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THE PRE-CONTRACTUAL DUTY OF DISCLOSURE IN THE PALESTINIAN CIVIL CODE DRAFT AND ITS ROLE IN MAINTAINING ECONOMIC CONTRACTUAL EQUILIBRIUM

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ABSTRACT

Many recent legislations and international principles tend to apply the pre-contractual duty of disclosure as one of the most substantial principles governing the pre-contracting phase, such as Article 1112-1 of the Amended French Civil Code of 2016, Article 1337 of the Amended Italian Civil Code and Article 13 of Chapter of the Common European Sales Law, etc. However, the Palestinian legislature has ignored enacting legal provisions imposing the pre-contractual duty of disclosure. In this regard, this paper suggests

orientations for the formulation of the provisions of the pre-contractual duty of disclosure in the Palestinian Civil Code Draft (PDCC). To do so, a comparative analytical approach with the French Civil Code is used to illustrate the Palestinian legislative deficiencies and the urgent need to legislate a legal article which obligates the negotiating party to disclose any substantial information for the satisfaction of the other party. As such, the contractual equilibrium entails that the pre-contractual duty of disclosure has its own independent essence from all the theories that the jurisprudence adopted as a legal basis for this duty.

Keywords: Duty of disclosure, pre-contractual obligations, Palestinian Civil Code Draft, economic contractual equilibrium, negotiation phase.

INTRODUCTION

There is no doubt that the negotiating party is always in favour of taking into account all the information, data, acquaintances and circumstances surrounding the negotiation process. Such is so in order for its *will* to be formed without any defects; thus, avoiding the nullity of the contract. Therefore, part of the jurisprudence says that the obligation of disclosure in the negotiations phase has a fundamental role in complementing the satisfaction defects theory, so as to achieve sufficient legal protection for the contracting parties in the negotiation phase.¹ Others, however, say it is necessary to admit the existence of a disclosure obligation in the negotiations phase to fill the legislative deficiencies in the negotiation phase.²

However, the importance of the duty of disclosure is increasing over time. This came to be as a result of advanced knowledge, technological progress, the consequent spread of risk and the widening gap between the negotiating parties with respect to possession of knowledge. In addition to this, neoteric contracts are no longer simple immediate

¹ Ismail, S. M. (2009). *Legal protection methods for electronic commerce transactions*. Damascus, Syria: Al-Halabi Legal Publications. 362.

² Saleh, A. A. (2011). *Negotiations in international commercial contracts*. Algeria, Algeria: Dar Houma. 413.

contracts, concluded by meeting an offer with an acceptance. They, rather contrastively, have become complicated contracts in terms of their conclusion and the circumstances surrounding them in terms of the contracting parties and the subjects of the contract. As such, these deals have come to be focused on very sophisticated techniques involving both professional and non-professional parties.

Thus, the duty of disclosure at the pre-contracting phase must be recognized as a major obligation imposed on all parties in order to avoid a situation of massive disparity in contractual relationships with regard to the necessary information to be provided for concluding the contract in the proper way. This requires us to study the concept of the duty of disclosure, its function in maintaining contractual balance between the contracting parties and its legal nature.

DEFINITION OF THE DUTY OF DISCLOSURE IN THE PRE-CONTRACTING PHASE

The duty of disclosure in the pre-contracting phase is rooted in ancient laws, such as Greek law and Roman law. In Greek law, Plato's literary texts were found enumerating the diseases that would give the buyer the right to terminate the contract if the seller conceals or does not inform the buyer about these diseases. Besides that, a special leaflet was found containing a text requiring the seller to provide some information that assists the buyer to make good use of the slaves by clarifying their qualities and stating their defects. However, Greek law distinguishes between the case of the seller's knowledge and that of his unawareness of these defects. Whenever the seller knew of these defects and concealed them, the seller was required to pay double the price paid by the buyer, and was only to refund the price when he was unaware of these defects.³

Additionally, in a similar fashion, Roman law imposed a duty on the seller to inform the buyer of the status of the property, so that the seller is liable for the defects of the sold property in two cases: First, the seller deliberately conceals the defects from the buyer. Second, the seller offers the property and describes it with descriptions that are not

³ *Ibid.*, 415.

actually existent. In both cases, the buyer has the right to sue the seller for damages caused by this sale. Furthermore, in the sale of slaves and animals, the provisions of the Law of the Twelve Tables included an obligation on the seller's part to inform the buyer and to reveal any defects in the slaves and animals, by demonstrating a sign indicating to the buyer what defects may be found in the slaves or animals.⁴

As stated earlier, however, the duty of disclosure has recently become one of the matters of interest to jurists, although no one can deny the role of the judiciary in establishing the duty of disclosure. Therefore, the French jurist, Juglart, is one of the first jurists who mentioned the matter of the duty of disclosure in his book titled: *The Obligation to Provide Information in Contracts*,⁵ through the extrapolation of legal texts and judicial decisions.⁶

Thus, a part of the jurists has defined the duty of disclosure as: “a pre-contracting obligation concerning a party's obligation to provide the other contracting party during the negotiation phase with the necessary information to reach its complete satisfaction and full awareness of the contract's details owing to certain circumstances and conditions relating to the contract, its parties or the subject of the contract and any other factors which may render either of the contracting parties to a state of partial knowledge of the contract or force one of the parties to offer the other party its confidence which, based on such considerations, commits to providing the other party

⁴ See Silver, M. (2016). At the base of Rome's peculium economy. *Fundamina*, 22(1), 79.

⁵ The title of this book in French is “L'obligation de renseignements dans les contrats”. Legrand, P. (1991). Information in formation of contracts: Civilian perspective. *Canadian Business Law Journal*, 19, 331. Giliker, P. (2005). Unifying European contract law: Identifying a European Pre-contractual obligation to inform. *Cambridge Yearbook of European Legal Studies*, 7, 146. Musy, A. M. (2001). The good faith principle in contract law and the pre-contractual duty to disclose: Comparative analysis of new differences in legal cultures. *Global Jurist*, 1(1), 14.

⁶ Pop, L. (2017). Contractual solidarism and the obligations of the parties during the performance of the agreeemetns. *Romanian Review of Private Law*, (1), 334.

with the required information.”⁷ However, others defined it as: “a kind of obligation through which one of the contracting parties informs the other of the benefits and/or risks of a particular contract and exposes the conditions surrounding the contracting process so that the other party is fully aware of that contract”.⁸

Based on the above definitions we conclude that:

1. The duty of disclosure is a pre-contracting obligation,⁹ which arises and is executed at a pre-contractual phase.¹⁰
2. The debtor of this obligation is not required to inform the creditor of all the information he knows about the contract he intends to enter into, but he is obliged to provide substantial information that would benefit the creditor in concluding the contract, and which the creditor cannot obtain through his own sources.¹¹
3. The debtor of this obligation must investigate the accuracy and truthfulness of the information provided to his creditor in connection with the contract he intends to conclude.¹²

⁷ See Abdel Al-baki, O. (2008). *Contractual protection of the consumer*. Alexandria, Egypt: Munsha'at Almaearif. 189. Si Yousef, Z. (2009). *Civil liability of the product*. Algeria, Algeria: Dar Houma. 137.

⁸ See Ibrahim, A. (2007). *Consumer protection*. Beirut, Lebanon: Al-Halabi Legal Publications. 367.

⁹ Jing, Z. (2017). Remedies for breach of the Ppre-contract duty of disclosure in Chinese insurance law. *Connecticut Insurance Law Journal*, 23(2), 329.

¹⁰ Li, X. (2017). The legal status of Ppre Ccontractual liability: Contrasting responses from German and English law. *National Taiwan University Law Review*, 12(1), 138-139.

¹¹ See légifrance, le service public de la diffusion du droit, French Court of Cassation, civil room 2, public sitting of Thursday 12 July 2018, no of appeal: 17-22908. <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechExpJuriJudi&idTexte=JURITEXT000037384123&fastReqId=262703431&fastPos=38> Légifrance, le service public de la diffusion du droit, French Court of Cassation, civil room 1, public sitting of Wednesday 11 July 2018, no of appeal: 16-15643 16-15687. <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechExpJuriJudi&idTexte=JURITEXT000037384095&fastReqId=262703431&fastPos=39>

¹² See légifrance, le service public de la diffusion du droit, French Court of Cassation, commercial room, public sitting of Wednesday 26

Otherwise, he will be deemed to have violated this obligation in a manner that requires liability and compensation.¹³

4. The obligation of disclosure is a general pre-contracting obligation that covers all types of contracts when the conditions of disclosure exist.¹⁴ They do not concern the type of contracts or a particular contract, but are imposed upon one of the parties of the intended contract to be concluded or both regardless of the type of contract as long as there is substantial information related to the contract, known to one of the parties while the other party's unawareness of this information is a legitimate unawareness.¹⁵
5. The term *obligation of disclosure* is a broad meaningful term, which includes in its meaning the data and information provided by the debtor, as well as the meaning of counselling or advice when the obligation of information and disclosure given to the creditor has a significant effect in directing it to a specific decision regarding the contract.¹⁶ In addition, it also

September 2018, no of appeal: 16-17989. <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechExpJuriJudi&idTexte=JURITEXT000037474085&fastReqId=262703431&fastPos=29> Légifrance, le service public de la diffusion du droit, French Court of Cassation, civil room 1, public sitting of Thursday 3 May 2018, no of appeal: 17-10520. <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechExpJuriJudi&idTexte=JURITEXT000036930050&fastReqId=262703431&fastPos=62>

¹³ See légifrance, le service public de la diffusion du droit, French Court of Cassation, civil room 3, public sitting of Thursday 6 September 2018, no of appeal: 17-21096. <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechExpJuriJudi&idTexte=JURITEXT000037450680&fastReqId=262703431&fastPos=33> visited on 07/11/2018.

¹⁴ See Ahmed, J. K. (2003). *Obligation to inform in pre-contracting*. Cairo, Egypt: Dar Alnahdah Alearabiah. 82.

¹⁵ See légifrance, le service public de la diffusion du droit, French Court of Cassation, commercial room, public sitting of Wednesday 7 February 2018, no of appeal: 16-12808 16-24004. <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechExpJuriJudi&idTexte=JURITEXT000036670407&fastReqId=1497836409&fastPos=112>

¹⁶ See légifrance, le service public de la diffusion du droit, French Court of Cassation, civil room 3, public sitting of Thursday 29 March 2018, no of appeal: 17-15549. <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechExpJuriJudi&idTexte=JURITEXT000036780152&fastReqId=1669902453&fastPos=78>

includes the meaning of warning or drawing attention when the obligation of disclosure contains some information about something that is risky.¹⁷

JUSTIFICATIONS FOR ENACTING THE DUTY OF DISCLOSURE AT THE PRE-CONTRACTING PHASE

Lacking parity in knowledge between the parties to the negotiations is considered the main justification for obliging the negotiating parties to a general duty of disclosure, given the differences in the standards of knowledge and experience among the negotiators. Therefore, enacting the duty of disclosure in a legal article is the best way to re-equate knowledge between the negotiators and to ensure the equilibrium of contractual relations from their inception.

Re-equating the Knowledge between the Negotiators

Economic, industrial and commercial developments have led to a noteworthy increase in the knowledge disparity between the parties to the negotiations, proving it difficult for the ordinary person to know of the accurate technical details of the goods becoming subjects of contracts. Therefore, the negotiator is incapable of identifying the circumstances surrounding contracting and negotiations, especially in terms of the appropriateness of the goods to their legitimate desires or in terms of the dangers of the commodities in use. For example, scientific progress has been credited with creating mechanisms and

¹⁷ See Mohamed, B. (2005). *Duty to advice in the scope of services contracts*. Cairo, Egypt: Dar Al-Fajr. 10-12. In this regard, the French Court of Cassation stated that: “the notary shall inform the parties of the scope, effects and risks, in particular regarding the tax consequences...”. Légifrance, le service public de la diffusion du droit, French Court of Cassation, civil room 1, public sitting of Wednesday 24 October 2018, no of appeal: 17-16733. <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechExpJuriJudi&idTexte=JURITEXT000037556197&fastReqId=339909876&fastPos=1> Légifrance, le service public de la diffusion du droit, French Court of Cassation, civil room 3, public sitting of Thursday 18 October 2018, no of appeal: 17-25814. <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechExpJuriJudi&idTexte=JURITEXT000037536351&fastReqId=1858488907&fastPos=20>

methods of production and distribution, diversifying exchanges and products and their different usages, and even developing services in an unprecedented manner, which make the ordinary person accept the purchase without having knowledge of the products that he acquired, not differentiating between what is necessary or suitable for his desires and what is not.¹⁸

Another example is that the rapidity of the conclusion of contracts and transactions leads to an opportunity being missed by the simple negotiator in taking the time needed to know all the substantial information before concluding the contract, especially as transactions are made now by means of modern communications.¹⁹

In addition, the legislature's intervention in regulating commercial relations in a manner consistent with the rapid development of the economic and industrial fields has led to the large number of legislative interventions of amendments and cancellations that prevent the knowledge of what they are or knowledge of their contents for the ordinary person.²⁰ All of the above have led to the existence of a kind of inequality between negotiators in the field of information related to the contract, which led some to say that the adhesion took a new form for a new subject, which is the subordination of the unaware negotiator to the other knowledgeable negotiator.²¹

Regarding these, the Palestinian legislature has imposed the duty of disclosure in many statutes. For example, the sixth paragraph of Article 3 of Law No. (21) of 2005 concerning consumer protection states: "the consumer shall enjoy the following rights: ... 6- to access correct information about the products which he purchases or uses so that he can exercise his right to a free and informed choice from among all the goods and services supplied in the market".²² Furthermore,

¹⁸ See Si Yousef, *supra* note 7 at 151.

¹⁹ See Simonovic, I. (2017). Duty to inform and legal consequences of breaching this duty. *Collection of Papers, Faculty of Law, Nis*, 76, 412.

²⁰ See Assali, A. (2015). The contractual balance at the conclusion of the contract (Unpublished doctoral dissertation). Department of Law, University of Algeria 1, Algeria, 235.

²¹ See Abdel Al-baki, *supra* note 7 at 201.

²² In the same context, Article 9 and Article 12 of the Palestinian Law No. (21) of 2005 concerning consumer protection state respectively: "*each product, the use of which entails any risk, must be labelled or be enclosed*

the Palestinian legislature imposed on the insured party the duty of disclosure.²³ However, if the insured party breaches this duty, the insurer may request annulment of the contract.²⁴

However, the proponents of the principle of will autonomy still believe that the nature of dealing states that the party is entirely freed of any obligation,²⁵ in the absence of any special provision in the law or of an agreement by the parties to the contrary.²⁶ In this sense, a person

with a warning which states the facet of risk and the best method of use, as well as the manner of treatment in the event a damage arises from use”, “each person who promotes and advertises products must observe that his advertisements are congruent with the real specifications of the advertised products. Such advertisements may not entail a mischief or deception of the consumer”. See also Article 12, 17 and 21 of the Palestinian Law No. (21) of 2005 Concerning Consumer Protection, (hereinafter ‘PCPL’).

²³ Article 15 of the Palestinian Law of Insurance No. 20 of 2005, states: “the Insured shall adhere to: 1- pay the amounts agreed upon on the date defined as such in the contract. 2- declare at the time of the conclusion of the contract all of the information which the insurer requests to know in order to assess the risks which it assumes. 3- notify the insurer of necessary matters which lead to the increase of such risks during the period of the contract”, (hereinafter ‘PIL’).

²⁴ The first paragraph of Article 16 of the PIL, states: “in the event the insured conceals under an ill intention a matter or submits an incorrect statement in a manner that reduces the relevance of the risk insured against or leads to the change of its subject matter or in the event he or she violates by means of fraud of the satisfaction of what he or she has pledged to do, the insurer shall be entitled to request the annulment of the contract. It may also demand the payment of the due premiums prior to such request”.

²⁵ This rule is based on what is stated in the Islamic jurisprudence and the provisions of the Al-Majallah Al-Ahkam Al-Adliyyah, (The Ottoman Courts Manual). Article 8 states: “*freedom from liability is a fundamental principle. Therefore, if one person destroys the property of another, and a dispute arises as to the amount thereof, the statement of the person causing such destruction shall be heard, and the onus of the proof as to any amount in excess thereof is upon the owner of such property*”.

²⁶ On this basis, the Palestinian legislature establishes a general rule in Article 2 of the Palestinian Law of Evidence in Civil and Commercial Matters No. 4 of 2001, (hereinafter ‘PECCML’), which states: “*the burden of proving an obligation lies on the creditor and that of proving its discharge on the debtor*”.

cannot be compelled to disclose information concerning a contract that has not yet been concluded since the contract, as a general rule, is also binding on its parties only after their agreement.²⁷ Moreover, a lot of legislations and regulations have not imposed any obligation to disclose to one of the parties or both of them.²⁸

In addition, they believe that the negotiator has the right to remain silent in the pre-contracting phase, and at this phase it is not permissible to oblige the negotiator to submit any information related to the contract; however, the only responsibility that may be taken in this regard is no more than a moral responsibility that does not amount to the legal rules which are considered binding.²⁹ Nonetheless, the party who wants to contract with others can inquire about the information that concerns it by its own means. Nevertheless, if its own means could not provide this, it may request annulment of the contract if its will was defected -by one of the will defects,³⁰ or it can request for the guaranteeing of concealed defects.³¹

In response to these beliefs, we can say that the international trend to affirm the duty of disclosure in many legislations and regulations such as the laws of consumer protection, insurance, banks, trade, and labour did not originate out of a vacuum, but came to address an urgent need and to provide legal protection for these parties.³² It is clear from this that the justifications for enacting the duty of disclosure in the practical aspect are unassailable to the attempts to refute them, as they are based on realistic considerations which can be summed up in the cognitive imbalance in owning the substantial details of the contract and the interests in completing the contract.

²⁷ See Ahmed, *supra note* 14 at 113.

²⁸ Such as, the French Civil Code of 1804, Egyptian Civil Code of 1947 and the Jordanian Civil Code of 1976.

²⁹ See Ahmed, *supra note* 14 at 113.

³⁰ See the second paragraph of Article 124 of the Palestinian Civil Code Draft, (hereinafter 'PDCC').

³¹ See Article 468 of the PDCC.

³² Such as, the UNIDROIT Principles of International Commercial Contracts, United Nations Convention on Contracts for the International Sale of Goods of 1980, European Union Directives and the new French Civil Code, which were created by Decree N 131-2016 of 10 February 2016, (hereinafter 'NFCC').

Retaining Economic Contractual Equilibrium

The inequality between the contracting parties or the negotiators is an existing matter and is necessarily present by virtue of the inevitable difference between persons in mental abilities and natural capacities, but this variance has increased and widened in a manner that has created a different reality in most aspects from the reality when the old regulations were enacted.³³

Therefore, the sense of inadequacy of the general rules in the contract's theory for the regulation of the new reality is what led to the legislature's intervention in some special legislations, as mentioned above, for enacting the duty of disclosure as a legal obligation, aiming to rebalance the inequality of knowledge between the parties.³⁴ Hence, the pre-contractual duty of disclosure is the preferable and fundamental means to be followed in restoring the equality of knowledge equilibrium within the general theory of contracts in general.³⁵

LEGAL BASIS FOR THE DUTY OF DISCLOSURE AT THE PHASE OF PRE-CONTRACTING

The positions of the comparative legislations on the existence of the duty of disclosure in the pre-contracting phase vary according to the differences between them regarding the recognition of the principle of good faith at this phase. Although the English legislature did not recognise the duty of disclosure as a general principle binding the parties to the contract, this rule has some exceptions. For example,

³³ Badr, A. O. (2005). *Consumer protection in E-contracting*. Alexandria, Egypt: Dar Al-Jamieat Al-Jadidah. 90.

³⁴ See the sixth paragraph of Article 3, Article 9 and Article 12 of the PCPL and Article 15 of the PIL.

³⁵ See Wilcox, J. C. (2011). Comply-and-explain: Should directors have the duty to inform. *Law and Contemporary Problems*, 74(1), 149-150. Millard, K. D. (2005). The trustee's duty to inform and report under the Uniform Trust Code. *Real Property, Probate and Trust Journal*, 40(2), 375. Al-Mahdi, M. N. (2009). *The professional contracting party, its concept, obligations and liability, A comparative study*. Cairo, Egypt: Dar Alnahdah Alearabiah. 47-48.

article 28 of the Partnership Act of 1890 states: “partners are bound to render true accounts and full information of all things affecting the partnership to any partner or his/her legal representatives”.³⁶ Furthermore, the English legislature imposes the obligation of disclosure through legal articles in many acts, such as the Consumer Protection Act and the Insurance Act.³⁷

The French legislature has regulated the duty of disclosure in many special laws such as the consumer protection law,³⁸ the labour law,³⁹ and the trade law;⁴⁰ however, the duty of disclosure has only been enacted as a general rule recently in article 1112-1 of the new French Civil Code, which was created by Decree N 131-2016 of 10 February 2016 (NFCC). Article 1112-1 states: “the party who knows information which is of decisive importance for the consent of the other, must inform him of it where the latter legitimately does not know the information or relies on the contracting party...”.⁴¹ Nevertheless, the reason for the imposition of the duty of disclosure under the new text is that the French legislature seeks to establish balanced contractual relations, since the contractual imbalance is primarily due to an imbalance of knowledge between the parties which requires that the party possessing fundamental information affecting the consent of the

³⁶ See Teplitsky, M. (2002). Failure to account for benefit: Section 29 of the Ontario Partnership Act, *Rochweg v. Truster. Advocates' Quarterly*, 26(3), 340. DeMott, D. A. (2001). Transatlantic perspectives on partnership law: Risk and instability. *Journal of Corporation Law*, 26(4), 893.

³⁷ See Suleiman, A. S. (2008). *Good faith in concluding contracts*. Amman, Jordan: Dar Dijla. 26.

³⁸ See Article L 111-1 of the French Consumer Code. Ritaine, E. (2011). Reform of contract law between tradition and modernity examples of legislative practice in Europe. *Romanian Review of Private Law*, 2011(1), 203.

³⁹ See Article L3171-1 of the French Labour Code. Vericel, M. (2016). The labor inspectorate in France and the protection of wages. *Comparative Labor Law & Policy Journal*, 37(2), 312.

⁴⁰ See Article L141-1 of the French Trade Code. Wallace, P. E. (2002). The globalization of corporate governance: Shareholder protection, hostile takeovers and the evolving corporate environment in France. *Connecticut Journal of International Law*, 18(1), 35.

⁴¹ In this regard, see Article 1337 of the Italian Civil Code (approved by Royal Decree of March 16, 1942, No. 262, and as amended by Decree of December 7, 2016, No. 291).

other party be obliged to disclose such information so that that party is fully aware of that contract.⁴²

Although the French judiciary has established the duty of disclosure previously in the contracts theory, the explicit provision of this obligation in the law is important in several respects. First, the unification of the legal bases for the duty of disclosure, without referring to many legal theories and principles, raises many difficulties. Second, the imposition of the duty of disclosure by a legal article in the general theory of contracts extends the scope of application of this duty to all contracts without distinction.⁴³ Third, is standardising the penalty to be imposed in case of violation of the duty of disclosure.⁴⁴ Fourth, the duty of disclosure in the new article of the NFCC is considered a public order rule, which the parties cannot restrict, exclude or breach.⁴⁵

However, in the same context, states and international legal jurists are trying to unify their efforts to enforce the duty of disclosure in the pre-contracting phase through concluding international conventions or establishing international principles; for example the United Nations Convention on Contracts for the International Sale of Goods of 1980 did not include an explicit legal provision implying a duty of disclosure which raised a legal debate about the existence of such a duty.⁴⁶

Nevertheless, part of the jurisprudence considers that the duty of disclosure is one of the obligations imposed by the Convention on the parties, since it is a practice to which they are accustomed. It was stated either explicitly or implicitly depending on what is stipulated in accordance with Article 9 of the United Nations Convention on

⁴² See Abdel Al-baki, *supra note 7* at 201.

⁴³ See Article 1112-1 of the NFCC.

⁴⁴ See Article 1112-1 of the NFCC.

⁴⁵ Article 1112-1 of the NFCC states: "...the parties may neither limit nor exclude this duty".

⁴⁶ Spagnolo, L. (2013). Law wars: Australian Contract Law Reform vs. CISG vs. CESL. *Villanova Law Review*, 58(4), 640. Johnson, W. P. (2013). Analysis of incoterms as ssage under Article 9 of the CISG. *University of Pennsylvania Journal of International Law*, 35(2), 401. Schroeter, U. G. (2013). Defining theBborders of Uniform International Contract Law: The CISG and remedies for innocent, negligent, or fraudulent misrepresentation. *Villanova Law Review*, 58(4), 576.

Contracts for the International Sale of Goods of 1980.⁴⁷ In addition, the UNIDROIT Principles of International Commercial Contracts (PICC) do not stipulate an explicit legal provision obliging the parties with the duty of disclosure in the pre-contractual phase. However, on the basis of Article 7/1 of PICC, each party should inform the other party of the necessary information to reach its complete satisfaction and full awareness of the contract's details,⁴⁸ in accordance with the requirements of good faith and fair dealings.⁴⁹

The provisions of the PDCC is devoid of any provisions governing the contractual negotiation phase or any provisions imposing the duty of disclosure in this phase. In light of this, the jurisprudence is based on many other theories and legal principles to say that there is a duty of disclosure in the pre-contracting phase, the most important of which are the following:

Theory of Will Defects as a Legal Basis

Part of the jurisprudence based their opinion on the theory of the will defects,⁵⁰ especially the defect of fraud when the Palestinian legislature stated: "intentional concealment on the part of one of the parties as to a fact or as to the accompanying circumstances constitutes fraudulent misrepresentation if it can be shown that the contract would not have been concluded by the other party had he had knowledge thereof".⁵¹

⁴⁷ DiMatteo, L. A.; Dhooge, L.; Greene, S.; Maurer, V. (2004). The interpretive turn in international sales law: An analysis of fifteen years of CISG jurisprudence. *Northwestern Journal of International Law & Business*, 24(2), 383-384. Jenkins, S. (2013). Rejection, revocation of acceptance, and avoidance: Comparative assessment of UCC and CISG goods oriented remedies. *Minnesota Journal of International Law*, 22(1), 192.

⁴⁸ Article 1-7 of the UNIDROIT Principles of International Commercial Contracts states: "each party must act in accordance with good faith and fair dealing in international trade".

⁴⁹ See Marshall, B. (2018). The Hague choice of law principles, CISG, and PICC: Hard look at choice of Soft Law. *American Journal of Comparative Law*, 66(1), 200.

⁵⁰ See Al-sanhuri, A. (1998). *Illustration of updated civil law*. Beirut, Lebanon: Al-Halabi Legal Publications. 323.

⁵¹ The second paragraph of Article 124 of the PDCC. This article corresponds with Article 125 of the Egyptian Civil Code and Article 144 of the Jordanian Civil Code.

However, it is clear that the fact that the Palestinian legislature considered intentional concealment as a fraudulent misrepresentation is an explicit recognition by the legislature of the existence of the duty of disclosure.

Nevertheless, the Palestinian legislature has set out several conditions for the purpose of considering the intentional concealment as a fraudulent misrepresentation, which is, that this intentional concealment should substantially affect the will of the other party who is not aware of it,⁵² and it must be intentional;⁵³ meaning, the party who committed intentional concealment meant to do so, and also intended the effects resulting from what he had done.⁵⁴ Besides that, the other party could not obtain what has been intentionally silenced by the first party's own sources.⁵⁵ Thus, if all of these conditions are met, the injured party may request the contract to be void and a compensation for the damage which he suffered as a result of this act.⁵⁶

Based on what we have stated above, intentional concealment is similar to the failure to provide substantial information in the duty of disclosure, but differs from the duty of disclosure in that the defendant of fraudulent misrepresentation is not obliged initially to seek for providing the information in order to disclose it to the other party unless he is a professional or unless such information is essentially related to the subject of the contract.⁵⁷ Further, it is not a prerequisite to prove the subjective element in order to confirm the breach of the duty of disclosure as required in intentional concealment to be a fraudulent misrepresentation.⁵⁸ Therefore, any intentional concealment could be regarded as a breach of the duty of disclosure, but otherwise cannot be said.

⁵² See the Official Explanatory of the Palestinian Civil Code Draft (hereinafter 'OEPDCC'), unpublished manuscript, 158.

⁵³ The second paragraph of Article 124 of the PDCC.

⁵⁴ See the OEPDCC, unpublished manuscript, 158.

⁵⁵ The second paragraph of Article 124 of the PDCC.

⁵⁶ See the OEPDCC, unpublished manuscript, 158. See also Mohamed, *supra note 17* at 10-12.

⁵⁷ Article 124 of the PDCC.

⁵⁸ See the OEPDCC, unpublished manuscript, 158.

Theory of Guaranteeing Concealed Defects as a Legal Basis

Another part of the jurisprudence based their opinion on the theory of guaranteeing concealed defects as a foundation for admitting the legal existence of the duty of disclosure, where Article 468 of the PDCC states: “1- the vendor is liable under his warranty, when, at the time of delivery, the thing sold does not possess the qualities, the existence of which he guaranteed to the purchaser, or when the thing sold has defects diminishing its value or usefulness for the purpose for which it was intended, as shown by the contract or resulting from the nature or the destined use of the thing. The vendor is answerable for these defects, even if he was ignorant of their existence. 2- the vendor, however, is not answerable for the defects of which the purchaser was aware at the time of the sale or which he could have discovered himself had he examined the thing with the care of a reasonable person, unless the purchaser proves that the vendor has affirmed to him the absence of these defects or fraudulently concealed them from him”.⁵⁹

Initially, Article 468 of the PDCC relates guaranteeing concealed defects with the delivery of goods,⁶⁰ while some jurists believe that guaranteeing concealed defects is related to the pre-contracting phase and the satisfaction of the parties in general,⁶¹ since if the buyer knew at the outset that the goods were not valid for use given what they were prepared for, he would not conclude the contract. Accordingly, the French jurist, *Ghestin*, suggests addressing the provisions of the theory of guaranteeing concealed defects under the obligations that have an impact on the satisfaction of the contracting parties.⁶²

In response to these jurists, the failure of the negotiator to disclose substantial information that would affect the satisfaction of the other negotiator may constitute a concealed defect, which is considered eventually a breach of the duty of disclosure. However, legal logic requires that obliging the seller to guarantee the concealed defects of the sold goods means in contrast that the seller is obliged to

⁵⁹ This article corresponds with Article 447 of the Egyptian Civil Code and Article 512 of the Jordanian Civil Code.

⁶⁰ See the OEPDCC, unpublished manuscript, 495.

⁶¹ Ghestin, J. (1993). *Traité de droit civil, Les obligations, La formation du contrat*. Paris, France: Librairie L.G.D.J. 607.

⁶² *Ibid.*, 607-608.

disclose all substantial information which relate to the sold goods. It is also noticeable that the scope of the obligation to guarantee concealed defects is limited in comparison with the scope of the duty of disclosure; for example failure to provide information on how, or on warnings or inappropriate use for the buyer's purposes is not a concealed defect that must be guaranteed, but it constitutes a breach of the duty of disclosure.⁶³

Provisions of the Delivery of the Sales as a Legal Basis

Thirdly, part of the jurisprudence considers that the duty of disclosure finds its legal basis in the provisions for the delivery of the sale, and they base their opinion on the text of Article 452 of the PDCC which states: "the vendor is bound to deliver the thing sold to the purchaser in the state in which it was at the time of the sale".⁶⁴ In other words, a purchaser cannot use the thing sold without hindrances unless the vendor informs the buyer of all information and data concerning the use of the thing sold, as well as informing the purchaser of the risks of its use and how to avoid them.⁶⁵ Otherwise, the vendor is not considered an executor of the obligation to deliver in a sound and complete manner.⁶⁶ Therefore, the duty of disclosure is a subsidiary duty to the provisions of the delivery of the sale, which is inseparable from it.

However, this trend has been severely criticised, given the considerable differences between the duty of disclosure and the provisions of the delivery of the sale, since the duty of delivering the sold things emerges from the sales contract itself and relates to its implementation.⁶⁷ On the contrary, the duty of disclosure arises at the negotiation phase in order to conclude the contract. Therefore, saying that the duty of disclosure is a subsidiary duty to the provisions of the delivery of the sale and is inseparable from it is illogical, since the duty of disclosure in terms of time precedes the existence of the delivery of the sold thing.⁶⁸

⁶³ See the OEPDCC, unpublished manuscript, 495.

⁶⁴ This article corresponds with Article 431 of the Egyptian Civil Code and Article 489 of the Jordanian Civil Code.

⁶⁵ See Mohamed, B. (2006). Consumer protection in comparative law, comparative study with French Law. Algeria, Algeria: Dar Al-Kitab. 67.

⁶⁶ See Saleh, *supra note 2* at 446.

⁶⁷ See the OEPDCC, unpublished manuscript, 482.

⁶⁸ See Saleh, *supra note 2* at 446.

Principle of Good Faith as a Legal Basis

Part of the jurisprudence based their opinion on the theory of the principle of good faith as a legal basis for the duty of disclosure. In light of this, the French jurist *Galais Onloy* believes that the pre-contractual duty of disclosure is based on the principle of good faith, which is the basis and source of all the obligations of every negotiator willing to conclude contracts to disclose to the other negotiator all necessary information that he or she knew or should have known.⁶⁹ This opinion is based on Article 1134 of the French Civil Code of 1804, which states: “1- agreements lawfully entered into have the force of law for those who have made them. 2- they may be revoked only by their mutual consent, or for causes allowed by law. 3- they must be performed in good faith”.⁷⁰ Thus, a concealment of information is considered as a violation of the principle of good faith.

This part of the jurisprudence believes that the application of the principle of good faith is not limited to the implementation of the contract phase, but also extends to the pre-contracting phase of the contract based on the tortious liability and, in particular, the provisions of Articles 1382⁷¹ and 1383,⁷² which are similar to the provisions of Articles 179⁷³ and 180⁷⁴ of the PDCC.

⁶⁹ See Abdellah, K. R. (2000). *Negotiate the contract*. Cairo, Egypt: Dar Alnahdah Alearabia. 425.

⁷⁰ This article corresponds with the first paragraph of Article 148 of the PDCC, which states: “the contract shall be executed in accordance with what it has included and, in a manner, consistent with what is required by good faith”.

⁷¹ See Marshall, *supra note* 49 at 200.

⁷² See Al-sanhuri, *supra note* 50 at 323.

⁷³ Article 179 of the PDCC states: “anyone who has committed an act that caused damage to others is obliged to compensate for it”.

⁷⁴ Article 180 of the PDCC states: “1- a person is responsible for his/her harmful actions as long as he/she is in full possession of their senses. 2- if harm is inflicted upon another by a person who is not in full possession of their faculties, and there is no one who is responsible for him, or it has proved difficult to get a compensation from the person responsible for the inflicted damage, then the judge is at will to force the person who inflicted the damage to pay a fair compensation, keeping in mind the standing of each opponent”.

In this regard, the Paris Court of Appeal decided to revoke the contract for the sale of computers between Logabax company (supplier) and Savie company (client) on the basis that the supplier company concealed operating defects in the computers and did not inform Savie about them, which if they had been known to Savie, it would have not concluded the contract. Thus, the court ruled that Logabax company, in its concealment of such information, violated the principle of good faith.⁷⁵ In another case, the Paris Court of Appeal ruled that: “in addition to the legal articles, the duty of good faith in contracting entails the existence of a complementary duty of sincerity, which requires that each party to the contract provides the other party with all matters that are under negotiation”.⁷⁶

In fact, the above-mentioned judicial decisions were achieved by the French judiciary after a long time of realising the deficiency of legislation in enacting a legal provision on the contracting parties the duty of disclosure, until the French legislature enacted the duty of disclosure in the general rules of the contracts theory.⁷⁷

Referring back to the provision of the PDCC, it is devoid of any provisions governing the contractual negotiation phase or any provisions imposing the obligation of behaving in good faith at this phase, where the Palestinian legislature made the first paragraph of Article 148 of the PDCC clearly limited to obligating the contracting parties to implement the contract in good faith.⁷⁸ Moreover, we found

⁷⁵ See Abd, H. M. (2011). *Consumer civil protection in electronic commerce*. Beirut, Lebanon: Zain Legal Publications. 100.

⁷⁶ See légifrance, le service public de la diffusion du droit, French Court of Cassation, civil room 1, public sitting of Tuesday 26 February 1991, no of appeal: 88-14676. Retrieved from <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechExpJuriJudi&idTexte=JURITEXT000007025840&fastReqId=554572774&fastPos=68> visited on 11/11/2018. Légifrance, le service public de la diffusion du droit, French Court of Cassation, civil room 2, public sitting of Thursday 30 June 2011, no of appeal: 10-22871. Retrieved from <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechExpJuriJudi&idTexte=JURITEXT000024296749&fastReqId=1688853769&fastPos=74> visited on 11/11/2018.

⁷⁷ See Article 1112-1 of the NFCC.

⁷⁸ The first paragraph of Article 148 of the PDCC states: “the contract shall be executed in accordance with what it has included and, in a manner, consistent with what is required by good faith”.

out that relying on the theory of error in the provisions of Articles 179⁷⁹ and 180⁸⁰ of the PDCC cannot address the legislative shortcomings in the legislative remedy for the subject of good faith in preliminary negotiations. Therefore, we cannot establish the legal basis for the duty of disclosure on the principle of good faith in the PDCC.

In view of the foregoing, most jurists tended to regard the duty of disclosure as an independent duty which has its special nature,⁸¹ which plays a major role in supplementing the provisions of the general rules in the contracts theory. In addition, it is a legal means that contributes to the strengthening of the legality of the contractual relations, rather than being a subsidiary duty to other duties. Moreover, the duty of disclosure is necessary to give discretionary authority to the judiciary in order to achieve contractual equilibrium.⁸²

Therefore, this duty cannot have more than a legal basis, as this is contrary to logic. Furthermore, changing the legal basis and its multiplicity leads to a change in the essence of the duty itself.⁸³ However, accelerated scientific and technological expansions and the developments in concluding contracts models and techniques have shown a clear deficiency in legal articles addressing the pre-contracting phase, and the inability of conventional rules in the general theory of contracts to accommodate these developments and provide adequate protection to the parties to the negotiation. This, therefore, demands the intervention of legal jurists and the judiciary to figure out legal solutions to counter these developments by developing the duty of disclosure.

SUGGESTED ORIENTATIONS FOR THE FORMULATION OF THE DUTY OF DISCLOSURE TERMS AND PROVISIONS IN THE PDCC

The intended purpose of imposing a duty of disclosure in the pre-contracting phase is to inform the negotiator of all the substantial

⁷⁹ Article 179 of the PDCC states: “anyone who has committed an act that caused damage to others is obliged to compensate for it”.

⁸⁰ See Article 180 of the PDCC.

⁸¹ See Abdel Al-baki, *supra* note 7 at 189.

⁸² See Ahmed, *supra* note 14 at 120.

⁸³ Abu Amro, A. M. (2010). *Commitment to inform in consumption contracts*. Alexandria, Egypt: Dar Al-Jamieat Al-Jadidah. 61.

information and data related to the contract to be concluded, so that the other party is fully aware of that contract, in order to take the appropriate decision as required by his own interests. To this end, there is considerable difficulty in establishing a boundary between the roles of the parties in achieving the purpose of imposing the duty of disclosure, which necessitates the determination of the conditions of this duty in a legal provision under the text of the legal article which imposed the duty of disclosure obligation as follows.

Knowledge of the Debtor of the Duty of Disclosure of this Information

It is obvious that the debtor of the duty of disclosure in the pre-contracting phase should know the information and data related to the contract to be concluded. In this regard, the French Court of Cassation affirmed that: “it is a necessity that the debtor of the duty of disclosure should be aware of this information, in order to be bound by the duty of disclosure”.⁸⁴ In the same context, the French legislature ruled in Article 1112-1 of the NFCC that “the party who knows information...”, as a condition to be imposed by the duty of disclosure.

However, Article 1112-1 of the NFCC limits the debtor’s obligation to inform the information that he already knows, in contrast to Article 1129 of the previous Decree Draft of March 2015, which states: “the party who knows or ought to know information...”.⁸⁵

⁸⁴ “d’autre part, celle des parties qui connaît une information dont l’importance est déterminante pour le consentement de l’autre a l’obligation de l’en informer...”. Légifrance, le service public de la diffusion du droit, French Court of Cassation, civil room 3, public sitting of Wednesday 28 February 2018, no of appeal: 16-28687. Retrieved from <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechExpJuriJudi&idTexte=JURITEXT000036697179&fastReqId=2070818107&fastPos=1> visited on 12/11/2018.

⁸⁵ The Original text is “Celui des contractants qui connaît ou devrait connaître une information dont l’importance est diterminante pour le consentement de l’autre doit l’en informer des lors que, Idgitiment, ce dernier ignore cette information oufait confiance d son cocontractant. Le manquement d ce devoir d’information engage la responsabiliti extracontractuelle de celui qui en itait tenu. Lorsque ce manquement provoque un vice du consentement, le contrat peut itre anul”. See Rosher, P. (2016). French Contract Law Reform. *Business Law International*, 17(1), 71.

Thus, the debtor's duty to disclosure does not oblige him to inform as long as he is unaware of this information even if it is substantial and has a fundamental effect on the satisfaction of the other party, since article 1112-1 is explicit in its limitation to the debtor's actual knowledge. Therefore, Article 1112-1 changes the trend of the French judiciary, which was a conclusive presumption of the knowledge of the professional seller who contracts in his specialisation.⁸⁶

In addition, the debtor's duty to disclosure is not obliged by Article 1112-1 regarding the provision to inquire for information in order to provide appropriate information to the other party, in contrast to the previous French judicial decisions; for example the French Court of Cassation has determined a general principle, which is: "the party which has accepted to give information, has an obligation to inquire for information in order to implement its obligation to inform as required".⁸⁷ Nevertheless, part of the French jurisprudence sought to

⁸⁶ "Attendu qu'il résulte de ce texte une présomption irréfragable de connaissance par le vendeur professionnel du vice de la chose vendue qui l'oblige à réparer l'intégralité de tous les dommages en résultant". See *légifrance*, le service public de la diffusion du droit, French Court of Cassation, civil room 1, public sitting of Thursday 1 July 2010, no of appeal: 09-16114. <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechExpJuriJudi&idTexte=JURITEXT000022428112&fastReqId=432956645&fastPos=2> *Légifrance*, le service public de la diffusion du droit, French Court of Cassation, commercial room, public sitting of Tuesday 1 February 2011, no of appeal: 10-30037. <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechExpJuriJudi&idTexte=JURITEXT000023552922&fastReqId=1109746013&fastPos=1> In another decision, the French Court of Cassation explicitly states: "the seller is liable for concealed defects, even if he has not known them...". See *légifrance*, le service public de la diffusion du droit, French Court of Cassation, civil room 3, public sitting of Tuesday 7 October 2014, no of appeal: 13-21957. <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechExpJuriJudi&idTexte=JURITEXT000029567534&fastReqId=1441927637&fastPos=2> *Légifrance*, le service public de la diffusion du droit, French Court of Cassation, commercial room, public sitting of Tuesday 1 December 2015, no of appeal: 14-21565. <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechExpJuriJudi&idTexte=JURITEXT000031578140&fastReqId=1411496863&fastPos=1>

⁸⁷ "Attendu que celui qui a accepté de donner des renseignements a lui-même l'obligation de s'informer pour informer en connaissance de

say that although the new Article 1112-1 does not impose a general obligation to inquire in order to fulfil the duty of disclosure, such a duty of inquiry for information can be imposed in certain circumstances such as the debtor's commitment of enlightenment which involves clarifying to the other party and not merely informing him; it is estimated in each case independently.⁸⁸

Ultimately, as evidenced by Article 1112-1, professionalism and experience are not taken into account when assessing the extent to which the duty of disclosure is applied, since the article does not distinguish awareness between the professional and the ordinary; rather, it applies to all persons irrespective of their status as ordinary or professional. This is contrary to the motive of jurisprudence, the judiciary and special laws, such as the French Public Health Code.⁸⁹

cause". See *légifrance, le service public de la diffusion du droit, French Court of Cassation, civil room 2, public sitting of Wednesday 19 October 1994, no of appeal: 92-21543. <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechExpJuriJudi&idTexte=JURITEXT000007032360&fastReqId=261278068&fastPos=11>* *Légifrance, le service public de la diffusion du droit, French Court of Cassation, civil room 2, public sitting of Thursday 5 October 2017, no of appeal: 16-21457. <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechExpJuriJudi&idTexte=JURITEXT000035748910&fastReqId=1668216974&fastPos=1>* *Légifrance, le service public de la diffusion du droit, French Court of Cassation, civil room 1, public sitting of Thursday 16 April 2015, no of appeal: 14-14012. <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechExpJuriJudi&idTexte=JURITEXT000030498413&fastReqId=87910317&fastPos=2>*

⁸⁸ Chénéde, F. (2016). *Le nouveau droit des obligations et des contrats: consolidations, innovations, perspectives*. Paris, France: Dalloz. 36-37. In this regard, the Reims Court of Appeal decides that: "as a professional, the Sarl Sébastien Immobilier had, in order to exercise its commitment of enlightenment to the purchaser, to inquire from the sellers about the house water supply system and the risks of the electrical installation...". See *légifrance, le service public de la diffusion du droit, "Reims Court of Appeal 11, public sitting of Tuesday 3 July 2018, no of appeal: 13/031551. <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechExpJuriJudi&idTexte=JURITEXT000037237842&fastReqId=1440840599&fastPos=1>*

⁸⁹ See Article L 1111-2 of the French Public Health Code. In the same context, the PCPL obliged the supplier to inquire about each product that involves any risk, or otherwise be liable for the damage caused by its

Therefore, the Palestinian legislature should follow what has been settled in the French judiciary and jurisprudence in enacting this term.

Creditor of the Duty of Disclosure must be Unaware of this Information

The duty of disclosure in the pre-contracting phase requires that the creditor of this duty to be unaware of this information concerning the subject of the contract to be concluded. Further, this unawareness must be legitimate.⁹⁰ In this regard, Article 1112-1 of the NFCC defines the creditor of the duty of disclosure as the one who is legitimately unaware of this information, or depends on the other contracting party.⁹¹ This means that the creditor of the duty of disclosure has a duty to inquire for information himself, even if he is a consumer.⁹²

The creditor of the duty of disclosure should be curious to investigate the substantial matters affecting his or her satisfaction, not just waiting to have this information from the other party.⁹³ Subsequently, the debtor of the duty of disclosure is not required to inform the creditor

use, Articles 9 & 10 of the PCPL state respectively: “each product, the use of which entails any risk, must be labelled or be enclosed with a warning which states the facet of risk and the best method of use, as well as the manner of treatment in the event a damage arises from use”, “the ultimate supplier shall be responsible for the damage resulting from the use or consumption of the local or imported product, which does not meet the conditions of safety or health for the consumer, or for non-compliance with the safeguards declared or agreed upon, unless he demonstrates the identity of those who supplied him with the product and proves his irresponsibility for the resulting damage as well”.

⁹⁰ See Al-Mahdi, *supra* note 35 at 84.

⁹¹ Article 1112-1 of the NFCC states: “...where the latter legitimately does not know the information or relies on the contracting party”.

⁹² See Ahmed, *supra* note 14 at 321.

⁹³ “Attendu que le manquement du professionnel à son obligation de conseil et d’information ne dispense pas le client de tout devoir de prudence et de diligence...”. See légifrance, le service public de la diffusion du droit, French Court of Cassation, civil room 1, public sitting of Tuesday 25 March 2003, no of appeal: 99-15198. <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechExpJuriJudi&idTexte=JURITEXT000007453357&fastReqId=1823764576&fastPos=108>

of the information that the creditor is able to obtain easily⁹⁴ or the information that is known to all.⁹⁵ In many cases, the French Court of Cassation refused to revoke the contract on the basis of intentional concealment, since the creditor of the duty of disclosure could have inquired but he did not,⁹⁶ or that the creditor did not take the necessary caution.⁹⁷

In this regard, if the creditor of the duty of disclosure is a professional or vocational, it is presumed that he is well acquainted with the information of the intended contract to be concluded, especially if the transaction is within the scope of his or her profession or vocation; then, unawareness is not legitimate here.⁹⁸ However, in all

⁹⁴ See *légifrance*, le service public de la diffusion du droit, French Court of Cassation, commercial room, public sitting of Wednesday 17 October 2018, no of appeal: 17-21857. <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechExpJuriJudi&idTexte=JURITEXT000037536275&fastReqId=1104882437&fastPos=20>

⁹⁵ See *légifrance*, le service public de la diffusion du droit, French Court of Cassation, civil room 1, public sitting of Wednesday 7 November 2018, no of appeal: 17-11723. <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechExpJuriJudi&idTexte=JURITEXT000037621920&fastReqId=1375474203&fastPos=1>

⁹⁶ See *légifrance*, le service public de la diffusion du droit, French Court of Cassation, civil room 1, public sitting of Thursday 4 June 2009, no of appeal: 08-13480. <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechExpJuriJudi&idTexte=JURITEXT000020707787&fastReqId=354296873&fastPos=102> *Légifrance*, le service public de la diffusion du droit, French Court of Cassation, civil room 1, public sitting of Tuesday 30 November 2004, no of appeal: 01-14314. <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechExpJuriJudi&idTexte=JURITEXT000007047337&fastReqId=1239973232&fastPos=121>

⁹⁷ See *légifrance*, le service public de la diffusion du droit, French Court of Cassation, civil room 3, public sitting of Tuesday 9 October 2012, no of appeal: 11-23869. <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechExpJuriJudi&idTexte=JURITEXT000026489268&fastReqId=1494525829&fastPos=38>

⁹⁸ See *légifrance*, le service public de la diffusion du droit, French Court of Cassation, civil room 1, public sitting of Wednesday 14 February 2018, no of appeal: 16-27263. <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechExpJuriJudi&idTexte=JURITEXT000036648654&fastReqId=323080316&fastPos=7> *Légifrance*, le service public de la diffusion du droit, French Court of Cassation, commercial room, public

cases, unawareness of the information is justified if that important information which affects the satisfaction of the creditor of the duty of disclosure is difficult to reach, very expensive or it exists exclusively with the other party.⁹⁹

However, in the case of the legitimate trust that a party relies on the other party with regard to the information;¹⁰⁰ this reliance is assessed by the nature of the relationship to be achieved or the nature of the relationship between the parties,¹⁰¹ as in company and agency contracts, and all contracts in which the parties have common interests¹⁰² which impose a duty of cooperation and transparency.¹⁰³

Moreover, although referring back to Article 1112-1 of the NFCC which states: “the party who knows information which is of decisive importance for the consent of the other, must inform him of it where the latter legitimately does not know the information or relies on the contracting party”, it would seem clear that the first part of the article “the party who knows information which is of decisive importance for the consent of the other, must inform him of it...”, is inconsistent with the second part of the article “...where the latter legitimately does

sitting of Wednesday 6 December 2017, no of appeal: 16-22809. <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechExpJuriJudi&idTexte=JURITEXT000036178444&fastReqId=1970913558&fastPos=84>

⁹⁹ See Terré, F., Simler, P., & Lequette, Y. (2013). *Droit civil, les obligations*. Paris, France: Dalloz. 83.

¹⁰⁰ Article 1112-1 of the NFCC states: “...or relies on the contracting party...”.

¹⁰¹ See Deshayes, O., Genicon, T., & Laithier, Y. M. (2016). *Réforme du droit des contrats, du régime général et de la preuve des obligations: commentaire article par article*. LexisNexis. 82.

¹⁰² “Alors que, de plus, celle des parties qui connaît une information dont l’importance est déterminante pour le consentement de l’autre a l’obligation de l’en informer, dès lors que, légitimement, cette dernière ignore cette information ou fait confiance à son cocontractant...”. Légifrance, le service public de la diffusion du droit, French Court of Cassation, civil room 3, public sitting of Wednesday 28 February 2018, no of appeal: 16-28687. <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechExpJuriJudi&idTexte=JURITEXT000036697179&fastReqId=1991391528&fastPos=1>

¹⁰³ See Chénéde, *supra note* 88 at 38.

not know the information or relies on the contracting party”, which required the debtor to inform the creditor of the duty of disclosure as long as the creditor was reliant on him even if he or she was aware of this information. Besides that, the second part manifests that reliance on the other party exempts the creditor of the duty of disclosure from inquiring about substantial matters affecting his or her satisfaction by himself. While this provision is only limited to legitimate reliance in order to invoke the breach of the duty of disclosure; nevertheless, this is what the Palestinian legislature should avoid when formulating the legislative article of the duty of disclosure.

Information must be Substantial and has an Impact on the Satisfaction of the Other Party

The debtor of the duty of disclosure is not required to inform his creditor of all the information he knows about the contract to be concluded; rather, he is required to inform his creditor of the substantial information that affects his satisfaction.¹⁰⁴ Here, the first part of Article 1112-1 of the NFCC states: “the party who knows information, which is of decisive importance for the consent of the other...”. In this regard, the third paragraph of Article 1112-1 specifies the information that has an impact on the other party’s satisfaction as: “the information the importance of which is decisive if it has a direct and necessary relationship with the content of the contract or the status of the parties”.¹⁰⁵

¹⁰⁴ See Deshayes, *supra note* 101 at 81.

¹⁰⁵ The substantial feature varies from one party to another. Therefore, some jurists believe that the determination of substantial features must be based on a subjective criterion to determine the substantial nature of the thing, that is, the attribute is substantial from the point of view of the purchaser regardless of the fact that it is not from the perspective of others, while others believe that the determination of the substantial feature of the thing must be based on the objective criterion, which is based on the fact that the intrinsic nature is determined in light of the circumstances surrounding the contract. For example, the core character of the land in the countryside is its ability to be cultivated, however, as for the land located in the city, the essential feature of the purchaser is its ability to be built on. See Aldsouki, I. M. (1995). *Legal aspects of negotiations management and conclusion of contract*. Riyadh, Saudi Arabia: General Administration of Research. 82.

Accordingly, any information useful to the other party and is related to the content of the contract or to the parties can be regarded as influential,¹⁰⁶ such as the subject of the contract, the financial equivalent of the contract subject,¹⁰⁷ the characteristics related to the parties, such as years of experience and reputation, and any substantial characteristics of the contract's subject agreed upon explicitly or implicitly.¹⁰⁸

The purpose of this influential information is to make the other party fully aware of the contract to reach his/her complete satisfaction and be able to ascertain the totality of his/her obligation while, the secondary or the non-influential information is not required. With respect to these considerations, the French Court of Cassation ruled that: "the intended purpose of providing a lot of ineffective and non-influencing information was to distract the attention of the other, the creditor of the duty of disclosure, from certain substantial information".¹⁰⁹

Although Article 1112-1 requires the debtor of the duty of disclosure to inform the other party of the substantial information that affects his satisfaction, it exempts from it the disclosure of the price. Here, the second paragraph of Article 1112-1 states: "this duty to inform does not apply to an assessment of the value of the act of performance". Consequently, the debtor of the duty of disclosure does not have to inform the creditor of the price or the value of the contract's subject, even if this information is substantial and has an impact on his/her satisfaction.

¹⁰⁶ See Saleh, *supra note 2* at 443.

¹⁰⁷ See légifrance, le service public de la diffusion du droit, French Court of Cassation, civil room 3, public sitting of Wednesday 28 February 2018, no of appeal: 16-28687. <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechExpJuriJudi&idTexte=JURITEXT000036697179&fastReqId=1991391528&fastPos=1>

¹⁰⁸ See légifrance, le service public de la diffusion du droit, French Court of Cassation, civil room 3, public sitting of Wednesday 25 March 2015, no of appeal: 14-50003. <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechExpJuriJudi&idTexte=JURITEXT000030411629&fastReqId=1188033030&fastPos=2>

¹⁰⁹ See légifrance, le service public de la diffusion du droit, French Court of Cassation, civil room 3, public sitting of Wednesday 26 June 1991, no of appeal: 89-21325. <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechExpJuriJudi&idTexte=JURITEXT000007027379&fastReqId=2082729969&fastPos=10>

The above provision is an entrenchment settled by the French Court of Cassation, where it ruled in the Baldus case: “there is no obligation to inform the purchaser, and he is not obliged to disclose to the seller the true price of these paintings or pictures, even if he bought them cheaply”.¹¹⁰ In another case, the French Court of Cassation settled that: “the possessor, even if he is a professional, has no obligation to inform the seller about the value of the subject of the contract”.¹¹¹

These provisions correspond with the new French legislator’s intention to reject lesion as one of the will defects,¹¹² while the Palestinian legislature considers lesion as one of the will defects which allows the lesioned party to ask for annulment of the contract. For example, Article 128 of the PDCC ruled that: “if the obligations of one of the contracting parties are out of all proportion to the advantages that he obtains from the contract or to the obligations of the other contracting party, and it is established that the party who has suffered the prejudice

¹¹⁰ *“Alors qu’aucune obligation d’information ne pesait sur l’acheteur...”*. See légifrance, le service public de la diffusion du droit, French Court of Cassation, civil room 1, public sitting of Wednesday 3 May 2000, no of appeal: 98-11381. <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechExpJuriJudi&idTexte=JURITEXT000007043587&fastReqId=1100696374&fastPos=53>

¹¹¹ “Qu’en statuant ainsi, alors que l’acquéreur, même professionnel, n’est pas tenu d’une obligation d’information au profit du vendeur sur la valeur du bien acquis; la cour d’appel a violé le texte susvisé...”. See légifrance, le service public de la diffusion du droit, French Court of Cassation, civil room 3, public sitting of Wednesday 17 January 2007, no of appeal: 06-10442. <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechExpJuriJudi&idTexte=JURITEXT000017626339&fastReqId=1334771698&fastPos=4> Légifrance, le service public de la diffusion du droit, French Court of Cassation, commercial room, public sitting of Tuesday 6 September 2016, no of appeal: 10-23634. <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechExpJuriJudi&idTexte=JURITEXT00003112330&fastReqId=476760177&fastPos=1> Légifrance, le service public de la diffusion du droit, French Court of Cassation, commercial room, public sitting of Tuesday 19 January 2016, no of appeal: 14-17865. <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechExpJuriJudi&idTexte=JURITEXT000031901379&fastReqId=1602721548&fastPos=2>

¹¹² Article 1168 of the NFCC states: “in synallagmatic contracts, a lack of equivalence in the acts of performance of the parties is not a ground for nullity of the contract, unless legislation provides otherwise”.

entered into the contract only as a result of the other party exploiting his obvious levity of character or his unbridled passion, the judge may, at the request of the party so prejudiced, annul the contract or reduce the obligations of such party”.¹¹³

However, the problem is evident in the attempt to reconcile the text of Article 1112-1 - its second paragraph- with Article 1137 of the NFCC -relating to intentional concealment, where this article authorises the nullification of the contract if a contracting party conceals substantial information affecting the consent of the other party.¹¹⁴ Nevertheless, without a doubt, the value of the act of performance is an essential element affecting the decision of the other party. Thus, the contradiction is obvious between the texts of the two articles. In this regard and from the perspective of the researcher, the general principle of the duty to disclosure lies in the text of Article 1112-1 of the NFCC, while

Article 1137 paragraph 2 is based on the commitment of the parties to the principle of good faith and integrity in dealings, not on the basis of the duty to disclosure¹¹⁵ and; therefore, the matter is still existent until it is settled by the French judiciary.

¹¹³ Depending on this article the Palestinian legislature states in Article 447 of the PDCC that: “1- when an immovable belonging to a person who is legally incapable, has been sold with a lesion of more than one fifth of its value, the vendor will have a right of action with a view to making up the price to the price of a similar immovable belonging. 2- in order to ascertain whether the lesion was more than one fifth, the value of the immovable at the time of the sale should be ascertained. 3- a fundamental lesion is more than one fifth of its value”.

¹¹⁴ Article 1137 and 1139 of the NFCC state respectively: “1- fraud is an act of a party in obtaining the consent of the other by scheming or lies. 2-the intentional concealment by one party of information, where he knows its decisive character for the other party, is also fraud”, “a mistake induced by fraud is always excusable. It is a ground for nullity even if it bears on the value of the act of performance or on a party’s mere motive”.

¹¹⁵ This opinion is based on an exception to the rule in Article 1112-1, paragraph two. In the matter of the sale of shares in the company, the French Court of Cassation ruled: “the manager of the company shall bear the liability for violating the duty of integrity towards his partners on the basis of intentional concealment, as it is the responsibility of the company manager to inform the seller partner of the value of his shares in the company”. See *Légifrance, le service public de la diffusion du droit*, French Court of Cassation, commercial room, public sitting of Tuesday 27 February 1996, no of appeal: 94-11241. <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechExpJuriJudi&idTexte=JURITEXT00007035060&fastReqId=1266922526&fastPos=91>

Eventually, the Palestinian legislature should avoid the French legislative contradiction between the legal texts of Article 1112-1 and 1137 by ignoring the provision of the second paragraph of Article 1112-1, and leaving the verdict matter to the Palestinian judiciary according to the circumstances of each case.

Proving the Duty of Disclosure

The fourth paragraph of Article 1112-1 of the NFCC states a general rule, which is: “a person who claims that information was due to him has the burden of proving that the other party had the duty to provide it, and that the other party has the burden of proving that he has provided it”.¹¹⁶ This rule distributes the burden of proof between the creditor and the debtor of the duty of disclosure. Therefore, the creditor of the duty of disclosure bears the burden of proving the existence of the obligation to disclosure to the debtor on behalf of the creditor, and the debtor bears the burden of proving his implementation of the obligation to inform.

What the French legislature came up with in the fourth paragraph of Article 1112-1 is only an entrenchment of the French judicial Precedents in this regard, where the French Court of Cassation

ruled on the basis of Article 1315 of the French Civil Code of 1804 that: “the party who is obligated legally or by an agreement with a particular duty to inform must show the evidence that he has fulfilled his obligation”.¹¹⁷ Subsequently, the French Court of Cassation had settled on this trend in several cases.¹¹⁸ However, here we notice that

¹¹⁶ “Il incombe à celui qui prétend qu’une information lui était due de prouver que l’autre partie la lui devait, à charge pour cette autre partie de prouver qu’elle l’a fournie”.

¹¹⁷ “Attendu que celui qui est légalement ou contractuellement tenu d’une obligation particulière d’information doit rapporter la preuve de l’exécution de cette obligation...”. See Légifrance, le service public de la diffusion du droit, French Court of Cassation, civil room 1, public sitting of Tuesday 25 February 1997, no of appeal: 94-19685. <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechExpJuriJudi&idTexte=JURITEXT000007037245&fastReqId=581510174&fastPos=167>

¹¹⁸ Légifrance, le service public de la diffusion du droit, French Court of Cassation, commercial room, public sitting of Tuesday 13 October 2009, no of appeal: 08-10430. <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechExpJuriJudi&idTexte=JURITEXT000021170998&>

the French Court of Cassation has changed the burden of proof,¹¹⁹ since it is difficult for the creditor of the duty of disclosure to prove a negative incident which is that he is not being informed, and this is what the Palestinian legislator should adopt as an additional legislative protection for the creditor of the duty of disclosure. Eventually, as a general rule, the fulfilment of the duty of disclosure can be proved by all means of evidence, unless the law provides for it in a special manner.¹²⁰

The Penalty for Violation of the Duty of Disclosure

The French legislature settled in the sixth paragraph of Article 1112-1 of the NFCC that: “in addition to imposing liability on the party who had the duty to inform, his failure to fulfil the duty may lead to annulment of the contract under the conditions provided by Article 1130 and following”.¹²¹ Based on this provision, one or both of the following penalties may occur in case of breaching the duty of disclosure, namely the liability of the debtor of the duty of disclosure to compensate the damages caused by his breach of this duty, and the possibility of nullifying the contract.

Therefore, the liability arising from the violation of the duty of disclosure is a tort liability, since the duty of disclosure often comes

fastReqId=1311301734&fastPos=1 Légifrance, le service public de la diffusion du droit, French Court of Cassation, commercial room, public sitting of Tuesday 6 February 2007, no of appeal: 05-19452. <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechExpJuriJudi&idTexte=JURITEXT000007515526&fastReqId=1460695223&fastPos=2> Légifrance, le service public de la diffusion du droit, French Court of Cassation, civil room 2, public sitting of Tuesday 20 September 2005, no of appeal: 04-10548. <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechExpJuriJudi&idTexte=JURITEXT000007504076&fastReqId=1642923536&fastPos=3>

¹¹⁹ The general principle in the rules of evidence is that: “the burden of proving an obligation lies on the creditor and that of proving its discharge on the debtor”. See Article 2 of the PECCML.

¹²⁰ See Article 1112-1 of the NFCC.

¹²¹ “outre la responsabilité de celui qui en était tenu, le manquement à ce devoir d’information peut entraîner l’annulation du contrat dans les conditions prévues aux articles 1130 et suivants”.

in the pre-contracting phase. Besides that, the violation of this duty is a breach of a legal duty, not of a contractual obligation. Therefore, this new French approach has consolidated the legal basis of the litigation.¹²² Moreover, the elements of tort liability, -namely the commission of an act that results in damage where there must be a causal relationship between the act and the damage,¹²³ must exist to claim compensation.

As for the second part of paragraph six of Article 1112-1, and whether the court ruled the compensation on the basis of tort liability or not, the court may verdict the annulment of the contract based on the will defects,¹²⁴ especially error¹²⁵ or fraud,¹²⁶ where in article 1132 of the NFCC the annulment of the contract may be ruled on the basis of an error in law or fact if two conditions are met:¹²⁷ firstly, the error is fundamentally related to a feature in the subject of the contract, or to the other contracting party; and secondly, the error is not justified.

Besides this, the second paragraph of Article 1137 of the NFCC considers “the intentional concealment by one party of information,

¹²² The French Court of Cassation was ruling the compensation for violating the duty of disclosure based on either the provisions of the tort liability or contractual liability, depending on the legal basis for the adoption of the duty of disclosure.

¹²³ Article 1240 and Article 1241 of the NFCC states respectively: “any human action whatsoever which causes harm to another creates an obligation on the person by whose fault it occurred to make reparation for it”, “everyone is liable for harm which he has caused not only by his action, but also by his failure to act or his lack of care”.

¹²⁴ Article 1131 of the NFCC states: “defects in consent are a ground of relative nullity of the contract”.

¹²⁵ For example, Article 1134 of NFCC states: a “mistake about the essential qualities of the other contracting party is a ground of nullity only as regards contracts entered into on the basis of considerations personal to the party”. See also Articles 1133, 1135 and 1136 of the NFCC.

¹²⁶ Article 1137 of the NFCC defines the fraud as: “an act of a party in obtaining the consent of the other by scheming or lies”.

¹²⁷ Article 1132 of the NFCC states: a “mistake of law or of fact, as long as it is not inexcusable, is a ground of nullity of the contract where it bears on the essential qualities of the act of performance owed or of the other contracting party”. In the same context, see Article 120 of the PDCC.

where he knows its decisive character for the other party, is also a fraud”. However, in order to nullify the contract on the basis of fraud by intentional concealment, three conditions must be met: concealment of substantial information from the other party; this concealment must be intentional; and the concealment of information must have a decisive impact on the satisfaction of the other party with the knowledge of the party who concealed the information.¹²⁸ For example, the French Court of Cassation ruled in 12/01/2010 that “the breach of the duty of disclosure in the pre-contracting phase is not sufficient to be considered as an intentional concealment, as long as the nature of the violation was not intentional, and there is not a decisive influence of this violation on the satisfaction of the other party”.¹²⁹

The problem, however, is the attempt to reconcile Article 1137, paragraph 2, and Article 1139, where Article 1139 provides that: “the error which is induced by fraud is always excusable”.¹³⁰ Thus, the error

¹²⁸ The same conditions exist in Article 128 Of the PDCC.

¹²⁹ Légifrance, le service public de la diffusion du droit, French Court of Cassation, commercial room, public sitting of Tuesday 12 January 2010, no of appeal: 08-16812. <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechExpJuriJudi&idTexte=JURITEXT000021704661&fastReqId=1522450933&fastPos=58>

¹³⁰ *réticence dolosive, à la supposer établie, rend toujours excusable l'erreur provoquée...*”. This provision is an entrenchment settled by the French Court of Cassation in the previous judicial precedents. See Légifrance, le service public de la diffusion du droit, French Court of Cassation, civil room 3, public sitting of Wednesday 21 February 2001, no of appeal: 98-20817. <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechExpJuriJudi&idTexte=JURITEXT000007043792&fastReqId=95031831&fastPos=37> Légifrance, le service public de la diffusion du droit, French Court of Cassation, civil room 1, public sitting of Wednesday 7 November 2018, no of appeal: 17-11723. <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechExpJuriJudi&idTexte=JURITEXT000037621920&fastReqId=95031831&fastPos=1> Légifrance, le service public de la diffusion du droit, French Court of Cassation, commercial room, public sitting of Wednesday 21 March 2018, no of appeal: 16-13338. <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechExpJuriJudi&idTexte=JURITEXT000036779690&fastReqId=95031831&fastPos=3>

which resulted from a violation of the duty of disclosure is sufficient to adapt the existence of fraud based on intentional concealment, while if it was based on paragraph 2 of Article 1137, this would require that the error must be intentional. Consequently, the French judiciary must eliminate the conspicuous contradiction between the two articles.

The above conspicuous contradiction (between the text of Articles 1139 and 1137 paragraph 2) does not exist in the PDCC, as the Palestinian legislature does not provide a legal Article that states a provision as the provisions of Article 1139 of the NFCC. Therefore, the most important orientations for enacting a legal Article in the general theory of the contracts law, which obliges the parties to the duty of disclosure, become clear to the Palestinian legislature in general.

CONCLUSION

In light of the foregoing analyses and explanations of the concept, justification and legal basis for the duty of disclosure, it has become evident that the traditional theories of the will defects, guaranteeing concealed defects and the principle of good faith are not enough to restore contractual equilibrium, which necessarily entails that the pre-contractual duty of disclosure has its own independent essence from all the theories that the jurisprudence adopted as a legal basis for this duty. Thus, it is clear that the significance of passing a legislative text obliging the contracting parties in the pre-contracting phase to commit to the duty of disclosure as a legal means through which the Palestinian legislature can solve the cognitive imbalance between the negotiating parties in the field of commercial and civil transactions, in order to reach a stage of ensuring contractual justice.

Therefore, in reviewing and analysing the terms and provisions of the duty of disclosure in the NFCC which is considered as one of the main sources of the PDCC, the Palestinian legislature must observe and avoid the errors and inconsistencies in the fourth part of this section which, in one way or another, diminish the efficiency of this legal means in ensuring contractual equilibrium between the contracting parties in the early phase of the contractual process.

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