A study on the enforcement of the original of obligation in Iranian law and international instruments

Seyyed Sajjad Mosavi\textsuperscript{1}

\textsuperscript{1}Department of Humanities, College of Law, Tabriz Branch, Islamic Azad University, Tabriz, Iran. (seyyed.sajjad1395@gmail.com)

\textbf{ABSTRACT:} By studying the legal provisions, judicial procedure, judges’ opinion, and interviews with lawyers, jurisprudence and Islamic ideas it can be stated that enforcing obligations is almost similar to the legal event and the only way for the promisor is to its fulfillment. The obligations include act, material practice, omission, and legal act. The legal texts on the enforcement of the original of obligation in our country is mostly derived from jurisprudence and indicate commitment and coercion of promisor. The exceptions existing in the law are also derived from jurisprudence. We have a procedure apart from jurisprudence only in the enforcement of official instruments. The enforcement is divided into direct enforcement and indirect enforcement. This in turn ensures the enforcement of obligations. However, considering the further guarantees for the enforcement of commercial instruments, the way it is implemented is easier compared to other instruments. Different and various solutions and alternatives have been predicted in international conventions for enforcement of self-obligation in the cases in which the enforcement of the original of obligation is impossible. There is this gap in our law and judicial procedure and except (emergency) unexpected events the legislator has not paid attention to other cases that they have even been considered in jurisprudence. In other legal systems the titles of frustration, hardship and etc. have been considered in this respect. This issue has been studied in this research and it has been tried to propose some solutions in this regard.

\textbf{KEYWORDS:} obligation, enforcement, enforcement of the original of obligation, Iranian law, international convention and documents.

1. \textbf{INTRODUCTION}

All people face with obligation in their life. The law, judges and lawyers try to set it. Any problem in it causes complex claims. The enforcement of obligations is what that is considered by wise people and it is influential in the economical, social and political fields and it is set by law. In the case of shortage in the fulfillment of obligations it can cause notable damages to the victim or community. It might result in claims, hostility and rancor.

This work is licensed under a \textit{Creative Commons Attribution 4.0 International License}. 

31
It should be tried to avoid such a kind of breach of promises and the problems there are in this area should be removed. The fulfillment of obligations is a clear issue and when an obligation is created then its fulfillment becomes the most important issue. (Direct and indirect enforcement) In the case of non-compliance of obligations the resulted damages are compensated, except in cases where its fulfillment is impossible and abstained that in these situations the responsibility is excluded and this is called as force majeure and or in some cases as being excused in the civil law of our country. Since the complete fulfillment of obligation is necessary, it is important to consider some ways to maintain the interest of parties and to prevent the violation of the rights of contracting parties. As case in articles 237, 22, 376 to 239 of civil law regarding the raise of prices in the market process, the nonalignment will result in a substantial loss and another way in the case of impossibility of compulsion is repudiation of obligation that it is possible only after proving the inability to fulfill the obligation that is issue of article 239 of civil code. The law and judicial procedures should make it possible to enforce (financial, legal, omission and deed) obligations in order to prevent legal claims in this regard.

Dealing with the comparison and study of various ways of fulfillment of original of promise and its breach in terms of judicial procedure and legal system of Islamic Republic of Iran and its comparison with the law of Britain, comments of jurists and comparison with legal systems and solutions of some countries, especially Britain, and international conventions and their comparison may be effective in vague and unknown points and or judicial procedure and make recommendations for law of Iran and considering the issues that have not properly been regarded to date and or they need more attention and explanation due to sensitivity of the issues in order to be helpful in obligations. However the current issue needs more research to remove existing ambiguities so that it can improve the effectiveness of justice system and to be a guide for legislator in amendment of regulations and rules in this regard. The research method is an analytical, descriptive, library and comparative one. A library method was used to collect references and data analyzing is an analytical and descriptive one.

2. THE CONCEPT OF FULFILLMENT

The term fulfillment literally means doing, acting (decision, act) (Azar Taash, 2006, p.83) and in common sense it is considered as doing act and making decisions. The idiomatic meaning is close to lexical meaning (same reference, p. 84). The obligation derived from promise means testament, expression, oath and covenant (Ibn Manzour, 1408, p. 231). The fulfillment of obligations is same in law, judicial procedure, legal scholars (Safaie, 2003, p. 32).
In our judicial procedure and law it seems that the fulfillment of obligations has not been defined. The fulfillment of obligations has been proposed in the judicial system of common law including the country of Britain. It has been proposed with the same title in the United States (Ahmadi, 2012, p. 235).

3. OBLIGATIONS

The article 182 of civil code while defines the contract, it refers to the obligation and there is this possibility that the obligations is created along with the contract. For example, the sale contract under article 183 of civil code is created through compliance and acceptance and transfer of property that is the result of obligation including constructing a house, so there is not any transfer of property without obligation in the contract (same reference, p. 68). The article 1138 of French civil code is in the same case. In order to create an obligation, three elements are required: (1) a subject for which the obligations is raised (2) parties of obligations, and (3) the existence of a legal relationship. The subject of obligation is what that is undertaken by promisor to the promisee and in has its own special condition.

4. THE ORIGINAL OF OBLIGATION

Every obligation has some elements as follows: 1)The legal relation between promisor and promisee, 2) existence of debt (negative aspect of obligation), 3) existence of credit (positive aspect of obligation), 4) existence of right to claim for promisee, 5) sanction of obligations, 6) belonging to the issues of obligations (transfer, omission, deed), 7) be defined of obligations’ parties, 8) different parties of obligations. According to the issue, the obligations are divided into financial and non-financial obligations. According to references, contractual obligations are based on the agreement of parties and have legal effect.

In obligations, what is claimed is same as what the parties have agreed on it. The promisee should not claim more than it and the promisor should not meet less that it. What that has been mentioned in the contract should be paid. In the case of the existence of several debts, it should be exactly defined that the payment paid belongs to which one of the debts. In the case of the original of obligation, delivery and transfer of the property, deed and omission is generally the case. In this case, what is committed should be paid to the promisee.
5. ENFORCEMENT OF THE ORIGINAL OF OBLIGATIONS IN THE LEGAL SYSTEM OF IRAN

In our country, in the enforcement of the originals of obligations, compulsion and requirement is the case in the lack of the fulfillment of obligation. If the possibility of compulsion and requirement becomes excluded, then we resort to the termination as the last alternative and it has been taken from jurisprudence. The obligations are created with will and compromise and they are disappeared in this way. The civil code in article 219 provides that: “the contracts that have been concluded in accordance with law, are binding between parties and their representatives, unless they are terminated with the consent of parties or for legal reasons.” The article 220 of civil code is in this regard. The article 376 of civil code [1] has explicitly referred to the compulsion to do the original of obligations, although the sale has come in this article, it encompasses all contracts and obligations and it is the general principle not merely about the case sale that just specify it to the case sale and do not extend it to the contracts and obligations. Although it came late, it encompasses all cases that interfere with obligations. The articles 237, 238, 239 of civil code are on the compulsion and termination of obligations. Regarding the immaterial issues, the court and promise have not right to terminate the contract until the compulsion and mitigation are possible.

6. THE WAYS OF ENFORCEMENT OF THE ORIGINAL OF OBLIGATION IN IRANIAN LAW

6.1. Direct enforcement

Direct enforcement and forcing to fulfill the obligations: in our country, the promisee has right to invoke the forcing of promisor to fulfill the obligation and the termination is in the next step and it is not indulged in using the termination. Stability and durability of obligations are respected. The issue that is in the civil code on the execution of the original of obligations is regarded by Shiite jurists and it is derived from them (article 239 of civil code).

The direct enforcement is in accordance with article 42 of the law of enforcement of civil code passed in 1356 on the given original that is taken by judge and given to the promise. The article 46 of mentioned law is about the loss of the given original or impossibility of delivery that its substitution or price is given to the promisee. The articles 49 and 59 of the law of enforcement of civil code is on the total property, cash, seizure and sale. (Article 2 of the enforcement of financial sentences) article 47 of the law of enforcement of civil code
and article 222 of civil code are on the fulfillment of the case of obligation in cost of promisor by promisee and or third party. Mentioning the penalty clause is not substitution of obligation and in the case payment, the case of obligation should be fulfilled.

6.1.1. **Surrender**

Articles 362 and 367 of civil code is on the obligation to the surrender of the object of sale and the price. The surrender includes: delivery of the total given original, and payment of the price and etc. The article 619 of the civil code states that: “The trustee should deliver the same property that he has received.” The given property should be exactly delivered in the case of deposit and loaned. The articles 278 and 620 of civil code and article 42 of the law of enforcement of civil law are in this regard. In the property contract with the possession of one of parties, the other party is obligated to submit the case of the obligation that is usually the original of obligation. And in the case of refusal it is acted according to article 42 of the law of the enforcement of civil code. In surrendering the original of obligation, the submission is so that the other party to be propertied of ways of possessions and profits (article367 of civil code). The components and accessories to the object of sale in submission should be part of it and the submission includes them, too (article 383 of civil code).

6.1.2. **Payment of the amount**

Sometimes an amount is mentioned in the obligations and if it is not mentioned, then it is considered in the form of currency. According to article 59 of the enforcement of civil code and rules of the principles of civil trials 1329, in the case of a refusal to pay the aforementioned amount, of the properties of the promisor is sold by the court with respect to exceptions of the debt and the mentioned amount is paid.

6.1.3. **Obligation in the transfer of possession**

The person submits his/her possession on the original of property or intellectual property rights that have in the present time and or in the future to the other. In some cases, according to article 145 of the law of the enforcement of civil code, this procedure depends to some procedures of acquisitions that should be gone through in.

6.1.4. **The enforcement of obligations related to deed or omission**

Where the perpetration of the promisor in fulfilling the obligation is not the case, the obligation is fulfilled by promisee in the cost of promisor (article 22 of civil code) or in the cost of promisor and by the third party. In some cases, the perpetration of promisor in doing the act is the main cause of obligation, otherwise doing act is meaningless and there is not

---

This work is licensed under a [Creative Commons Attribution 4.0 International License](http://creativecommons.org/licenses/by/4.0/).
any obligation. In this case, the obligation is vested to the promisor and indirect enforcement is applied, that is, the person and its personality is the cause of obligation and if for any reason the promisor cannot undertake the mentioned act, then it is executed through indirect enforcement (Langroudi, 1978, pp. 100-101).

The promisor is obligated to refuse and avoid from something and it is continuous (article 237, civil code) and if the person does not act to it, then the enforcement is carried out by the law court.

6.1.5. Implementation of commitments made

In two cases committed can replace the principal obligation, brought it to fit into the included and optional selection is commitments.

6.1.5.1. Selection obligations

The obligations in which the promisor can choose one from several things and do it (Katouzian, 2000, p. 289). The subject of obligation is among several cases and in the various forms and the promisor chooses one of them. Here, the selection has been eliminated and the obligated debt is forced to that case. The subject of obligation that is among several different issues should not be linear rather they should be transverse and to be placed in parallel with each other and the arrangement should not be regarded between them. And articles 190 and 216 of civil code should be regarded in terms of clearness and the lack of ambiguity. In the selection obligations, the subject of obligation, its price and description are defined and the promisor and promisee are also defined and there is no doubt in the transaction. According to the idea of majority of lawyers and jurists, the accuracy of selection contracts is acceptable. In France, it is considered as a guarantee and in the case of impossibility of one of obligations another one is selected and it is considered as a guarantee for promise.

6.1.5.2. Optional obligations

In the optional obligations, the promisor is given authority that if he/she cannot fulfill the original obligation, then he/she can substitute another one and fulfill it and if a problem is encountered in doing the main obligation so that its fulfillment becomes impossible, he/she can substitute it with an easier one. The selection obligations remain as the main obligation in the case of voiding the subject of one of several obligations in the optional obligations. In the optional obligation, the indebted can choose, but in selection obligation it includes both indebted and promise and the selection obligation has the effect to the past, but the optional obligations is not so.
6.1.6.  **Enforcement in commercial documents**

The civil and commercial documents have their own form of obligation, components and special condition. The commercial documents have been referred in our law have some features and conditions in terms of form and context. Generally, any protocol and condition in terms of form is thought for the civil documents and they are subject to the will. The form of commercial documents is important. Checks, promissory notes and bills of exchange are of commercial documents (Skinni, 2010).

6.2. **Indirect enforcement**

Where the promisor does not directly fulfill the obligations, then other ways in the laws and judicial procedure should be applied trying to force the promisor to fulfill his/her obligations.

The indirect enforcement is divided into physical and financial enforcement. The two articles of the enforcement of financial sentences approved in 1998 have predicted and expressed detention in the case of insolvent. The financial enforcement has been stated by article 47 of the law of enforcing the civil laws that it is to be acted as previous according to article 729 of the law of enforcing the civil laws. The court enforces the promisor to pay an amount to the promisee for a defined period for every day of delay in the case of impossibility to fulfill the obligation that this rule is obsolete considering the Guardian Council objection to article 729 and its absence in the new law and approval of parliament. The financial enforcement was not generally applied in times of former code of civil procedure and it was tried to fulfill the case of obligation by others or directly as possible.

6.2.1. **Civil execution guarantee**

The article 47 of the law of enforcing the civil code provides that: If it is possible to fulfill the obligation by other person that promisor refuses to do it, and then the court gives it to another person in the cost of the promisor and if doing act and the subject of obligation to be specified to the promisor, then the article 47 of the law of enforcing civil code refers it to article 729 of the former law of civil procedure. Although there is disagreement between lawyers and the judicial procedure based on the ideas of the Guardian Council, there is not seems any problem considering the mentioned reference (Shams, 2005, p. 408); however, regarding the strict comments of the Guardian Council on not to take the damage of delayed payment and disagreement to bring article 279 of the former law of civil judicial procedure in the new law, the cancellation of article 729 of the former civil judicial procedure should be accepted.
6.2.2. **Criminal execution guarantee**

The obligations are divided into commutative and trusty obligations. The blank signed document, bland sealed document, movable and immovable properties have been referred as the trust in the trusty obligations of articles 673 and 674 of the Islamic punishment and sentence the committed of mentioned acts in above article to the imprisonment. The article 696 of Islamic punishment on the criminal conviction, the replay and selling the property is considered as refusing the enforcement of the sentence. In the commutative and transactional obligation, the article 117 of registration act is on contradictory transactions and article 1 of punishment law is on the transferring the property unapproved 1308 about transferring others property in order to be as a lever to void any breach of obligations. The codification of law in this way is a great aid to preserve the interests of society due to the relation of obligations with the public discipline.

6.2.3. **The right of lien in contracts and commutative obligations**

The promise before fulfilling the original of obligation by promisor can refuse doing the obligations who has undertaken. This right is applicable in the commutative contracts in which generally there is the exchange and it is not applicable in free contracts. (article 377 of civil code) the intended purpose: refusing to surrender the object of sale and price due to the surrender of other party and suspending the submission until the other party fulfills his/her obligation and to be a guarantee in fulfilling the original of obligation and in order to prevent possible abuses about the contract and what is contracted. Also, it is not applicable in subsidiaries and sub-provisions, unless that the provision to be the main element of the contract and does not have the subsidiary aspect. The articles 371 and 390 of civil code on the factorage and consignee are about the right of lien. However, the principle of the right of lien is in the commutative contracts and it is expressed on other cases including the above-mentioned articles. In the common law, the right of lien exists in the commutative contracts (withholding performance). And it has come in the above-mentioned articles and it is used in a part of obligations if that part is customarily important, it has not capability to be isolated and the part from sales is not placed opposite to the part from the price. In the case of disagreement on the priority of parties to deliver earlier, it can referred to the court and both of them fulfill it simultaneously and or the constraint to be removed from both of them, or firstly the buyer and then seller or vice versa fulfills the obligation. According to Allameh Helli, the first idea is correct and because the law is silent in this case, it is possible to refer to the authorities and accept it and it is possible to give preference to the first idea (Katoozian, 2003, p.103). In the recission, the right of lien is applicable in such cases on taking the considerations back.
6.2.4. **Penalty clause**

Due to that the parties think that other party or parties may possibly refuse to commit their mutual obligations, so they consider obligations initially according to the circumstances that would be preventive and will be very effective facilitation in processing claims. Considering the penalty clause in principal contract is among the main conditions attached to the contract and the contract is classified according it, when the contract is canceled, the penalty clause is canceled too, in France and Germany it is acted in the same way. The penalty clause is not defined in our country and our law is silent in this field. Lawyers have been defined it among other issues, Dr. Katouzian says: "The determined agreement that the parties are obliged to pay in non-compliance with contracts which lead to damages and losses." (Consistory, 1379, p. 214) In common law legal system it is stated that: "The amount on the basis of mutual consent, in breach of an obligation to pay damages which is regardless of the real damage. (Jowit, 1982, p1105)

Yet, penalty clause is based on the condition of the mutually agreed situations in the contract, or after the conclusion of it. In violation of the amount obligations, financial condition to make a decision to act or committed omission before a broken promise will be determined. Dr. Safai knows penalty clause as a loss knows, (Safai, 1382, p. 247 and Langeroodi, 1374). This view has been confirmed by many jurists.

6.2.5. **Limiters and exempt suppliers**

There are conditions in any contract that reduce the obligations of the parties, or increase it. Articles 642, 558, 10 and 223 of the Civil Code are on legal contracts and experts have been mentioned them repeatedly. (Imami, 1375, p. 109) The elements mentioned above are included in cases that add to commitments, sometimes in contracts commitments are reduced, for example: in contract which damages are accepted to a certain amount, or their meet are required, the claimant must prove damages entry thoroughly.

6.2.6. **Exceptions**

Although in the laws of our country, the first step has to do the definite obligations, but in some cases the laws mentioned to those that are initiated with termination. Article 8 of the Law of Landlord and Tenant Act approved in 1362 and articles 496, 242, 243 and 379 are such consequences of civil law. First, constraints and penalties, after commitment committed by the third party or the obligee, then the terminations are mentioned, yet they should be based on Article 190 as the general and specific conditions of the commitment, and legitimacy, non-ignorance and ... must be examined and true commitment arose. Article 221 of the Civil Code, which is provided for compensation in commitment in tradition and law, considers it acceptable in damages.

This work is licensed under a [Creative Commons Attribution 4.0 International License](https://creativecommons.org/licenses/by/4.0/).
7. PERFORMING ORIGINAL OBLIGATION IN THE INTERNATIONAL CONVENTION ON THE SALE OF GOODS 1980

In chapter III of the Convention on the sale of goods, Articles 25 to 88 are on performing the principal commitments and obligations of the seller and the buyer. (Darabpour, 1374, p. 217) the obligations of the seller are mentioned at the Article 31, 32 and 9 of the Convention. If the goods delivered are not in conformity with what was in the contract, Article 35 of the Convention refers to it. (Ibid., P. 219), so the contract subject should be inspected immediately in order to be able to use the right to terminate the contract. According to Article 44 of this Convention, the buyer has the right to reduce the price to the ratio of non-compliance or claim compensation. However, such non-compliance should be declared in less than two years.

Lack of legal compliance: Articles 41 and 42 of the Convention have declared it which includes situation where the third party claim ownership, mortgages and so on to the contract. The same is true in industrial property where claims by third parties deriving from the industrial contracts. Under Article 48, the provisions of this Convention are on preventing violent behavior and solve it through paying compensation. Trying to avoid termination and cancellation of contracts and commitment are necessary far as possible.

Buyer obligations: Article 53 of the Convention is on the obligations of the buyer. Paying the price after delivery and receipt of goods are among these cases. Article 55 refers to the business practice in the ambiguity of the price and similar conditions. The common law countries act through this convention. In French or Islam system it is not the same. Place, date of payment and the price of the material have been announced in detail in Convention. Sanctions for non-performance are client compensation, which is closer to Islamic law than to the rights of common law countries; the way of compensation is concerned in Article 28 of the Convention. If the same commitment in executing the warrant was issued by a competent court in the judicial system and is predicted, it will be forced to implement. Such a thing is not forecasted in common law. Any request for compensation is subject to application of specific performance obligation. Article 63 of the Convention is noted to additional time and granting it to the seller. Articles 71 and 72 of the Convention are in cases that one party has not committed his pledge, so the other one can carry out his obligations in the suspended operation carried out by the other party or announce to terminate contracts and commitments. (Ibid., P. 138)

8. PERFORMING ORIGINAL OBLIGATION IN INCOTERMS

This work is licensed under a Creative Commons Attribution 4.0 International License.
In 1936, the International Chamber of Commerce, has codified and published Incoterms (International Commercial Terms). Parties can refer to it and in some cases the contracts expressly provide using such definitions and functions. Incoterms just cover some part of the commitment and the relationship between the seller and the buyer such as shipping and delivery of goods. In the case of termination, coercion and release are not available on the responsibility of the buyer and seller and there is no integrity in this respect. Some common terms in Incoterms are:

- **Group E expression (EX.works):** refers only to delivery of the goods. Delivering the goods to the buyer in the area mentioned in the contract.
- **Freecarvier group (named place) F.C.A.F:** deliver the goods to a carrier that is determined by the buyer. In Group F (named prot of shipment) ship Free, delivery of goods at the port of loading is determined by the buyer.

The goods are for export and are placed alongside the ship at the loading port. The difference between the two methods is in their carrying mode. In F.c.A , carrying is possible in any way. The next item is only ships and waterways.

- **FOB: Free on Boread (named port of shipment):** discharging by the seller for the issuance and delivery of goods at the port, on the deck of a ship. Group C: C.I.F and C.I.P are used to pay insurance of imported goods. C.F.R is shipment to the port of destination with no responsibility for loss and probable accidents and discharging by the seller. C.P.T such as: C.F.R the risk that the goods would be responsible for any costs in this regard. Group D: Group D is in recipient mode unlike Group C and has responsibility for delivering its goods to the place. While Group C pays attention only to carry and writes notes.
- **Delivered Atfrontiey: DAF:** delivery of goods at the border after discharge.
- **DES: Deleverad Exship:** deliver of goods on board at the port of destination is the responsibility of all costs and risks, before it is discharged. DEQ: delivering the goods on the quay at the port of destination. With responsibility for all costs and risks of discharging the goods.
- **DDU: Delivered Dutyuhpaid:** delivering the goods to the buyer at the named place of destination with liability risks and costs without duty and without discharge. Buyer's failure to discharge its responsibilities in a timely manner is also included.it is possible.

### 9. CONCLUSION
What is common in the law books is binding commitments and their mandatory. Cases come to mind which are out of the will of unwanted situation and return to what was true and partially related to commutative justice, which will benefit both parties in terms of commitments knowledge. In Iran in spite of the view from some authorities that think about obligation and penalty, maintaining fairness in termination, cancelation or adjustment is in high value. In articles 395, 379, 242 and 496 of the Civil Code, constraints are ignored the cancellation is presented and articles 222, 238 and 239 of the Civil Code are considered obligation and compulsion as the best way of commitments. It is rational to use international conventions, which really and honestly pay full attention to the contracting parties in implementing the same commitment. Due to the long duration of proceedings in the courts with regard to the high volume of cases, it should be avoided recourse to the courts as far as possible to solve the problem of prolongation of proceedings. In implementation of this law, it is willing to commit the first declaration and the actual notification, invite him to fulfill the obligations and if not committed to fulfill the obligation, the obligee can win the commitment of termination, whichever obligation is to their advantage or not in the same requests. Sometimes force majeure factors which are from unexpected commitment surround the situation. If these factors are transient and fleeting, the commitment will continue after them. Sometimes they are permanently, or do not affect the obligation, in which cases, the termination is the only way in solving the problem.

REFERENCES
1. Ahmadi, Hussein Ali, (1391), the nature of performance of contractual obligations of the Bar Association No. 8 and 9.
2. Azartash Azarnoush, (1385), Tehran, Western-Gulf contemporary culture, based on Western culture English Hans Wehr.
13. Langerodi Jafari, MJ, (1357), Encyclopedia of civil rights and trade, the first volume printing.
14. Langerodi Jafari, MJ, (1374), terminology rights, Tehran, publisher treasure of knowledge, VII, the term mood the 404.
17. Safai, Seyyed Hossein, (1382), Civil Rights Foundation, published in Tehran, the first volume.
18. Scan, Rbya, (1386), a pamphlet lessons Business Law, Private Law, Master of Science, University of Qom useful.