Concealed defects

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Abstract: Much Maigdm rights to buy their needs from the market and clear after placing order and return them to the house and there is a hidden defect does not appear, but may use it for any possible thing that appears in the time or at a later time of use. This Mathare nosy in the writing of this research to clarify the meaning of hidden defect and is Almsol guarantor of these defects and when human underwriter of the defect, if it turns out a long period of use, and what warranties and conditions were Pvt through research addressed to the reader aware of the die if signed Find in his hands. It reached through our study that the seller of the ICON has implemented its commitment to the buyer, but Btzlimih Sales and be valid for the purpose of the buyer It is not enough to ensure the seller to the buyer quiet possession, but must be the acquisition of useless useless that is why the law imposes on the seller's obligation to ensure that hidden defects, because these defects shift between the buyer and the achievement of its purpose of the contract.
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Introduction:

When a person decides to buy something, he tends to meet a certain purpose by this thing. Therefore, getting something is not an end by itself; it is a means to achieve the desired purpose, and therefore the sold item must be valid for meeting this purpose.

Guarantee of latent defects transcends the scope of sale contract to include every property or utility transfer contract, particularly the contracts of indemnities, and whoever transfers the ownership or utility of something transfers the useful possession of it so that the transferee be able to use this thing according to the purposes. Therefore, if a latent defect appeared and rendered the use of this thing impossible, the seller shall guarantee the defect. However, since the sale contract is one of the key ownership and possession transfer contracts, the legislator organized the Rules of guarantee of latent defects of this contract, and only referred to these provisions in other contracts with the required amendments to it.

Investigation of this guarantee requires us firstly to elaborate the meaning of guarantee of latent defect, secondly to discuss the basis of the seller's compliance with guarantee of latent defect, thirdly to investigate the conditions of defect that raises guarantee, fourthly to understand the Rules of guarantee of latent defects between some legal systems that may be doubtful in some cases, and to allocate for all the above paragraphs respective topic as follows:

Part one: Meaning of the expression "Guarantee of defect"

Section one: meaning of the expression "guarantee" in general

Section two: linguistic and legal concept of latent defect

Part two: Basis of the seller's obligation to guarantee the latent defect

Part three: Conditions of defect that raises guarantee

First condition: that the defect is latent

Second condition: that the defect is effective

Third condition: that the defect is old

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Section one: inspection of the sold item and notification of the defect to the seller

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Part five: Amendment of the Rules of guarantee of latent defects

Part six: Comparison between guarantee of latent defects and some legal systems

Section one: differentiation between defect and default

Section two: differentiation between the period of guarantee of defects and guarantee of partial entitlement in case of sold item is charged with burdens

Section three: guarantee of defects and guarantee of properties

Section four: differentiation between the guarantee of defects and guarantee of validity of the sold item for work for a certain period

Section five: differentiation between the guarantee of defects and rescission because of failure of execution

Part one

Meaning of Guarantee of Latent defect

Definition of the meaning of guarantee of latent defect requires, on the one hand, indication of the meaning of the word "guarantee", and, on the other, indication of the legal and linguistic meaning of the expression "latent defect", so we will discuss these two topics in detail.

Section one: meaning of the expression "guarantee" in general

The term "guarantee" was used in Western jurisprudence in broad context to signify the contractual and non-contractual liability in the meaning in which Muslim jurists used this nomination. It began to diminish gradually in the Western thought. Muslims used this term "guarantee" because it is the most accurate nomination since it is related to the financial matters, while the expression "liability" implies judgment of the person in penal, not financial, terms.

However, they used the term "option of vision" in this field, since Islamic jurisprudence considered the side of buyer who has the option, while jurisprudence of law considered the side of seller, so the seller himself is guarantor of defects. There is no doubt that the situation of Islamic jurisprudence is considered accurate and true, because the option here is a clear-cut right of the buyer, so the buyer was granted this option[(1)].

The sale contract is the most common and most usable contract, either in terms of time or place, as it is a form of all contracts and it is the core of money exchange.

Anyway, the general provisions of civil code contain guarantees that can achieve stability in the contract such as the in rem and personal insurances, the direct and indirect lawsuit, clearance, right to retention and objection by non-execution. All these legal means don't constitute sufficient guarantee in the sale contract, so the legislator didn't use them only, he also approved special guarantee on the seller, which is the guarantee of latent defects[(2)].

The Iraqi civil code used the term "guarantee" in articles (567, 569 and 570), and articles WERE INCLUDED IN 558 Iraqi civil code to 570 Iraqi civil code of it under the title "guarantee of latent defects". In addition, the term "option" was used in article 566 and 567 Iraqi civil code. This undoubtedly results from the Iraqi legislator's adoption of consensual plant in setting this codification to indicate the rules of Islamic sharia and the provisions of modern descriptive laws[(3)].

Here we can define guarantee as "compound requisite, legal or contractual" whereby the seller undertakes to deliver something useful to the buyer, or in case the seller is not able to it, he shall indemnity the buyer in accordance with certain bases[(4)].

Section two: linguistic and legal concept of latent defect

Defect has two concepts; linguistic concept and legal concept. We will indicate the meaning of each of them:

Linguistic meaning of defect:

Defect in language is the slur, and the plural is defects. To defect something means render it defective.

In general, "defect" is the slur or inferiority, and what is beyond the good intuition. The small defect is what decreases to the extent that enters under the evaluation of evaluators. They assessed it in meter in the ten by increase of half, in animal by increase of one dirham, in property by increase of two dirhams, and the filthy defect other than this whose decrease is not included in the evaluation of evaluators[(5)]. The Egyptian court of cassation defined the defect in language as: "the emergency damage that is free of good intuition of sale, and the mentioned court adopted this definition in the footnote of Ibn Badin in the hanafite jurisprudence that stated that "defect is what is free of good intuition of the accidental damages" and some jurists defined it as "violation of the normal course either by increase or decrease resulting from the lack of finance[(5)]".

Legal meaning of defect

Defect that requires guarantee was presented by the section one of paragraph two of article (558) of the Iraqi civil code as (what decreases the price of the sold item for the traders and experienced people, and what exceeds its, right purpose of the party who solicits sale didn't do it).

Defect is a property of an object that doesn't exist in a similar object, and existence of defect reduces the value or utility of that object, so anything that is usually not found in the object is not considered defect so that its existence in the object be dominant than its absence. The foreign objects as in seeds like few dust of wheat or barley are not considered defects[(7)].

The Iraqi civil code regulated the rules for guarantee of latent defects in thirteen articles (articles 558-570) were mostly measured in Islamic jurisprudence.

Part two

Basis of the seller's obligation to guarantee the latent defect

According to law, the seller shall comply with guarantee of defect in the sale contract. The sale contract is one of the ownership transferring contracts. The property right gives its holder the right to dispose the object owned to him, and to exploit and utilize it. The owner can't practice these authorities unless the possessed object is free of defects, because defects may reduce the property of the owned thing or its value or utility, or miss the right purpose. This affects the disposal of the object or its exploitation or utilization.

If the seller didn't transfer the useful owner to the buyer by selling invalid object allocated to him. If validity decreased apparently because of its defects, the buyer shall be responsible as required by law.

Jurists varied on the determination of the legal basis of the seller's obligation to guarantee , since the basis of guarantee or "responsibility" in this respect is that the seller didn't fulfill his obligation to transfer the ownership of the sold object for utility and interest of the buyer and the basis of guarantee of defects in the sale contract according to this view on the principle of good faith in the contracts. The buyer would arrange his affairs on the basis that he bought something that can provide to him certain services. The price to be paid by the buyer shall be determined on this basis. If the defects in sale can prevent the buyer and what he needs, the seller doesn't receive the agreed price legally(8).

Others believe in a similar view that justification of liability for guarantee lies in finding fair balance between the requirements and rights of the contractors, and in case of difference of balance between them requires fairness to amend, and restore this balance. That is, they use the idea of fairness as basis for guarantee of latent defect.

The main view based on the idea of fairness is what was proposed by the German Jurist Shering who considers the seller as mistaking by knowing the existence of defect and tending to enter into contract without verifying the validity of the sold object. It is the duty of the seller not to enter into contract unless the seller assures condition of the object that he sells. Fairness requires that the seller indemnifies the buyer for restoration of balance to the mutual obligations. This opinion is criticized because it is nonconforming because it offers two contradicting principles on the one hand, and deals with the seller's mistake by ignorance of the defect if such ignorance is justified. On the other hand, "Ebhering" emphasizes that decision of sale constitutes exaggerated mistake. However, the key criticism of this idea is that it is based on the concept of fairness, which is ambiguous and inaccurate.

Law is objective science while attribution of guarantee of defect to fairness doesn't justify anything. Fairness is the rule of most legal systems, while there shall be basis of guarantee in the clear, apparent and tangible principle(9).

Mr. Abdel Rahman Al Sabouny takes another approach to illustrate it, because through the situation of Islamic sharia, "satisfaction" is used as a general basis in all contracts, as stated by Allah, the Almighty, in His saying "O ye who believe! Eat not up your property among yourselves in vanities: But let there be amongst you Traffic and trade by mutual good-will". Therefore, if consensus is not realized, the legislator gives the right to termination to one of the parties who breached consensus. In this case, that party shall return the sold object or terminate the contract. He adds that compensation contracts are based on equality and exchange. The price shall be equal to the goods. Here there will be quality between two things. The price shall be in return for the good commodity. Appearance of defect in goods means defect in equality, because the price of the defective object is not equal to the price of the good object. Appearance of defect in the sold or contracted object means that the seller cheated the buyer when he concealed this defect. Cheating is a matter not declared by legislator because it is prohibited, so option shall be given to the party affected by termination. The Prophet (PBUH) says "it is not permissible for a Muslim to sell his brother goods in which there is a defect, without pointing that out to him". The seller's liability is a contractual one, and the buyer's claim is not based on mistake attributed to the debtor. It is based on material and objective idea that means the necessity to treat the difference that inflicted the balance of relation of obligation with result, because enforcement of liability is not duly met as required by the agreement or law(10).

Another section took the "assumption" as basis for guarantee of defect. The advocate of this view is the German Jurist "Windsceid" that was approved and defended by the Italian Jurist "Foyeeni".

This view distinguishes the objectives that contractors aspire to meet. The main general goal without which the contract is concluded and the other objectives that shall be realized by the result that shall be pursued before everything.

These goals are embodied in the presumption that there are necessary criteria for meeting the practical ends of the contract. Presumption extends to all contracts that require guarantee. It is considered the condition of agreement and authorizes the guarantee to challenge the contract if he didn't find the properties that he presumed.

We shall not confuse this presumption on the one hand, and the reason on the other. The reason plays a more important role in conclusion of the contract, because lack of reason prevents conclusion of the contract. In addition, the broadest scopes of all contracts, while the presumption has narrower effect. In case of lack of the presumed properties and conditions, the contract shall be valid, and the buyer must request to terminate the contract or redraft it on valid bases that reduce the price. In addition, presumption is either explicit or implicit, if it is in consistent with the natural use of the object, the buyer is not required to prove it other than the other cases.

However, this opinion was denied even in Germany. Jurist Level found that it turns the element of will in the contract from its end, and gives very much

importance, so it reduces the elements of stability and assurance in contracts. It competes the principle of good faith that shall follow the conclusion and performance of contract, because it allows a party to control the destiny of contract according to its unclear assumptions, since such party is not committed to any permission. In addition, this theory is unable to interpret the seller's failure to comply with indemnity for the failure or damage unless bad faith is proved.

The other opinion was expressed in the lines of guarantee of defect that it is "the idea of risk taking" as basis for guarantee of the defect, and the advocate of this opinion is the German Jurist "Brinz", who considers the guarantee of defect as application of the theory of risks. The risk is a future uncertain accident that happens to the thing and leads to its loss in whole or in part. According to (Brinz), defect is classified in this concept. Its result is primarily assumed by the owner, but the Roman rulers of markets attributed this result to the seller through the claim of returning the sold item or reducing the price, in addition to the failure or damage in case of bad faith.

However, this opinion was criticized as well. This theory can't be admitted for several reasons. Brinz ignores the provisions of descriptive law for justifications of practical requirements. Here he asks about the reasons for retaining the seller's responsibility in spite of transfer of ownership to the buyer, and the combination based on the practical necessities is not sufficient to justify the approved solution, and doesn't violate the general rules that regulate the necessities. On the other hand, according to this opinion, the seller either takes the risks because he has the requirement of delivering the sold object without defect. He concludes that talking about the risks is due to failure of the seller to execute under it, and doesn't constitute independent reason. In the opposite case, when the seller doesn't enforce the contract in accordance with it to deliver the sold item, how can the burden that will assumed by the seller can be interpreted here. This view can't be approved as basis for guarantee of the defect [(11)].

Part three

Conditions of defect that raises guarantee

For the seller to guarantee the defect that appears in the sold object, the defect shall meet certain conditions without which the buyer wouldn't charge the seller with guarantee, because if we took into account any defect that appears in the sold object, regardless of whether the defect is gross or trivial, this would lead to disorder and instability of transactions and waste the binding force of contracts.

The legislator who wanted by guarantee to protect the buyer's right didn't arise in the same time to protect the speed or lack of vision. The condition of protection requires that concealment is in defect, not in lack of the buyer's vision. Therefore, the concept of defect shall not be expanded and its conditions shall not be underestimated, and interpretation shall not be narrowed and conditions shall not be increased. A concept of defect that helps play positive role in retention of contract and strike of balance between the parties shall be added to create confidence in contracts and develop the trade exchanges[(12)].

According to articles (558 and 559), for the seller to be accountable for defect that may be in the sold object, the following conditions shall be met[(13)]:

1- That the defect is latent
2- That the defect is effective
3- That the defect is old

We investigate below every one of these three conditions, respectively:

First condition: that the defect is latent:

The rule is that the seller only guarantees the latent defects [(14)]. For possible accountability of the seller for the defect that may appear in the sold object, it is a condition that the defect is latent. If the defect is apparent, such as if the house is about to be demolished or to fall, the seller shall not guarantee it since this defect is easy to discover and determine [(15)].

To consider the defect as latent in accordance with article (559), Iraqi civil code, the buyer must be ignorant of the defect at the time of sale or the buyer can't demonstrate it if the buyer inspected the sold object with due care and diligence, because the buyer can't claim that the defect is concealed even if the defect is latent, if the buyer knew that the defect exists, or if the buyer knew, through his personal experience or by hiring expert. Therefore, the buyer can raise the guarantee to the seller because the seller's knowledge of defect makes it apparent and not latent. Ina addition, the buyer's intention to buy the sold item while the buyer knows the defect is useful for satisfaction and acceptance of the sold object. The defect shall be latent as well if the buyer can't be caution and careful to it, if the buyer inspected the sold object with due diligence. The due diligence is the care of the ordinary person. The question to be raised here is about whether the standard that shall be approved for admission of latency of defect is an objective standard or personal standard?

The first standard considers the defect from the public view of people depending on general model of man regardless of the buyer's traits. The second standard depends on specific man's person, so this standard looks into the buyer's traits and the certain information he has to allow him to inspect the sold object and to detect its defects.

Towards these standards, the Iraqi legislator adopted the abstract, not the personal, objective standard or considers the care of ordinary person, not the care of the buyer. Therefore, it doesn't depend, by the buyer's ability, on discovery of the defect, not the

ability of the ordinary person. That is, it disregards the buyer's conditions in terms of knowledge and lack of knowledge and in terms of numbness and negligence.

From this standpoint, the buyer's lack of experience doesn't justify consideration of the defect as latent, if another person is able to detect it by consideration of its advantages. In case of lack of knowledge of the person, he shall appoint the person who owns it. The buyer would be neglectful if he didn't recourse to this aid that allows him to detect the defect even if it occurred, so the defect in this case lacks the latency criterion.

The buyer's false disposal is what leads to failure of detecting the defect, so the buyer shall be responsible for the result for this defect by considering the defect apparent for the buyer him and deprivation of his guarantee[16].

If discovery of the latent defect is not possible by due care, and this was required for accurate examination that requires certain experience and trial that is not accustomed for use, as is the case for the weak force of fire that results from the sold coal, or weakness of the land soil and exceptionally high ratio of salts in it in the area where it is located, or if the defect requires chemical analysis, the seller in this case will be responsible to the buyer[17].

Finally, the seller shall guarantee the defect in two cases, even if the buyer can detect the defect by ordinary inspection of the sold object. These two cases are:

First: If the buyer found that the seller confirmed that the sold item is free of defects, and if he was able to find the defect by ordinary inspection of the sold item, because the seller's assurance to the buyer is considered explicit agreement on the seller's guarantee of the defect in case of defect or as implicit agreement.

Second: If the buyer proved that the seller deliberately concealed the defect as means of fraud, as when the defect is break in the car engine, and the buyer deliberately concealed the defect by welding or paint, or is considered by his cheating to have committed a mistake that raises the buyer's mistake by not inspecting the sold object, which requires care.

Second condition: that the defect is effective

The seller doesn't guarantee every defect in the sold object. If the buyer was allowed to claim guarantee from the seller for any defect regardless of its extent, scale of transaction would be narrowed and mutual confidence between people would be lost. Therefore, the seller shall not be bound with guarantee if the defective is significant or apparent. The effective guarantee, according to article 558 of the Iraqi civil code, paragraph two "is what decreases the price of the sold object for traders and experienced people or what misses the valid purpose, if such defect doesn't exist in examples of sold item[18].

Therefore, the effective defect is the one that can decrease the price or utility of the sold object in the way if the buyer knew the defect at the time of contract, the buyer would have refused to conclude the contract or at least doesn't accept purchase at the price in the contract, but for less price[19].

The standard adopted by the Iraqi lawmaker to define whether the defect is effective or not is a material standard. The value of sold object is noted to decease and the right presumption is lacking. Two different points; the defect may decrease the price of the object without missing the intended purpose of purchase as when the sold item is a car valid for all purposes, but has latent defect in the seats that doesn't affect its validity for traffic and meeting all intended purposes. The defect may hide a right purpose without decreasing the price of sold object. For example, the sold object may be machine with latent defect and not valid for the purposes, but, in spite of this defect, it retains its material value. If this defect was known, it would have deceased its price[20].

However, the seller doesn't comply with guarantee if the defect in the sold object is attributed to decrease of its market value or missing the right purpose, because the defect is considered trivial and shall not be considered, as when there is a latent scratch in the body of the car.

In addition, the seller doesn't comply with guarantee if the defect is tolerable[21], or if there is a similar defect in such type of sold object, as is the case, for example, when there is a few quantity of dust with barley or wheat, because it is the custom in Iraq to tolerate such defects.

Third condition: that the defect is old

In addition, for the seller's guarantee of defect in the sold object, the defect shall be old. Paragraph one of article (558) of the civil code gives the buyer the option to return the sold object or accept it at the nominated price "if old defect appeared in it". The defect shall be considered old or to have been found in the sold object at the time of contract or appeared after the contract and before delivery. The defect shall be considered old whenever its occurrence is attributed to a reason that happened in the period. That is, whenever the defect in the sold object arises after sale and before delivery, even if the defect appeared only after delivery[22)]. This is the text of article (558, f^2) of the Iraqi civil law. "If the defect exists in the sold object at the time of contract or occurred after it while the sold object is in the seller's hand before delivery"[23].

In this condition, we discuss to matters; namely, the existence of defect and proof of the value of defect:

First: existence of defect: The defect is presented in Iraqi law if it exists in the sold object at the time of contract or before and after delivery as mentioned before. The matter can be admitted if the sold object is

in certain things or from certain things that are transferred only after detection.

The Iraqi legislator in this situation related the destruction of the sold item to delivery; that is, the buyer shall be responsible for destruction of the sold object for purpose of delivering it to the buyer. This is in agreement with the Islamic jurisdiction, while the other legislations, including the French civil code, confirm that guarantee of the sold object is related to transfer of property not delivery, because if the sold object is defined property by itself. In this case, the defect shall exist at the time of sale and whether the sold object is defined in its type with the similar sold objects, the defect shall exist at the time of delivery. This is stipulated by the Moroccan, Lebanese and Tunisian codes.

If the reason of defect existed before sale or before delivery, but spread afterwards, its spread shall not be due to the mistake of the buyer who shall be solely responsible for the damage if the reason damage resulted by appearance of defect because of the buyer's mistake and failure to take the necessary precautions or the buyer didn't observe the rights rules of use.

In this case, the judge may reduce the guarantee to the extent of contribution of the buyer's mistake to the aggravation of the effect of defect, based on the general rules of common mistake set forth in article (210) of the Iraqi civil code.

Second: Proof of oldness of the defect

As we know, the standard in sold object is its safety. This means that the burden of proof of the latent defect shall be assumed by the buyer.

The importance of the date of appearance of defect is when the transfer of car follows sale of it, so the date of defect shall be known to the buyer who shall bear the guarantee of defect.

Depending on experience is the most effective means for identifying the date of defect. However, the expert's duty becomes more difficult when there is close relation between the nature of the sold object and the type of defect. In this case, the Kingdom shall assign the expert to indicate whether the defects are attributed to mistake of the buyer by abuse of the sold object. In general, proof may be made by all means of proof because it is related to material approval[24].

Sales where the latent defect is not guaranteed

Article (569) of the Iraqi civil code states that "the lawsuit of guarantee of defect shall not be heard in what is sold to the best knowledge of court or other government authorities in public auction."

The wisdom of non-application of the seller's guarantee of latent defects in case of sale in public auction to the best knowledge of the court or government authorities is that these sales are preceded by long procedures through which opportunity is given to the auctioneers to inspect the sold object before deciding the purchase so that it will not be favorable after it that the request of rescission of sale is not allowed, which leads to reiteration of long procedures at new expenses to be covered by the debtor.

Some jurists in France and in Egypt admitted that this rule shall not apply and reply to the sales requires that judiciary intervenes in it as is the case for the sale of the debtor's retained funds or the sale of properties of minors or insane persons. If the intervention of judiciary in sale is accidental or upon the choice of the parties to dispute, the buyer shall be pay the guarantee, as if the lawsuit of division is raised by removing commonality by the partners who have full capacity, and the common property was sold, the buyer may claim the guarantee of latent defects to the sellers.

In the Iraqi law, there is no field for adopting the opinion of those jurists, because the wisdom that forced the legislator to decide non-hearing of the lawsuit of guarantee in all types of these sales whether they require intervention of judiciary or governmental authorities, or this transfer included judiciary and other governmental authorities, or if this transfer is accidental[25]. These sales shall be preceded by long procedures through which the opportunity shall be allowed to auctioneers to inspect the sold object before deciding to buy it. In addition, the legislator wanted to guarantee the stability of these sales and prevent reiteration of their procedures and costs[26]. However, if sale by public auction is optional, and was made without intervention of the court or any other entity, the provision of article (569) of the Iraqi civil code doesn't include this sale and therefore the seller remains guarantor of the latent defects.

Part four

Rules of guarantee against latent defects

If the conditions of the mentioned defect are met, the buyer shall claim the guarantee from the seller. However, before this, the buyer shall inspect the sold object and advise the seller with the defect that the buyer detect. Afterwards, the buyer shall institute against the seller the lawsuit of guarantee that had to be instituted within a short period, or it would lapse by outdating. We will discuss these matters below:

Section one: inspection of the sold item and notification of the defect to the seller

Article (560) of the Iraqi civil code states that "1- If the buyer received the sold object, the buyer shall verify its condition upon possession of it as is the custom in dealing. If the buyer detected a defect guaranteed by the seller, the buyer shall inform the seller. If the seller is negligent in anything, the buyer would be considered to have accepted the sold object. 2- If the seller concealed the defect in the way that can't be detected by ordinary inspection, then the buyer detected it, the buyer shall advise it to the seller on

appearance; otherwise, the buyer would be deemed to have accepted the sale."

This shows that the legislator required the buyer to inspect the sold object by the eyes of the ordinary person, on receipt of the sold object actually, not finally. However, this inspection does not require that the buyer receives the sold object. Law gave the buyer truce to do this, and described the extension as ordinary relation "according to the traditional dealing". If the buyer received the sold car, he wouldn't be considered to have accepted it with its defects upon his receipt of the car. A reasonable period shall pass for the conditions of contract or as commonly identified by custom.

However, if the defect is undetectable by ordinary inspection, and required technical inspection by experienced person, the buyer wouldn't be considered to have accepted it unless detected by technical inspection, but mandate of notifying the seller with it upon detection. If the buyer detected defect in the sold object, which is guaranteed by the seller, the buyer shall notify the seller with the defect upon detection of the defect. Any slowdown of this may make the knowledge of the source of defect on occurrence very difficult, or make the proof of defect difficult, which leads to disputes and instability of dealing[27].

The law didn't define certain mode of notification. It can be done by notification through the notary public, and may be served by recorded message and oral notification shall be valid. The buyer shall bear the burden of proving the occurrence of mistake, and the buyer can prove this by all legal means of proof, including testimony and evidences because it is material incident[28].

The foregoing shows that the buyer neglected the inspection of the sold object through the reasonable period or neglected notification to the seller of the defect that the buyer found in the sold object in reasonable time, the buyer will be considered to have accepted the sold object with its defect and abate his right to claim the guarantee from the seller[29].

Tendency of the Iraqi legislator not to define a certain period for the buyer's inspection of the sold object, and therefore to notify the seller with the defect that the buyer discovered in the sold object is a good approach, as the judge leaves the adequate stage for achievement of justice and failure of assessment by formal application of law[30].

Section two: claim of guarantee of latent defect

If the defect occurred with the above conditions, and the buyer notified the seller with this defect in the reasonable period, the buyer shall claim guarantee from the seller. Paragraph one of article (558) of the Iraqi civil law defined this guarantee by stating that "if an old defect appeared in the sold object, the buyer shall have the option, at his will, to return the sold object, or to accept it at the nominal price, if the buyer so desired."

The text of the above paragraph indicates that the buyer has the option either to return the sold object by rescission of the contract and refund of price and the holding the sold object, but the nomination stated in the contract is that the Iraqi legislator derived it from the hanafite jurisprudence since jurists don't have the option of defect without rescission of the contract or return of the sold object with the full price.

Other jurists of sharia give the buyer the option either to rescind the sale or return it with claim of part of price against the missed part of sold object by appearance of defect in it[31].

The Egyptian legislator did good when he applied to the guarantee of defect the same rules that the legislator dictated in guarantee of partial entitlement. This application required that in case of gross defect, the buyer shall opt for rescission or retention of the sold object with compensation for the defect according to the general rules. The buyer shall be indemnified for the loss that he incurred and the profit that he missed because of the defect. If the defect is not gross, the buyer shall only receive compensation[32].

The parties may agree that the seller repairs the defect, and this would be an agreement that the seller fulfills the obligation of guarantee physically, but the purpose of agreement, according to the Iraqi Court of Cassation, prevents the buyer from requesting the rescission of contract and refund of price.

The sold object may be several items that were sold in one deal, and, after inspection, some, not all, of them appeared to be defective, what would be the rule in this case?

Article (561) of the Iraqi civil law required differentiation between whether the deal can be partitioned without damage and, if not, whether partitioning of the deal implies damage. That is, not everything can be utilized independently of the other things without decrease of its value. If the buyer has the right to return the sold item by termination of contract or acceptance of price. If the deal can be partitioned without damage, the buyer can't request to return the sold item without satisfaction of the seller. The buyer can return the defective item only and claim the price of the defective item from the seller[33]

Section three: prohibitions of reply

We indicated before that when there is latent defect in the sold object, the buyer shall opt for returning the sold object by repudiation of sale or retention of the full nominal price. However, there are certain case that, if materialized, wouldn't make the refunding of the sold object to the seller possible, and the seller's right shall be limited to claim of the decrease of price. Here are these cases:

First case: New defect in the sold object after delivery:

Article (562) of the Iraqi civil law "1- If an old defect appeared in the sold object, then a new defect is sustained while in the custody of the buyer, the buyer many not restitute the thing on the account of the account of the old defect so long as the new defect exists therein, but may claim from the seller the depreciation in the price save where the seller has agreed to take in its existing state (with the new defect) if there is nothing to prevent return. 2- If the new defect disappeared, the buyer shall regain his right to restitute the sold object to the seller on account of the old defect."

The Iraqi legislator derived this text from the provisions of Islamic jurisprudence (articles 245, 247, 248 and 350 in the gazette). Adoption of this rule indicates that when the buyer asks the seller to reduce the price because of the old defect, the buyer must take the sold object in spite of the new defect in it. In this case, the buyer shall generally accept the sold object at its price or return it to the seller if there is no other prohibition of return that we will mention.

It is noted that if the defect is removed in the way that renders reply null, the buyer can choose to return the sold object with the old defect. For example, if a person sold an animal and this animal was infected with disease while in the custody of the buyer, then the buyer discovered an old defect, the buyer will not have the right to return the animal with the old defect to the seller; he will only have the right to decrease the price. However, if this disease was recovered, the buyer shall return the animal to the seller with the old defect, for the purpose of the rule that if the prohibition is removed, the prohibited object shall be returned[34].

Second case: increase of buyer's property over the sold object:

Article (563) of the Iraqi civil law states that: "increase of the buyer's property to the sold object prohibits return such as dyeing the sold clothes or building on the sold land or growth of fruits on the sold trees; 2- If the sold object increased in the way that prohibits return, then the buyer found old defect in it, the buyer shall claim the decrease of price from the seller and return shall be prohibited, even if the seller accepted it with the defect."

The increase that prohibits return is the related, not the resulting, one, such as dyeing the clothes or the building, and the separate increase that result such as fruits and production of animals, while the generating increase in the original thing such as obesity and separate increase that don't result from the original thing such as fees don't prevent return. The legislator appears to have ruled in this text that increase that prevents return is also prevented, even if the seller is satisfied with the defect. As a result, if a person sold defective cow, then the cow was infected with a new defect after it was owned by sale, the buyer may not repudiate the sale even if the seller agreed to restitute the cow with its new defect and generated sale. The interpreters of the gazette justify this judgment, which is criticized, by saying that this requires possession of another one's property by compensation, and without satisfaction of its owner. The seller is forced to give decrease of price. In this way, if the buyer sold the object after knowledge of the old defect, the buyer may request to decrease the price of the sold object. Such disposal wouldn't prevent the buyer of claiming the decreased price because this right was assured to the buyer by such disposal of the sold object[35].

Second case: destruction of the sold object in the buyer's hand

Article (564) of the Iraqi civil law states that "if the defective sold object was destroyed in the buyer's custody, the buyer shall be responsible for its destruction, and the buyer shall claim the decrease of price from the seller." The above rule applies if destruction is due to force majeure or because of new defect or action of the buyer. However, what would be the rule if destruction results from the seller's action or because of the old defect?

Some believe that the buyer's right is limited to the claim of decrease of price if the destruction occurred because of latent defect or because of sudden accident or force majeure, and shall be prohibited in one case, the case of destruction of the sold object by his act.

The common view states that the buyer can claim the full price from the seller with the costs as if the sold object is completed due in the buyer's hand according to the general rule. The court of cassation adopts the last opinion in its decision that stated that "If the buyer conditioned that the sold object shall be returned if old defect appeared in it within one month of receipt, then the sold object was destroyed because of the old defect within this period, the seller shall refund the price to the buyer"[36].

Arab Case: the buyer's disposal of the defective sold object before knowledge of the defect

If the buyer disposed the defective object as owner before knowledge of the defect in it, the buyer must claim the decrease of price from the seller. This rule is instilled from the concept of article (566) of the Iraqi civil code[37].

How price is assessed?

Article (565) of the Iraqi civil code states that: "decrease of price shall be assessed by experts by evaluation of the sold object in its valid condition, then evaluates it when it is good, and whether there is difference between the two values due to the nominated price. According to this percentage, the buyer must claim the decrease from the seller."

For example, if a person bought cloth for ten dinars, and after cutting and separating it he found old defect and wanted to return the goods to the seller by guarantee of this defect, and the experts evaluated this cloth in its good condition for twelve dinars, then evaluated it in its defective condition to nine dinars, the difference between the two values shall be evaluated to three dinars, which is one quarter, so the buyer has the right to claim from the seller quarter the nominated price of two and half dinars[38].

Section four: abolitions of the seller's guarantee of latent defects

The seller's guarantee of the of latent defects lapses in particular cases some of which is attributed to provision of law and others are attributed to explicit agreement between the parties or to the implicit will of buyers. We will mention the main cases below:

First: Failure's failure to inspect the sold object with due care

As mentioned before, the buyer must, after receipt of the sold object, inspect the object within reasonable period, and notify the seller with the defect upon discovery of it. If the buyer didn't inspect the sold object, or didn't pay the due care in its inspection, or if the buyer inspected the sold object as required, but didn't notify the seller with the defect upon discovery of it, the buyer's right to guarantee shall lapse unless the seller assures that the sold object is free of defects or the buyer concealed the defect from the buyer[39].

Second: buyer's disposal of the sold object after knowledge of defect in it

If the buyer detected old defect in the sold object, then the buyer disposed it as owner whether the sold object had a physical right to a third party such as by sale or pledge, or created personal right such as lease, the buyer's right to guarantee shall lapse.

Any act by the buyer after knowledge of the defect shows that the buyer choose to accept sale[40].

Third: Buyer's assignment of his right to guarantee

The buyer's obligation to guarantee the latent defects is a right prescribed for the buyer's interest. Therefore, there is no prohibition that the buyer uses this right according to article (567) of the Iraqi civil code[41].

Fourth: Buyer's condition to be discharged of any defect

Article (566) of the Iraqi civil law states that: "If a buyer stipulated his discharge of every defect or all defects in the sold object, the sale and condition shall be valid, even if the buyer didn't define the defects. However, in the first case, the seller shall be discharged of the defect that exists at the time of contract, and the defect that occurs after it, before receipt. In the second case, the buyer shall be discharged of the existing one, not the accidental one.[42]"

Fifth: Expiry of term

It is not sufficient that for the legislator to maintain his right to claim from the seller the guarantee of latent defects to inspect the condition of the sold object as usual in dealing, and to initiate the information of the seller about the defects that may be discovered by the buyer within reasonable period. The legislator shall, in addition, institute lawsuit of guarantee against the seller within six months from the time of delivery of the sold item. Article (570) of the Iraqi civil code stated in paragraph one that: "The lawsuit of guarantee of defect shall not be heard if six months passed after the time of delivery of the sold object, even if the buyer discovered the defect only after that period, unless the seller agrees to comply with the guarantee for longer period."

This indicates that law dictated abatement of lawsuit of guarantee of defect by expiry of shorter period after delivery. This shall be the same if the buyer knew the defect during that period or knew it only after this. Upon expiry of six months after delivery, it leads to the buyer's loss of his right to claim the guarantee from the seller. The legislator's view in this respect is justified by the legislator's desire to curb the disputes that may arise because of the guarantee of latent defects and the problems that may be raised by this guarantee, such as the difficulty to know the origin of defect and whether it is old or accidental, and the seller's remaining threatened with the buyer's claim of guarantee for longer period, and the general consequences of unstable transactions that may arise.

Since article 570 of the Iraqi civil law didn't declare, the same as article 452 of the Egyptian civil code, the meaning of delivery that applies from the period of outdating, question was raised on the nature of this delivery and whether it is real delivery or arbitrary delivery?

It can be said that the common view is the one that bases the currency of period to the real (actual) delivery, because it is the one that gives the buyer the opportunity to verify the condition of the sold object and detection of its defects.

In general, it is noted that the rule of article 570 of the Iraqi civil law is not of public order, so the parties to the contract may agree in contravention to what is contained in it. For this reason, the legislator allowed the parties to agree on extension of six months or otherwise as agreement to strengthen the guarantee. Therefore, the period of guarantee can be longer than six months if the seller deliberately concealed defect by cheating. In this case, the buyer's right to institute lawsuit of guarantee shall be abated by guarantee of expiry of six months from the date of receiving the sold object, and expiry of fifteen years on the day of discovery of the defect (article 570/2) of the Iraqi civil code[43].

Part five

Amendment of the Rules of guarantee of latent defects

Article (568) of the Iraqi civil law states that: "1- The parties may, by special agreement, define the amount of guarantee; 2- provided that every condition that abates the guarantee or decreases it shall be void if the seller deliberately concealed the defect." The above text indicates that the parties may agree on reinforcement of guarantee or reduce it, or to exempt it by abatement provided the seller has deliberately concealed the defect in which case every condition that abates the guarantee or decreases it shall be void.

First: Agreement on reinforcement of guarantee

The parties may agree on the seller's reinforcement of defects. For this purpose, they may expand the seller's period of obligation to include defects that weren't covered by the rule of law, such as obligation to guarantee all defects in the sold object, even if they are apparent or if the buyer is able to detect them if he inspected the sold object with the due diligence. Agreement of the parties to reinforce the seller's guarantee may take the form of agreement on extending the period required for instituting the lawsuit of guarantee, so it may be more than the six months stipulated by article (570) of the Iraqi civil code[44].

Second: Agreement on alleviation of guarantee

The parties may agree to alleviate the guarantee such as agreement that the seller doesn't guarantee certain defect by mentioning it, or limiting the guarantee to the defects that appear in the technical inspection, not the other guarantees, and the seller's agreement with the buyer to restrict claim of decrease of price not to return the sold object, even if the buyer has the right to return the sold object by law.

For enforcement of the agreement of the parties on the achievement of guarantee, the seller shall not deliberately conceal the defect, if the seller proved to have deliberately concealed the defect, so the alleviation condition doesn't have any legal effect, and the seller shall be the guarantor, because by concealing the defect, the seller would have resorted to cheating in his dealing. Examples of this include concealment of break in a part of the defective car by welding, painting or dyeing. The burden of proving the seller's deliberate concealment of defect in the sold object shall be assumed by the buyer[45].

Third: Agreement on exemption of guarantee

The parties may agree on abatement of guarantee as if the buyer declared in the contract that he abates the option in which case the buyer may not claim the guarantee from the seller for any defect.

Agreement on the decrease or abatement of guarantee shall be void if the seller deliberately concealed the defect in the sold object by cheating and would be considered cheating if the defect arises out of the seller's act[46].

This was stated by article (568) of the Iraqi civil law in paragraph two that stipulates "every condition that abates or decreases the guarantee shall be void if the seller decided to conceal the defect."

Therefore, if the seller deliberately concealed the cracks in the walls of the sold house by inscriptions and drawings, then stipulated that he doesn't guarantee any defect, the condition shall be null and the judgments of legal guarantee shall be applied. Not only this, the seller's cheating results in elongation of the period of abatement of the period of guarantee. It is not abated by expiry of six months after the delivery of the sold object, and fifteen months from the time of sale. Paragraph (2) of article (570) of the Iraqi civil code states that "the seller doesn't have the right to invoke this term (six months) if the seller concealed defect by cheating."

Part six

Comparison between guarantee of latent defects and some legal systems

After we identified the terms and conditions of guarantee of latent defects, in this chapter we will compare it to some legal concepts that approach it.

Section one: differentiation between defect and wrong

In discussing the latent defects, it is useful to distinguish the lawsuit of rescission because of latent defect and the lawsuit of nullification because of mistake.

The latent defect, as indicated, is decrease of price of the sold item in the market or in the point of view of experts, or missing right purpose, if what is common is "examples of sold object is non-existence of it", article 558/2, civil law.

The wrong that requires nullification is the wrong in the original matter considered in the contract or one of its material elements, or one of its basic traits. The buyer in case of wrong buys another thing different from the thing that he wanted to buy.

In case of latent defect, the buyer buys the object that he intended to buy in fact, but he finds after buying it that the sold object contains defect that renders it unusable. The foregoing indicates that whoever buys a painting as drawn by renowned painter then discovers that it is done by another painter would be wronged, and shall have the right to request nullification of contract for this reason, even if the painting is good in itself, and doesn't contain any defect.

If the painting appeared to be painted by the intended painter, but colors are unfixed, this will be considered as defect, and the buyer may request to request rescission of contract.

The wrong and latent mistake may be combined in some cases such as when the buyer commits mistake

in essential form in a property of the sold object, if the negligence of such property leads at the same time to rendering the sold object invalid for the purpose of the buyer, as when a person buys a horse capable of race and find it different from this. In the latter case, sale shall depend on the buyer's authorization because of the wrong, and the origin at the same time will be by guarantee of latent defects. That is, the buyer opts either between the claim of wrong or the claim of guarantee of latent defects. However, the buyer may not combine them. If the buyer brought lawsuit of wrong against the seller, the buyer shall prove that the seller collaborated with the buyer in the wrong or that the seller knew or was easy to knew at the time of discovery of wrong. If a judgment was made to repudiate the contract, it shall be void, while if the buyer brought the lawsuit of guarantee of latent defects, the buyer shall be required only to prove that there is defect in the sold object, and shall not be charged with proving the seller's knowledge or lack of knowledge.

The above provisions apply if the sale was optionally done, while if the buyer bought the horse in public auction to the best knowledge of the court or department, the buyer may not claim the guarantee of latent defects from the seller in this case because these sales don't create guarantee. However, the buyer in this case may institute lawsuit of wrong, and the rule of sales made in auction without intervention of judiciary or department in the rule of optional sales[(47))].

Section two: guarantee of defects and guarantee of properties

There is a basic point in discrimination of these two systems, which is that this defect that appears on the sold object is a third party's right carried by the sold object as a right of easement or preemption, and the sold object in this case is good and there are no defects in sale, so it is not charged with a third party right, but implies defect that reduces its value or renders it unusable[(48))].

Section three: guarantee of defects and guarantee of properties

If the seller mentioned to the buyer that there are certain properties in the sold object, or the buyer conditioned that they exist, the seller would be guarantor. If these properties are not met, and if this doesn't constitute defect in the accurate meaning and doesn't affect the value of the sold object or its validity to meet the purpose of it. Agreement may be made on certain properties of the form in the sold object. The seller shall guarantee the properties even if the buyer can indicate that they are not met in the sold object by the ordinary care, as in the case where the seller emphasizes to the buyer that the sold object is free of defects, since the seller is guarantor even if these defects are of the type that the buyer can indicate by ordinary due care.

Section Four: Guarantee of defects and guarantee of validity of the sold object for a certain period

If the seller guaranteed for the buyer the validity of operation of the sold object within a certain period of time, and deficit appeared in the sold object during this period, the seller shall be responsible if this defect or its reason are not defects that raise guarantee. However, the question that would be whether this is reinforcement of the seller's obligation to guarantee the latent defects or it is a future and different obligation?

In answer to this, we say that it is true that the deficit to the sold object is like defect, but we consider it an independent obligation to guarantee the defects has particular constituents that don't agree with this obligation and the agreement of reinforcement would increase the burdens of obligation to guarantee the defects, not to demolish all basic constituents[(49)].

Section five: Guarantee of defects and repudiation because of non-execution

If the latent defect in the sold object constitutes breach of the conditions agreed in the contract by the seller, the buyer would have two lawsuits, lawsuit of guarantee of defects and lawsuit of rescission because of non-execution as if the seller undertook to give the buyer car valid for racing and it appeared then to be invalid for this purpose because of latent defect in its motor. However, if the seller delivered the sold object in a condition that agrees with the conditions and descriptions, and there appeared latent defect in it, the buyer shall have only one lawsuit, which is the lawsuit of guarantee of defects before the other lawsuit, so the buyer can't invoke it because the seller has fulfilled its obligation in a way that agrees with the conditions of the contract[(50)].

Conclusion

The foregoing indicates that the seller is committed to guarantee to the buyer that the sold object is free of defects that miss the utility and use of it. The basis of this obligation is the implicit will of the parties and required nature of sale because the rule, according to the jurists of Islamic sharia is that the sold object shall be free of defects.

We conclude that the seller wouldn't have fulfilled its obligations to the buyer without delivering the sold object valid for meeting the buyer's purpose. The seller may not only guarantee for the buyer that the seller will not claim his possession of the sold object and the quiet possession, he shall guarantee that this possession is useful and feasible, because the buyer considered, on definition of the price, the benefit of the sold object. If the sold object has defect that decreases the amount of this benefit, putting the price under the seller's disposal shall not have legitimate justification.

For this reason, we find that law imposes on the seller obligation to guarantee the latent defects, because these defects prevent the buyer's fulfillment of his purpose of the contract.

Consequently, this obligation is in agreement with the logic and common intention of the parties, so the buyer can get the utilities that he expected from the sold object according to the requirements of good faith in dealing and in accordance with the intention of the parties, because it is nonsense that the buyer obtains the object unless he can benefit from it because of the defects or deficits that he didn't know on the entry into contract.

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