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EFFECTS OF WAIVING OPTION OF LESION ON ENORMOUS LESION

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Abstract

Option of lesion is one of the legal options usually waived by parties. As the deceived party is not informed of the real price, he predicts maximum damage and waives his option with such a probable presumption. In this regard, if it is known that the happened lesion exceeds his presumption or the convention considers such a lesion rate as excessive, should we regard the option of the deceived person as waived? To answer this question, there have been different opinions. We reviewed two different perspectives and then presented our viewpoints.

INTRODUCTION

In transactions, the parties waive their options, especially the option of lesion, to provide more stability in contracts. Option of fraud has some sub-categories, including negligence, gross, and enormous. The present study aimed to answer the following questions: Is the option of enormous fraud waived by waiving the option of lesion (gross)? If both the options of gross and enormous fraud are waived, and the happened damage exceeds the deceived person's presumption or convention, is there any other option? This is one of the transaction problems in each society. It is an application or deductive issue not being reviewed independently or specifically in Iran's law. To collect the required data, a library method was used. First, the generalities as well as the consistent and opposite views are reviewed, and the authors' viewpoints are then discussed.

FIRST TOPIC: GENERALITIES

Definition

An option literally means the power to choose (Amid Dictionary, 1978, p 553; Ibn Manzur, 1972, V.4, p 265; Fiumi, Bitā, V.2, p 185). In a legal expression, it refers to the domination on removing the effects resulting from a contract (Jafari Langroodi, 2004, p. 266). In the Civil Code, no definition is provided for this term. In jurisprudential texts, an option is defined as the right of giving priority in contracts (Najafi, 1984, V.23, p 3; Tabatabaei Haeri, 1998, V.8, p 289). According to some lawyers, an option is the right by which the holder may terminate a legal measure resulting from a binding contract (Emami, 2006, V.1, p 461; Baricloo, 2015, p169). Options are included in certain unilateral legal acts (Katoozian, 2011, p 67).

Lesion literally means cheating in a deal (Amid, 1978, p 840; Johari, 1989, V.6, p 2172; Tarihi, 1996, V. 6, p 288). In jurisprudential texts, the primary meaning of lesion is fraud and cheating (Shahid Sani, 1990, V.3, p 463). The lawyers consider lesion as damage in transactions, which would create an imbalance between unaware parties (Haeri Shah Bagh, 2019, p 401; Katoozian, 2012, p 371). The lesion is usually divided into gross and enormous.

Gross lesion means the lower or higher price, which is usually not ignored by individuals and is determined by convention (Mohaghegh Helli, 1988, V.2, p 16; Bahrani, 1985, V.19, p 40; Sheikh Toosi, 1988, p 237; Adl, 2010, p 260; Langroodi, *ibid.*, p 488). In Article 417 of the Civil Code, the definition of the gross lesion is determined by the convention. The law does not define the enormous lesion. Some lawyers believe that there is no difference between the gross lesion and the enormous lesion (Langroodi, *ibid.*, p 488). Jurists have used this term as a remarkable lesion (Khomeini, Bitā, V.1, p 523). The convention has also accepted these two terms with the aforementioned meanings.

The Realization Terms of Option of Lesion

Some concurrent conditions are required for the option of lesion to be realized by parties in transactions. These terms are as follows:

- A. Consideration: Some assume that the option of lesion is exclusive to consideration contract (Katoozian, 2001, V.5, p 207; Langroodi, 2019, p 318; Amiri Ghaem Maghami, 2013, V.2, p 312), even if it is a consideration gift (Mirzaye Ghomi, 1993, V.2, p15). They also consider it not to be included in the unilateral legal acts. In the likely contracts in business convention, there are no obstacles for making the option of lesion by considering probabilities and their evaluation (Asghari Aghmashhadi, Mohammadi, Mostafavi, 2014, p 32).
- B. Inequality of consideration values: This means that the values between considerations are imbalanced (Adl, 2010, p 261; Ghasemzadeh, 2014, p 156). If there is no inequality between considerations, the option of lesion will not be realized, as it is based on violating the implied condition of the parties regarding consideration equality or two commitments (Tabatabaei Yazdi, 2001, V.2, p 39; Khansari, 1985, V.3, p 156).

- C. Ignorance of the deceived party: This implies that the deceived person should not know about the price (Ansari, 1995, V.5, p 166) as such whether the other party is ignorant or not makes no difference (Langroodi, 2018, p 318). Regarding awareness of the real price and the deal under unequal price, it is included in the action rule, and the party is in charge of one's mistake.

Waivers of Option of Lesion

The option of lesion could be waived under one of the following conditions:

- A) After contract conclusion: After contract conclusion, the deceived person will be informed about the real price and his being deceived. In this case, there is no difference either between being deceived before or after the lesion, or the conditions changed conditionally or free of charge (Ansari, 1989, V.2, p 384) since it has been waived willingly.
- B) During contract conclusion: Some jurists criticized this issue as this condition arouses risk (Shahid Aval, 1996, V.3, p 276; Seimari, 1999, V. 2, p 36). Some jurists even believe in terminating and cancelling the contract regarding the high probability of the risk (Hosseini Ameli, 1998, V.14, p 243). The claim could be justified by offering what does not exist. However, this reasoning has not been accepted, and the stronger opinion is the soundness of this waiver (Ansari, *ibid.*, p 386). To support the stronger opinion, if the necessity of something exists, it could be waived, and this is possible in credit affairs. Moreover, this option is referred in Article 10 of the Civil Code (Emami, 2006, V.1, p 483).
- C) Possession of the transferred property by the deceived party after contract conclusion and being informed about the lesion: If the deceived party possesses the property after the lesion, it typically indicates his consent (Karaki, 1993, V.4, 295; Haeri Shah Bagh, 2019, p 404). This reasoning may be justified by the principle of action.
- D) Possession of the transferred property by the deceived person before knowing about the lesion: According to some general opinions, the option of loss for the deceived person is waived because of his possession; however, he may have an alternative (Ansari, *ibid.*, p 388).

Despite western law, the lesion is not considered as will defects and items contrary to public order and good morale in Iran's law (Katoozian, 2012, V.1, p 40).

After discussing the generalities, on the waiving of the option of lesion (gross) by the enormous lesion, two consistent and apposing opinions as well as authors' viewpoints are described.

Second Topic: Reviewing different Opinions on Waiving Enormous Lesion

In the case of concluding a deal, the option of loss shall be waived if there is no balance between considerations and the deceived party is ignorant. In which lesion is this issue addressed? Is there ranking for the lesion? Does it wave any lesions? What is the criterion for ranking the lesion? To address this sub-questions, different perspectives are further reviewed:

1. Proponents' Viewpoints Regarding Waiving option of Enormous Lesion by Waiving Option of Loss

It is possible that the deceived party waives the option of loss and does not mention the rate of the lesion. In this case, the lesion includes all kinds of lesions. If the parties determine a limit for the lesion, the lesion should be waived by the same limit. Otherwise, if the deceived party absolutely waive and considers the lesion waive rate as, for example, 10%, even though the lesion rate is $>10\%$, we should not assume the consent at 10% and consequently, consider the option of loss as presumed. As the proponents of this opinion ignore the intention of the deceived person and follow the terms and conversations but not assumptions, the option shall be waived (Mohaghegh Naraghi, 2001, p 348-9; Ansari, 1997, V.5, p 180; Khomeini, Bita, V.1, p 523). To justify this viewpoint, if there is no intention to write down the dialogues (Shahidi, 2011, p 133), there is no waiving by determining the limit and for reciprocity of two intentions, it needs a tool to express the intention for writing (Langroodi, 2008, p 164).

According to Article 416 of the Civil Code, it can be inferred that each kind of lesion does not make option, as by applying the word of gross loss and defining gross loss in a further article based on that lesion is gross, which is conventionally renounceable, then non-gross lesions which are renounceable, have no options (Hamiati Vaghef, 2009, p 226). Accordingly, by mentioning the term of waiving the option of lesion, it includes gross lesion, as negligent lesions have no options to be waived. In the Civil Code, the word of enormous has not been included. It could be stated that, from the viewpoint of legislators, there may be no difference between the gross lesion and enormous lesion, and that waiving the option of gross loss also includes enormous lesion. In the Islamic jurisprudence, waiving gross and enormous lesion on a presumption that the maximum prediction of the deceived person is 20%, even though, it is $\geq 30\%$, the proponents of this opinion believe that as only one reason arouses the option and that it is the option of loss already waived, so there is no other option (Mohaghegh Naraghi, *ibid.*, p 348-9; Ansari, *ibid.*, p 180; Khomeini, *ibid.*, p 523).

Some proponents assume three scenarios for this theory:

1. At the time of waiving, they mention the amount. For example, it should not be more than a given amount. In this case, the condition should be observed.
2. They assume a 10% lesion but do not utter that and waive their options (i.e., waiving the options with no condition). In this case, they consider the speech, and the option is absolutely waived.
3. They waive the option of loss not conditionally but as explained. In this case, the explanation is not valid, and the option is absolutely waived (Khomeini, *ibid.*, p 523).

2. Proponents' Viewpoints Regarding not Waiving Option of Enormous Lesion by Waiving Option of Loss

The proponents of this opinion believe that if there is a limit for lesion, for example, up to 10%, the option will be waived; however, if the option of loss

is absolutely waived, it could not be stated that all lesions ranks are waived. Similarly, in Article 417 of the Civil Code the option is subject to the gross lesion, it is not subject to non-gross or negligence lesion. This shows the rank of lesions. In this article, the criterion of the gross lesion rate is underpinned by the convention, which is of law resources and plays a crucial role in legal principles (Langroodi, 2014, p 40; Katoozian, 2004, p 182).

The convention is based on a practical method made by one or some individuals and is gradually considered as efficient and employed by the other members of society (Shahidi, 2009, p 301). In law, the enormous lesion has not been mentioned; however, in the conventions of official and non-official deals, the term 'enormous' refers to a plenty of lesions. In this regard, this convention has no discrepancy with the law. Here the convention does not make legal rules but expresses them (Saljooghi, 2014, p 92). A practical convention on the use of this term shows the integrity of action under the limitations of contracts and deals (Langroodi, 2007, p 86). In juridical texts, the jurists also use the word of enormous as plenty of lesions (Ansari, 1994, V.5, p 180).

Depending on the rate, the lesion is divided into negligence or non-gross, gross, and enormous. Some believe that the lesion could be rated by referring the issue to an expert (Langroodi, 2003, p 287).

If the lesion rate is determined in the agreement, it will be waived up to that rate. The deceived person could agree with the damages at any rate after knowing about the lesion rate. Our discussion is about the time when during a contract the deceived parson waived his option of loss before knowing about the lesion, but the rate of the lesion is enormous, and even he may waive gross and enormous lesion but knows the rate of enormous lesion maximum 30%, but the damage rate is 40%. In this matter, is there again any option for a deceived person or not?

Some believe that the deceived person has an option in case of waiving the option of gross loss and making enormous lesion; however, if he waived both, there would be no more options (Shahidi, 2011, p 60). Some other lawyers believe even based on waiving gross and enormous lesions, convention negligence in the lesion is different in terms of the type of transaction. For example, 10% lesion in a clothes deal is different from 10% lesion in a gold deal. In the clothes deal, it could be negligence lesion, and in the gold deal, it could be enormous (Safaei, 2010, V. 2, p 281). In other words, exclusive utterance does not suffice. Some also unreasonably accept that the option of loss is waived in the settlement; however, if it is known that the lesion rate exceeds the predicted rate, the settlement will be nullified (Emami, *ibid.*, p 484).

To respond to the proponents' reasoning, the opponents argue that:

First: In this viewpoint (i.e., they mention the rate while waiving), they have no discrepancies. For example, the rate should not be exceeded by a given amount. In this case, the condition should be observed.

Second: In the second case (i.e., the deceived person's prediction about the lesion rate), they consider it invalid while waiving and claimed that the proving and proof are mixed. Proof refers to the same intention of the deceived person, who predicted the lesion rate at, for example, 10%, and proving is the appearance which resulted from speech.

Third: To object to the previous viewpoint, they differentiated explanation and delimitation. According to this group, any explanation could be formed as a condition, and any condition could be expressed as an explanation.

Another reasoning in support of their opinion is that if the deceived person has an intention of 10% and does not talk about it and the other party knows about his intention, they will follow the intention as if he does not speak about his intention. If they act otherwise, then the transaction is not legitimated (Makarem Shirazi, 2017, pamphlet).

Some others cannot find a reason for waiving by mentioning similar reasons if the deceived person proves his prediction based on a maximum lesion like 30% and providing waiving option of the gross and enormous lesion (Javadi, 2010, pamphlet).

3. Authors' Viewpoints

Regarding waiving the option of lesion, the option shall be waived if the maximum rate is mentioned. In terms of the absolute waiving of the option of lesion and the specific prediction of the deceived person as the maximum rate, the rate predicted by the deceived person should be considered. As waiving is unilateral, and this unilateral act has been written down by the deceived, his will affects the written waiving; however, if his intention is not proved by some evidence, the justification of the second theory's proponents could not be announced in courts even if it is closer to the truth. Then the judge should prefer announcing the intention on the intention on his mind (Hosseini Moghadam, Mohammadi, 2019, p 285). Nevertheless, in the case of waiving the option of loss, even the enormous one, by referring to a convention on the subject of the deal and proving that this convention knows enormous the lesion of the transaction, waiving shall be nullified.

CONCLUSION

The lesion has three ranks, including negligence, gross and enormous. However, the legislator has not explicitly mentioned negligence lesion, it could be inferred from the converse meaning of Article 417 of the Civil Code.

The legislator has not mentioned enormous lesions in the law; however, conventionally, it damages more than gross and means much damages. About waiving the option of the gross lesion, there are discrepancies about the possibility of remaining of the option of the enormous lesion. Each group has stated a variety of reasons in support of their opinions. The authors believe that the gross lesion is waived to waive the option of loss; however, the enormous lesion is remained. Even by the presumption of waiving gross and enormous lesions, if the convention considers the enormous rate as 30% in transactions such as gold or car transactions though the rate of the lesion is

40%, the mentioned option cannot be considered as waived since it causes irrational fortune for the party and is far from the objectives of a bilateral contract. In this regard, courts should not consider the option as waived just because of the words. On the other hand, if the deceived person proves his prediction about the damage, the court should decide accordingly. Otherwise, the vote should be issued according to the convention.

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