

Fraud under Private International Law of Iran

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Abstract: Fraud is generally defined in the law as an intentional misrepresentation of material existing fact made by one person to another with knowledge of its falsity and for the purpose of inducing the other person to act and upon which the other person relies with resulting injury or damage. Fraud may also be made by an omission or purposeful failure to state material facts which nondisclosure makes other statements misleading. To constitute fraud, a misrepresentation or omission must also relate to an 'existing fact', not a promise to do something in the future, unless the person who made the promise did so without any present intent to perform it or with a positive intent not to perform it. The false statement or omission must be material, meaning that it was significant to the decision to be made. Also, an opinion does not constitute an existing fact and cannot be the basis of a claim of fraud unless the person stating the opinion has exclusive or superior knowledge of existing facts which are inconsistent with such opinion. The misrepresentation or omission must be made knowingly and intentionally, not mistakenly or accidentally, so that the person either knew or should have known of the falsity or acted in negligent disregard of its truth or falsity. The person charged with fraud must have intended the Plaintiff to rely on the misrepresentation or omission and Plaintiff must have been injured by such reliance to prevail on the claim. Sometimes, it must be shown that Plaintiff's reliance was justifiable and that upon reasonable inquiry would not have discovered the truth of the matter. For injury or damage to be the result of fraud, it must be shown that except for the fraud, the injury or damage would not have occurred. Fraud in the factum means fraud in the obtaining the execution of the agreement or delivery of a document. As opposed to fraud in inducing someone to sign a document, it is fraud regarding the contents of the document, so that the person defrauded is unaware of what they are signing. Fraud is one of the crucial elements of Private International Law. It makes issues related to the conflict of law more complicated. Two rather differing meanings can be envisaged for fraud: the first definition constitutes non-observance of a domestic or foreign law, by means of making voluntary changes in connecting elements such as nationality and domicile. In this study, it becomes clear that evade of parties the law by changing the connecting elements is not always good. The modern definition of fraud is considered as the escape of all parties or one of them from competent law along with a change of legal relations of substance which is determined by examining the fraud by both material and mental elements in the development of the legal establishment and proof of them. But proving the fraudulent intent of all parties or one of them will not be always an easy task. In Iran, it appears that under the Article 990 of the Civil Code, aiming to avoid fraud, the return of Iranians who have acquired foreign nationality is subject to the discretion of that government as well as Iran's judiciary.

Key words: Fraud, conflict of laws, the connecting elements, court conflicts, the law of cause and effect

INTRODUCTION

Due to the growth and development of international relations in the fields of trade, tourism and cultural tourism and by the establishment of Unions such as Europe and Africa, etc., it is natural that laws and regulations in different countries will be different. It is possible that a citizen of one country cannot proceed with his/her intention even by fraud but the same person can reach his/her goal with abuse of rules and regulations and the gaps therein of other countries. In most cases, the fraud of a jurisdiction can be made by fraudulent appointment of jurisdiction which is used to run more lucrative

substantive leading to one of the parties ignoring the applicable law. The existence of fraud is based on the fact that people can relate some of the elements that lead to the determination of the law with non-competent changes. Some of these elements are citizenship, residence, place of immovable property and the contracts. For example, prior to the year 1884 divorce was forbidden in France. Some French nationals, wished to get divorced from their spouses, used the right to change their nationality and acquire the nationality of another country wherein divorce was permissible. Today, the citizens of Spain can escape the law prohibiting divorce by changing their nationality. This may happen in other areas as well.

Fraud is a crime that many people equate with theft but there is a distinction. There is also a distinction between criminal fraud and civil fraud. The basic difference between theft and fraud is that theft generally involves taking something through force or by stealth where fraud revolves around a purposeful misrepresentation of fact and the basic difference between criminal fraud and civil fraud lies in who is pursuing legal action in the case. A single act of fraud can be prosecuted as a criminal fraud by prosecutors and also as a civil action by the party that was the victim of the misrepresentation. Whether criminal or civil, fraud generally has several legal elements including the following:

- Misrepresentation of a material fact
- Knowledge on the part of the accused that they were misrepresenting the fact
- The misrepresentation was made purposefully with the intent of fooling the victim
- The victim believed the misrepresentation and relied upon it
- The victim suffered damages as a result of the misrepresentation

When a person is accused of criminal fraud, the case is brought by either local, state or federal prosecutors, who have to prove that they intended to commit the misrepresentation and to gain from it. These cases can be pursued even if the fraud was not successful and nobody was actually harmed. Common examples of criminal fraud include:

- Mail fraud
- Wire fraud
- Racketeering
- Securities fraud
- Identity theft
- Tax evasion
- Bankruptcy fraud
- Embezzlement
- Bank fraud
- Counterfeiting

By contrast, a civil fraud case is brought to court by the person who was defrauded, who needs to prove that the defendant materially misrepresented the fact that the fact was false and they knew that it was false that they did so with the intention of getting the victim to act on the misrepresentation and that the victim acted reasonably in believing the misrepresentation. In addition to all of these elements, the victim needs to show that they suffered a

damage as a result of the misrepresentation. The biggest difference between a civil fraud case and a criminal case, beyond who is pursuing it is that actual damage needs to have occurred in a civil case.

Conduct that constitutes civil fraud is incapable of precise definition but it usually includes some type of deceitful, dishonest or unfair behavior. The primary difference between civil fraud and criminal fraud is that to succeed on a claim for civil fraud there must be damages that is someone must suffer a tangible injury. Criminal fraud can be prosecuted even if unsuccessful.

Claims for civil fraud are usually based on a fraudulent misrepresentation or inducement. Although, all states may have slightly different elements that must be met to maintain a fraud action, commonly plaintiff must prove a misrepresentation, concealment or deceit as to a material fact, the defendant's knowledge as to the falsity of the representation, the defendant's intention to induce the reliance by the plaintiff, actual reliance on the representation by the plaintiff to the detriment of the plaintiff and the plaintiff suffered an injury as a result.

Fraud is different than a breach of contract or warranty because fraud requires an intent to deceive and knowledge of the deception. A contract, sale, transaction or judgment procured by fraud can be rendered void. This intent element also distinguishes fraud from an action founded upon negligence or mistake.

An important component proving civil fraud is that any damages must be the proximate result of the fraud. Therefore, regardless of how egregious a misrepresentation may be, if the plaintiff does not rely on it or there is no injury connected to it, then no relief is available in a civil action. Compensatory and punitive damages are potential remedies in a civil fraud case.

The goal of pursuing both a criminal fraud case and a civil fraud case is to get justice and punish the wrongdoer but the punishments that result from a guilty verdict are very different. In the case of criminal fraud, the accused faces the possibility of incarceration or probation as well as of having to pay fines and possibly make restitution to any victims that may have been damaged. In a civil fraud case, the punishment sought is generally compensation for the damage that was suffered by the victim.

STUDYING HISTORICAL RECORD ON FRAUD

Fraud refers to the use of a legal means for achieving illegitimate and illegal objectives. It is natural not to accept motivated fraudulent intent to cheat the competent law by voluntarily changing the relationship factors and thus changing the real applicable law.

From a historical standpoint, we can say that fraud in societies is almost as old as the rules and regulations applied therein (Mohammad, 2002). Some people, by means hook or crook, have always been trying to gain illegal objectives through legal means. By looking at history, we see that this phenomenon is observed in many countries and ancient civilizations such as the Roman Law, French law, Christian Law, Human Rights and Iran before the Islamic Law History. Romans recognized fraud in the 6th century B.D. Roman lawyers and judges made efforts to prevent fraud. This phenomenon is common among people and the story of the Sabbath that the Holy Quran has stated it in a perfect way. Laws of Hammurabi constitute another example of fraud and regulations to avoid it. Church law and common law of Europeans have familiar theories of fraud.

THE DEFINITION OF FRAUD IN PRIVATE INTERNATIONAL LAW

In law, fraud is deliberate deception to secure unfair or unlawful gain or to deprive a victim of a legal right. Fraud itself can be a civil wrong (i.e., a fraud victim may sue the fraud perpetrator to avoid the fraud and/or recover monetary compensation), a criminal wrong (i.e., a fraud perpetrator may be prosecuted and imprisoned by governmental authorities) or it may cause no loss of money, property or legal right but still be an element of another civil or criminal wrong (Rezaei, 2002). The purpose of fraud may be monetary gain or other benefits such as obtaining a driver's license or qualifying for a mortgage by way of false statements. A person using a valid legal means to rid himself from the law or to escape the provisions of the respective of two countries including: a country where the rule of law is disqualified there and a country in which the case is nullified.

ELEMENTS OF FRAUD

Material 1 (change in the direction of conflict of laws) Personal

Citizenship: Citizenship of a country is required to comply with its laws, dual nationality could lead to additional assignments in some cases, dual nationality can be used to gain more advantages and even escape from some requirements in order to practice fraud. In such situations, governments generally refrain from recognizing the nationality of the other person (Parhisi, 2010). Contemporary international practice is obliged to consider the criterion of effective nationality to solve this issue. This means that every single person is a citizen of a country where he or she effectively takes the rights and

obligations of a citizen or plays his/her national roles. This approach is effective for obtaining citizenship, permanent residence or domicile of the person to objective criteria such as location, language, citizenship wife and is considered as the important issue.

Residence: Each person's domicile is the place where that person has resided. Although, the domicile and residence of a person are usually in the same place and the two terms are frequently used as if they have the same meaning, they are not synonymous. A person can have two places of residence, such as one in the city and one in the country but only one domicile. Residence means living in a particular locality but domicile means living in that locality with the intent to make it a fixed and permanent home. Residence merely requires presence as an inhabitant in a given place, whereas domicile requires presence in that place and also an intention to make it one's permanent home (Moojan, 1985).

This distinction is relevant to the military people who may have to move frequently during the course of their career, college students whose state of domicile may affect whether they are eligible for scholarships and grants from a state university or not and retired individuals whose domicile will determine where they should pay taxes or not. Domicile determines where a person votes and where his/her driving license must be issued.

The location of movable property: Fraud can happen with regard to the movable property when the country envisages the movable as depending to the country of last residence.

Contracts: Place of conclusion of contracts: when a contract is concluded in the absence of an element related to dependence on the will of the parties, fraud may happen.

Place of the implementation of the obligations: location of the contracts are not always determine a priori; a point that can lead to fraud.

Treaties: Always local law is applicable to treaties and obligations arising from it but it is not always easy to determine the place of conclusion of the treaties particularly when they are concluded through correspondence.

Firms: Some legal entities attempt to evade paying taxes and their legal rights by changing their nationality or those legal entities by consortium and freely commit fraud in relation to rules and regulations.

Mental: The second element in the realization of fraud is mental element which refers to the intention to refrain from observing the law. This fraudulent practice is one of conflict resolution rules whereby a person tries to escape law enforcement. The fundamental issue is the applicable prevention from the fraudulent intent of the people and that how it should be determined. Can any change of the law with regard to dependence elements be regarded as fraud? Whether the rule will still apply in private international law?

THE ORIGIN AND EVOLUTION OF FRAUD

The origin of this concept dates back to divorce cases of the French nationals put up in the courts of the foreign countries in the nineteenth century. Prior to 1884 divorce was forbidden in France owing to Catholic Rules. Some French nationals who wanted a relief from the shackles of marriage and wished to cheat divorce law, used their right to change nationality and thereby, acquired the citizenship of the state wherein divorce is legally permissible. An early case in France (under the civil law system) known as the Princess Bauffremont Affair decided by the Cour de cassation in 1878 (Civ. 18 mars 1878, S.78.1.193 (note Labbe)) saw the princess obtain citizenship in Germany for the purpose of obtaining a divorce there and then remarry, returning to France where she attempted to re-establish herself. Because the divorce was not recognised in France, her remarriage was declared null as a fraude a la loi (Abghari, 2008).

In the first paragraph of Article 15 of the 1945 Act it was stipulated that the long-term residence card would be granted for foreign nationals who are married to French nationals. In practice, in many cases, the aim of foreign nationals marrying French women was nothing but acquiring permanent residence in France. French State Council adopted refused to grant a residence card in an attempt to prevent fraud. French court also made it clear in the first paragraph of Article 37 of the vote in 1981 citizenship law which provides that a French citizen married to a foreigner can obtain French citizenship but those couples who have married just to obtain French citizenship and subsequently get divorced, do not benefit from this law.

THE DIFFERENCE BETWEEN PRIVATE AND DOMESTIC INTERNATIONAL LAW WITH REGARD TO FRAUD

Fraud envisaged under private international law and in domestic law of Iran are in the same direction and sometimes dissimilar of course. Similarity of the two types of rights are more or less in its definition conveying the

point that a person commits an illegal act by resorting to legal means. It is dissimilar because its effect under domestic law is limited to the law of a country while fraud envisage under international law and its effect on private international law exceeds the law of the two countries and may be extended to a third country. Hence, we must say that: motivation theory of fraud under private international law guarantees the rules of conflict of laws and prevent the change in laws concerned intending to commit an illegal act by the beneficiary concerned.

THE LAWS PRONE TO FRAUD

The laws prone to fraud are many in number including those related to personal status or nationality. Also, at the base of the movable property may constitute an area for fraud. In order to prove a charge of fraud it is important to be able to prove that a material fact has been misrepresented that the person who perpetrated the fraud did so knowingly.

There are a number of different types of fraud that can be perpetrated on an unwitting victim, including those that are perpetrated over the mail, phone or wire. The Internet has created additional opportunities for fraud. Other common types of fraud include:

- Securities fraud
- Credit card fraud/Debit card fraud
- Identity theft
- Insurance fraud
- Tax fraud
- Bank fraud

Fraud that is perpetrated against individuals often have commonalities that can act as warning signs including requests for money to be sent immediately or a request for personal information that can be utilized to access your personal bank accounts or records. In cases where civil fraud is targeted against a business the proof may lie in phone numbers and addresses that cannot be confirmed, phony references and testimonials.

When civil fraud is proven the penalties are generally geared towards restitution which means restoring money to the person who has been defrauded. In some cases punitive damages may be recovered as punishment, depending upon the exact circumstances and severity of the fraud.

FRAUD PUNISHMENT

Fraud, like most civil causes of action, must be proven by a preponderance of the evidence which is to say that the judge or jury must find that it is more likely

than not that each of the elements of fraud have taken place. Where a party can prove each element of fraud beyond a reasonable doubt (a much higher standard), extra or exemplary damages may be awarded beyond the harm or damage actually suffered. Since, direct proof of fraudulent intent is rarely available, fraud must be proven by circumstantial evidence and reasonable inferences. Fraud generally involves one or more of the following elements:

- Deception
- Misrepresentation of material facts
- False or altered documents
- Evasion (i.e., diversion or omission)

Criminal fraud is typically considered a felony crime and punishable by a fine, imprisonment and/or probation. The punishment for civil fraud may consist of two parts: monetary compensation to put the injured party back into the position the victim was in before the fraud occurred ("restitution") and the payment of a fine in order to punish the perpetrator for wrongful behavior.

CONCLUSION

In this research fraud under private international law was surveyed by citing the views of Iranian and foreign lawyers. Two relatively different meanings of fraud are provided to the law: the first concept is escaping from the competent national or international law, along with the voluntary changes in connecting elements. The new concept of fraud is escaping from the competent law by all parties or one of them with a change of legal relations, for example, referring to one of the institutions of civil rights of a country such as in marriage of a foreigner with a French one in order to gain French citizenship can prepare situation for realization of fraud. In this example, fraud is not combined with the change of nationality or moving residence of foreigners. Checking fraud in substance also found that both material and mental element can cause development of this legal establishment.

But showing or proving mental dimension which is the fraudulent intent of all parties or one of them will not be easy and straightforward. In this regard, the contemporary French jurists believe that we can review material element of this institution, namely change of nationality, residence or change of legal relations by individuals and then may be successful in proving and

realizing the competency of parties to evade the law and fraud to the law. So to prove fraud to the law, the moral element and its verification by judges or courts does not include great importance. It seems that the principle of freedom and autonomy in private international law or in contracts and the consequences of contracts are prevented from proving fraud to the law of any change of affiliation or the legal relations between persons of different nationalities. In private international law of Iran it can be seen that although Article 990 of the Civil Code does not focus on the fight against fraud to domestic law clearly, noting the last part of the so called article can help in discretion of the Iranian government's refusal to return to the main Iranian citizenship, defining penalties or show the will of people who are effective in carrying out fraud on citizenship issues. However, when law and custom and their requirements, conditions and circumstances do not comply with human nature over time, always there will be people who circumvent the law and want to achieve their illegal goals. Hence, the legislative bodies should be flexible according to the needs of communities and adopt comprehensive rules for appropriate changes, because when the law is suitable, no one wants to toil it and perhaps such thought not even occurred to him. Dissatisfaction with the law and its non-proportionality to the humanitarian needs can be able to cause a phenomenon called fraud and if legislators does not pay attention, its scope will be broaden from day to day.

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