



Removing the Domestic legal obstacles in signing and implementing of built, ownership, operation and transfer contracts in Iran

Amin Farhood, Rahim Pnahnzadh Hassan, Sfdary Mullan

Pardis Tabriz University Aras

Email: esaabedini@gmail.com

ABSTRACT

Today, communication is one of the inevitable factors between states and nations which quickly lead the human society towards globalization so that in some texts, earth is called a global village. Among the types of international communication, one that considerably shows itself is economic - business relationship, because various governments, to prepare the welfare of their peoples, import industries and new products from other countries and export their products with a better price to earn more profit.

It is obvious that when we talk about business, the contacts are inevitably mentioned and we know that implementation of international agreements in the countries in most cases encounter with some obstacles made by domestic rules. One of these agreements is built, ownership, operation and transfer contracts. It seems that despite the government's severe need to implement those contracts; it encounters some fundamental and legal obstacles. This paper attempts to explain this discrepancy and offer a completely scientific solution with a new interpretation from the legal procedures governing the courts.

Keywords: contract, Suspension, contract suspension, contract redact, Contract origin, contract effect, fasegh condition

INTRODUCTION AND STATEMENT OF PROBLEM

The Importance of contracts in Iran law and the international law is well-known. In the complex economic and business relationships and the world trade, adjustment of a contract involves different affairs which make it complicated. Article 1278 says that a contract may be formal or ordinary one (lawyer website, 2014).

Documents in the Real Estate Registration office or with other officials, based on their competence and in accordance with the legal provisions, are set formal. Topic of the contract – it is a name chosen by the parties for their contracts. Contracting Parties - the contract has at least two parties and they may be a natural or legal person. The subject of the contract – it is a property or a commitment or doing something that contract is set for it. It must not be contrary to public order and ethics rules and laws of the country. The subject of the contract must have a rational interest.

In addition to the above mentioned issues, the followings should also be considered:

- it should be mentioned that the contract must be specified quite clearly and the unit of the items mentioned precisely. For example, the meter unit, weight unit, contraction or repairing the building.
- The subject of the contract should be clearly mentioned and avoid using vague, uncertain and indefinite terms.

The obligations of the parties written carefully.

Set the duration to perform the obligation.

When a contract is signed, especially if the subject is doing something, it is doubtful if the contractor fails to fulfill its obligations, how he will compensate it and if the work is done and has some problems, how compensation is done. What can be done to achieve these goals? The solution is that a guarantee is signed by the parties. This guarantee is taken from the commitment, while paying the advance payment, to ensure that the financial resources will not be wasted (lawyer website, 2014).

Some problems such as budget constraints of the most owners according to the high cost of labor and owner unfamiliarity with the work process or multiple partnerships in a property led to increasing formation of construction contracts. However, despite the fact that the owners know this issue that by

entering a partnership in the construction, they will make much more profit than selling off their property. Contract harms and damages prevent them from entering this work (Khan Beigi, 2013). Now the question is that how is it on the international level?

While the heavy investment in infrastructure projects is an urgent need for developing countries, the governments are unable to provide the necessary budget for these projects. One of the new ideas to solve this problem is to use the built, operation and transfer (BOT) contracts. This method allows the private sector to participate in infrastructure projects and public works, without being the owner of the infrastructure projects forever. Recently, the use of built, operation and transfer contracts to privatization, attracting foreign investment, access to advanced technology and efficient management and utilization of technical skills have been considered by the Iranian government (Shirvi, 2013).

Gagik Badalians and Esna Ashari (2003) in paper "Management of International Construction Contracts (with particular attention to the management of claims)" claim that recently the Iranian government has welcomed the foreign capital and technology in the infrastructure development. For this reason, in the last few years more contracts have been signed by many public and private organizations and companies to do the construction projects. The subject of the foreign companies' participation in these contracts was in a variety of forms such as providing the budget, consulting and design services, project management services, or implementing the project.

Generally, in such contracts, which in this paper are called international civil agreements, the parties enter the international market of construction which is much more different from the construction market in the country. In addition to these projects which include huge sums, they are operated through modern management and agreement systems. Therefore, we can say that management of these projects is very sensitive and much more important with especial methods and issues. One of the most important sections in the international construction management projects is contract management and especially its legal issues such as investment and registration of foreign companies, matters relating to insurance, taxes, guarantee, and the most important one, disputes and litigation.

The world passes the development path with increasing pace and each of the countries tries to to hire the world's best technologies to the welfare of the nation. The share of developing countries in this process is inevitable. The potential of these countries to create standard infrastructures caused many countries unable to afford these development technologies and efficient management of these projects. One of the mechanisms used to solve the large-scale investment projects in the developing countries is the built, operation and transfer contracts. They are in different forms and used based on the especial condition of each contract. In a typical BOT contract, with government approval, a project is being built for a consortium or a company by a private company. For some time after the construction, it is used by that company and after the expiry of the contract period, the contract will be transferred to the contract party.

What encouraged the author of this article was the domestic legal vacuum in signing the modern International agreements. Due to the country's need to build new infrastructures, using the most modern technologies of the world, we can feel the necessity of signing and operating them. However, from the other hand, it seems that formation and writing these contracts are such that the internal rules do not accept them and call them cancelled! So first of all, it's better to identify the nature and formation of these contracts and after making the problem clear, the proposed solution is presented.

Foreign direct investment in Iran (FDI) has been hindered by unfavorable or complex operating requirements and by international, although in the early 2000s the Iranian government liberalized investment regulations. Iran ranks 62nd in the World Economic Forum's 2011 analysis of the global competitiveness of 142 countries (*Global Competitiveness Report*, World Economic Forum, 2010) & (*Tehran Times*, August 9, 2011). In 2010, Iran ranked sixth globally in attracting foreign investments (tehran times, Retrieved 2012).

The desire to attain the sustainability, in terms of economic, social and environmental demands the innovative project undertaking. The innovative approach involves private sector especially in funding the project. In 80th decade, many Asian countries started privatization of infrastructure to improve public facilities and increase the life level (Toan,2007),(Ahadzi,2004),(Chen, 2006). The attractiveness of Build Operate and Transfer (BOT) approach has increased in developing countries due to the advantages offered by the approach. The main advantage is the chances of government to utilize private sector's investment, management, and technology. Previous studies have assessed the market potential for producing the power, absorbing foreign and local investment engaged in BOT procurement. It seems that one of the reasons is legal contracts.

Built, Operation Ownership and Transfer (BOOT) Contracts

According to what mentioned above, it was determined that using the built, operation and transfer mechanism is sometimes discussed under different headings. One of them is Built, Operation Ownership

and Transfer (BOOT) Contract. In this contract, during signing the contract, the parties come to a preliminary agreement about 3 other contracts so that the formation of the second contract is based on the execution of the first contract and the third contract will be formed after the full implementation of the second contract and so forth. In other words, the parties agree that after completion of construction, the project ownership is transferred to the contractor that is called "ownership". In Iran, law, ownership means accepting the property rights (Jafari Langroodi, 2007). The ownership is on the behalf of person who accepts it and is against giving possession. Giving possession means an intention to transfer the ownership by the owner. The term "giving possession" is used because it is a consortium contractor of the project who gets the ownership of the material property for the period prescribed in the contract. After getting some conditions, transmits it to the government again (Shirvi, 2002: 31-50).

Problem statement (civil law obstacle)

In civil law, contract is placed in different categories. One of these categories is "suspension and Monjaz". Article 189 of the Iranian Civil Code is as follows: Monjaz contract is one whose effect does not depend on the issue, otherwise it will be suspended". It shows that suspending contract is a contract dependent on another issue. Law confined to this definition, but law doctrine developed and exchanged ideas on a variety of suspended contracts. The result is that the majority of the scholars believe that any suspending in writing the contract leads to its invalidity. They accept just suspended contract that suspension is at its root not in its formation.

Now, according to the definition of BOOT contracts, it is clear that in terms of the original contract, formation of a contract depends on the conclusion of the first contract. In other words, after building completion, ownership is transferred to the Consortium Contractor and later the state will be its owner freely. Accordance with paragraph 2 of Article 140 of the Iranian Civil Code, the transfer of ownership is only possible through having an independent contracted, while in the mentioned contracts, such conditions are not included and the parties are solely satisfied by the original agreement. This means suspension in writing the other contracts. Here we can see inconsistency of these contracts with civil laws and principles. It also raises a fundamental problem with the basis of such an agreement. The following parts try to sum up the civil doctrine comments and new interpretation of the law and solve the problem.

Civil doctrine: Opponents of suspension in contract (majority opinion)

A) They, mostly the early writers, call the contract suspension rationally impossible and reject it (Jafari Langroodi, 2007). They argue that contract writing has only two forms: first one is that the contract should be written or we must totally ignore it. We cannot imagine a state that the contract is based on the external event. We can not call possible the issues that are logically impossible (KazimYazdi, 2003: 198-199).

B) Some of them, by understanding the necessity of suspended writing and respect to the ideas of the earlier scholars, adhere to find a middle solution and suspension of the contract is divided into three parts:

1. Suspension in writing means suspending the formation and creation of a contract to something else.
2. Suspension in the origin means suspending the fulfillment of a written contract to something else.
3. Suspension as the effect of the contract means dependency of the contract process on something else (Shahidi, 2003: 66).

The writer believes that writing means creating the contract and it is the result of writing, while the effect of the contract is the law result. According to this view, the contract with suspension is invalid because there is no contract in fact, but the contract with origin is correct. It seems that some people have used writing to define the origin and actually have tried to approve the issue by changing the names and playing with words.

Supporters of the suspension in contract writing (minority opinion)

This research team calls suspending in writing permissible; with this justification that they call contract within the credit issues and believe that since, unlike the material things, creating credit things depends solely on the writer's intention, so there is no problem, based on the parties' willingness, contract writing is in subject to other affairs (Hakim, 2007: 108-109).

The author's interpretation

We know that in Iran law, like most legal systems, freedom in contract is the main principle. While Article 10 of the Civil Code confirms this claim, but there will be exceptions to any general rule. This article accepts the private contract of the parties as valid one till it is not explicitly against the law. However, two other exceptions can be seen in Article 975 about the contract freedom in which the ethics and public order issues also narrow the scope of private contracts. But the article issue is not in any of these exceptions because firstly there is no any obvious law about invalidity of a contract whose writing is suspended and just in Article 189, we can see the suspension contract definition. The Iranian legislator in both Articles 699 and 1068 of the Civil Code expressly banned the suspension in contract writing, while there are no explicit ruling about the other contracts and agreements. Now the question is that does the

lack of clear rules on suspending the contract writing mean that it does not know it valid or the legislator calls it so clear and said nothing about it? According to Article 3 of the Civil Procedure Code in Iran, if the judge did not find the written issue in the codified laws, by citing Islamic sources and authentic ruling of the legal principles, he must judge.

In the problem statement, we said that even among the authoritative sources and Fitvas, there is not consensus on this issue while they all are professors and all comments are valid. But it seems with all of these ideas can be used to reach a unique solution; Looking back to the civil law may help to resolve the issue:

Article 190 of the Civil Code has recognized the basic conditions of transaction validity in four cases: "1 - the intention of the parties and their consent 2 - parties' qualification 3. The certain subject of transaction 4. Legitimacy to deal. In this article, Monjaz state of dealing is not included as the basic conditions. In other words, according to Article 190 of the Civil Code, the suspension of the contract would not make any problem on its accuracy.

Article 234 of the Civil Code gave legitimacy to act condition in the contract and defines it as follows: "The act condition is that intention or lack of intention to act is provided to other parties". Of course, this act can be in both physical and legal forms (contract essay). It seems that this article implicitly accepted that under current act conditions, we can suspend the essay of contract to issues that may happen after some months later. For example, while essaying the selling contract one of the parties sell his car to the other party. This condition is nothing but the same suspension in the contract essay.

On the other hand, our legal doctrine talk about the suspension of contract dissolution and the judicial procedures also accepted it. They say: "As long as the parties may refer the effect of contract to a future condition, dissolution of the contract and the loss of commitment are sometimes referred to an incident in the future. In contracts with such a condition, as the result of compromise, commitment is achieved in Monjaz form, but the fulfillment condition destroys it by itself (Katouzian, 2006). Article 283 of the Civil Code states: "After the transaction, the parties can compromise and cancel it. Article 284 also states:" canceling means in any term or act that stops the transaction. By putting these two articles together, it is evident that basically dissolution of contract requires compromise of both parties and when we see that our doctrines accepted the possibility of suspension in the contract dissolution, it means that they accepted suspension in contract essay. Now the question is that what is the difference between contract dissolution essay and essay of contract formation?

With little regard to what passed, the same thing can be seen: a primitive settlement before the contract essay. For example, in Article 243 of the Civil Code, without the initial contract seems unimaginable. Also, the suspension of dissolution is apart from the contract. According to the passage, we can say that obsession of those scholars who revoked the suspension in the essay is respected because as long as there is no essay, there will not be no contract at all. In other words, as long as the parties did not make a commitment to one another and just morally committed each other, there is legally no consensus and there is only morality. Therefore, the ideas of these scholars about dissolution in essay suspension, is reasonable just at this point. Finally, we can say that "suspension in a contract essay could be included as source or other contract work. Such that the first contract is definitely essayed and the other contracts are dependent on the achievement of certain results or other external conditions. By accepting this idea, neither the freedom principle nor the Text of the law and Article 10 of the Civil Code are distorted. We also do not make any problem in the validity and permissibility of the laws. There will be no place for logical criticize and objection.

Matching theme (result)

With the provided definition of the built, operation and transfer contracts and interpretation of the possibility of suspension in essaying the contract, it seems that law problems are removed from the BOOT contract. So the initial contract will be contracted with full details and the essay of other contracts will be based on the completion of the previous contract. In other words, the essay of the three contracts is the source of the original contract and all its predecessors. The reason insists that there should be an interpretation of the rules that opens the way for the development and protection of the rights of nations and guarantees the more profitable of parties.

REFERENCES

1. Ahadzi, M. and Bowles, G. (2004). Public-private partnerships and contract negotiations: an empirical study. *Construction Management and Economics*. 22(November), 967-78.
2. Ansari, Sheikh Morteza (2006) Makaseb, quoting by Naser Katouzian "general rules of contract", Volume 1, Enteshar press, p: 54.
3. Badlians, Gagylk and Esna Ashari, Ahmad (2003) Managing the international construction contracts (with a particular focus on claims management), Sixth International Conference on Civil Engineering, [www.civilica.com / Paper](http://www.civilica.com/Paper)

4. Chen, M.S., Lu, H.F., Lin, H.W. (2006). Are the nonprofit organizations suitable to engage in BOT or BLT scheme? A feasible analysis for the relationship of private and nonprofit sectors. *International Journal of Project Management*. 24 (6), 244-252.
5. Iran ranks 69th out of 139 in global competitiveness. *Global Competitiveness Report*, World Economic Forum (2010). Retrieved September 18, 2010.
6. Iran ranks 6th in attracting foreign investments. *tehran times*. Retrieved 2012-01-23.
7. Iran's competitiveness rank up 7 places: WEF. *Tehran Times*, August 9, 2011. Retrieved September 18, 2010.
8. Jafari Langroodi, Mohammad Jafar (2007) *Law Terminology*, No: 1422, Ghanje Fanesh press
9. Kazim Yazdi, Seyed Mohammad (2003) *commenting on Makaseb*, Volume 1, pp: 198 - 199.
10. Katouzian, Naser (2006) *General rules on contracts*, Volume 1, Issue 26, Ghanje Fanesh press.
11. Khan Beigi, Mohsen (2013) *Pathology of Participation in construction contracts*, 10 October 2013, (<http://aftabnews.ir/fa/news/212933>)
12. Lawyer Website (2014) *Tips on legal issues related to commercial contracts*, 24/4/1393 / <http://vakilara.ir>
13. Shahidi, Mahad (2003) *Formation of Contracts and Obligations*, No. 38, Majd press, p: 66
14. Hakim, Seied Mohsen (2007) *Nahj Alfqahe*, Volume 1, pp. 108 - 109 (quoted by Naser Katouzian, general rules of contract, pp: 55 -- Hassan Emami, Vol 1, p 177), Islamia Press.
15. Shirvi, Abdul Hosein (2013) *built, operation and transfer Project*: (<http://dr.shiravi.com/articles/7-2>).
16. Shirvi, Abdul Hosein (2001) *built, operation and transfer Project*, Mofit letter, No: 26, summer, 2001, pp: 31 - 50.
17. Toan. T.N., Ozawa. K. (2007). *Evaluation of procurement systems for BOT infrastructure projects in Asian countries*. University of Tokyo.