

## The juridical-legal study of running provision and result of its violation

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**Abstract:** In this article, 'the juridical-legal study of running provision and result of its violation' is discussed. The research method of this study is librarian one. The current article is adjusted in three sections: the first section discusses generalities with the title. Second section is assigned to legal nature and concept, types of provision and at last running provision for its violation that considers subjects such as violation of provision, penalty for violating each type of provision, and the basis for violation of provision and ..; and finally in third section, the legal study of running provision and result of its violation in public law and opinions of traditionalist jurists about this issue is discussed. Findings of research show that provision means commitment and conditional obligation through other contract; and it means termination of sentence with assumption of termination of provision if there is not symmetry of lack of concept in between, and the required features for concept are available; so that Imami jurisprudence and civil law had divided provision into three parts: provision of quality, result and act. Thus, the main question is that what is the result of running provision in the contract for contract party in terms of legal action? And whether result provision is cancelled in case of termination or not? Therefore, in this article we prove that in violation of quality provision. The civil law has predicted right of termination for the person that a condition is made in his/her favor; yet in addition to right of termination, there is the possibility of warrantor commitment to provision. But in violation of act provision, if it is material, then the regulator considers two enforcements: compulsory and/or vicarious enforcement and right of termination; and if act provision is a negative legal one, on one hand there exists the possibility of violation; and on the other hand, the right of termination would be provided for person that a condition is made in in his/her favor.

**Key words:** Provision; Provision of violation; Provision of quality; Provision of act; Provision of result

### 1. Introduction

Provision is description of an affair that its absence requires absence, without its existence required for existence. In legal terms, provision refers to one of the following concepts: first, the issue that assurance, impact of action or a specific legal event depend on it. Second, it is an agreement that accounts in functions of another contract due to specific nature of its subject or mutual agreement. Provision of act is necessary and the person that a condition is made in his/her favor is allowed to terminate the contract when doing provision is not possible; therefore, if the person who the condition is made in his/her favor refuses doing provision, first he/she must be forced to do the provision; otherwise, the court forces him/her doing so and if again it was not possible this way, he/she has right of termination. Also some believe that act of provision is not necessary and the effect of provision is that proven option is allowable for the contractor. Provision is part of contract and also is its subordinate. Therefore, the principle of validity of contracts (article 223 of the civil law) includes also implied provisions. The background of this conventional institution in jurisprudence also confirms this finding: corruption of provision must

be obtained, unless any provision is respectful. The provision is allowed whenever if it is not against scripture and tradition and does not lead to ignorance in sales and prices.

From juridical point of view, a provision is correct if contract party is able of running provision, he has logical purpose, it is not against book and tradition, it is not incompatible due to contract, it is not passive so that causing betray, it does not require the impossible, it is a provision in the context of contract, and finally it is executable. Civil law is the result of long-term experience in juridical that expresses the invalid terms by using induction of jurists and conducted analyses: doing the provision must be impossible, it must be a provision without benefit, it must be an illegal provision, and the provision must be against appropriate contract.

According to article 235 of the civil law: 'whenever a provision that meanwhile is contracted be a provision of quality and it is revealed that quality is not available, and then the contractor will have authority of termination. Thus, the warranty enforcement for provision of quality is establishing right of termination for the party who loses from it. Civil law regulates about possibility of coercion of person committed to provision: 'whenever an act is provisioned through a contract and enforcement of the person committed to is impossible but doing it by another person is possible, then the governor can

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provide motives doing that action to the cost of committed one'.

Provision of act could be dismantled: if provision is in favor of both parties, its removal is possible just by compromise. But whenever it is just in favor of one party, then according to article 244 of civil law: 'the correspondent who the provision is in his/her favor can refuse doing that provision, as if this provision is not indicated in the contract; thus, provision of result is not removable'.

## 2. Concept and types of provision

Provision is a term compound of two words 'concept' and 'condition'; fundamentalists define 'logic' as below: signified logic that is directly perceived by word and speech and the signified concept not available in the speech, but it is perceived and deducted by speech; for example, 'if it rains not tomorrow, we will go to the trip', this is logic and means that 'if it rains tomorrow, we will not go to the trip'.

### 3. Types of concept

Concept is divided into two categories:

#### 3.1. Compatible concept

What is perceived and deducted from logic and is compatible with logic in terms of negation and affirmation. For example, God says in the Quran: 'do not tell parents a word of lie'. It is perceived by this logic that parents must not be beaten.

#### 3.2. Opponent concept

It is a concept unlike logic in terms of negation and affirmation. For example, God says in Quran: 'if a lecher reports, then you must search about it', this is logic of the verse but its concept is 'if a righteous man reports, it is not necessary for investigation'.

## 4. Types of conditional sentences

Provision is realization of a subject. Sometimes provision is realization of a subject, it means that penalty realization depends on provision realization; for example: father of the family says his wife if our child was a boy, we would call him Ali. It is obvious that realization of naming depends on gender of the child, and it is no doubt that such conditional sentences are meaningless because by absence of subject, the sentence also will not be realized; in the above example, it is not possible to call the child 'Ali' if he would not be a boy, and the concept is placed where penalty is possible by lack of provision of realization.

Provision is not realization of subject. Sometimes provision is not realization of subject; it means that penalty realization is possible without provision. For example a person says his sons that 'if Ali came to

visit you, respect him', here the provision of 'Ali's visit' might not be realized but the penalty of 'respect' is possible.

Discussion about concept of provision and its authority relates to these types of conditional sentences. The fundamentalists realized the concept of having conditional sentence based on three issues:

-There must be inherence between provision and penalty.

-The correlation and relation between that two is cause and effect, it means that provision is cause and penalty is effect.

-The provision that is cause, its causality must be unique and no other causes must be in between.

## 5. Study of provisions of contract

### 5.1. Article 1: provision of act

According to the recent part of article 234 of civil law, the provision of act is that action or inaction of an act be provisioned on one of the parties or third person. Therefore, in terms of civil law provision of act divides into two parts:

#### 5.2. Provision of positive act

The purpose is that the person (who the condition is made in his/her favor) commits doing an act besides the main contract whether the act is legal or material, for example the seller of an automobile commits to drive it for a while and/or he commits to accept attorney of buyer bedside the mentioned contract.

#### 5.3. Provision of negative act

It means that the person (who the condition is made in his/her favor) accepts refusal of certain action, whether refusal of act is legal (e.g. one of the parties commits to not renting his house), or refusal of act is physical (e.g. during contract of sale, the customer is provisioned to not open his window in front of the seller's house).

According to the recent part of article 234 of civil law, the provision of act might be in terms of action or inaction on a third party; in this case, obligation of third party to this provision will depend on his acceptance; because according to article 219 of civil law, the contracts based on law are binding just between parties and their deputies, and article 10 of civil law also confirms it.

## 6. Example of provision of act

### 6.1. Provision of mortgage and guarantee

This is one of the types of provision acts that article 241 of civil law says about' it might be provisioned in the contract that one of the parties must give a mortgage or guarantee for what he/she

is indebted of'. Thus after the main contract, the person who the provision is made in his/her favor must pay money as assurance of mortgage or introduce a guarantee.

Although giving mortgage and guarantee are both introduced in one article and it shows that nature of these two commitment is equal, but with a little care it is cleared that despite giving them for assurance of doing commitment, the nature of these two are different. Giving mortgage is provision of the act that promisor him/herself is required to do it; otherwise, there must be a difference between the properties under mortgage and the assumption that the property belongs to another one or it is lost. In the first assumption, refusal of debtor to giving mortgages does not give right of termination to his/her party, because the court can mortgage the property on behalf of debtor and sign the required documents. But in the second assumption, since it is not possible to force the contractor to provision so there is no alternative except termination of contract. Article 242 of civil law relates to this assumption and declares: 'if it is provisioned in the contract that the person who is responsible to perform a condition, whenever he/she mortgage the certain property and that is lost or damaged afterward, then the contractor will have the power to terminate the contract, but not right of demanding the mortgage; and he/she has not right of termination if the property is lost or damaged after contract'. The nature of giving guarantee is commitment to third act; therefore, if no one is ready to guarantee the promisor, the opposite party would have right to terminate the contract.

### 7. Enforcement of provision of act

Provision of act whether positive or negative can be a legal or physical act. The provision of act for positive physical and legal act and also for negative physical one is predicted on three levels of civil law:

1. Forcing the person who is responsible to perform a condition to fulfill the provision.
2. Doing the conditional act on behalf of promisor (article 238 of civil law)
3. Right to terminate the contract on behalf of the person who condition is made in his/her favor.

It must be noted that path of each of these three enforcements is lack of the previous one; in other words, we can use the second enforcement if the first one would not be helpful and also we can use the third enforcement if the second one would not be helpful.

There exists disagreement between lawyers about violation of enforcement of legal negative act that some know 'invalidity' as guarantee of legal negative act, while some others perceive 'lack of influence' as its reason. Those who believe in 'invalidity', they refer to article 959 of civil law: 'generally, no one can deprive him/herself of right of enjoyment and/or right of running full or part of civil law'. Therefore, the person can partly deprive him/herself from civil law. When it is said that

guarantee enforcement of legal negative act is 'invalidity' or 'lack of influence', it means invalidity or lack of influence of legal act that is result of violating the legal negative act.

If the person who is responsible to perform a condition does not play the role committed through main contract, the promisor can ask the court to force him doing it, and the court forces him/her to do the commitment. Article 237 of civil law states: 'whenever provision through the contract is provision of act, the person committed doing the provision must perform it; and in case of violation, the opposite party can refer to governor and ask for coercion to fulfill the provision'. In support of this, article 238 of civil law states: 'whenever an act is provisioned in the contract and it is impossible to force the contractor doing it (but third party is able of doing it), the governor can provide obligations of that act in cost of contractor. In the second case, article 239 of civil law states: 'whenever it is not possible to force contractor doing conditional act and it also is not such a work that someone else could do on his/her behalf, then the opposite party will have right to terminate the contract'.

### 8. Discussion and conclusions

Civil law divides provision to three categories: provision of quality, provision of act and provision of result. From analytical point of view, provision of quality is a correct one; and belief in invalidity and its regression to provision of result does not seem true. In addition to right of termination that is mentioned in article 235 of civil law, the enforcement violation of quality provision is commitment permit of the person responsible to perform provision. The second category is provision of result; it means realizing the effect of a legal act in the contract. Opposite to the belief of a group that consider it invalid, the provision of result must be studied in correct provisions. In other words, provision of result is invalid in those legal acts that require a specific reason; otherwise, the provision result is true. We must know that violation of result provision is not possible. The last category is provision of act and there is no doubt in validity of such provisions in the contracts. Provision of act might be legal physical act, and in any case the conditional act might be negative or positive. In case of possibility of violation of physical positive provision act, ruling of the problem differs due to the effect of provision in the contract. If effect of provision is pure task, right to claim or creating right of termination; then it is possible to violate such provision in the contract; otherwise, it would not be possible to violate such provision. Now if it is possible to violate the provision of act, its violation enforcement includes binding enforcement, vicarious enforcement and right of termination. But in case of violation in a negative legal provision act, the negative legal act would be true but ineffective; and according to this theory, the right of termination is created for contractor relative to the first legal act.

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