the validity of the lease contracts, while in the first decision we find that the legal loss was represented in the form of a decision by the judge to demolish the rented café, and the Court of Cassation decided in another decision that (The appropriation of a large part of the rented property by the official authorities, based on the Agrarian Reform Law, has led to a major breach of the value of the leased property. The rented property has become perishable, which allows the tenant to request termination of the contract due to the loss of the leased property. This loss has resulted from an order issued by the government that cannot be expected. And it cannot be resisted) The legal loss is represented here in the form of a breach of the usufruct of the leased property, or More precisely, the seizure of a large part of the wages by the official authorities based on the Agrarian Reform Law. And the Beirut Commercial Court ruled that (if the movement in the desert between Iraq and Syria exposes the transported goods to looting, then this cause of loss is expected, and the transportation fare has been determined on the basis of these risks...) The legal loss is represented here in the form of looting and theft of the thing ⁽¹⁾.

As for the Egyptian judiciary, it excludes that the loss be legally, as there is, according to the Egyptian judiciary, only material loss, and therefore the Egyptian Court of Cassation ruled in one of its decisions that (if the destruction stipulated in Article (433) of the Civil Code, according to what happened in the judgment of this court is The cessation of the sold thing from existence with its natural constituents, so the appropriation of the agrarian reform after the sale of a quantity of the lands sold is not considered to be the destruction of this quantity, and the provisions of the destruction in sale apply to it. The jurists have criticized the decision and direction of the Egyptian judiciary, by saying that as long as the Court of Cassation limits

(1)See Muthanna Muhammad Abd, previous reference, p. 160

(1)See Hamid Mustafa, Obligations and Contracts in Islamic Sharia, Baghdad, Al-Ahali Press 1943-1944, p. 174.

And see Resolution No. 1651, Salahiya, 85 Al-Amarah, dated 9/25/1958, Iraqi Civil Judiciary, Part 2, Salman Bayat Collection. And Resolution 1409, Human Rights, 59 Sulaymaniyah, dated 10/15/1959, Iraqi Civil Judiciary, Part 2, Salman Bayat Collection.

the intended destruction in Article (437) to material destruction without legal destruction, then it is necessary to ask about

The ruling on the legal perishment of the sold property after its delivery to the purchaser and before the transfer of ownership to him, so if we assume that the purchaser, after receiving the sold property and before transferring ownership to him by registration, a decision was issued to expropriate this property for the public benefit, or a decision was issued to seize it from the agrarian reform authority or otherwise. . Who is responsible for the loss in this hypothesis?

If we had applied the text of Article (437), we would have said that the buyer is the one who bears the responsibility of the loss due to its occurrence after delivery. He has fulfilled his obligation to deliver, but he has not yet implemented his obligation to transfer ownership to the buyer. Given that legal perishing made the implementation of the seller's obligation to transfer ownership impossible, this obligation expires, the corresponding obligation expires, the contract is annulled, and the two contracting parties are returned to the state they were in before the contract, with the consequence of that being the buyer's recovery of the price he paid, and the seller bears the consequences of the loss. In this sense, the Court of Cassation ruled in connection with the agrarian reform appropriating part of the sold land after handing it over to the purchaser. Whatever the case, if we move to the English judiciary, we will find that this judiciary tended to expand in the interpretation of the material destruction of the place of the contract. The concept of this perishing did not stop at its narrow literal meaning, but transgressed it to something else. This court tended to expand the concept of perishing to include perishing in the physical sense. Rather, this perishing included moral, non-sensual or legal perishing, despite not explicitly acknowledging that. The position of the English judiciary is also clearer in a case whose facts are summarized in that a ship was chartered under a maritime transport contract to move from the city of Liverpool to the city of Newport to carry a load to San Francisco. repairs, whereupon a dispute arose between the ship's owner

And between the carriers because the delay in sailing the ship to its destination has led to the loss of the commercial benefit that both the ship owner and the carriers hoped to obtain through the contract. When the case was presented to the Court (Treasury Chamber), the jurors said that (the maritime transport contract ended in a disaster, that the ship's voyage and the repair process took a long time, and that this time is necessary for the contracting parties who were affected by this delay, and that the ship's voyage has become a different voyage from the agreed voyage. In the contract, which led to the loss of the commercial benefit that the parties intended to obtain, and thus the court ended the termination of the contract.

The intended purpose, which the court called the (commercial benefit) that the shipowner and the carriers hoped to obtain through this contract in order to delay the extraction and repair of the ship. The loss here is not limited to the material loss, but the legal loss is what led to the termination of the contract, and the court acknowledged the existence of the legal loss.

It is clear from the foregoing that the judiciary in the matter of legal death is divided into two directions:

The first: It is represented by the Iraqi, Lebanese, Tunisian and English judiciary, and this trend takes the legal loss and entails the same effects that result from the material loss.

The second: It is represented by the Egyptian judiciary, and this trend refuses to acknowledge the legal doom and that the doom, according to this trend, is only material.

It is clear from the foregoing that the Iraqi judiciary has approved the legal destruction in many judicial decisions and in different forms and cases, sometimes by the state's seizure, sometimes by a judicial decision, and at other times by its looting. As for the Egyptian judiciary, it refused to recognize the legal loss and that the loss is only material, and the Egyptian judiciary confirmed its refusal to do so in many cases.

Judicial decisions that used to fall within the legal doom, but the Egyptian judiciary counted them as cases within the legal impossibility and arranged for them the same effects of material doom. The Egyptian Court of Cassation ruled in one of its decisions that (if it is established from the facts recorded by the appealed judgment that the dispute deal is of long-staple cotton, then the appellant had sent to the contested company to transfer the pieces to March (March 1952) and did not notify it of the pieces until (February February 17) the date of issuance of Ministerial Resolution No. (17 of 1952) and then the contested company did not find the coverage process until this date, so the performer of these decisions is that the company was not considered to have an existing position in the contracts exchange in relation to this transaction and that dealing in this cotton has become Attended for contracts (March 1952) by force majeure and relied

Dealing in it turned into a monthly contract (May and July 1952), and thus the price on which accounting is conducted between the two parties is (125 riyals) minus two and a half riyals from it, as determined by the stock exchange draw in its decision issued as a result of the government's intervention, buying at this price. He ruled that the price decided by Decree No. (18 of 1952), which is (140 riyals) not be considered, and if the account was settled between the two parties at the rate of (122.5 riyals for the ..) (1) the law would have worked correctly).

And it ruled that (the rescission is considered a reality in the contract binding on both sides by the impossibility of its implementation, and the implementation is impossible when the sold thing is out of the seller's possession and makes him responsible for the refund of the price, and it is not necessary to return the implications if the impossibility was due to his negligence). In the dissolution of the contract by force of law and the return of the contracting parties to the state they were in before the contract. Despite this, the judiciary refuses to recognize that these cases fall within the legal perdition, based on the principle established by this judiciary that the perish is only material.

Third, the concept of legal perishing in legislation:

Legislations differed in the way they are organized and dealt with legal loss, and it can be said in general that commercial law is the field in which the provisions of legal loss are dealt with. Despite this, this organization and treatment contains a lot of deficiency and ambiguity, as it is limited to one case, which is the case of non-delivery of the sold within a certain period, as is the case of the Egyptian legislator, as it stipulated in paragraph (Second) of Article (240) an Egyptian commercial that (be The thing to be transported is totally perishable if the carrier does not deliver it or does not notify the consignee to come to receive it within thirty days from the expiry of the date specified for delivery or from the expiration of the time period that the ordinary carrier takes in transporting if he is found in the same circumstances if he does not specify a date for delivery). The Egyptian legislator stipulated this principle in Article (289/2), as the thing is considered perishable if a period of (30) days elapsed without the delivery of the sold item. The Egyptian commercial legislator did not differentiate from that period between land, sea or air transport. The calculation of a period of (30) days starts from the expiry of the date specified for delivery or from the time taken by the ordinary carrier for transportation. The Egyptian legislator adopted the objective criterion that calls for putting a person of average care in the same circumstances as the carrier.

As for the Iraqi legislator, if we go back to Civil Law No. (40 of 1951), we do not find anything that indicates the legal destruction explicitly or implicitly. But by turning to the provisions of the transport law, it is noted that this law regulates the provisions of legal loss in one case, which is the case of non-delivery of the sold item within the period specified in the law. The carrier of things to the addressee, in this case the things are considered perishable. The law has defined this

The period of time during which, if the objects are not delivered to the addressee, they are considered perishable in Article (36 Second) thereof, which stipulates that (the thing is considered perishable if the carrier does not deliver it to the consignee or notify him to come and receive it within forty-five days from expiry of the delivery date), however, the law reverted and made two exceptions to this article ⁽¹⁾.

The first: It relates to the transportation of the thing in cars. The principle here is that the period during which the thing must be delivered to the addressee, which is (45 days) from the date specified for delivery, otherwise the thing is considered perishable. However, if no date has been set for delivery, the thing shall be deemed perishable if it is not delivered after ninety days have passed since the delivery of the thing by the carrier.

The second: relates to the transportation of the thing by sea, as the law considers the thing to be perishable if the carrier does not deliver it to the consignee or notify him to come to receive it within sixty days from the

(1) See Majeed Hameed Al-Anbaki, Iraqi Transport Law, Principles and Rulings, Baghdad, Publications of the Legal Research Center (9), 1984., p. 234. See Basem Muhammad Salih, Commercial Law, Part One, General Theory (merchant, commercial contracts, banking operations The Socialist Commercial Sector), Baghdad, Dar Al-Hikma, 1987.

expiration of the delivery date, and both exceptions were required by the necessities of the transportation of the thing by sea or by car.

Some jurists go to the adoption of the period stipulated in the law in the agreements each in its field. However, the calculation of the prescription period in the case of a claim for the total loss of the thing against the carrier begins after forty-five days from the date of the expiry of the date specified for delivery or from the date of the expiry of the date on which the thing could have arrived by a regular carrier had he been found in the same circumstances. This is when no date has been set for delivery. In terms of proving destruction, there is no

Difficulty in work. The carrier is obligated to deliver to the consignee the number, quantity, or weight of the goods as much as he received from the sender. If the carrier did not deliver anything or delivered things less than the things he had previously received, then this is before the total or partial loss, according to the circumstances. Therefore, the carrier is usually keen, when delivering the goods to the consignee, to retrieve the transport document signed by him, indicating that the delivery has taken place. And if the consignee has a clean transport document (that is, free from the carrier's reservations), he can easily prove the loss of the goods, as the document proves the carrier's receipt of the goods as described in that document. The consignee only has to show the transport document to the carrier when he does not receive the thing

It proves that the total loss has occurred, and in the case of partial loss, the consignee only has to compare the description of the goods that is proven in the transport document in terms of number, quantity, or weight, and the goods that he actually received and that are proven in the delivery receipt, and then he proves whether there was partial loss, and if it was in his possession. The sender is any transport document that is not clean (i.e. it contains the carrier's reservations), so his task will be difficult, because the reservations contained in the document, if they are specific and clear and not such as general reservations, will be a presumption in favor of the carrier. That is, it indicates that the carrier has received the goods in the description in which the delivery took place, and it requires the consignee to demolish that presumption by proving what contradicts it. That is, if he proves that the goods were delivered to the carrier in a manner other than the description included in the document, and that is permissible for him, and the consignee can also prove that he is wrong. The carrier that led to the damage and thus severing the causal link between the reservations included by the carrier and the real damage ⁽¹⁾

The Jordanian Court of Cassation clarified in one of its decisions in which it was stated (and the report concerned is about the shortage of the contents of these cartons, and the shortage does not happen except when these cartons are opened, unless they were torn and their contents were dispersed, and the records did not indicate that they were excessive). The existence of a deficiency that did not result from this poor packaging, and there are two cases that represent two forms of judgmental destruction:

First: replace things:

The conceivable hypothesis is that the carrier delivers to the addressee other things that are not the same as the things he contracted for, such as if the carrier had transported several consignments at the same time and in the same medium with different recipients, and it happened that he delivered the consignment of one of them to the other. The replacement may be total or partial, for example the first if the consignment was of Yemeni rice, then the carrier delivered the entire quantity to the recipient of Chinese rice. An example of partial replacement is if the consignment is lengths of woolen cloth, and the carrier delivers the whole quantity from the number, but part of it is made of woolen cloth and the other

From cotton cloth (2) And the question that arises is whether the things in the previous examples change in the ruling perishable or damaged? Jurisprudence and jurisprudence have differed in answering this question. The French judiciary considers total or partial replacement as total doom, while a group of French jurisprudence distinguishes between total or partial replacement, so the first is considered as total doom, while the second is considered as partial doom. Arab jurisprudence, so an opinion goes to saying that the addressee actually received the things in his ability to discover the deficiency or defect in them.

Hence, it is concluded that the case of replacement, whether in whole or in part, represents a case of partial destruction. And another opinion goes to that

(1) See Bassem Muhammad Salih, previous source, p. 218.

The case of replacement, whether it is total or partial, and whether it is from the lowest to the best or vice versa, represents a form of damage. The other section of jurisprudence goes that this topic should be viewed comprehensively in the relationship of the addressee to the sender, the addressee to the carrier, and the sender to the carrier. That is, the consignee (buyer) has the right to refuse to receive the goods if they are not according to the specifications mentioned in the transport document, and he also has the right to demand compensation from the sender (the seller) in addition to rescinding the contract. Doom? Especially if we know that there are some goods that are difficult for the carrier to distinguish. The carrier will receive his penalty for not being entitled to the fare if it was payable by the consignee, and he will have the right to claim back the fare if he had paid it.

The Court of Cassation took this direction, and this is evident from the decision issued by the Iraq Court of Cassation on (2/8/1972), whose facts are summarized in that one of the carriers transported lengths of cloth of the quality of Terlin (45%) and wool (55%) and upon delivery to the addressee It was found that among the lengths there are two lengths of pure wool instead of tarlene. And when the consignee asked the carrier for compensation, the Court of Cassation ruled that (the judgment of the discriminator in what it ruled is correct and in accordance with the law, because the discriminator has to transport the goods delivered to him from Beirut to Baghdad and there was no nullity in the number of lengths of the fabric, but there is a change in the quality of two lengths of them if they are replaced From the two tarlins to the wool, and because the value of the wool is higher than the two tarlins, it is not in the interest of the carrier to make a change in the goods from the other to the better.

This happened by the supplier's fault and the carrier has nothing to do with it. Thus, the carrier is not responsible for this exchange, and the distinguished judgment in what it decided is based on valid legal reasons) .⁽¹⁾ In fact, this decision does not refer from near or far to a universe

Substitution is tantamount to perishing (2), but the case was looked at from the perspective of the addressee's relationship with the carrier and the extent of the latter's responsibility in this matter, so the discerning person had to file the case against the sender and the seller (the supplier) and not against the carrier, either if the sender is the same as the addressee. He shipped the goods at the destination and found them replaced at the destination. This is considered a form of fraud that has its own penalties.

The second: the deficiencies that are tolerated in it (the inability of the road):

It is the minor shortage that some goods are exposed to during transportation, and it has been tolerated, and the carrier is not responsible for it, such as a decrease in the weight of the grain or meat transported, or a decrease in some liquids. The Transport Law referred to this in Article (4/First) of it, which stated (the carrier shall not be responsible for any loss of weight or volume incurred by the thing during transportation). We find the case explained in the light of (the custody) as a basis for the responsibility of the carrier, as long as this kind of deficiency is close to the nature of the thing and outside of

Control, control and direction of the carrier. Accordingly, there is no place to ask him about that deficiency, and the assessment of the tolerable deficiency in him is subject to the prevailing custom in the place of arrival usually. It should be noted here that the concept of custom takes an evolving picture with the development of means of transport, so it is not possible to rely on an old custom that was appropriate to the old conditions of transport, as the custom in this field is variable depending on the change in the means of preserving and shipping the goods and the different modes of transport and their development.

It is clear from the foregoing that the legal destruction is broader than the material destruction, because the material loss can only be in one form, which is the form of destruction and annihilation of the thing in whole or in part. The issuance of an administrative decision that prevents dealing with the thing, it may be in the form of theft, looting or loss of the thing, and it may be in the form of delay in its delivery, and it may be in the form of replacing it, and many examples of legal destruction can be added, as the decisions that are issued during the outbreak of war may affect the validity of the contract, as it may lead The issuance of such laws leads to the termination of existing obligations, especially if one of the parties to the contract is in a hostile country or in lands under the occupation of enemy forces, and then it becomes prohibited for the debtor under those laws.

(2)See Decision No. 310, published in the Judicial Bulletin, S2, No. 3, 1973, quoting Majeed Al-Anbaki, previous source, p. 237.

And decisions are dealing commercially with the enemies, and the issuance of decisions may be aimed at addressing the existing economic situation, such as preventing the import of cars whose year of manufacture is less than a specific model or a certain year, as well as preventing the import of poultry meat because it may be infected with bird flu, or prohibiting the import of red meat because it may be infected with mad cow disease.

Despite the many applications of legal perishment, the legislation differed in the extent to which it was taken on the one hand, and on the other hand, the legislation did not set a specific and clear definition of legal perishment, and as for the Iraqi legislator, although the Iraqi legislator took it in the transport law in one form, which is stipulated in Article (31) of it, and despite the issuance of judicial decisions that stipulated and dealt with the provisions of legal loss, we do not find in jurisprudence and the judiciary a text in the law on which this jurisprudence is based, and we do not find in judicial decisions a text that defines legal loss that is inclusive and comprehensive for every form, and therefore we call on the Iraqi legislator to The introduction of legal destruction and its inclusion in the civil law, and it has implications

And the provisions of the material loss itself, and the loss can be defined by law as (the disappearance of the benefit of the thing while it remains material due to the existence of a legal or material impediment with which it is impossible to dispose of it or transfer its ownership).

Fourth: Legal destruction in Islamic jurisprudence:

It is mentioned that Muslim jurists divide the destruction into two types, the first of which is the real destruction and corresponds to the physical destruction. As for the second type, it is the moral destruction, which is the destruction of the thing in meaning only, by creating a meaning in it that prevents us from benefiting from it while it is established in itself in reality, and from that (preventing the delivery of the borrowed property to the lender after requesting it). From him or after the expiry of the loan period) and as the jurists said that (mixing the deposits in a way that prevents distinguishing between them is considered a destruction according to the meaning, and the same applies to the mixing of usurped dirhams) (1). The jurists use destruction in their expressions for everything that leads to the disappearance of the situation, its loss, and its departure from the hands of its owner. And among what is evidenced for him is that if one of the two partners emancipates his share in a slave of a people, then he must share the share of his remaining partner, the value of justice.

He fined him and set him free, and they called this destruction (2). Likewise, if a person hunted an antelope and tied it up, and another came and untied it, this is considered a destruction because it has left the property of its owner. One of the jurists said: Untie the bound antelope usually causes it to perish and be destroyed, even if it is attached to the wilderness, so its condition becomes like the case of all other antelopes in the wilderness, so ownership in it is considered void. . Likewise, the death of the depositor without knowing of the deposit or pointing to it is considered a destruction of meaning, because when he neglected the deposit, he destroyed it meaning to prevent it from being a beneficiary in the right of the owner by ignorance, which is the interpretation of destruction and it becomes clear that the moral destruction in Islamic jurisprudence corresponds to the legal destruction in law Islamic jurisprudence precedes legal jurisprudence in the definition

And the interpretation and regulation of legal destruction, and we call on the Iraqi legislator to take into account the provisions of legal destruction stipulated in Islamic jurisprudence, which are the provisions of moral destruction.

Section two

Material doom

First: in jurisprudence:

What is meant by physical loss is the loss related to the essence of the thing sold and its material. Physical perishing is included in the previous decision of the Egyptian Court of Cassation when it defined perishing by saying (the disappearance of the thing sold from existence with its original constituents, in whole or in part).

This means that the sold thing becomes impossible in itself as a result of the thing losing its natural constituents. This is the same if the physical destruction is a result of one of the natural factors such as earthquakes, volcanoes, floods, torrents and locusts, or it is a result of human action such as burning, destroying or breaking the thing. If the thing perishes, such as the car burning, the house collapsing, or the

vessel sold being broken, then the fulfillment of the obligation becomes impossible, and it follows that the judgment rescinds the contract, rescinds it, or exempts it with reducing the thing according to whether the perishment is wholly or partly. The material loss that occurs by force majeure or a sudden accident is within the scope of the human will's interference in it

Inducing perishing, or in other words, the fact of will is what determines the nature of this perishing in terms of being due to human action, such as burning the goods, for example, or due to the act of nature, such as drowning the goods. Therefore, the seller's implementation of his obligation to deliver the sold thing to the buyer becomes absolutely impossible if The subject of the specific obligation perished by itself, as it would not exist at that time

As for Islamic jurisprudence, we have mentioned previously that it divides destruction into two types, the first of which is the real destruction, which is the destruction of a thing in its image and meaning, by removing it from being fit for use, and it is called real destruction because it either falls on the eye or on the benefit and on each. The eye or in the benefit, and this destruction in both of them is real, and the real destruction corresponds to the material destruction in the law.

on others) and he said (the guarantee must be provided if the following conditions are met) (1):

(1) If the damage is money, then it is not necessary to guarantee the destruction of the carcass, the blood, the skin of the carcass, and other things that are not money.

(2) If it is taqwa, then it is not obligatory to guarantee that the wine and pork will be destroyed by the Muslim, whether the one who destroyed it is a Muslim or a dhimmi.

(3) If the destroyer is one of those who are obligated to guarantee, then even if a person's property is destroyed by an animal, there is no guarantee for its owner because the act of the barren is tyrannical, and it was waste and there is no destruction on the part of its owner, so the guarantee is not obligatory.

(4) If there is a benefit in the obligation, then there is no guarantee for the Muslim of the war's money, nor for the warlord to destroy the Muslim's money in Dar Al-Harb. Likewise, there is no guarantee for the just person if the transgressor destroys, nor for the transgressor if he destroys the just's money, because there is no benefit in the obligation because it is not possible to reach the guarantee due to the lack of guardianship. .

(5) If the damage or damage is permanent, if the thing is returned to the state it was in, there is no guarantee (2).

Second: in law and judiciary:

As for the Iraqi civil law, a general framework has been established for this law that deals with the issue of material loss without providing practical examples of what is considered destruction in the text of Article (547) of the Iraqi Civil Law or distinguishing between its types from other texts. Despite the presence of these general texts in dealing with the issue of perishing, the Iraqi Civil Code provided an example of material perishing in Article (187) in which it says:

(1) If someone demolishes the property of another without a right, then the owner of the property has the option, if he wishes, to leave its ruins to the demolisher and include its value as a building with compensation for other damages, or if he wishes, to reduce its value based on the value of the ruins, and he himself takes the ruins and guarantees him the remaining value with compensation for other damages.

(2) But if the wrecker builds it as it was first and compensates for the other damages, he is released from the guarantee.

Another example is stipulated in Article (800/1) regarding renting agricultural land, which stipulates that (if the water overwhelmed the leased land and it swept away and it was not possible to cultivate it, or the water was cut off from it and it was not possible to irrigate it, and the lessee had no hand in that, then the rent is not due in the first place, and the lessee has the right to annul it. The lease) and it is noted that the Iraqi legislator mentioned two examples in these two texts, which are the demolition of the property and the submergence or submergence of the land, so it can no longer be cultivated. From this we note that the two examples provided in Article (187) and Article (800/1) related to physical loss do not contradict the general principle contained in Article (168) that

It states (if it is impossible for the person obligated by the contract to perform the obligation specifically, he shall be sentenced to compensation for failure to fulfill his obligation, unless it is proven that the impossibility of implementation arose from a foreign reason that he must have, and the ruling shall also be if the obligor delays the implementation of his obligation) and the text of Article (425) which states However,

(the obligation expires if the debtor proves that the judiciary has become impossible for him for a foreign reason that he has no hand in), which includes not mentioning examples of material loss or providing a definition for it.

As for the Transportation Law No. (80 of 1983), it has a clear position on material loss, as it did not provide practical examples of material loss that lead to exempting the debtor, who is the carrier, from liability resulting from damage to the thing or the passenger subject of the transportation contract, and this is clear from the texts of Articles (11, 40), 41, 46) of this law, as these articles did not mention a definition of physical loss, or applications for material loss, or other forms of material loss. As for Trade Law No. (30 of 1984), it did not provide an application or definition of physical loss, which is the position of the Iraqi legislator himself in the Transport Law, and this is evident through the commercial legislator's treatment of marine sales.

In spite of that, there are many examples of what is considered a material loss, through the rulings of the Court of Cassation. In many of its decisions, this court held that (the fire arising in the transported goods, which has no influence on the will of the carrier, is considered a sudden accident that cannot be expected and Then the carrier can get rid of his responsibility for the loss of the transported goods when this incident is proven.) In this decision, it is noted that the physical loss is represented in the burning of the goods, and thus a barrier between the carrier and his implementation of the transport contract for the destruction of the goods. In another decision, the Court of Cassation decided (exemption

The defendant from the wages of the quantity that has not been transferred from the beet crop due to the fact that this crop has been weakened and has not reached the minimum amount of the contracted quantity, and this weakness in the yield is considered a reason outside the control of the debtor that exempts him from the wages of transferring this contracted ownership).

It is clear from the foregoing that the Iraqi judiciary has applied the material loss contained in the law, as a reason for exempting the contracting seller from his responsibility for non-implementation.

The second requirement

Divide the destruction in terms of its generality and capacity

The loss is divided according to its generality and its capacity to include all or part of the sold item, into two types: total loss and partial loss:

First branch

Total doom

It must be said at the outset that the definition of total loss and its statement is of great importance, because the debtor is exempted from responsibility only if the loss is total. The subject matter of the contract agreed upon is absent, and the seller's obligation lacks a subject. The total loss may be physical, as if the sold goods were burned or drowned, and it may be legally, as if the subject matter of the contract was confiscated. Despite this, the Iraqi legislator was silent about the definition of perishment first, and secondly, he was silent about regulating the provisions of total perishment, and all that was stipulated by the Iraqi legislator in Article (547) is that (perishment is on

seller before delivery). There was no provision in the Iraqi civil law stating (total loss), as is the case in the transportation law, which explicitly distinguished between total loss and partial loss, as in the text of Article (49) of the transportation law. The total loss assumes that the object of performance is not divisible into parts, and in the sale contract, the object of the sale contract is represented in the specific thing. It should be indivisible by nature (1). An example of total destruction is the outbreak of a fire in the seller's warehouses that destroys all the materials and goods subject to the contract before they are fully delivered, as the owner of the factory becomes in a state of absolute impossibility with which he cannot follow up on the implementation of his contractual obligations in an absolute manner. The total depreciation is represented in non-obligations

Divisible by nature, an example of which is the seller's commitment in the house sale contract. So the buyer cannot oblige the seller to hand over the house, just as the buyer is not obligated to pay the price of the thing sold to the seller, because he has not received the thing sold yet? Because the parties to the sales contract

imposes corresponding obligations on it. But if the thing sold is completely destroyed, this makes the contract rescinded on its own due to the destruction of the subject matter of the contract, regardless of the manner in which the loss occurred. It may arise from a fire, damage or destruction, and some of the jurists go to that it requires the verification of total destruction in the destruction or destruction of the factory or facility that the comprehensive destruction of the reality and the means of production is verified. In the sense that it is required that the destruction of the facility be totally and completely destroyed, not partial destruction, and to this same meaning went another aspect of jurisprudence, as some of the jurists go that accidents such as floods or earthquakes are not considered as a foreign cause unless they result in total destruction (total destruction).) for each facility limited to parts of it. The Kuwaiti Supreme Court of Appeal ruled that (the perishment exempted from The reservation is only achieved by the absence of the entire shipped goods upon unloading the ship at the port of arrival, so it is impossible for the delivery to take place that proves the commitment of the consignee to make the reservation, but if the goods are partially destroyed or damaged, the consignee cannot release from his commitment to the reservation starting from the time the reservation is made In it is delivery to him and does not exempt him from this obligation by his mere refusal to receive part of the goods on the pretext of its damage or violation of the specifications, but the obligation to reserve remains on his shoulders and to take into account the time in which the rest of the goods were delivered to him). The goods sank (1), which is different from partial loss.

That the total destruction is the destruction that leads to the physical disappearance of the thing, and this is what the Court of Cassation decided when it ruled that (with the total destruction of the thing during the lease period, the contract is considered rescinded on its own) and ruled to dismiss the plaintiff's claim to claim the rent of the house (because this total loss led to rescission The contract) and the French judiciary goes to stipulate the total destruction of the subject of the contract so that it can be considered a total impossibility, which results in the termination of the contract. If, for example, the loss is limited to some of the assets of the factory and does not cover the loss of the entire site or the destruction of all means of production, then in this case it is not considered a total impossibility. The same applies to a fire whose effect is limited to the facility. The French judiciary has decided On the other hand, fire is considered a force majeure as long as it leads to the complete destruction of the industrial facility, as the business owner becomes in a state of absolute impossibility with which he cannot absolutely continue the implementation of his contractual obligations. As for the English judiciary, it decided in one of the cases whose facts are summarized in that one of the contractors pledged to the owner to install equipment on this building. The judgment stated that as long as the building was completely demolished through no fault of any of the parties, both parties are exempt from their obligations and none of them is a cause for action, even if the emergency fire did not affect the property of the defendant, but rather destroyed the part of the work that the plaintiff accomplished, so it is the duty of the plaintiff to restore Do that part in order to complete all agreed work

However, in view of the incident that occurred, the plaintiff is not entitled to retain anything in exchange for installing that part of the equipment that was damaged as a result of the collapse of the building as long as the completion of all the work agreed upon was not completed. Referring to the Iraqi civil law, we find that the Iraqi legislator stipulated in Article (336) that The criteria for indivisibility of commitment, as they stipulate the following (the commitment is indivisible:

(1) If it comes to a place that does not accept division by nature, it will be divided.

(2- If it is clear from the purpose that the two contracting parties aimed at that the obligation may not be executed by division, or if the two contracting parties went to that).

As for Paragraph (First) of Article (330) of the Trade Law, it stipulates that (if the goods are homologous and are completely destroyed, then the seller remains to ship goods of the type that he had contracted with the buyer. But if the goods are specific money in particular, then the sale is rescinded. automatically). As for the transportation law, there are many texts that differentiate between total and partial loss without setting a criterion to differentiate between them or setting a definition for total and partial loss.

As for the Egyptian Civil Code, a text was quoted in Article (300) (provided that the obligation is indivisible:

(A) If it came to a place that does not accept its nature to be divided.

(b) If it appears from the purpose that the two contracting parties intended that the obligation may not be implemented in division, or if the laws deviate from it. wayulahiz ann almusharie aleiraqia walmisria yatafiqan ealaa almaeayir alati tuhadid eadam qabiliat alshay' lilainqisam.

altaerif almukhtar :- tanusu almada (336) min alqanun almadanii aleiraqii walmada (330) min qanun altijarat raqm (40) lisanat 1983, walmada (300) min alqanun almadanii almisrii walqararat alqadayiyat alsaadirat ean almahakim alfaransiat walmisriat waleiraqiat yumkin taerif alhalak alkuliyyi bi'anah (alhalak aladhi yataratab ealayh aineidam alshay' madiyahana bizawalih , 'aw qanuniana bizawal manfaatihi) . alfare althaani alhalak aljuzyiyu mafhumuhu:

It is noted that the Iraqi and Egyptian legislators agree on the criteria that determine the indivisibility of something.

The chosen definition:

Article (336) of the Iraqi Civil Code, Article (330) of Trade Law No. (40) of 1983, and Article (300) of the Egyptian Civil Code and judicial decisions issued by French, Egyptian and Iraqi courts stipulate that total loss can be defined as (loss that results in the absence of The thing is materially with its disappearance, or legally with the disappearance of its benefit).

Section two

Partial perish

Its concept:

Partial loss is one of the most important types of loss in which legal legislation and judicial courts differ in regulating its rulings, as it is not related to all of the sold property, but to a part of it. In spite of that, the Iraqi legislator did not deal with partial loss except by a single text, which is the text of the first paragraph of Article (547) and in the last part of it, as it says (..... If the value of the thing sold decreases before delivery due to damage, then the buyer has the choice between rescinding The contract and between its survival with a decrease in the price). The Egyptian legislator regulated it in Article (438) when it stated in it (If the value of the thing sold decreases before delivery due to damage that occurred to him, the purchaser may either request the rescission of the sale if the decrease is serious.....). And after the Iraqi legislator dealt with the total destruction, the Egyptian legislator stipulated it after regulating the destruction in Article (437). It means (decrease in value).

The sale) contained in the Iraqi and Egyptian texts is the decrease in the value of the physical sale that occurs as a result of damage to the thing sold, or due to the destruction of a part of it, and not the decrease in value due to any of the economic reasons. As the decline in value is not considered a partial destruction of the sale.

Partial loss, in contrast to total loss, is assumed to occur on part of the sale, i.e. on a part of it, and not on the entire thing sold. Also, the partial loss may be physical, as if part of the sold goods were burned or drowned, and it may be legal, as if a decision was issued by the administrative authority prohibiting dealing with part of the sold goods. Some of the jurists are of the view that the (damage) mentioned in the laws is intended to be partial destruction. Therefore, the legislator expresses it with the word "damage" next to "destruction." Moreover, partial destruction has provisions that are specific to it and are unique to it, and there is no equivalent to it in total destruction (1).

And within the framework of the valid Trade Law No. (30) of 1984, it is noted that the legislator did not deal with partial loss except with a single text, which is the text of Article (330/Second), as it says in it (if the goods were partially destroyed or damaged, and that did not result in the loss of the intended purpose The buyer is obligated to take delivery of it, provided that a decrease in the price is commensurate with the loss or damage to the goods, according to what the experts estimate. It is clear from this text that the Iraqi legislator in the Trade Law distinguishes between two types of partial loss:

The first: It is partial destruction that leads to missing the intended purpose of the sale.

The second: It is partial destruction that does not lead to the loss of the intended purpose of the sale.

The criterion according to which a distinction is made between minor and partial loss is that the partial loss results in the loss of the intended purpose of the sale. But what is meant by (missing the intended purpose of the sale) and what is meant by (the intended purpose) mentioned in the previous text, and how is it known that partial destruction leads or does not lead to the loss of its intended purpose, and what is meant by partial destruction mentioned in the text? The Iraqi legislator did not answer this issue, and it seems that the Iraqi legislator left the issue of determining what is considered (intended purpose) to the will of the contracting parties. but regarding

For partial destruction in the Transportation Law No. (80) for the year 1983 in force, we find that partial destruction was mentioned in many of its texts, but the legislator did not specify what is meant by partial destruction and did not indicate the criterion for distinguishing between it and total destruction. This is noted through many texts of the law. Partial destruction was mentioned in Article (46/Second), which stipulated that (every condition is invalidated It stipulates exempting the carrier from responsibility for the loss or damage of the thing in whole or in part, and also invalidates every condition that exempts the carrier from this liability if it arose from the actions of his subordinates. Sets a criterion for distinguishing partial loss from all

From total loss and damage Partial loss was mentioned in Article (49) which stipulates that (it is permissible to determine the liability of the carrier for the destruction of the thing wholly or in part, or its damage, or the delay in its delivery when carrying out the transport operations that take place between Iraq and abroad in accordance with the provisions of this law, and it is not permissible for him To adhere to the limitation of responsibility if it is proved that fraud or gross error has been committed by him or his subordinates. This text is like the previous one, as it mentioned the partial destruction in addition to the total destruction, damage and delay. The question remains, what is the criterion by which partial loss is distinguished from damage? The answer to this question It is necessary to determine the nature of each of the partial loss and damage separately, which seems to be incapable of the Iraqi legislator and therefore remained silent once again on the answer to this question.

Partial loss was mentioned in Article (69/First), which stipulates that (the consignee must confirm his reservation on the condition of the thing if he finds it damaged or partially destroyed, and notify the carrier of that in writing within thirty days from the date of its actual receipt). In this text, the legislator equated partial loss with damage and gave Both have the same ruling. Partial loss contained in this text

It is similar to the partial loss contained in the decision of the Kuwaiti Supreme Court of Appeal, in which it was stated (if the goods suffered partial loss or damage, then the consignee cannot release from his obligation to reserve as of the time of delivery to him). He must tighten it.

What is important in the foregoing is that the nature of the partial loss is the opposite of the case in the case of the total destruction, as it remains for the debtor to implement part of his obligations in contrast to the situation in the case of total loss, and the debtor in light of the partial loss is obligated to implement his obligations that were not affected by the loss, so he must implement what can be implemented If the buyer so desires, but this implementation may not have any benefit, if the partial loss is serious, then there is a benefit from the property, and the assessment of whether the partial loss is serious or not is due to the judgment of the subject matter judge (1).

Partial loss can be defined as (the physical or legal disappearance of part of the sold property).

Conclusion :-

After we finished our tagged research (the provisions of the destruction of the sold before delivery and its implications). We summarize the most important results we have reached in the following points:

The issue of bearing the responsibility does not arise unless the loss is due to force majeure in particular, and not due to a foreign cause in general. That is because the foreign cause is either a force majeure, or the act of the creditor, or the act of a third party, as previously explained. The loss due to the act of the creditor entails that the purchaser rectify his mistake and bear his responsibility because of his destruction of the thing sold, but if the destruction was due to the act of a third party, this results in the third party taking a guarantee. The sold perishable because the sold perished by doing it. And if the destruction was due to the debtor's actions, the debtor bears his responsibility because he caused the destruction of the sold by his actions. But when the thing sold is destroyed by force majeure, then the question arises about the party that bears the responsibility of the loss and its consequences.

The debtor shall not be liable if he proves that the thing sold has perished because of a foreign cause that he had no hand in. If the creditor claims that the thing sold perished due to the debtor's action, the debtor can get rid of this responsibility if he proves that the thing sold perished because of a foreign cause. In other words, to prove the three pillars of liability, which are action, damage, and the causal relationship between them. That the legal loss has an independent and separate existence from the material loss, just as the material loss can be wholly or in part, the same is the case with regard to the legal loss, and it can occur in whole or in part. And material destruction can also occur and the issue of bearing the responsibility arises because of it. The legal destruction occurs and the issue of bearing the responsibility arises because of it. Most laws are

silent on defining perishing in general, and legal perishing in particular, or setting a specific criterion to distinguish between them. These legislations were silent on the definition of total or partial loss and did not set a criterion to distinguish between them, and court decisions were accordingly confused and contradictory. At a time when the judiciary recognizes certain cases as falling within the legal perdition, we do not find support for the judiciary's jurisprudence in the law. As for jurisprudence, it was divided on this subject into two parts. The first narrows the concept of doom by limiting it to its physical form only, while the second section expands the concept of doom to include legal doom. However, this approach limits legal doom to one image, which is the image of delay in delivery. The jurisprudence is that Islamic jurisprudence precedes the recognition of legal destruction and we find This is clear from the opinions of Muslim jurists who considered that the dissolution of the antelope's restriction and the death of the seller without indicating the location of the sold goods and the mixing of usurped dirhams with others, all these cases are images of legal destruction, and we find the position of Islamic jurisprudence more clearly when the jurists defined destruction and mentioned that destruction is of two types The second: Destruction is a meaning only, and it is a destruction of the thing in a sense, not in reality, according to the expression of the jurists.

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