



THE ROLE OF HIDDEN DEFECT IN TERMINATING THE SALE'S CONTRACT

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Article history:		Abstract:
Received:	26 th April 2024	The effect of the existence of an old and influential defect in the sale is that the contract is not obligated on the buyer, and he can express his opinion about terminating the contract by his unilateral action. The contract is terminated before receiving the sale with everything that indicates it, whether explicitly or implicitly, without the need for the seller's consent or litigating him, but on the condition that he is aware of the rescission. If the receipt is made, the termination must be done either by mutual consent or by litigation. If the contract is terminated because of the defect, the buyer must return the sale to the seller and recover the price. The Iraqi legislator must apply the provisions of the Vienna Convention regarding its regulation of the treatment of the issue of hidden defects through repairing the defect, because this case, when taken into account, as stated by the Vienna Convention, reduces the cases of contract termination.
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INTRODUCTION

Many of us buy a real estate or a movable property and then find hidden defects in it that we were unable to discover at the time of purchase. These defects may reduce the value of the sale or make it unfit for use for the purpose for which it was prepared. What are the legal guarantees for each of the seller and buyer in the event of discovering a hidden defect? What are the limits of each of their obligations and the resulting effect and compensation for it? What is the legal period for this obligation? Does it lapse by prescription? We answer all these questions and more.

The seller's obligation to guarantee hidden defects is an obligation required by the nature of things, because when a person buys something, it assumes to be free of defects. If he had known that it had a defect, he would not have contracted to buy it, or his contract would have been better for him.

The defect guarantee includes all sales, whether the subject matter is real estate or movable property, a tangible or intangible thing. Examples of the defect guarantee in sales of intangible things include if the sale is made to a store and it turns out that it has a bad reputation. The presence of a hidden defect does not prejudice the buyer's right to resort to other claims other than the hidden defect claim to terminate the contract if the conditions for filing that claim are met, since the defect that results from the claim of guaranteeing hidden defects is the sudden defect that is free from the common sense of selling.

Thus, hidden defects that require a guarantee are those that reduce the value of the sale or make the sale unfit for use for the purpose for which it was intended. Examples of this include wood decay, a broken car engine, the proximity of groundwater to the ground, and the unsuitability of the property for habitation.

The study has great importance in clarifying the hidden defects that allow the contracting party to terminate the sale contract that is defective with a hidden defect, as well as clarifying all the provisions related to hidden defects.

The problem of the study arises from the large number of practical applications of termination due to hidden defects, as well as the lack of specialized studies on this topic.

The study aims to show the hidden defects that lead to the termination of the contract, as well as to show the conditions of the hidden defect, its provisions and effects. The researcher used the descriptive analytical method, studying the opinions of jurists, deducing rulings from them and comparing the legislations under study.

Section One: The concept of hidden defect.

Section Two: The role of hidden defect in terminating the contract.

Section One

The concept of hidden defect

The guarantee of hidden defects is characterized by intrinsic elements that make it not merely a mere application of the general rules. It was possible to dispense with much of what was mentioned in the texts related to this guarantee and to be satisfied with applying the general rules if a hidden defect appeared in the sale that was present at the time of the sale and the buyer was not aware of it, then it is said that the seller did not fulfill his

obligations. It is assumed that the seller has committed to transfer to the buyer not only ownership of the sale but also useful possession that responds to the purpose for which the sale was prepared. The appearance of a hidden defect that has an effect on the sale that is likely to make the sale unfit for the purpose for which it was prepared is a breach of the seller's obligation. Therefore, the buyer may request the cancellation of the sale. It can also be said that as long as this influential defect was present at the time of the sale and the buyer was not aware of it, and if he had known it, he would not have proceeded to purchase it, then the buyer may request the cancellation of the sale due to a fundamental error in the sale ⁽¹⁾. Accordingly, this research will be divided into two sections as follows:

First requirement: Definition of hidden defect

Second requirement: Conditions of hidden defect

The First Requirement Definition of hidden defect

The Iraqi Civil Law defined the defect in Article (558, Paragraph 2) as what reduces the price of the sale for merchants and employers or what deprives a valid purpose if it is common in similar sales that it does not exist or it is old if it was present in the sale and the contract was concluded or occurred after it while it was in the seller's possession before delivery.

Therefore, the seller is obligated to deliver the sale to the buyer in the manner specified in the contract and to guarantee him a peaceful use of the sale free from any inconveniences. If he does not do so, he is in breach of his obligation. He also guarantees to the buyer that the sale is free from any hidden defect that may appear in it. This is what is called a hidden defect guarantee.

Islamic law also dealt with defects. It was narrated that Uqbah ibn Amir said: I heard the Messenger of Allah (PBUH) say: "A Muslim is a brother of a Muslim. It is not permissible for a Muslim to sell his brother goods in which there is a defect without pointing that out to him". Another narration of Muslim is: The Messenger of Allah (PBUH) happened to pass by a heap of corn. He thrust his hand in that (heap) and his fingers felt wetness. He said to the owner of that heap of corn, "Whoever cheats us is not one of us". Therefore, the absolute contract requires freedom from defect, so freedom is like that which is explicitly stipulated in the contract, because it is usually required. If it is lost, he has a choice so that he will not be harmed by being obligated to do something that he is not satisfied with, as if the desired description stipulated in the contract is lost.

Therefore, the guarantee of hidden defects is the fourth obligation that falls on the seller after the transfer of property and delivery of the sale and the guarantee of exposure and entitlement. This obligation is required by the nature of things because when a person buys something, he assumes that it is free of defects. If he knew that it had a defect, he would not have bought it or his contract for the purchase would have been on easier terms for him. Whoever buys a car buys it on the basis that it is free of defects because it should be free of defects. Whoever buys a refrigerator, washing machine, or any electrical appliance buys it on the basis that it is free of defects because the presence of a defect in the sale leads to a reduction in the buyer's right to fully benefit from it and affects the extent of benefit from it in the usual manner. Although the defect may lead to a reduction in the buyer's right to benefit from the sale in some cases, it sometimes leads to the sale being unusable for the purpose for which it was prepared, as if a disease were found in a horse that its owner bought, or the defect may lead to a decrease in the value of the sale, as if the buyer discovered a defect in the engine of the car he bought ⁽²⁾.

Therefore, the creditor in the guarantee of hidden defects is the buyer, and his right is transferred to the heir. If the buyer dies, his heirs may claim the guarantee of the defect on the seller, just as their testator did, and the guarantee is divided among them, each according to his share of the property.

The seller shall be obligated to guarantee if the sale does not have the qualities that he guaranteed to the buyer at the time of delivery, or if the sale has a defect that reduces its value or benefit according to the intended purpose, as inferred from what is stated in the contract or what is apparent from the nature of the sale or the purpose for which it was prepared. The seller shall guarantee this defect even if he was not aware of its existence.

Therefore, the defect choice is the choice given to the buyer, in which he has the choice between signing the contract or terminating it if it becomes clear to him that the contracted item is defective with a defect that he was not aware of before the contract. The existence of a defect in the contracted item may prevent the buyer of the opportunity to benefit from the sale in the manner he wants, such as if the buyer discovers that the machine which he bought is defective with a defect that prevents him from benefiting from it, so the contract loses its obligation's nature, which allows the buyer in this case to terminate the contract by himself or to proceed with it if the defect does not actually affect it. The Jordanian legislator has treated the defect choice from Article 193 to Article 198, but he did not consider it sufficient to treat the guarantee of defects in the sale, as they are only general rules, as he said in Article 512, Paragraph 2 of the Civil Law, the following: The general rules regarding the defect choice apply to the defect contract, taking into account the following provisions: the general rules about the defect option apply to the defect contract,

⁽¹⁾) Dr. Abdul Razzaq Ahmed Al-Sanhouri, *The Mediator in Explaining Civil Law*, Vol. 4, 3rd ed., Beirut, Lebanon, 2009, p. 72

⁽²⁾) Dr. Ali Hadi Al-Abidi, *Named Contracts of Sale and Lease*, 5th ed., Dar Al-Thaqafa for Publishing and Distribution, 2011, p.135.

taking into account the following provisions. Therefore, the Jordanian civil law returned to this topic with general rules, especially in the sales contract from article 512 to 521 Jordanian Civil Code <1>, which are rules derived from Islamic jurisprudence that require that the sale should be free of defects because it is the original, it was stated in Article 336 of the magazine that the absolute sale requires that the sale should be free of defects 2. So the basic principle, as we see, is that the sale is free of defects. If it appears in the sale, the buyer has the choice between terminating and signing so that he is not harmed by obligating him to do something with which he is not satisfied. Thus, freedom from defects is as if it were an implicit condition in the contract, and this is what was stipulated in Article 512/1 of the Jordanian Civil Code, which says that a defect is considered a contract on the basis that the sold item is free of defects, except for those that are customarily tolerated ⁽³⁾.

The guarantee for hidden defects is characterized by special intrinsic components that make it different from the application of general rules and subject to special rules. Even if it is subject to the general rules only, it is not possible to dispense with much of what is stated in the texts related to the guarantee for defects in the sale and to suffice with applying the general rules, including proving that the seller has not fulfilled his obligations on the basis that he is obligated by transferring to the buyer. In addition to the ownership of the sale, it is beneficial possession that responds to the purpose for which the sale was prepared, and the appearance of an affecting defect in the sale that would make it unfit for the purpose for which it was prepared, which means that the seller has violated his obligations, and the buyer may request cancellation of the sales contract or declare the sales contract invalid due to a mistake in its characteristics. It is essential to the sale and other general legal reasons, but the claim for guaranteeing hidden defects is distinguished by special elements that distinguish it from the claim for invalidation and cancellation because it goes back to historical traditions rooted in antiquity. The primary credit for codifying the guarantee for hidden defects and making it obligatory goes back to the Code of Hammurabi, in which it was stated that if a purchase was made a slave in which a defect appears before the expiry of a month after the completion of the sales contract. The buyer has the right to recover the price and return the sale to the seller, but this is according to Sharia law. ⁽⁴⁾

The claim for reducing the price was not known, although the Code of Hammurabi addressed the guarantee for hidden defects. The main source of the rules for this guarantee goes back to the Roman law, where the guarantee with this law appeared to be an agreement and not a legal one based on a contemporary personal agreement associated with the delivery of the sale and with the increasing importance of commercial exchanges in ancient societies. Regarding an economic development that entailed the expansion, variety and multiplicity of commercial relations, it became necessary to establish the foundations of stability in commercial dealings in order to protect the buyer from bearing the burden of defects that afflict the sold item by providing him with specific guarantees. ⁽⁵⁾

The Second Requirement Conditions for hidden defect

After we defined the hidden defect as the faults that reduce the value or usefulness of the sale, or if the thing is free from the qualities stipulated for in the contract, and the men of Islamic jurisprudence defined it as what is lacking in the proper paragraph and reduces the value, we move to the conditions that make this defect a reason for a guarantee. The defect that requires a guarantee must be several conditions are met:-

First: it must be old. An old defect is a defect that was present in the sale before the conclusion of the contract or occurred while it was in the hands of the seller before delivery, that means, it must be present at a specific time, as it is required that it should be present in the sale at the time the buyer receives it from the seller. This means that the defect must be present at the time of sale and remain until the time of delivery, then it will be present at the time of delivery and the seller will be responsible for its guarantee. However, if the defect occurred after the sale and before delivery and remains until the time of delivery, then it will also be present at the time of delivery and the seller will be responsible for its guarantee. It goes without saying that the hidden defect must exist even before delivery. If the sale is not specifically identified, this is due not only to the time at which the existence of the hidden defect is considered, which is the time of delivery, as previously said, but also because the thing is not specifically identified at the time of sale, it is not conceivable that the defect will be attached to it at this time, but rather it is conceivable that the defect will befall it at the time of its occurrence. It must be subjective; this can only be done by sorting, which usually takes place at the time of delivery. However, if the delivery is delayed after sorting and the item sold was not

⁽³⁾ Dr. Mahmoud Jalal Hamza, Simplification in Explanation of the Jordanian Civil Law, vol. 4, Cooperative Printing Press Workers Association, vol. 2005, p. 172

⁽⁴⁾ Dr. Ahmed Muhammad Ali Dawoud, Provisions of the Contract in Islamic Jurisprudence and Civil Law, vol. 2-3, Dar Al-Thaqafa for Publishing and Distribution, 2011, p. 618.

⁽⁵⁾ Muhammad Yousef Al-Zoubi, Contracts Named Explanation of the Sales Contract, 1st edition, Dar Al-Thaqafa for Publishing and Distribution, 2006, p. 423.

defective until the time of its sorting, and then the defect befell it in the period between sorting and delivery, then the seller will be responsible in this case for guaranteeing this defect, and the cause of the defect or its germ may be found before delivery, but the defect itself does not occur until after delivery. If the sale is an animal, for example, a disease germ or microbe may be present in it before the buyer receives it, and then the disease occurs after he receives it. If the buyer can prove this, then the defect whose direct cause goes back to before delivery is considered a rule of existence at the time of delivery and then guaranteed by the seller. So there are three cases in which the defect is old ⁽⁶⁾:

The first case: If the defect was present in the sale before concluding the contract. The second case: If the defect occurred after concluding the contract and before delivery, as if a person bought an electrical device and it was free from any defect, but a defect occurred in it before it was delivered. It becomes clear to us from this case that the Jordanian legislator was affected by Islamic jurisprudence has linked the seller's obligation to guarantee hidden defects to the delivery of the sold item, not to the transfer of ownership. Just as the seller bears the risk of loss before delivery, he is also obligated to guarantee the defect occurring before delivery. The third case: If the defect occurs after the delivery of the sale, but its cause is old and present in the sale with the seller, and the defect in this case is old, but it is considered old because its source and origin is old. All that matters is that it did not spread to the sale and its danger did not become severe until after a period of time, as if the sale was an animal that contained a germ of a specific disease at its beginning, and the symptoms of the disease did not appear until after it was delivered to the buyer, or the sale was a mechanical device and the defect occurred in it on the part of the buyer, and it became clear that the cause of the defect led to deposits of bad oils that the seller was using in this device. This case is subject to the decision of the court, as it may the reason for the spread and severity of the defect is due to the buyer's error.

Second: That the defect be hidden. A hidden defect is known if it is not known by looking at the appearance of the sale. A person who buys a car with an interior damage that he cannot detect through normal viewing, and he also bought the car with a hidden defect, like someone who buys spoiled food and cannot detect its spoilage through normal viewing, has bought food with a hidden defect. However, a defect that the buyer can see through the appearance of the sale is not considered a hidden defect and the seller cannot be held responsible for it. In the two previous examples, if the defect was in the exterior structure of the car, such as if it was damaged on one side or its paint was faint and this was clear to the extent that an ordinary person could see it, or if the food was clearly spoiled, its color would be clearly different or its shape would show this, or its smell would indicate its spoilage such that these things would be clear to an ordinary person, in such cases, despite its existence, it is not considered a hidden defect, meaning that the buyer bought while being aware of the defects, he cannot demand any guarantee from the seller because he is not responsible for them. Therefore, the hiding of the defect is considered a living source for the system of guaranteeing defects in the sale, because the buyer, who relied on the integrity of the sale, relying on the principle of good faith that must prevail in contracts, becomes isolated against the defect that taints the sale. If the contract is the law of the two parties within the scope of the good intent of the contracting parties, then fairness, sound goodness, and natural logic justify the buyer to reconsider the covenant he made to himself that he is committed to fulfilling his contractual duties, and this is what most legislations have enshrined in explicit legal texts ⁽⁷⁾.

Therefore, the defect that requires a guarantee must be hidden, such that the seller does not guarantee defects that the buyer can discover. What is important is that the defect be hidden, not that the buyer be ignorant. Going in this direction, it seems that the concealment of the defect is not sufficient in itself, but rather it must be completed with another condition, which is that the defect be unknown to the buyer. Even it was hidden to prove the buyer's good intent.

Therefore, a hidden defect is not considered a defect that is known by observing the appearance of the sale, such as if the sale were a car and there was an apparent breakage in one of its parts. Likewise, a hidden defect is not considered a defect that is discovered by an ordinary person with medium care, such as if the sale was a television, the defect in which is known by simply turning it on and seeing its pictures. Accordingly, if a person buys something without paying attention to the defect in it because he did not expend the care of an ordinary person in examining it, he cannot return to the seller with the guarantee because he is negligent, while a hidden defect is considered a defect that cannot be discovered except by experts, such as if the sold item were an animal infected with a disease that cannot be discovered except by laboratory analysis. A hidden defect is also considered a defect that cannot be discovered except by experimentation. The experimentation here does not mean the initial experimentation, for example, of operating the device, which every buyer is supposed to do with mediate care before proceeding with the

⁽⁶⁾ Dr. Mahmoud Jalal Hamza, Simplification in Explanation of the Jordanian Civil Law, Part 4, 1st Edition, Cooperative Printing House Workers Association, 2005, p. 130

⁽⁷⁾ Dr. Ahmed Mohamed Ali Dawood, Contract Provisions in Islamic Jurisprudence and Civil Law, Part 2-3, Dar Al Thaqafa for Publishing and Distribution, 2011, p. 612

purchase. Rather, it means putting the sale into use, as if the sale was a car with a defect that could not be discovered except after it had been driven a long distance.

Third: That the defect be influential, and the influential defect that requires a guarantee is the defect that occurs in the material of the sale. The defect criterion here is a purely objective criterion, and the objectivity of the criterion becomes clearer by referring to the regulations set by the first paragraph of Article 447. The text stipulates, as we have seen, that there be a defect in the sale that reduces its value or its benefit according to the intended purpose, as inferred from what is stated in the contract or from what is apparent from the nature of the thing or the purpose for which it was prepared. The defect may be such that it may reduce the material value of the thing or its material benefit. The value and benefit of the thing are two distinct matters. The defect may reduce the value of the thing without reducing its benefit, as if the sale was a car suitable for all intended purposes but had a hidden defect in the seats or the cover or any other part of it that did not affect its validity for driving and fulfilling all intended purposes. If this defect was influential and reduced the value of the car significantly, the buyer may return to the seller with a guarantee of the hidden defect. The hidden defect may reduce the benefit of the thing but not reduce its value. If the sale, for example, was a mechanical machine and had a hidden defect, and despite the presence of this defect, it still maintained its material value. If this defect had been known, it would not have reduced its value, then if the benefit that the buyer passes up because of this defect, he may return to the seller with a guarantee. If the defect is serious and affects the value of the contracted item, such that if the buyer had known about it, he would not have proceeded with the purchase, the buyer has the option of the defect. If he wishes, he may terminate the contract, or if he wishes, he may accept at the specified price. He does not have the right to keep the sale and demand what the defect has reduced from the price. However, if the defect does not affect the value of the contracted item, but is rather something that is customarily tolerated, then in this case the contract is concluded and the minor defect is not guaranteed by the seller ⁽⁸⁾.

The determination of the intended benefits of the sale is also an objective criterion and is derived from three matters that were explained in the first paragraph of Article 447 of the Iraqi Civil Code: what is stated in the contract or what is apparent in the nature of the thing or the purpose for which it was prepared. The buyer may take precautions and state in the sale contract the intended purposes of the sale. All purposes must then be considered intended benefits of the sale. If there is a hidden defect in the sale that impairs any of its benefits in a tangible manner, the buyer may have recourse to the seller to guarantee the hidden defect. It is not necessary for the benefits mentioned in the contract to be the usual benefits. The buyer may stipulate other benefits that he intended from the seller and the seller guarantees them for him in the sale contract, such as if the buyer stipulates that the car sold be easy to drive on unpaved streets or that it reaches a speed higher than the usual speed or that it consumes only a certain amount of fuel. If the sale does not have the qualities that the seller guaranteed to the buyer, this is a defect that requires a guarantee, even if the sale itself being devoid of these qualities is not a defect according to what is customary in dealings between people, as long as the seller has guaranteed these qualities to the buyer. This is what is called in Islamic jurisprudence the option of missing the desired description and it becomes clear to us that there are two criteria for determining the concept of an effective defect: the criterion of deficiency in value, which can be identified by determining the value of the sale in the market, and the criterion of deficiency in benefit, which is determined on the basis of the purpose intended by the buyer from the sale, regardless of the value of the sale in the market. This purpose can be identified from the nature of the sale or from the conditions of the contract. Whoever buys a house, his purpose is to live in it unless he stipulates otherwise, such as if he wants to use it as a factory or an office. Whoever buys a car, his purpose is to travel in it unless he stipulates otherwise, such as if he wants to use it for the purpose of racing ⁽⁹⁾.

Section Two

The role of hidden defect in terminating the contract

The effect of the presence of a hidden, old, and influential defect in the sale is that the contract is not obligated on the buyer, and he can express his opinion to terminate the contract by his unilateral action. The contract is terminated before receiving the sale with everything that indicates it, whether explicitly or implicitly, without the need to satisfy the seller or sue him, but on the condition that he is aware of the termination. If the receipt is made, the termination must be done by mutual consent or by suing. If the contract is terminated due to a defect, the buyer must return the sale and recover the price. Accordingly, we will divide this topic into two requirements as follows:

First requirement: Defect claims

Second requirement: Ruling on terminating the contract due to a defect

The First Requirement

Defect claims

We must introduce the idea of a suit for hidden defect and then talk about its parties and topics, so we will assign a branch to each of them.

⁽⁸⁾ Dr. Elias Nassif, Encyclopedia of Civil and Commercial Contracts, Vol. 8, no place and no year, p. 566.

⁽⁹⁾ Dr. Taleb Hassan Musa, International Trade Law, 1st ed., Dar Al Thaqaafa for Publishing and Distribution, 2004, p. 189

Section One The idea of a defect claim

If a defect is found in the sale that meets the conditions, the buyer must take the initiative to notify the seller, and then he may return to him with a guarantee claim, and it must be filed within a short period, otherwise it will lapse by prescription. If the buyer receives the sale, he must test its manner as soon as he is able to do so, in accordance with the usual practice in dealing. If he discovers a defect that the seller guarantees, he must notify the seller of it within a reasonable period. If he does not do so, he will be considered to have accepted the sale. However, if the defect is one that cannot be discovered by the usual test, and then the buyer discovers it, he must notify the seller as soon as it appears, otherwise he will be considered to have accepted the sale with its defect. The legislative policy in guaranteeing hidden defects is based on the lack of mutual consent in taking the necessary procedures to prove the defect and taking the initiative to file a guarantee claim, because delay in any of that makes proving the defect difficult, and it may be impossible to know whether the defect exists. The legislator has obliged the buyer to take the initiative to notify the seller of the defect as soon as it is discovered. Article 446 of the Lebanese Law of obligations and contracts stipulates the following: If the sale is of movables other than animals, the buyer must test the condition of the sale on the basis of receipt and inform the seller without delay within seven days following receipt of any defect that the seller must guarantee. Otherwise, the sale is considered acceptable unless the defects are not known by ordinary test or there are obstacles unrelated to the buyer's will that prevented test of the condition of the sale. In such a case, the defects of the sale must be reported to the seller upon their discovery and the sale is not considered acceptable. However, a seller in bad intent does not have the right to invoke this last provision ⁽¹⁰⁾.

It is clear from this text that the buyer's notification to the seller of the existence of the defect is a duty that falls on the buyer, and the same applies to Arabic laws with the simple difference that in Lebanese law the notification period is set at seven days from the date of receipt unless the defects are not known by normal test or there are obstacles that are not related to the will of the buyer. As for other Arabic laws, the notification of the seller is within a reasonable period and not a period of seven days. As for the Iraqi Civil Law, it stipulated in Article 560 that:

1- If the buyer receives the sale, he must test its condition as soon as he is able to do so, according to the usual practice in dealing. If he discovers a defect that the seller guarantees, he must notify him of it within a reasonable period. If he does not do so, it is considered acceptable for sale.

2- If the defect is one that cannot be discovered by the usual test and then the buyer discovers it, he must notify the seller as soon as it appears, otherwise he will be considered to have accepted the sale with the defect. Islamic jurisprudence also differed in determining the notice period. While the Hanafi school did not specify this period, but rather considered prolonged silence as acceptance of the defect, the Maliki school specified a period of two days for notification, and the Shafi'i school obligated that notification be made immediately except in the case of a legitimate delay. French law did not specify a period for notification, but the unified international project for the sale of movables obligated in Article 48 that notification be made within a short period from the date of discovery of the defect or the date on which the goods should have been tested ⁽¹¹⁾.

Section Two The Parties of the Claims

The claim for a guarantee against hidden defects arises from a contract that preceded it, which is the contract of sale, and the parties to the contract of sale are the seller and the buyer. Therefore, the parties to the claim for a guarantee against hidden defects are the seller and the buyer themselves. The seller is the debtor in the guarantee claim, and the buyer is the creditor in this claim. The debtor in the guarantee of hidden defects is the seller, and his obligation does not transfer to his heirs, but rather this obligation remains a debt in his estate. If the seller dies, the buyer has recourse to the guarantee of hidden defects, not to the heirs, but to the estate itself. If he collects the compensation due from it, the heirs take what remains of the estate after paying all the debts, including the debt related to the guarantee of hidden defects. It is not conceivable that the guarantee of hidden defects would transfer to the successor of the seller in the sold item. The seller's creditor is obligated to guarantee hidden defects in the manner stipulated in the general rules, as the buyer also becomes a creditor of the seller with a guarantee of hidden defects, so all participants will participate with all the seller's creditors as litigants, and the seller's guarantor is obligated to guarantee. The claim for guarantee of hidden defects, which in both forms ends in compensation, is divisible. If two people sell a common property between them, the buyer may claim the guarantee from the sellers, each according to his share in the sale, and he may not claim the entire guarantee from one of them, because the guarantee of the defect is divided between them. The exception to this is if the two sellers are jointly and severally liable towards the buyer, in which case the buyer may have recourse to either of them for the guarantee in accordance with the rules established for joint liability. Therefore, the debtor in the guarantee of hidden defects is the seller, and his obligation does not pass to his heirs, but it remains a debt in the estate that the buyer can enforce without exceeding the limits of this estate. However, if the buyer receives compensation from the seller's estate, what

(10) Dr. Nabil Ibrahim Saad, *Obligation Provisions in Civil Law*, Maaref Establishment, Alexandria, 2011, p. 231(10) .

(11) Dr. Sulaiman Markos, *Al-Wafi in Explaining Civil Law*, Dar Al-Nahda Al-Arabiya, Cairo, 1980, p. 456

remains of it shall be the share of the heirs after paying all debts, including the debt related to the guarantee of hidden defects ⁽¹²⁾.

The creditor in the guarantee of hidden defects is the buyer and his right is transferred to the heir. If the buyer dies, his heirs may return the guarantee of the defect to the seller as it was returned to their testator, and the guarantee is divided among them, each according to his share in the property. However, in this case, the seller may demand that they agree to return the sold property, so some of the heirs do not return part of the property to him so that the deal is not divided between them, and the buyer's right is also transferred to his special successor. If a buyer sells the defective property to a second buyer, this second buyer, who is the special successor of the first buyer, has a claim against his predecessor, the first buyer, against the seller, because this claim was transferred with the sale from the first buyer to the second buyer. Therefore, the second buyer has three claims for the guarantee of hidden defects. First: His personal claim against the first buyer for a hidden defect guarantee, which is the claim he derived from the second sales contract that was concluded between him and the first buyer, and the prescription period in it applies from the time of receiving the sold item from the first buyer.

Third: The direct claim, which is the claim of the first buyer himself against the seller for the guarantee of the defect, and it arose from the first sale contract concluded between the seller and the first buyer and was transferred by the second sale contract from the first buyer to the second buyer. This suit differs from the indirect suit in that the second buyer does not compete with the other creditors of the first buyer and it agrees with them in the prescription periods. This direct claim is also distinguished by the fact that it remains valid for the second buyer even if he does not have the right to return the defect guarantee to the first buyer, as if the first buyer had stipulated the absence of a guarantee. It is noted that if the second buyer files his personal claim for the guarantee against the first buyer, which is the first of the three claims, the first buyer may include the seller as a guarantor in this claim. Therefore, the creditor in the guarantee of hidden defects is the buyer, and in the event of his death, his right is transferred to his heirs, each according to his share in the sold item, but the seller may demand from them, by agreement to return of the sold item, and they may accept the return or reject it, and it is not permissible for them to accept some and reject the other, lest the deal be divided for the seller ⁽¹³⁾.

The Second Requirement

The ruling on terminating the contract due to a defect

The effect of the presence of an old and influential defect in the sale is that the contract is not obligated on the buyer, and he can express his opinion about terminating the contract by his unilateral action. The contract is terminated before receiving the sale with everything that indicates it, whether explicitly or implicitly, without the need for the seller's consent or suing him, but on the condition that he is aware of the terminating. If the receipt is made, the terminating must be done either by mutual consent or by suing. If the contract is terminated due to a defect, the buyer must return the sale to the seller and recover the price. These provisions are regulated by Articles 195 and 196 of the Jordanian Civil Law, which are found in the defect option, in which the rules existing in the sales contract apply without prejudice to the rules of sale, based on Article 512\Paragraph 2 stipulated in the rules related to the sales contract. Therefore, this requirement will be divided into two sections:

The first section: Who has the right to terminate?

The second section: Types of termination rulings

Section One

Who has the right to terminate?

The seller's guarantee for hidden defects differs from the termination of the contract for non-implementation, due to the difference in the reasons for each of them. The reasons for the seller's warranty for hidden defects are the presence of the hidden defect in the sale, while the reasons for the cancellation of the contract for non-implementation are the seller's failure to fulfill his obligation, as if he obligated to delivering the sale to the buyer in a certain condition and delivered it in a different condition. However, in some cases, the reasons for the guarantee for hidden defects may be the same, leading to the termination claim for non-implementation. This occurs when the hidden defect in the sale constitutes a prejudice by the seller of the terms agreed upon in the contract, such as if the seller pledged to deliver to the buyer a car suitable for racing and it later became clear that it was not suitable for this purpose due to a hidden defect in its engine, or if the seller pledged to deliver to the buyer a cow suitable for producing milk and it later became clear that it was not suitable for this purpose due to a disease in it. In these two cases, the buyer has the choice between a guarantee claim and a termination claim. There is no doubt that the buyer's recourse under one of these two claims differs from his recourse under the other claim. For example, in order for a guarantee claim to be accepted, it must have been set up through six months from the date of receipt of the sale and the sale must not have been conducted by auction or by judicial or administrative authorities, while this is not required in a termination claim, but it is required that to send a warning to the seller. It is worth noting that the presence of a hidden defect in the sale does not prejudice the buyer's right to resort to claims other than the hidden

⁽¹²⁾ Dr. Abdul Majeed Al-Hakim and others, Provisions and Sources of Obligation in Civil Law, Legal Library, Baghdad, 2010 AD, p. 231.

⁽¹³⁾ Dr. Ismat Abdul Majeed, Obligation Provisions in Civil Law, Cihan University, Erbil, 2012, p.87.

defect claim to terminate the contract if the conditions for filing such a claim are met. He has the right to demand the termination of the contract if he made a mistake in a desirable matter such as a characteristic of the place, even if the absence of this characteristic is considered a defect in the concept of the defect that the seller guarantees. He has the right to demand the termination of the contract as well if the contract was concluded through deception accompanied by gross fraud if this deception is likely to make him conclude a transaction that is proven to have a hidden defect, with his right to resort to filing a hidden defect guarantee claim. He also has the right, if the defect is such that it prevents him from fulfilling his obligations to ensure that the sold item is free from defects, based on the general rules that permit one of the parties to demand the cancellation of the contract after notifying the other party if he does not fulfill his obligations. The obligation to guarantee hidden defects is an obligation stipulated by law, so it is not necessary for the buyer to stipulate it in the contract, but he can demand it with the consequences that result from it, simply by the existence of the defect, even if this is not stipulated in the contract ⁽¹⁴⁾.

Section Two

Types of Termination ruling

First: Specific implementation, repair of the sale

Since the legislation did not address the idea of repairing the defect, we will deal with it according to the provisions of the Vienna Convention on International Sales, and it is an obligation to implement his obligation according to what is stipulated in the contract and according to the provisions of the Convention. The Convention did not specify the means to which the judge refers in forcing the seller to implement a real obligation, and the reference of the matter is national law that should be applied, which is often the judge's law, considering that the matter relates to the rules of litigation and the means that the rules of litigation usually stipulate in this regard, which are imposing a threatening fine and allowing the buyer to buy similar goods from the market to complete the deficiency he has or to buy another in its place and repair the defect in it. However, the Convention, despite leaving these means to national laws, stipulated special provisions required by international trade, which are:

A- Regarding the replacement of the goods and the repair of the sold goods

1 -The buyer may not, in the case that the goods do not conform to the contract, request the seller to deliver the replaced goods in unless the defect in conformity constitutes a fundamental breach of the contract

2-Submitting the replacement request either at the same time that the seller is notified and conformity must be made in accordance with Article 39 or within a reasonable period from the date of this notification

3- He may request the repair of the defect even if the lack of conformity does not constitute a fundamental breach Article 46/P3 which is

- That repairing the defect does not constitute an unreasonable burden on the seller.
- That the repair request is submitted either in the same notification or within a reasonable period from the date of notification.

B- The seller's right to repair the defect in implementation after the delivery date

Article 48 stipulates that the seller who fails to implement his obligation has the right to offer to correct the situation in implementation and force the buyer to accept this offer. It was previously noted that Article 37 gives him the same right when delivering the goods before the scheduled date. Article 48 came to complete this picture in order to restrict the cases of cancellation as much as possible. Article 48 included the following text: The seller may correct, in his account, any defect in the implementation of his obligation and the logic dictates that this does not apply unless the defect can be corrected in implementation. There is no space for applying the text if it cannot be corrected. This occurs when there is a delay in delivery when the delivery date is of special importance to the buyer. This means that there is a possibility of applying this text if there is no special importance to the delivery date. However, it can be said that the broad field for applying this text is the seller's failure to comply with the non-conformity and not the defect in delivery ⁽¹⁵⁾.

Second: Implementation in return, compensation with return of the sale

The main effect of the existence of an old and influential defect in the sale was dealt by Article 513/ P1 of the Jordanian Civil Law, which states that if an old defect appears in the sale, the buyer has the choice of returning it or accepting it at the specified price, and he does not have the right to keep it and claim what he reduced from the price.

It is noted in this text that the existence of an old defect affecting the sale gives the buyer one of two options: the first is to return the sale to the seller and recover the price. In this case, if the sale is not returned and the price is not recovered by mutual consent and the buyer resorts to the court, then in addition to the information provided by the buyer, the court must make him swear an oath of proof. The second is to accept the sale with the existing defect and at the same agreed price. In such a case, if the buyer accepts the sale with the existing defect after testing it and at the same agreed price, he will have exempted the seller from responsibility for the old defect.

Since it becomes clear to us that the buyer has the choice between returning the sold item and returning the price or reducing this price and keeping the sold item, he has complete freedom to request the return or reduction, whether by claiming one of them in a fundamental or recursive manner, and it comes back to the court to decide the solution that it deems appropriate according to the importance of the damage resulting from the hidden defect. The

¹⁴ () Dr. Ali Hadi Al-Abidi, *ibid*, p. 251

⁽¹⁵⁾ Dr. Sulaiman Markos, *ibid*, p. 641.

buyer may also be satisfied with claiming one of the two claims without the other, and then the court may not compel him to exercise the claim on the other claim if it deems that more appropriate for him, nor may it rule voluntarily on the other side of the guarantee, because it cannot replace the buyer in raising the claims, especially since none of them has an obligated trait ⁽¹⁶⁾.

Conclusion

First: Results.

1 -The hidden defect is an emergency affliction that is absent from sound nature, and because of its prevalence in transactions, the legislator has regulated it with a special regulation.

2 -The effect that results from the presence of an old and influential defect in the sale is that the contract is not binding on the buyer, and he can express his opinion about terminating the contract by his unilateral action, and the contract is terminated before receiving the sale with everything that indicates it, whether explicitly or implicitly, without the need for the seller's consent or suing him, but on the condition that he is aware of the termination. If the receipt is made, the termination must be done either by mutual consent or by litigation. If the contract is terminated due to the defect, the buyer must return the sale to the seller and recover the price.

3-Terminating the contract due to a hidden defect has several forms, including repairing the sold item by the seller himself, and dissolving the contractual bond.

4- The presence of an old defect affecting the sold item gives the buyer one of two options: the first is to return the sale to the seller and recover the price. In this case, if the sale is not returned and the price is not recovered by mutual consent and the buyer resorts to the court, then in addition to the information provided by the buyer, the court must make him swear an oath of recitation. The second is to accept the sale with the existing defect and at the same agreed price. In such a case, if the buyer accepts the sale with the existing defect after reviewing it and at the same agreed price, he will have exempted the seller from liability for the old defect.

Second: Suggestions

- We suggest that the Iraqi legislator apply the provisions of the Vienna Convention regarding its organization of the treatment of the issue of hidden defects through repairing the defect, because this case, when taken into account, as stated by the Vienna Convention, reduces the cases of contract termination.

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(¹⁶) Dr. Essam Salim, Provisions and Sources of Obligation in Civil Law, Maaref Establishment, Alexandria, 2010, p. 354.