



## The State of Defect Option with Having the Guarantee

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### ABSTRACT

Defect option is one of the options that the civil law following by the jurisprudence gives to the sides of the transaction in order to adjudication in the case of good defect. Nowadays, a right has been added to this option that based on this right the obligation to troubleshoot or any suitable adjudication for wronged is on the responsibility of second side. But the some adversary arguments about guarantee express the wronged satisfaction and take himself innocent of any defect and responsibility about the guarantee.

The present article is analyzed by the descriptive method and is codified relying on law materials and liberally resources. In this article is discussed about some questions like guarantee rights nature and wronged rights in the cases of guarantee in the domestic law. The results of this article have showed the guarantee doesn't help to the seller of defective goods and rather than impose on him a further obligation.

**Keywords:**defect option, guarantee, defective goods

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### INTRODUCTION

1 concepts and theoretical foundations

1-1 concepts

1-1-1 the concept of defect

1-1-1-1 the concept of defect idiomatic translation

The "عیب" in word, originate from "ع ی ب" and its equipollent in Persian is "deficiency=نقص" and "physically defect=کمبود فیزیکی". In some wordbook the defect came as synonym with "عوار" or "عور". In some news and religious novels, "عوار" is adverted to the "عیب" with conjunction "و". Meanwhile the tow counjected words through the "و" could imply the adversion not necessary the synonymy. But the review the literal meanings of these two words, it can be deduced that "عوار", means "rupture of shirt" or "blindness" used but the "عیب" can be used in all kind of defects (M'loof, 2000,540). The jurisconsults generally provide a similar definition of defect like: defect is the egression of natural process in result of blemish or supernumerary that cause financial detriment (Ansari,1999,193) when damage some features of goods that related to its origin(khoei, 1989, 406). These definitions consider the financial detriment as a necessary criterion for the defect and the financial detriment means decrease of the goods value.

2-1-1-1 the defect concept in the law

The jurists alleged varied definitions based on their outpoints from the law; for example: the defect is a situation of the

transaction that is unlike the normal and healthy situation of transaction.(Shahidi, 2007, 61). The denotation of defect is depending on custom because the custom maybe consider a act in somewhere defect but in another place the same act is not a defect or the specific act in some when count a defect but another time not.(Emami, 2007, 500). The defect is a damage that reduces of goods value or reasonable benefit (Katozian, 2010, 239). A person wants to buy some goods and pay for that so he expected a right goods. This issue named the healthy rights of defects although it is not mentioned in transaction conditions.

The predication of transaction to any process behove that the purchased goods or services is healthy any without defect. So the term of flawless of the products or services is just anemphasize in the transaction. The customer with the imagination of the product is safe and healthy buy it. In the case of having any defect the customer will be lose that is not fair.(Jaafari langroodi, 2001,530)

The article No. 422 of civil law declares: "if it is revealed that the product is defected the costumer is free to accept the defected product with the repayment or termination of deal". The appearance of the order is about the sale but it is deduced from the context of 456 civil law article that lawmaker intend to express a general rule for the contracts. The content of article 437 of civil law emphasis this dedication too, because if the article 426 unlike its appearance was a exceptional order it is necessary to not involve the price of defective while the article of 437 says:"in terms of the provisions of the flaw, the personal price like personal sales" due to mentioned text the lawmaker has exemplify the achate as the most prominent deal involved defect and did not intend to dedication of the law to the achate. In case of existence any defect the customer is free to choose:

1- The termination of the contract and give the achate and price back

2- Accept the fine. It means acceptance the defected product in addition to the price difference between the safe product and defected one.

### 3-1-1-1 The defect in international law

In the international convention of product transaction do not provide any definition of defect. Only in the article of 35, have been discussed a general topic "incompatibility between the product and contract". In this convention the originality has been gave to compromise and contract between two sides.(karami, 2002, 119)

In the France law "defect in consumption" is the criteria for detection of defect.( article 1641 France civil law) and like our law has been authorized to the costumer to ask the termination of contract in order to compensation his damages, it means return the product and give back the money or ask the difference from the court. The buyer is free to choose one of the tow solutions and he can change his mind before the confirmation the writ by the court. For example, if the costumer asks the termination of the contract he can change his mind and claim the compensation. Since the termination of the deal will be implemented by the writ of the court if the justicer denoate that the defect is not noticeable lead to determination of deal. He can don't accept the claim to determination the deal and order to repayment.(Katozian, former resources, volume 5,275)

### The concept of Guaranty

The Guaranty in its common concept means the obligation of the producer in the specific duration for the repair the product or elimination of the defects or even replacement. These methods are from common methods to support the consumer. In this article we want to study its juridical nature. In its literal translation is predicated to any guaranty and includes any kind of legal guaranty. This kind of guaranty plays an important role in the competitive markets in the attraction costumer to the slightly products and depends on quality of guaranty providing and its time is effective in customer's attraction.

Another definition of the guaranty: guaranty is an imperative obligation that make the seller to implement his commitments before the costumer according the rules and conditions that the deal is accomplish based on it. In fact, based on principle of the free will, the seller's will is not only influent in the make a deal and its results but it also in all legal relations. The seller has committed that claim responsibility of some special cases such as elimination the malfunction, repairmen or replacement the parts or the product until specific duration and under special condition.

This commitment has created based on arbitrary freedom and it seem since it is not adverse the public discipline and the morality as well civil law and it is not against the superior social interests. so it can be imperative for the producer. In addition to, based on article

0 of civil law that order:" the privet contracts towards the sides who signed them, in case of not against the law, are influent" "We can warrant the accuracy of such commitment

Deals and contracts are not limited to specific names in special frames and nowadays the Emamieh jurisconsults know any type of deal that is consider as contract and deal reasonably is necessary to completely accomplished and position in the range of compromise deals.(Abde Brojerdi, 2002, 193). The point is whether the guaranty is an independent obligation or it is a primary condition or in accordance the deal become imperative. Some believe the article 10 of civil law releases the influent of condition from depending on the deal as a

stipulation. Because the condition is a deal too and can imperative separately apart from the deal, So it is enough the condition was affiliated to the contract to be its complement although it was signed after the contract (Katozian; former resources, volume 4, 263)

The provided guaranty by the companies can be imagined in tow state.

A). the guaranty is supposed as stipulation and the contract is based on the condition. In this case the existent commitment from the contract includes the stipulation and makes the condition imperative.

B). the guaranty is supposed as separate condition and only related to the contract, based on above explained this condition is imperative too even don't position in the contract. So the producer if only obligate to repair or replace the product until a specific duration and this condition was accepted by the costumer, a imperative commitment is created. Based on it the costumer can in case of producer's refusal from accomplish his commitment, demand it from the court.(Jaffari Langrodi, 2008, 196)

### 2-1 Theoretical principles

#### 1-2-1 the conditions of creation the defect option

Some conditions are needed to creation the defect option

##### 1-1-2-1 the concealment of the defect

If the defect of the product is apparent and the buyer can see it, then he could not anymore demand to termination the contract based on defect option, because the seeing of defect while buying the product means the satisfaction to it. Sometimes the defect is not really hidden, but the buyer did not see it. In this case there is the defect option too.(Mohaghegh Helli, 19995, 281). The criteria of distinguish of "concealment" common law judgment is about instance. And will be assess in related with knowledge and ignorant of the buyer?(the hidden defect that conceal from normal buyer's eye) or a blemish that the buyer neglect it. Or defect that was the subject of dispute buyer unaware of it as traffic police officers

what is effective in achieving the defect is not judged common knowledge and ignorance of the buyer. However, in view of the common law is clear. (Consistory, former C-5, 2)

The intention of concealment in the 423 article did not imply this meaning. The civil law interoperate it in article 424 immediately "the defect consider as hidden in case of the customer did not Know about it while buying whether this ignorant is because of concealment or customer's careless " so if the customer is aware of the defect and buy it he is not justified to acclaim the defect option, because the customer chose the defected product with knowledge to the its defect.(Emami, former resource, volume 1, 168)

##### 2-1-2-1 existence of the defect in time of deal

Just an existent defect in time of deal can qualify the conditions of defect. Article 423 of civil law order in this case: "the defect option belonged to the customer in case of the defect is hidden and existent during the deal" it is possible the defect of product appear after while the deal, but whatever give to the buyer of such product the right of determination and getting the compensation is the existence of the defect in time of compromise because the appearance of the defect is stater of his right and the customer has not any role in create this option, therefore the option can be eliminated before the appearance the defect.

If the product is defected while buying and the customer buy it and pay for actually he loss in his deal. The law to prevent of the loss permit to the customer to terminate the deal or accept the compensation)( the option will be don in the sold good as an instance if one of the goods was defected the buyer can give the defected one and replace it with another and seller have to do it( Shahidi, former, 162)in the case that the defect after deal caused by the reason return to before the deal "like a sold hours stop from move because an ill return to before the deal " the defect is belong to before the deal.

### 3-1-2-1 being individual of the product

One of the conditions to creation the defect option is the being individual of the product and in other word being instance. Article 437 of civil law stats " in regarding to regulation of defect, individual price is like individual product". This article proves that the being individual of the product is one of the conditions of defect option. If the product is general after proving the defect in the sample, the customer could claim the situated but he cannot terminate the deal, unless an event make the general product individual. in the object of sale, if there is in general quantity a specific quantity of product is safe the seller should deliver healthy sales and if they all is defected the buyer can determinate the deal (Zinedine, 1413; 119).

The other condition is that the product is paid for. In the free deal the defect option is not influent. Who obtain something freely do not make benefit from defect option claim and act against his benefit. Because does not paid for defected product until he can terminate the deal or acclaim the compensation. Although in the paid gift that the one of side of contract expected a safe product in benefit of second side, the ignorance of the law before the gifted product with defect seems fair. Definitely, the gift with condition of exchange is can't be determinate according to defect option or claim the compensation. The annunciation of invalidity or ineffectuality the condition of exchange can be acclaim hardly, this claim rarely win in our courts. Other condition is ownership of the deal.in the committed deals if the warrantor doesn't obligate to his commitment merely the implement the commitment should be asked. The defect option is belong to a product that exchange with Sam or something but the product is defected. Although in the paid possession of the benefits the defect option is influent, but in condition of the defect that terminate the contract made the loss or hardness in make benefits.

### 4-1-2-1 denying responsibility of defects

Maybe at time of deal two sides deny responsibility of the defects and the prices. According to Article 436 of the Civil law if the salesperson denies the defect responsibility or sales the product with all its imperfections, the customer cannot claim defect option according to same imperfections. If the seller does not bear the responsibility of some of the imperfections, the customer has no right to terminate the contract based on same defects. But in case of appearance other defects; the customer can claim the termination of contract. It seems that the denying the responsibility of defects is a kind of termination of defect option, and accordingly, the customer will not have the right to terminate if the sales are faulty. So with deny the responsibility, the right of deal termination and demand the compensation. Denying the responsibility of course includes all hidden faults and obvious errors in the contract, and normally the seller takes its responsibility. regarding the issue that the denying of responsibility of defects is former or new depends on the sides of deals or compromise in each case, in each case in accordance with relevant decisions

must be made by mutual consent of the parties. (Katozian, former, 296).

### 2-2-1 the base of defect option

#### 1-2-2-1 the principle of product safe

A bunch of jurisconsults are looking for the bases of defect option in compromise. According to their thoughts in normal cases the buyer want to possess a safe product based on the trust. Trust to health of product rich him from the condition of this definition. The seller is aware of this confidence and so put in the most of deals the principle on the safe of product. Somebody who buy something and pay for it, he supposes the product is safe and health, this issue in idiomatic translation of law called healthy of defects. Therefore even if the term of healthy of defect do not mentioned the name of deal behove the health of defect. The term of health of defects is just an emphasizing term. In case of the customer buys a product supposing it is safe but it was defected and imposes the loss on the buyer. The justice behove this loss is repaid. (Former recourse, 311) people find this common-law sense in their conscious and accept this as stipulation. But we have to confess this base is not sufficient for justification all the orders related to defect option. , On the assumption that to be accepted that option of determination due to violation of product from common definition or implide term, the legislator due to this problem separated the description and term from the general rules and has been determined it as subject of specific provisions.

#### 2-2-2-1 defect option a way to compensation of loss

Some jurists and lawyers consider the necessity of negate the loss also among the foundations of defect option (Imam, former; 376).It cannot be denied that the main purpose of anticipating ways to get rid of a contractual obligation to prevent unjust loss. Because what occurs based on two sides will and implement the contract is legitimate and if it caused a loss cannot be considered "undue". The law in order to prevent customer loss against product defect guide to tow ways that buyer can chose one of them without attracting buyer's satisfaction. One of them is termination of contract and the other is acceptance the deal with getting the compensation. And in rest of the options the loser just can terminate the deal or accept it whatever it is.

One of the legal grounds for cancellation of the contract is intentional termination the contract because of defect option. Defect option is one of the options in Article 396 of the Civil law. Flaw in the law (jurisprudence) means anything that is more or less from its original creation. Some knows the judgment of common law as criterion for diagnosis this issue and some know the more and less as criterion for diagnosis this issue. In Iranian law subject of "fix the defect of product" is resent topic, and in the legal books is not discussed. The Civil law in defect option discussion neglects it. What is discussed in legal resources is deterioration of flaw that don't related to rectify the fault by the seller. Because the deterioration included cases in that the defect rectify automatically and without the involvement of the seller.

Lawyer's definitions of defect are often similar to juratory definition. Some lawyers say the defect is the exit of things from its original shape, some other in definition of defect say the defect is a situation in the deal against the normal and health situation. Another bunch of lawyers definite the defect in addition to the necessity to typical face, and involved the special incentives and objectives of mutual sides and believe the defect is a fault reduce of the total price or its standard benefits (Katozian, former, 319). This definition seems more

complete because in a defected product normally there is all parts. But some of its part work correctly, like a car damages in accident. But in defect normally on part of product is missing like a porter animal loses one of his legs.

## 2- Contrast between defected product and defect option

### 2-1 Principles of responsibility with guaranty

Protection of consumer One of the law important issues is the principle of civil responsibility. Law professors express the foundation of Responsibility to the philosophy of the responsibility, etc. (Badini, 1384, 52) in general, the various principles of civil liability has been discussed. In continue the provisions of the Consumer Protection will be study until the legislator's position of Iran become clear.

#### 2-1-1 contractual liability

At first it seems to be accepted in this law, is the Contractual liability. In fact, the supplier with sell goods and provide guarantee to the buyer undertakes any failures that exists in the goods or occur while normal use, and compensate any damages to consumers and third parties. This idea is practicable about the first buyer who is in direct relation with supplier. But in the case that the affected is not the one of the parties of deal and only was a consumer of defected goods or is a third part that affected by defected goods, based on the rules of contractual liability is almost impossible and claim of civil responsibility is depends on proving the delinquency of supplier and demanding the recompense caused by defect from supplier that not aware of his product defect is not possible according to the traditional rules of civil liability.

#### 2.1.2 Strict liability

although in the Iranian Law, the main basis for civil liability is delinquency. but the legislator has followed in special cases the theory of risk. In case of the supplier of defected product the legislator based their responsibility on the theory of risk. Since supplier of the defected product that aim at getting benefit, must claim the responsibility and of defects in case of occurring. He must also bear the losses caused by it (the benefit-risk material) or at least the production of a defective is an unusual activity that it should take responsibility for losses arising from (liability arising from abnormal risks); in other words, any manufactured product or should have required conventional usability and safety for such applications. In otherwise the producer has done a harmful unconventional activity and so has to bear its consequences (losses caused by the defect).

The requirements of having the discussed analysis based on the risk theory are that the responsibility of the supplier of the defected products should go beyond responsibility of the contract and become the responsibility to be legitimized. This absolute responsibility (regardless of compatibility or incompatibility with the conditions and the scope defined in the regulations under discussion that will be mentioned in following literature) does not comply with the principles of Islamic jurisprudence. Because according to Islamic law, absolute responsibility is only claimed in case of loss of property. So that it can be claimed only in case of illegal usurpation and domination over another person's property. Unless juridical rule of no ham could be implemented as a general rule that proves undue loss. In this regard the loss imposed on the costumer is an undue loss that must be compensated by the manufacturer or supplier of the defected product.

### 3-1-2 the supplier's delinquency

In production of any product it is necessary to regard all the qualitative and quantitative provisions and normal standards. This issue is not only consider as a implied term in the relation between seller and buyer but also impose as a professional duty to all producers, and if they neglect it counts a delinquency (in its social concept) and it is the foundation of producer's responsibility. The products defect that because the damage and loss basically caused by neglect the legal standards in the production process. Producer in their process of production, special in case of products that deal with people healthy must regard to these standards otherwise existence a defect that caused consumer damages imply the producer's delinquency and caused in his civil responsibility, if the producer is aware of his production defect, it is his personal fault and lead in his penal liability. The mentioned analyze is noticeable because put the liability of suppliers of defected goods in a frame of general regulations of liability civil and make us rich of special regime of liability of defected goods supply. But it contradict the dominant soul on the provisions of protection of consuming right, because the requisite of above analyze is the supplier can be free of his liability in case of proving his unawareness from product defect. While predication some of law article imply the responsibility defected goods supplier in case of making the damage. In Article 3 of the Auto Consumer Protection read: "... compensation of any damages reached to consumers and third parties, including damages and costs resulting from defect or flaw treatment (out of obligations of third party insurance) ... is the responsibility of the supplier. " it is understood from this law that proving supplier's delinquency (who could be the manufacturer or importer of cars) is not necessary for the fulfillment of his responsibilities. Also another requisite of this analysis is the possibility of renounce the defects condition and condition non-responsibility of the supplier, but it contradict the discussed regulations and provisions. However it can be amended and supplemented as follows the theory that if there is a defect in the product, it supposed to be the fault of the manufacturer. The law assuming that it is not possible to prove its misdeed

#### 4-1-2 implied term

the suppliers in addition to guaranty the healthy and productivity of product and fix any defects or potential defects within the specified period (warranty period) that stated while selling the product. Also guaranty explicitly or implicitly their safety of your goods and products. The guaranty of product safety that can be from contract legal terms of selling the product because of anticipating in the law, and based on article 220 of civil law consider as contractual seller commitments. There is no only one a simple condition means description in order to compensation of damages or replaces it in case of being defected. But also a commitment to a repay damages due to the lack of product safety is annexed to this commitment. Such condition is not only beneficial to buyer but also is beneficial to the third part that situated as implied term in the contract. And third side here is not a specific person but is consumer generally.

However, it is said if safety guaranty of sales as a condition of the sale contract is of subsidiary and its related matters, the requisite of knowing this contractual base is that the guaranty of product condition of safety situated in domain compromise of sides and the deal implement based on guaranty of producer or supplier. So where the buyer doesn't know the producer or does not attention to such issues, how does he can build the deal based on the mentioned guaranty and know the producer as the blameful in case of defect of product? So we have to

know it as an independent obligation that the producer is obligated to do it. (Katozian, 2006,160). In this case, due to unnecessary implementation necessary basic conditions in known standpoint and the rejection of public comment in the subjects, must analyses such an independent obligation in the contractual frame (Ghanavati, 2001, 95). as to say the suppliers are committed before the public consumer product that "everyone use this product and due to its faulty harm physical or financial, the loss is compensated him I".

However, it is said If the guaranty of product safety find common conception and we accept nowadays the supplier of goods implicitly guaranty their reasonable usages and safety of production during conventional use, So that there is no need to reiterate and remind. All transactions implemented based on it. It is logical to knowing that the Supplier has to compensate the losses imposed on buyer (Katozian, 1384, 162)

Any way regarding to the mentioned analyses and due to provisions of consumers protecting law and also the dominant soul on it we can conclude that in our law like many of foreign legal systems, the responsibility of supply the defected product has the specific legal regime that called liability of defect production. In this area, the general rules of civil liability has not been implemented and based on the public interest of community certain rules implemented to protect consumers; Because in the domain of production and supply, innocent or caution, is not prevention to damage or loss. It is possible the producer does not mistake but his product was defected and harm the consumer, in this situation the producer is more than anyone else deserves to compensate the loses. Lack of necessity to prove the delinquency is doesn't mean deny the causal relationship and it is main difference between the strict liability and absolute liability, and in liability arising from the supply of defective products, the causal relationship between the defect of goods and created loss is from conditions of the implementation of responsibility (Abrahi, 1391, 69).

## 2-2 obligations to suppliers

### 2.2.1 fix the defects

In this regard, Article 3 of the Car consumers Protection law states: "Supplier within the warranty period have to fix any flaws or defects (caused by design, assembly, production, or transportation) that exists on your device or create by conventional use, or it is adverse the announced features or guaranty concept to consumer or it caused proper usage by the consumer or reduce its safety. The cost of elimination the defect during the guaranty period is on liability of supplier.

### 2-2-2 Compensation

According to the Article 3, compensation for any damages caused to consumers and third parties, including damages and medical expenses resulting from defects (that outside third party insurance liability) transportation costs, car repair shops, providing similar alternative duration of repairs (if the car stops is more than 48 hours) is from supplier responsibility.

### 2-2-3 replacement or refund defective goods

Based on article 4 of this law if the fault or safety devices of car during guaranty period still stay after 3 times of repair or fault of those parts that caused physical harm doesn't fix after one repair or the car remain useless more 30 days due to repair, the supplier is obligated to replace the old car with new one or by agreement, refunded the price to the consumer.

Due to divided liabilities in this law in the case of appear a defect the supplier firstly have to repair this and in case of the repair it's not possible, according to consumer demand replace the defected car with a new one or refund the price, this act is adverse the article 422 of civil law about defect option. According to this article if reveal after deal that the product was defected the costumer is free to choose the accept the defected product or get the Compensation or termination of deal

## CONCLUSION

Defect option is a common options between the contracts. Under Article 435 of the Iranian civil law of defect option after the knowledge is immediate and in case of delay the termination is not available any more. The lawmaker's purpose of urgently is conventional law. Damage caused by the fault should not be mixed with the provisions of the defect. If as result of the use of defected product reach any disservice to the buyer or other consumer. Like the drug poison someone or car failure to lead to overturn, the seller is responsible and this guarantee is not following the termination of the option. And remain until the time of claims .since the elimination of possible dysfunction or repair the product after selling it to the customer impose the cost to the manufacturer or his representative, so the cost of merchandise with the warranty, is higher of its cost without warranty. If the warranty is as an implied term consider as denying the responsibility there is no more reason to consider the warranty as advantage or other Or other guaranteed products become more expensive.

Basically, presented guarantee by the company as a concession to attract customers and best presence in the market. If the supplier or producer denies the liability of other defects with present a guaranty, this is a benefit that earn for himself not giving the costumer. the manufacturer of the vehicle with presenting the guarantee cannot deny responsibility from other imperfections and thus the necessity of fault during making the contract, Maintenance the right of defect option for the buyer and the guaranty has not adverse with it.

## Suggestions

Considering aforementioned issues, some suggestions could be made to get the standards of the seller and buyer legitimized and improved, regarding their rights in case of defective goods.

1- Formulation of guarantee related laws and their ways of implantation for domestic products and have a supervisor for making sure of observation of the law by the importers.

2- Adopting stronger enforcements for offenders and suppliers of defective goods offered mostly by vehicle manufacturers that are most involved in the community.

3- uniform judicial procedure of law enforcement by all authorities in all levels regarding the subject matter of guarantee in order to avoid conflicting judgments by different authorities and whereby treating the victims equally, leading preserving their rights.

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