

**Time Bar - Limitation Period  
under Iraqi Law**

by

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## **Introduction**

This article deals mainly with the question of limitation period under Iraqi Law. Creditors holding claims against Iraq arising from construction, financing and supply contracts concluded with the Iraqi government entities prior to the fall of Saddam Hussein`s regime in 2003 may find this article of interest.

I shall attempt to answer the following questions among other things:

- **What is the concept of limitation or prescription period under Iraqi law? How does it apply?**
- **How can the limitation period be interrupted or suspended?**
- **Can the creditors rely on certain events or correspondence to claim the suspension or the interruption of limitation period under Iraqi law?**

Prior to discussing these questions, a short reference to the categories of claims against Iraq and the related settlement mechanisms may be relevant.

## **SECTION ONE: Categories of the Claims**

There are at least three types of claims as to the mechanism of the settlement applicable to each group:

- I) Claims arising from Iraq invasion of Kuwait in August 1990, based on the Security Council Resolution no. 687 of 03.04.1991, which rendered Iraq .....”liable under international law for any direct loss, damages.....or injury to foreign Governments, nationals and corporations, as a result of Iraq`s unlawful invasion and occupation of Kuwait”.

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The U.N. Security Council Resolution no. 692 of 20.05.1991 established the Iraq Compensation Commission as a subsidiary organ of U.N. to settle such claims submitted by individuals, states, and corporations.

As in the word of the Secretary General in his report of 02.05.1991, the Commission is neither a court nor an arbitration tribunal before which the parties may appear. It is a political organ, and decisions are taken by the Commission Council consisting of representatives of the States members of the Security Council. Panels of experts were appointed by the Commission to review claims and submit their recommendations to the Governing Council for approval, without giving Iraq, as the defendant, the right to appear.

Contrary to the minimum requirements of due process, the process was arbitrary and Iraq had no right to request any judicial review of the decisions of the Commission. Now, that the people of Iraq are struggling to build a country out of ruins of wars and years of UN sanctions, USA, which was the main power behind imposing the sanctions, has the moral duty to remedy the situation and refer the matter to the UN Security Council for re-consideration and in order to establish an international tribunal, which Iraq may request, to review certain decisions of the Commission.

The Commission has approved approximately 1.55 million claims and awarded compensation amounting to US \$ 52.4 billion. To date, the Commission has paid individuals, companies, and governments about US \$ 21.8 billion, withdrawn from the sales of Iraqi oil, which Iraqi people today are most in need of. Many of the claims submitted to the Commission by corporations and private creditors were rejected by the Commission for falling outside its jurisdiction or for other legal reasons.

**The creditors of those claims which have not yet settled their claims will have to consider seriously the question of the limitation period.**

- II) The second category of claims are private commercial claims, which were estimated about 22 billion US \$. The Iraqi Ministry of Finance during 2004 had established through Ernst & Young settlement procedures (which have recently come to an end) to restructure and settle these claims. Creditors of private commercial claims were invited to submit their claims to the office of Ernst &

Young. Ernst & Young decided whether the claims were “eligible” for settlement and invited the holder of eligible claims to accept a partial settlement, as follows:

- A creditor holding a claim of US \$ 35 million or less was offered cash buyback equal to 10.25 % of the value of his eligible claim.
- A creditor claiming more than US \$ 35 million in outstanding debt, which Ernst & Young accepted as eligible, was offered 20 % of his claim in government bonds that will mature in January 2028.

The process was dictated without much regard to the provisions of the relevant contracts, with no room to negotiate. Within one year, a total of US \$ 19,7 billion of commercial claims against Iraq were settled. 491 commercial claimants submitted their claims, and more than 12000 claims from Saddam period were settled.

Under this process Ernst & Young rejected a number of claims as being not “eligible” for lack of documentation or because of the expiry of the limitation period.

No statistics are available on the number of claims rejected, nor on the number of creditors who failed to apply to Ernst & Young for settlement.

III) The third category of claims consists of those creditors who have either failed to make use of the United Nation Compensation Commission mechanism and Ernst & Young process or have had their claims rejected by the Commission or by Ernst & Young.

**Provided that the right of such creditors are not yet extinguished by passage of time, they are advised to resort to the specific provisions of their contracts concerning settlement of disputes by arbitration or by litigation.**

In spite of the prevailing lack of security in Iraq, the writer has represented clients in Iraqi courts with large claims arising from construction contracts concluded during Saddam Hussain`s regime.

## **SECTION TWO: Limitation Period**

The provisions of the Iraqi Civil Code no. 40 of 1951, articles 429 to 443 have laid down the general rules for limitation periods which are applicable to all kinds of transactions, unless otherwise stipulated in the Commercial Law or other laws.

### **I) Period of Limitation**

1. Article 429 of the Civil Code has laid down the general period for prescription of claims. According to the provisions of article 429, a claim shall not be heard in respect of any obligation whatever its cause may be, if the right has not been claimed, without lawful cause, for a period of 15 years, subject to any other specific provisions.
2. Article 430 of the Civil Code provides that in respect of recurring and periodical rights such as rent, interest and salaries, the claim of the creditor shall not be heard against the debtor if the creditor has failed, without lawful excuse, to file a claim within five years.
3. Article 431 of the Civil Code provides for one year prescription period, and applies to certain transactions including claims of lawyers, doctors, engineers as well as suppliers and manufacturers of goods if they deliver goods or services to non-traders. The general rule for such claims is one year, but paragraph 4 of the same article further provides that in cases where such rights or claims are out of written documents, then the limitation period would be 15 years.

The Iraqi courts have in a number of cases applied the above-mentioned provision and confirmed that the 15 years limitation period applies when the transaction is in writing. In a number of decisions<sup>1</sup> rendered by the Court of Cassation, the court held that the transaction, which has one year limitation period under article 431, is subject to 15 years limitation period in accordance with paragraph 4 of the aforesaid articles, if the claim arises from a written document.

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<sup>1</sup> See decisions of the Court of Cassation no. 116/ First General Chamber, dated 05.10.1974, and the decision no. 126/M1/78, dated 29.08.1978.

4. As far as construction, engineering and supply contracts are concerned, the limitation period of 15 years as stated in article 429 applies.

Having defined the general period for limitation after which the court must abstain from adjudicating a claim if the defendant party raises the defence of time bar under articles 429 or 430 or 431, a question arises as how do we calculate such period and from what date or event does it commence?

## II) **Commencement**

1. According to the provisions of article 434 of the Civil Code, the limitation period is calculated as from the day when the obligation becomes due for fulfilment. And in case of deferred debt, the time begins from the date of maturity of the debt or the obligation, or from the date when an invoice becomes due.

Thus, in case of a deferred payment, which is subject to the submission of certain documents, or the occurrence of a certain event, the obligation becomes due from the date of the fulfilment of the conditions, and from that date the limitation period begins.

2. For a claim or an action based on a breach of a contract, the limitation period starts from the date when the debtor or the buyer had to fulfil the obligation and failed to do so, regardless when the actual damage or loss was suffered by the Seller or the Creditor.
3. As an exception to the aforesaid general rule, the Civil Code as well as the Commercial Law no. 30 of 1984 have laid down separate provisions for certain transactions and documents, whereby the limitation period starts from dates or events other than the date of the maturity of the obligation.

For example, under article 870 of the Civil Code, the engineers and architects are liable for structural defects for a period of 10 years, calculated from the date of the completion of the works and the hand-over of the work to the owner.

### III) Suspension

There are certain events or causes, the occurrence of which suspends the limitation period:

1. The limitation period is suspended when there is a legitimate ground such as when the creditor is a minor and has no guardian to take care of his interests or if there is an **impediment rendering it impossible for the creditor to claim his right**. The period during which the suspension continues is disregarded and deducted from the total period of limitation as stated in paragraph 2 of article 435. The word "impediment" is not defined, but would apply to war or other events, if it becomes impossible for creditors to file claims.<sup>2</sup> It is to be noted that article 435 of the Civil Code refers also to events as legitimate grounds suspending the limitation period, though they are not of the nature of impossibility.

Based on that, the invasion of Kuwait by Iraq in August 1990, and the subsequent Gulf War as well as the US invasion of Iraq in 2003 were impediments within the scope of the aforesaid article 435.

It follows that the limitation period applicable to the claims of Contractors and Suppliers were suspended during the period of the invasion of Kuwait as well as during the US invasion of Iraq in 2003.

2. Furthermore, Iraq enacted the Law no. 57 dated 16.09.1990, namely "the Law for the Protection of Iraqi Property, Interests, and Rights In and Outside Iraq". The law became retrospectively effective as from 6th August 1990. According to article 6 of the Law no. 57, Iraqi courts and arbitration bodies were prohibited from adjudicating any lawsuit or claim brought inside Iraq against the Iraqi government, its entities, organisations, and against any Iraqi natural or judicial person. The prohibition of the aforesaid article 6 was also "impediment", which suspended the limitation period in accordance with the provisions of article 435.

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<sup>2</sup> See Dr. Abdul Razzak Al Sanhoury, Commentaries on the Civil Code, Volume 3, 1958, page 1083

During the period of validity of the Law no. 57, Iraqi courts could not have adjudicated on any claim filed by contractors or suppliers against Iraqi entities. Thus, the limitation period of 15 years, was also suspended for the period during which the Law no. 57 remained effective.

Regarding the period of the validity of the Law no. 57, there exist different opinions as to whether or not the aforesaid Law was repealed by the Resolution of the Iraqi Command Council no. 55 dated 05.03.1991,<sup>3</sup> or remained valid until 08.12.2005, when the law No. 17 was enacted.

The Law No. 17, dated 08.12.2005, repealed all previous laws which had deprived Iraqi courts from the jurisdiction to adjudicate on certain claims. Article 2 of the said law stated that the periods during which the courts were barred from adjudicating such claims shall not be calculated for the purpose of the limitation period. Therefore, the period between the date of the Law No. 57 of 16.09.1990 until the date of the effectiveness of the Law No. 17 of 08.12.2005, i.e. 15 years, would be disregarded for the purpose of calculating the limitation period. This may prove to be a significant relief for creditors whose claims were considered extinguished and therefore abandoned.

- 3. In conclusion, the invasion of Kuwait, the Gulf War, the US invasion of Iraq, and the Law no. 57/1990 are deemed as impediment suspending any limitation period. But, the length of the period of each event is a matter of fact, and is subject to the decision of the court.**

#### **IV) Interruption**

In addition to the events which suspend the running of the limitation period, the Iraqi law recognises a number of events as reasons for the interruption of the limitation period as stipulated in articles 437 and 438 of the Civil Code. If the limitation period is interrupted by any of the following events, the past period is disregarded and a new period starts to run.

##### **4.1 Interruption by filing a law suit as stated in article 437.1 of the Civil Code**

Filing a law suit interrupts the limitation period subject to the following rules:

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<sup>3</sup> See Saleh Majid, Enforcement of Foreign Judicial And Arbitral Awards in Iraq, International Trade Law Quarterly, May 1998, page 177.

1. The application to the court must incorporate the claim arising from the right in respect of which the limitation period runs, and must be addressed against the debtor.
2. The application to the court interrupts the limitation period from the date of the registration of the lawsuit and payment of the court fees; even before a notification is sent to the respondent or the defendant.
3. The limitation period is interrupted by filing a lawsuit, even if the court finds that it has no jurisdiction provided that the claimant's reason for the jurisdiction of the Court is an excusable mistake. Also, an application to an appropriate arbitration committee or tribunal is deemed sufficient, similar to filing a lawsuit.<sup>4</sup>

But, complaints or recourse to administrative authorities or requests to non-judicial bodies are not considered sufficient to interrupt the limitation period, as it was held by the Court of Cassation in its decision no. 1229/Civil Chamber, dated 11.12.65.

The Court of Cassation held in another judgement no. 1092/M3/ dated 16.12.1973, that a notification through the Notary addressed to the debtor does not interrupt the limitation period. Similarly, a statement or a letter by a creditor that he reserves the right to make a claim or file a case, as often done in correspondence between contractors and employers, does not interrupt the limitation period, as it was decided by the Court of Cassation in judgement no. 408/Civil/Second Chamber/1972.

4. If the claimant abandons a lawsuit and the court decides to invalidate the lawsuit, then the consequences of filing the lawsuit lapse including any interruption of the limitation period as if no lawsuit was ever filed.<sup>5</sup>
5. In cases where the right of the creditor is not disputed, and is capable of enforcement, such as a decision of a court recognising the right, an application

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<sup>4</sup> See Abdul Hameed Al Shewarbi, Civil Defences (in Arabic) pages 1210-1211

<sup>5</sup> Supra, Dr. Al-Sanhouri, Vol. 3 (1958), pages 1096-1097

to enforce the right or a formal notice to the debtor will have the effect to interrupt the limitation period.<sup>6</sup>

#### 4.2 Interruption by admission of the debtor, as provided by articles 488 and 439 of the Civil Code:

1. The prescription period is interrupted if the debtor admits expressly or impliedly the right of the creditor, or acknowledges liability or if there is a partial payment or payment on account to the creditor.

In a decision by the Court of Cassation no. 311/Administrative Chamber, dated 11.4.1982, the court held that an offer for an amicable settlement by the debtor was deemed as an implied admission of the right of the creditor and was sufficient to interrupt the prescription period. The Court further added that an implied admission may be inferred from any act by the debtor indicating a recognition of the claim of the creditor.

2. If the limitation period is interrupted by any of the events referred to here-above, the period prior to the interruption event is disregarded, and a new period, similar to the original period begins to run, as stated in paragraph 1 of article 439 of the Civil Code. But in cases where the limitation period is one year, and becomes interrupted by an admission of the debtor, whether express or implied, then a new period will run for 15 years, not one year.

Furthermore, paragraph 2 of the article 439 adds that if a court upholds a claim, and the decision of the court becomes final "res judicata", a new period of limitation of 15 years begins whatever the original period was.

**In this respect, one may contend that there is an implied admission in cases where partial payments were made by an Iraqi entity to a supplier or a contractors. In such events, the limitation period is deemed interrupted at the dates when partial payments were made, and therefore a new period of 15 years began, as from the date of such partial payments.**

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<sup>6</sup> Ibid, Dr. Al-Sanhouri, Vol 3, page 1101

Due to similar interrupting events, the writer has in practice found that a number of claims were valid though the creditors had thought that they had expired.

## V) **The Effects**

A question arises as to what are the consequences and the effects of the limitation period. In this respect, the following rules apply:

1. The right in question does not automatically extinguish by the lapse of the limitation period,<sup>7</sup> and the court may not of its own accord abstain from hearing a claim on the ground of the limitation period, unless the debtor requests the court to reject the claim on that ground.<sup>8</sup> Such a defence by the debtor may be raised in front of the court at any stage of the proceedings even where the case is being heard by the court of appeal (excluding the Court of Cassation), unless it is revealed that from the circumstances that the debtor has waived his defence.<sup>9</sup>
2. If the debtor raises the defence based on the limitation period before the court, then the court is barred from hearing the case, and the claim is extinguished with a retrospective effect from the date when the limitation period began. It follows that the right to claim interest for the past period is also extinguished.<sup>10</sup>
3. Furthermore, the periods of limitation are part of the public policy, and may not be increased or reduced by the agreement of the parties. But, there is nothing to prevent the debtor to waive his defence based on the limitation period, when this period is completed.<sup>11</sup>

## VI) **Limitation Period under Other Laws**

As indicated before, the Civil Code has laid down the general periods and principles for limitation periods, which are applicable, unless otherwise

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<sup>7</sup> See article 440 of the Civil Code.

<sup>8</sup> Ibid article 443

<sup>9</sup> Ibid article 442

<sup>10</sup> Ibid, article 441

<sup>11</sup> Ibid article 443.2

stipulated under other laws. For example: The Commercial Code no. 30/1984 and the Transport Law no. 80/1983 have laid down separate limitation periods and specific rules in respect of commercial papers and contracts of carriage.<sup>12</sup> Also, the Law for Enforcement no. 45 dated 1980 stipulates that a court decision shall not be enforced after 7 years from the date of becoming final "res judicata".<sup>13</sup>

The Commercial Code no. 30/1984 is applicable mainly to commercial papers, banking transactions, including bank guarantees, international sales of goods incorporating the provisions of ICC-Incoterms. Construction, engineering, and supply contracts as such are not subject to the Commercial Code in so far as the provisions of limitation periods are concerned.

Furthermore, the Iraqi Civil Code has laid down three years limitation period for claims arising from tortious liability and unjustified enrichment, subject to special provisions for calculating the date from which the three years limitation period begins.

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<sup>12</sup> Articles 132, 135 and 175 of the Commercial Code no. 30/1984. See also articles 86-93 of the Transport Law no. 80/1983.

<sup>13</sup> Article 114 of the Law for Enforcement no. 45/1980