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## **Option of Non-Separation and Right to Cancellation in E-Contracts**

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### **Abstract:**

All types of contracts might be concluded electronically. In electronic contracts, option as to defect, option as to fraud and some other kinds of options can be applied, but due to specific nature of these contracts, the existence of option of non-separation for making a contract is doubtful. According to legal and jurisprudential study of this concept and its philosophy of existence, one may say that this option exists in online electronic sale contracts but not in offline ones, as actually there isn't any meeting in the latter. In article 37 of Iran e-commerce code, the legislator assumed a right to cancellation for the consumer which can be considered as a legal option to protect consumers and lead them to noted contracts, so the legislator can annihilate the abuse grounds for producers and providers of goods and services.

**Key words:** option of non-separation, Electronic contracts, Right to cancellation, Consumer.

## **I. Introduction**

Any kind of contract could be concluded electronically, thus an e-contract could be in the form of any contract; it could be mandatory or optional. If it is optional, it would be terminated by death or insanity. But if it is mandatory, it would be obligatory to the parties, unless in the case of rescission or a statutory option (*kheyar*). Rescission is one of the general rules of contracts in Iranian civil law by which the parties would be able to terminate their contract. Rescission and option exist also in the field of e-contracts and their very nature won't contradict with this idea. Thus it is possible to talk about defect option, fraud option, etc. but existence of the option of non-separation (*kheyar-e madjlis*) is under hesitation. The principal question is whether considering the nature of e-contract of sale in which the parties do not attend in a material session, the option would have a legal explanation.

On the other hand article 37 and 38 of Iranian e-commerce code apply a right to cancellation within 7 days from the day of conclusion. It should be studied what this very right actually is and why the legislator applies it. The first part of this paper will study the question of option and the second part considers the article 37 and 38 of e-commerce code.

## **II. Option of non-separation in e-contracts**

According to article 397 of Iranian civil code any of the parties will have the right to rescind the contract as long as the session is still on. The term session (*madjlis*) refers to the general situations. Normally the parties to the contract are present and whenever the

contract is concluded, they will leave the session. But it would not be a rule and they may accompany each other after the session. In such a case, since they are not dispersed, the option is still on.

Option of non-separation according to a jurisprudential idea is only applicable in sale contract. In a discourse of Prophet Mohammad (p.b.u.h.): the parties to a sale have the option as long as they are together [1]. To determine the dispersal, custom should be referred.

### **A. Jurisprudential ideas according to option of non-separation**

Jurisprudential ideas according to option of non separation are based on several traditional discourses as the two followings:

- From Mohammed bin Muslim, from Abu Abdellah (a.s.): Said the Prophet (p.b.u.h.): the parties to a sale have the option as long as they are together.

- From Mohammed bin Muslim, from Abu Abdellah (a.s.): ... I concluded a sale, when it was over I took some steps and returned so the contract would be firm and obligatory [2].

### **1. The explanation of Shahidain (ShahidAwwal and Shahidthani)**

(First-option of non-separation) ShahidAwwal considers option as the place of the sitting, although sitting doesn't have any character in the demonstration of the option and the only criterion is not to be dispersed. The word session has obtained a new meaning which is not to be dispersed and whenever this option is named, the folks will understand that sitting doesn't

have a character and being together is the principal [3].

## **2. The explanation of ShahidThani in Masalik**

The basis of this option is the discourse of Prophet (p.b.u.h.) who said the criterion is not to be dispersed. In other words it is better to use the term option as not to be dispersed instead of option of non-separation, but it also will make sense, because session and negotiation became a costumed reality for not to be dispersed [4].

Any kind of screen or fender wouldn't nullify the option, since it doesn't make the parties dispersed [5].

## **3. The explanation of Sheikh Ansari**

The meaning of dispersal for the parties is to keep aloof proportional to their position in the time contract is to be concluded. So whenever the separation increased, the option miscarried [6].

## **4. The explanation of Sahib Jawaher**

If a fender appear between the parties but they are still in their former situation in which they were making the contract, the option won't nullify because that doesn't mean dispersal; and it is the same in the case of any kind of fender such as thick on thin matters. All Islamic sect apply such a view unless Shafe'iyah [7].

## **5. The explanation of Sahib Meftah Al-karamah**

In this option it is not necessary for the parties to be gathered in a certain point; thus if they shout the offer and acceptance, they will have this option. This issue is mentioned in the following books: Tazkerah, Dorous, Kanz Al-

Fawa'ed, Ta'liq Al-Irshad, Djame' Al-Maqased.

The reason is the generality of the Prophet's Discourse, but some of Sunni Jurists nullify the option in the case mentioned [8].

## **6. The explanation of Mohaqeq Karaki**

Mohaqeq Karaki in the explanation of Allamah's saying said: if any of the parties take aloof even as much as a single step purposefully, the option is to be nullified. Dispersal means the distance of the parties after the conclusion is more than the distance in the contracting time. It is the same how much they have distance in the first place; thus if they are far from each other and conclude by shouting, to nullify the option they should take aloof [9].

## **7. The explanation of Ayatollah Kho'ei**

The reason of this option and its philosophy is assistance to the owner and giving him an interval of time to think if he wants to bind to the agreement or not [10].

## **8. The explanation of Mohammad Djavad Moqniah**

The unity of the contract session makes two different senses. One of these is conception of offer and acceptance in one session so the offeror and the acceptor are attending in the same session. The other meaning is that the contracting session won't terminate after the conclusion. The second is our subject matter.

The meaning of unity of session is not only that the offer and acceptance take place in the same place, but it has a

more general meaning. Its meaning is that the offeror and the acceptor be in the same place in which they were in the moment of conclusion of the contract. Thus if supposedly any of the parties were in a different place but they came to an agreement by phone or other instruments, unity of the session will be that they don't leave their position. If they leave the position there would be no ground for the option [11].

### **9. The explanation of Sahib Iysal Al-Talib in the interpretation of Makaseb**

And if their contracting session is held by wireless connection or telephone or one of them uses a loud speaker, when their separation is increased proportional to the moment of conclusion, the option is nullified and in the situation of doubt, the general principle is non-separation [12].

According to the explanations of the jurists and according to the Prophet's discourse the option is applicable in all kinds of sale agreements. This will include any kind of sale which is concluded by video, telephone or computer. Not to apply the option in such agreements needs a proof and it seems that in most of mentioned sorts there is not such proof.

In the other hand, to confirm the existence of this option in e-contracts one could refer to the philosophy of its legislation. Custom and law appoint the options as a mean to retribute the mistakes. Not to apply the rule of obligation in these situations is justified

by making an extra opportunity of deliberation [13].

Options as to deliberation are triplex and contain two major sorts: the first ones are those which are legislated by the holy legislator and are named 1. Option of non-separation; and 2. Option of animal. The second sort is option to rescind the contract unilaterally [14]. These options give an extra opportunity to the parties to deliberate more and figure if they want the contract to be firm. Thus being concluded electronically wouldn't be a pretext not to apply the options.

According to some ideas [15], if option of non-separation was a general rule in contracts, then its application in e-contract would be rational; because the purpose of attending in a session is the mental bond not the physical, but since this option in our legal system is an exception and only applicable in sale contract, it seems to limit its domain is more reasonable according to the obligations general rules. To reply such a view one may say, first of all the unity of contract session has two meanings in our jurisprudence. One is unity of the session of the offer and the acceptance and the other is that the session of contract does not terminate after the conclusion. The second meaning is our issue [16].

Thus in the assumption of parties not to be together, but they reach a complete agreement by telephone or other electrical instruments, the unity of session in such case is remaining in

their own place. So if one of them quits the place the option will be nullified [17].

Second of all, if the parties cease to negotiate about the contract and do other things in the same session, they will have the option as long as they did not quit the session; although their mental bond was interrupted. This says that the mental bond is not the base, but not to be separated is the criterion.

In e-contracts non-separation of the parties is assumable and there is no proof not to apply the option in such situations.

#### **B. Online and offline contracts**

After studying the views of the jurists considering the non-separation option and its application in e-contracts, we will examine this option in transactions. In sale contracts which are concluded by e-mail, since the connection is offline, actually there is no session to form a non-separation option. The offer and acceptance are not simultaneous and thus separation doesn't make any sense. This case is similar to mail contract. On the other hand, if the parties have a online connection such as a chat room or video conference or over the phone, there will be a session and cutting the connection means terminating the session. The criterion to terminate the option is taking aloof from the contracting point.

For instance, if the parties are in the sides of a wide river and without any move a just by shouting conclude a

contract, according to jurists' ideas the option exists and if after the conclusion each of them take a way, the option is terminated, but if they begin to approach the option will lasts.

Proof of termination of the option in traditional transactions is very easier than e-contracts, because the parties see the separation; but in e-contracts such proof is obtained in a more complicated way. In case of doubt, the rule is existence of the option. Although one would say that deliberate interruption of the connection is considered as separation; custom accepts such view.

It is preferred that the legislator resolves this issue by expressing the option in e-contracts and determines a criterion for the separation. For instance determine the interruption of the connection as the terminating point of the option.

### **III. Right to cancellation according to article 37 & 38 of Iranian e-commerce code**

#### **A. The basis of the right to cancellation**

Legislator in article 37 and 38 of Iranian e-commerce code appoints a certain kind of right for the consumer which is not an ordinary option according to civil code and Imamiah Jurisprudence. Article 37 held: in any tele-transaction, the consumer should have a 7 days interval to resign without any kind of compensation obliged. The

mere expense in such case would be the refund expenses.

The purpose of this article is protecting the consumer, because in e-contracts the subject of the contract is not tangible in the moment of conclusion and the contract is based on the explanation of the seller. These articles give the consumer an interval in which he would be able to examine the subject of the contract. Now we will try to determine the essence of this right to cancelation.

### **B. The essence and nature of the right to cancelation**

One of the analyses would be considering this right a suspended option to rescind the contract. In suspended option the parties should suspend the option on a future event within a specific time. This analysis about article 37 and 38 bring up some problems. Because it necessitates the appointment of what the option is suspended on. Unless considering the unsatisfaction of the consumer as the criterion. But since the criterion should be something out of the will of the parties this analysis doesn't make any sense.

It seems that we should consider the cancelation rights of article 37 and 38 as a statutory option like non-separation option or animal option which the legislator has assigned to protect the consumer and gave him a 7 days interval to rescind the contract without any explanation needed. So the essence

of this right seems to be a statutory option.

Using the term right to cancelation is more efficient than the term right to rescission. Because under Iranian civil law right to rescission has no effect into the past and buyer is able to benefit the good from the point of conclusion to the moment of rescission; on the other hand in right to cancelation the contract will be ruined and the buyer doesn't have the right to make benefit out of the sold good [18].

Article 37 and 38 are only applicable in the relations of buyer and consumer; but in the commercial transactions between merchants who couldn't be considered as consumers there will be no such option.

According to article 46 of e-commerce code any condition contradictory to the provisions of this part and any condition inequitable to the consumer are null and void. Thus it seems that this right to cancelation is mandatory, otherwise the purpose of the legislator won't be fulfilled. This situation sure has unpleasant effects on the public order of transactions. Unless the contracting circumstances provide a situation for the consumer to deliberately resign his right.

Paragraph C of article 34 on which the supplier is bound to inform the consumer his right to cancelation is a sign of importance of this term.

In article 38 the moment of the beginning of the right is the point of delivery and in the contracts concerning

the services, the day of conclusion is the beginning point. But according to paragraph B of article 38, if the information subject to the article 33 and 34 is not given to the consumer, the beginning point is the moment of delivery of the information [19] [20] [21]. Although this right might be inapplicable according to the paragraph D of article 38 in special conditions. These conditions are expressed in a decree considering the absence of the right to cancellation of the consumer.

*According to this decree,*

1. Consumer in the followings wouldn't have the right to cancellation subject to the article 38 of e-commerce code, unless the parties agree otherwise:

a. In services, if delivery is before the termination of the 7 days.

b. In services in case of delivery of food or other daily stuff.

c. Goods or services which their price is determined by financial markets and the supplier has no effect in between.

d. Goods supplied personally for the specific consumer.

e. Audio or video discs and software unpacked by the consumer or confidential internet cards.

f. Newspaper and magazine

2. Consumer protecting rules do not include the following financial services subject to the paragraph 42 of e-commerce code:

a. Investment services

b. Insurance services

c. Services of the credit and finance institutes

Paying attention to article 37 and 38 shows that legislator applies an extra protection for the consumer and place the supplier in a passive situation. Because if the purpose of this articles was making an opportunity for the consumer to examine the goods, then some statutory options could provide such opportunity. This is not compatible with the benefits of the suppliers and sure will lead them to supply in a non-electronically form. This issue in the case of services has a more irrational face.

Leave alone these critics; one may say legislator was making a surety for the consumer in the e-contract where the supplier often has a dominant role. The refund expenses may also make the consumer not to use his right without any rational excuse.

On the other hand, the mentioned decree excluded a numerous number of goods and services from the article 37 and just a little percentage could be included under this rule.

#### **IV. Comment and conclusion:**

Studying the non-separation option and its philosophy and the general rule stated by Prophet (p.b.u.h.) it might be concluded that in e-contracts in which the parties have connection there is no reason not to apply the option. Because as mentioned in the explanations of the jurists, this option is not special for the cases the parties are together and in

distanced contract it also can be applied. The philosophy of this option is deliberation which is an emphasis on our deduction.

Studying article 37 and 38 of Iranian e-commerce code shows that the legislator made a statutory option to rescind the contract for the consumer so he can cancel certain contracts within 7 days after the point of delivery. This right is an issue of consumer protecting policy to make a balance between supplier and consumer. To prevent the misuse, the consumer is charged by the expenses of the refund.

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