

A EXPLICAÇÃO DA OPÇÃO DE FRAUDE DO PONTO DE VISTA DA JURISPRUDÊNCIA E LEI

THE EXPLANATION OF OPTION OF FRAUD FROM THE POINT OF VIEW OF JURISPRUDENCE AND LAW

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Resumo: Uma das questões jurídicas e jurídicas mais importantes é a questão da opção de fraude. Pela opção de fraude, é referido o direito de revogar um acordo para alguém que pagou mais do que o preço original por algo, ou alguém que tenha vendido algo abaixo do seu preço original. O presente estudo é um estudo qualitativo e seus dados são coletados por meio de estudos bibliotecários. Existem três teorias populares sobre a confirmação da opção de fraude. Alguns estudiosos e advogados acreditam que a primeira opção é confirmada por consenso, enquanto outros negam a opção de fraude considerando-a incomum. Por outro lado, alguns outros acreditam que a opção de fraude é confirmada devido ao princípio de não prejudicar. Neste caso, os juristas estão aparentemente aprovando a generalidade desta opção em todas as trocas financeiras e se o seu motivo foi citado consenso, a opção de fraude é sobre a venda. Esta opinião também foi realizada pelo xeque Ansar.

Palavras-chave: opção, fraude, flagrante, ignorância de preços

Abstract: One of the most important judicial and legal issues is the issue of option of fraud. By the option of fraud, it is referred to the right to revoke a deal for someone who has paid more than the original price for something, or someone who has sold something under its' original price. The present study is a qualitative study and its data are collected through library studies. There are three popular theories regarding the confirmation of option of fraud. Some scholars and lawyers believe that the former option is confirmed through consensus while some others deny the option of fraud considering it as uncommon. On the other hand, some others believe that the option of fraud is confirmed due to the no harms principle. In this case, the jurists are apparently approving the generality of this option in entire financial exchanges and if its reason was quoted consensus, the option of fraud is about selling. This view was also held by Sheikh Ansar.

Keywords: option, fraud, egregious, ignorance of pricing

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Introduction

The option of fraud is an authority given to a disadvantaged party by the law in the effect of lack of balance between the value of a sold thing and its price. In this sense, the disadvantaged party can revoke the deal. In other words, by fraud it is referred to harming or disadvantaging another person while in legal terms, it refers to imbalance between the dealt item and its set value. In addition, the lexical definition of fraud is deception and in legal terms it points to an egregious disadvantage inflicted on one side of the deal as a result between imbalance between the cost paid for an item and its real value. The Legislator of Iran has defined the option of fraud in the article 416 of civil code as follows: In every deal, any side who has been subjected to egregious fraud can revoke the deal after becoming aware of the fraud. The civil code has not provided any definition for the option of fraud and almost all lawyers hold a similar attitude towards it. Therefore trying to compare the definitions provided by the lawyers will not yield for us in any advantage.

Types and characteristics of option of fraud

Types of option of fraud

There are two types of fraud, one being egregious and the other being non-egregious. However some others have also considered for a third type of fraud, being the over-egregious fraud.

Non-egregious Fraud

When the fraud is negligible by common law, it is considered as a non-egregious fraud. This criterion has been envisaged for by the civil code. The fraud will only be egregious when it is not negligible by the common law. However there may be always disagreement on the extent of negligibility in common law. This type of fraud does not allow for the option to revoke the deal.

Egregious Fraud

As you may already know, the fraud is considered as egregious when it is not negligible by the common law. However the same problem of criterion of determination of common law exists here as well. The criterion for having the option of revoking is the existence of an egregious fraud and as it is stated in the article 417 of the civil code; the main criterion for determination of egregiousness of a fraud is that the fraud should not be negligible by the common law. In order to further explain this, it can be said that the mere existence of difference between the real value of a property and its dealt value may not provide the ability to revoke the deal. Rather if the difference is to the extent that the common law sees it as egregious loss of one party of a deal, the disadvantaged party is provided with the right or option to revoke the deal. Before the 1982 and before the amendment of the article 417, the criterion for considering a fraud as egregious was the one fifth of the set price and it was held that a difference less than one fifth of the original price is negligible. After the amendment, the mentioned criterion was dismissed and instead the identification of the common law was replaced. It seems that this amendment was logical since if the general criterion is the common law, there would be no legal necessity to set an absolute amount. In addition, if the determination of the egregiousness of a fraud is left to the common law, every situation can be decided for according to its own specific conditions. Nowadays the courts refer the issue of egregious fraud to experts while mentioning that the criterion of egregious fraud is the price of the sold item at the time of deal.

Over-egregious Fraud

As it seems from the title, over-egregious fraud refers to cases where the difference is more than obvious. However, the definitions stated in legal books and documents usually do not cover the term of over-egregious fraud. Now that we have become aware of the characteristics and types of fraud, we will try to elaborate on the sentences and conditions of the option of fraud.

Characteristics of option of fraud

Any side of a deal who becomes aware of being subjected to egregious fraud can revoke the

deal. Hence the option of fraud can be considered to have the following characteristics:

- Option of fraud is not for only one side of the deal. Among the options listed in law, there are some that are only for one side of deals, while the other side has no right to revoke the deal; for example the option of delayed payment is only for the seller while in case of animals, the option is provided for the buyer. However there are also options that have been envisaged for the both sides of deals. For example in the case of option of meeting place, the option of fraud is not exclusive to one side of the deal and whoever the disadvantaged person is, whether the buyer or seller, the law considers for him/her a right to revoke the deal.
- The option of fraud is not exclusive to selling and it is envisaged for in other deals such as renting where there may be an imbalance between the real value of a rental item and the paid rent.
- The option of fraud is confirmed only if the fraud is egregious. More explanations would be provided later on in this article.
- The option of fraud is envisaged for in exchange deals, but in non-exchange deals, since there are no exchanged items, there can be no fraud and resultantly there would be no option of fraud.

Proof conditions of option of fraud

Imbalance of prices

The important point here is that the fraud must be existent. In other words, there should be an imbalance between the real price and the dealt price of an item. Otherwise the option of fraud would not be existent in the first place. However, the extent of this imbalance would be scrutinized and discussed later on in this article.

Ignorance of original pricing

The option of fraud is confirmed only if the disadvantaged was not aware of the original price of the dealt item at the time of dealing. In other words, option of fraud is confirmed when the disadvantaged is unaware of the real or original price of the item in the market. On the other hand, if the disadvantaged was aware of the original pricing at the time of the deal, the article 418 of the civil code does not allow him/her to revoke the deal. On this basis, if someone sells an item under its real value due to hurry or stress, he/she cannot revoke the deal with reference to the option of fraud. If it is claimed that the disadvantaged was aware of the real price of the item at the time of contract, it is the duty of the other party of the deal to prove it.

Egregiousness of the fraud

In order to confirm the option of fraud, there must be an imbalance between the original price and the dealt price of the item. But the subject of the discussion of this part of the present paper is whether this imbalance is general and absolute or not. The article 416 of the civil code maintains that any side of a deal who becomes aware of being subjected to fraud can revoke the deal. As it was mentioned earlier, for the option of fraud to be confirmed, not only there should be an imbalance of pricing, but also the fraud itself must be egregious. The criterions of egregiousness of fraud include:

- In Imami jurisprudence, Sheikh Ansari believes that the criterion of egregiousness is a price difference of $\frac{1}{4}$ and or $\frac{1}{3}$ of the original price while the criterion of one fifth is mentioned doubtfully. The condition for confirmation of fraud is an egregious difference and it won't be confirmed in cases where the difference is about $\frac{1}{10}$ or $\frac{1}{20}$ of the original price. It seems that the egregiousness of the fraud is confirmed with a difference equal to $\frac{1}{3}$ or $\frac{1}{4}$ of the original price and the only doubt that there is, is about the criterion of $\frac{1}{5}$.
- In terms of law, there is a difference of criterion between the before amendment and the after amendment states of the civil code. The following includes both criterions:

Civil code before amendment:

The previous article 417 of the civil code included two criteria for confirmation of egregiousness of the fraud.

- One fifth criterion: regarding the price difference and fraud, the previous article 417 of the civil code maintained that if the fraud was equal to 1/5 of the original price of the item, it is egregious. For example if someone buys a 75 dollar book for 100 dollars, then the buyer is disadvantaged and subjected to fraud. This is because the price difference between the original pricing and the dealt price is larger than one fifth of the original price. But if the same person buys the same book for 80 dollars, since the difference of prices is equal to one sixteenth of the original price there would be no confirmation for the option of fraud. The point is that we should know what is meant by one fifth. Is it referred to the one fifth of the original price or the one fifth of the dealt price? Here there are two possible opinions. 1st opinion: one fifth of the deal price: this opinion can be used based on the example that is stated on the page 58 of civil book 6 written by Dr. Shahidi regarding the issue of option of fraud, which is the upper mentioned example. 2nd opinion: one fifth of the original price: this opinion is based on the explanation provided in the civil book of Dr. Shahidi: by the word price it is referred to the market value of the sold item and whenever the difference is larger than one fifth of the market value, the fraud is egregious. For example a student who has paid 60 dollars for a 40 dollar book is disadvantaged since the difference is larger than one fifth and therefore the student can revoke the deal.
- Common law criterion: the same article 417 has also included another criterion too: in cases of price differences smaller than the mentioned extent, the fraud is considered as egregious only when it is not negligible by the common law. In this case, the option of fraud is confirmed for the disadvantaged party.

Civil code after amendment

After the 1982 amendment of the civil code, one of the formerly mentioned two criteria for the egregiousness of fraud was dismissed and only the criterion of common law identification remained. The amended article 417 of the civil code maintains: the fraud is egregious if it is not negligible by common law. It seems that this amendment was logical since if the general criterion is the common law, there would be no legal necessity to set an absolute amount. In addition, if the determination of the egregiousness of a fraud is left to the common law, every situation can be decided for according to its own specific conditions. Nowadays the courts refer the issue of egregious fraud to experts while mentioning that the criterion of egregious fraud is the price of the sold item at the time of deal. That Mr. Shahidi believes that this amendment is not highly logical, is not something far from expectation since leaving the criterion with the common law may result in difference of common laws. May be it is better to consider for the both criteria of identification of common law and one fifth of the original price; or in cases when the criterion of one fifth was not met, one could go for the common law criterion. This could have been the subject of the pre-amendment law.

The conditions for collapse of option of fraud**Delay in effectuation of the option**

The option of fraud is an urgent option and it must be effectuated as soon as awareness has been made about it. Delaying in doing so will result in the collapse of the option of fraud. As article 420 of the civil code envisages, the option of fraud must be effectuated urgently once the person has become aware of it. But how long can this take? Or in other words, how much time does one have to put this option into effect? As it was already mentioned, the option of fraud is an urgent option and once it is confirmed, the disadvantaged must put it into effect in a time length that is not contradictory to the common law's interpretation of urgent. Sheikh Ansari states: there have been disagreements regarding the urgency of option of fraud. He has also talked a lot about the urgency of option of fraud in his book, saying that the urgency must be in a way that it does not cause any

harms and if one claimed that he/she was unaware of the option, it is better to accept it.

Waiver by the contract

While contracting, one can mention the option of fraud not unlike many other authorities that can be mentioned. The option of fraud can be waived by the contract but if the disadvantaged is able to prove that a significant amount of difference of price was considered for in the contract, the option of fraud will be confirmed for him/her. If the contract says that even an egregious fraud is waived and after the contract it turns out that that the fraud was over-egregious, the disadvantaged party will have the right to revoke the deal. On this basis, while registering contracts in notary publics, in order to block every way of collapsing the contract, it is mentioned that the contract cannot be voided in case of egregious or over-egregious frauds.

Awareness about the original price at the time of contract

It is obvious that if the disadvantaged party was aware of the real price of the item at the time of contract, he cannot revoke the deal after the contract. This is because if a person was already aware of the market price of an item but did deal the item anyway, he/she will not have the right to revoke the deal since he/she has consciously disadvantaged him/herself. In this regard, the article 418 of the civil code maintains that if the disadvantaged was aware of the original/market price of the item at the time of dealing, he/she will not have the option to revoke the deal.

Conclusions

Researches have shown that many jurists and lawyers believe in the confirmation of option of fraud and this view is also accepted by Sheikh Ansari and Iranian laws and lawyers as well. Some have even claimed that a consensus is required for the confirmation of option of fraud while some others have denied the option of fraud, but since it is inconsistent with the jurisprudence and laws, it is not accepted. The jurists have referred to these documents for confirmation of the option of fraud: the no harms principle in the religion of Islam and the verse of:

ضارت نع هراجت نوكت نأ ال لطابلاب مكنىب مكل اوم ول كاتال اونمأ نىذلا اى اى
مكنم

Meaning: O you who have believed, do not consume one another's wealth unjustly but only [in lawful] business by mutual consent.

In order to confirm the option of fraud, there are two conditions that need to hold. One is that the disadvantaged must have been unaware of the market value of the item, and the other is that the difference between the dealt price and the original price must be egregious. In addition the jurists and Sheikh Ansari have mentioned that the right to revoke the deal (option of fraud) can be waived by contract. In addition if the disadvantaged party delays in effectuating his/her right after becoming aware of the fraud, the option of fraud would no longer be accessible for him/her. Considering the appearance of the claims of jurists and considering the differences between them and some other jurists it is concluded that the option of fraud is exclusive to selling. In addition one of the jurists believes that if the criterion for detection of option of fraud is the principle of no harms, then the option of fraud applies to any financial exchange. But if the criterion is considered to be quoted consensus, the option of fraud would be exclusive to selling. Regarding the urgency of the option of fraud, it is referred to the views of jurists most of whom including Sheikh Ansari believe that the option of fraud is urgent.

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