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The possibility of ratification of the Vienna Convention into the Iranian Law: A case study on delivery of goods in international transaction.

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THE POSSIBILITY OF RATIFICATION OF THE VIENNA CONVENTION INTO THE IRANIAN LAW

A CASE STUDY ON DELIVERY OF GOODS IN INTERNATIONAL TRANSACTION

A THESIS SUBMITTED FOR THE DEGREE OF DOCTOR OF PHILOSOPHY

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I dedicate my thesis to Fatima, daughter of the beloved prophet of Islam, the one who dedicated her life to spread message of Islam and to our waited Imam, Imam Mahdi; the one who will return and "*will fill out the earth with peace and justice as it will have been full of injustice and tyranny"*.

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ABSTRACT

The main objective of this research is to explore the possibility of ratifying the United Nations Convention on Contracts for the International Sale of Goods (١٩٨٠) into the Iranian law. To achieve this goal, the thesis first considers the reasons why Iran has not ratified the Vienna Convention also the thesis consider the legal and economic probable of ratification then the thesis will examine consequences of ratification of the Convention. The research reveals and discusses several reasons for the non-ratification of the Convention by Iran and suggests that Iran should ratify the Convention by giving reasons and recommended solutions to the ratification of the Convention. The study focuses on the rules for delivery of goods in international transactions because delivery of goods is the fundamental obligation of the seller and taking delivery is an important obligation for the buyer. This study is carried out mainly by comparing the provisions of the Iranian Civil Code and the articles of the Vienna Convention, relating to the concept of the delivery of goods and its impacts on passing of risk, transfer of property and lien in transactions. The thesis also explores the compatibility of the Vienna Convention and Iranian Law in the area of delivery of goods and its effects in international sale by highlighting the similarities and differences between these two regimes. Upon the discussion, the study suggests that, absence of a clear and adequate law in certain areas of international sales is due to Iranian law being silent, therefore ratification of the Convention should be considered - which could adequately and properly meet the need for a competent law in the areas where the existing law is neither clear nor adequate. Furthermore, some suggestions have been made for the amendment of the Iranian Civil Code, where there are gaps in the provision. Since Iranian law is based on the principles of Islamic law thus, ratification of the Convention need not conflict with principles of Islamic law. If there are some conflicts between the Vienna Convention and Iranian law and the principles of Islamic law then, the Vienna Convention cannot be ratified by Iran. The purpose of this study is to analyze the principles of Iranian law and compare them with the principles of the Convention in terms of delivery and its effectiveness in international sale, proves that there is no conflict between Iranian law and the Vienna Convention Therefore, ratification of the Convention would be recommended.

Declaration

‘I hereby declare that this thesis is the results of my own investigations, except where otherwise stated. All other sources are acknowledged by bibliographic references. This work has not previously been accepted in substance for any degree and is not being concurrently submitted in candidature for any degree unless, as agreed by the University, for approved dual awards.

I confirm that I am submitting this work with the agreement of my Supervisor.

ABBREVIATION

CISG

The United Nations Convention on Contracts for the International Sale of Goods ١٩٨٠

CIF

Cost, Insurance, and Freight

SCC

Swiss Civil Code Act ٢٠١٠

DTI

Department of Trade and Industry

FIDIC

The International Federation of Consulting Engineers

FOB

Free on Board

ICC

The International Chamber of Commerce

SOGA

United Kingdom Sale of Goods Act ١٩٧٩

UNECE

United Nation Economic Commission for Europe

UNIDROIT

The International Institute for the Unification of Private Law

UNCITRAL

The United Nations Commission on International Trade Law

UNESCAP

The United Nations Economic and Social Commission for Asia and the Pacific ١٩٨٠

OTIF

Intergovernmental Organization for International Carriage by Rail

WTO

The World Trade Organization

CHAPTER ONE

١ INTRODUCTION TO THE STUDY

١.١ INTRODUCTION

This study, as the title indicates, explores the possibility of ratifying the United Nations Convention on Contracts for the International Sale of Goods (١٩٨٠) (hereafter, the Vienna Convention) into Iranian law. To achieve this goal, this thesis initially examines the question of delivery of goods as the fundamental obligation of the seller and taking delivery as the obligation of the buyer. This topic is examined with respect to Iranian law and the Vienna Convention by discussing the some elements of contracts such as documents, methods of delivery, delivery to the carrier, compatibility of goods with the contract, fundamental breaches of contract time, place and expenses. This study also examines the effects of delivery on transfer of property and the passing of risk and lien under the following three respective legal systems:

١. Iranian Civil Code - as a hybrid legal system - formed from Islamic *Shiah* law.[١]

٢. The United Nations Convention on Contracts for the International Sale of Goods - as a well-recognized, international instrument.

[١]. Islamic law is of two main sects: *Shiah* and Sunni. Iranian law has been adapted from Shia law.

٣. The United Kingdom Sale of Goods Act (١٩٧٩) - as a leading example in Common Law and as a point of reference.

International sale has been described as the "heart of international trade".[٢] Laws on international sale vary from state to state and thus require diverse obligations for both contracting parties. One way to resolve international disputes is to harmonize the laws with a United Nations (UN) Convention.[٣]

Since medieval times, attempts have been made to harmonize International Sale Law. Over the years, bills of lading, and other important documents in international trade have gradually become unified.[٤] In recent years, specialized international diplomatic, legal, professional, and trade organizations such as the International Chamber of Commerce (ICC)[٥] and the International Institute for the Unification of Private Law (UNIDROIT)[٦] have attempted to improve the uniformity of contracts in international trade law. One such attempt, the United Nations Convention on Contracts for the International Sale of Goods (CISG), was developed by the United Nations Commission on International Trade Law (UNCITRAL)[٧] and was signed in Vienna in ١٩٨٠. It was the product of an effort by lawmakers and scholars from different regions of the world and differing legal systems[٨] to promote international trade by removing various legal barriers.

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٢. Folsom, Gordon Spanogle, Jr., *Fitzgerald and Van Alstine's International Business Transactions: A Problem Oriented Course book and International Business Transactions: Trade and Economic Relations,* (١١th edn, Documents Supplement Thomson West, ٢٠١٢)١٥.

٣. I. Carr, and Stone, P., *International trade law* (٦th edn, published, Routledge, Oxon, ٢٠١٨).lxxxvi

٤. M Nasiri, *Iranian Law System in International Trade Law* (٤th edn, Amir Kabir, Tehran, ٢٠٠٣) ٢٣.

٥. The International Chamber of Commerce is the largest, most representative business organization in the world, established in ١٩١٩ by a group of industrialists, financiers, and traders to represent businesses everywhere as 'the merchants of peace'. See more at http://www.iccwbo.org/about-icc/history/the-merchants-of-peace/.

٦. The International Institute for the Unification of Private Law (Unidroit) is an independent intergovernmental organization with its seat in the Villa Aldobrandini in Rome, established in ١٩٢٦ and reestablished in ١٩٤٠. Its purpose is to study the need and methods for modernizing, harmonizing, and coordinating private—in particular commercial—law between states and groups of states, as well as to formulate uniform law instruments, principles, and rules to achieve those objectives. Now ٦٣ states including Iran are members of the UNIDROIT. See more on http://www.unidroit.org/dynasite.cfm?dsmid=١٠٣٢٨٤.

٧. UNCITRAL was established by the United Nations General Assembly in ١٩٦٦ to promote the progressive harmonization and unification of international trade law.

٨. The Convention was passed with the participation of representatives from ٦٢ countries. This followed the unsuccessful experience of the Hague Convention in ١٩٦٤ when attempts were made to construct a new system in the area of international trade. See M Nasiri, (trans) '*Iranian Law System in International Trade Law* (٣rd edn, Tehran, Amir Kabir, ٢٠٠٣) ٢٣.

In practical terms, the Vienna Convention is a binding agreement or contract between nations. It launched the creation of a set of rules governing all aspects of the performance of trade contracts between sellers and buyers who have places of business in different states.[٩] By ratifying the Vienna Convention, a contracting state adopts Vienna Conventions into its national laws and becomes responsible to other contracting states. The Vienna Convention provides rules and provisions governing the making and interpretation of contracts for the international sale of goods. In addition, the Convention contains rules governing the obligations and remedies of each party to such transactions. The Convention does not deprive the parties from exercising their freedom to 'mould' their contracts into their individual conditions and circumstances. Generally, the parties are free to modify the rules established by the Convention or to agree, that the Vienna Convention will not apply at all.[١٠] However, the passing of property, the validity of the contract, product liability, consumer sales, and other important areas have not been addressed by the Vienna Convention.[١١]

The aim of the Vienna Convention is to make it easier and more economical to buy and sell raw materials and manufactured goods internationally. Also, the aim is to promote international trade by removing legal barriers in transactions between international traders. Without the Convention, there is a greater likelihood for disputes between the contracting parties, as the rules of sale and provisions of one country sometimes differ from those of another. In international transactions, there is often doubt regarding the 'governing law'. In such cases, the parties may be unsure of their rights and obligations.

For reasons that will be discussed shortly, Iran has not ratified the Vienna Convention. The Iranian Civil Code is the main source of contract law in the Iranian legal system and is derived from Islamic *Shiah* law along with some aspects of the French Civil Code and Swiss Civil Code.[١٢] European law is accepted in some limited areas such as,

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[٩]. The Vienna Convention Act ١٩٨٠, Art ١.
[١٠]. The Vienna Convention Act ١٩٨٠ Art ٦.
[١١]. The Vienna Convention Act ١٩٨٠ Art ٤.
[١٢]. Bahrami Hamid, *Tarikhche Tadvine Qanoone Madani* (The Development History of Iranian Civil Code) [٢٠١٣] Imam Sadiq University Journal (٢٤) <http://www.isu.ac.ir/publication/research-quarterly/research-quarterly_٢٤/Research-Quarterly_٢٤٠٢.htm> Accessed July ٢٠٢٣.

nationality and domicile.[١٣] The Iranian Civil Code, which dates from ١٩٢٨ to ١٩٣٦, was amended by the Civil Codes Amendment Acts of ١٩٨٣ and ١٩٩١.[١٤] However, the structure of the code, both in its basic provisions and its contractual rules, including those relating to sale- remains unchanged.[١٥] There are no Iranian statutes relating to the international sale of goods, and the regulations of the Civil Code were not drafted to deal with international sales, which may be the source of some of its differences from other legal systems and the Vienna Convention. Also, some aspects of sale, such as the delivery of goods to the carrier, have not been incorporated into the Iranian Civil Code. Unfortunately, these areas have not been addressed by Muslim jurists. In fact, there is urgent need for a law that can properly deal with problems of international sale in Iran.

This study may benefit and have practical applications for commercial lawyers and merchants when drafting contracts under Iranian law, or when Iranian courts have jurisdiction over any contracting parties. In addition, this study can benefit European and Iranian businesspeople, as Iranian business and government are closely linked with European countries, including the United Kingdom. Iranian courts do not affect the foreign laws chosen by the parties as applicable to the contract, when the agreed terms or laws contradict the public policy or public morality of Iranian society.

A comparison of Iranian law and the Vienna Convention can reveal whether the Convention could be applied as contract law by Iranian courts and whether a term or clause that is valid under the Vienna Convention is also enforceable under Iranian law. Moreover, because Iranian law, subject to some controls, is open to common practices, customs, and usage, such study could reveal whether or not the customs and usage from the Vienna Convention could be recognized by Iranian law and courts This study is of practical importance for Iranian lawyers and business people, as the Iranian private and public

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[١٣]. *Ibid.*

[١٤]. Erfani Mahmoud, *Hoghogh e Tijarat* (Vth edn, Iran, Tehran, Mizan Publisher ٢٠١٣) ٢٤.

[١٥]. Bahrami, Hamid, Tarikhche Tadvine Qanoone Madani, (The Development History of Iranian Civil Code) [٢٠١٣] Imam Sadiq University Journal (٢٤) <http://www.isu.ac.ir/publication/research-quarterly/research-quarterly_٢٤/Research-Quarterly_٢٤٠٢.htm> Accessed July ٢٠٢٣.

sectors both have very close business links with European countries, including the United Kingdom.[١٦]

The primary focus of this chapter is to present a general introduction of the research including the purpose of this research, the methodology, and the structure of the chapters in the thesis. Also, this chapter examines why the question of delivery was chosen as the focus for this research.

١.٢ THE PURPOSE OF THE STUDY

The main aim of this study is to examine the possibility of ratification of the Vienna Convention into the Iranian law. To attain this aim, this thesis firstly, considers the reasons for the non-ratification of the Vienna Convention by the Iranian government. Secondly, this research assesses the probable legal and economic consequences of these decisions. Finally, this study examines, in detail, the question of delivery as the main obligation of the parties in both Iranian law and the Vienna Convention. To narrow the scope of the study, the focus will be on Delivery as an obligation of the seller and taking delivery as an obligation of the buyer. Delivery of goods is of particular importance because it considers as the main obligation of parties, which enable both of the parties to obtain what they aim to achieve by the contract. In addition, delivery enables buyer to take control of the goods and exercise his control as the owner.

This examination focuses on the characteristics of these two laws with regard to the meaning and methods of delivery; the effects of delivery on the transfer of property; the passing of risk and lien as the principal elements of a contract; the time, place, and expenses of delivery; the quantity and quality of delivered goods; and the remedies for the breach of terms concerning quality and quantity.

١.٢.١ IMPORTANCE OF DELIVERY IN INTERNATIONAL SALE CONTRACT

[١٦] After China, European countries like England, France and Italy are the biggest trading partners of Iran. For example, the trade exchanges between Iran and the European Union in the ٨ months of ٢٠٢٢ have reached about ٣,٤ billion euros. <https://www.tasnimnews.com/fa/news/١٤٠١/٠٧/٢٧/٢٧٩٠٢٨٩/> Accessed, September ٢٠٢٣.

Delivery is the main obligation of the seller in sale contracts, which is mentioned expressly in Iranian Civil Code Articles ۳٦۷–۳۸۹[۱۷] and in the Vienna Convention Articles ۳۰–٦۰. In the Vienna Convention, the delivery of goods is one of the most important seller's duties and it is the major duty of the seller in an international transaction. The buyer must facilitate this duty by enabling the seller to deliver the goods in accordance with Articles ۵۳–٦۰ of the Convention. References to the delivery of goods can also be found in the UK Sale of Goods Act of ۱۹۷۹. In accordance with the provisions of that Act, the delivery of goods to the buyer is the obligation of the seller, and the buyer is obligated to take the delivery and pay the agreed-upon price. [۱۸]

A contract of sale is a contract based on the exchange of subject matter for sale for some consideration. The main purpose of a contract is to transfer goods and the ownership of those goods between parties in exchange for a price. The delivery of goods that conform to the quantity and quality specified in the contract allows the seller to fulfill his duty under an FOB[۱۹] contract. In CIF[۲۰] contracts, the delivery of the documents of sale is also important. Delivery is important because it enables a person to take delivery of the goods and use them as their owner.

Delivery in this context includes both physical delivery and constructive delivery. Physical delivery refers to delivery of goods by a seller to a buyer. There may be intermediaries between them such as a carrier. Constructive delivery includes all circumstances which the goods are not in the physical possession of the buyer, such as when the goods remain in the possession of the seller as the bailer. Delivery is of major importance in FOB contracts because in this context the property in goods passes on delivery. With the passing of property, there is a linkage between delivery and passing of risk. For instance, in FOB contracts, risk passes at the time at which property passes, and

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۱۷. The Iranien Civil Code Arts ۳٦۷&۳۸۹.

۱۸. U.K. Sale of Goods Act ۱۹۷۹ S ۲۷ & ۳۷ (۱).

۱۹. FOB is one of trade term contracts, which stand for "Free On Board" this means that the good will be shipped to a specific place without cost.

۲۰. CIF is one of the terms for sale of goods contract which stand for "Cost, Insurance and Freight" this means that the goods will be shipped where the seller pays the cost of insurance and transport of the goods to the beer's destination.

property passes when delivery takes place. Therefore, the time of the passing of risk is the time of delivery.[٢١]

١.٣ RESEARCH QUESTION

The following research questions are posed in this study:

The main research question is; is it possible for the government of Iran to sign the Vienna Convention or not? In other words, is there any conflict between the Vienna Convention and the principles of Islamic law?

Do Islamic Principles allow the Iranian government to ratify the Vienna Convention?

١.٤ METHODOLOGY

In order to achieve dependable outcomes, various research techniques employed in this investigation. These encompass research conducted in libraries, comparative methodologies, and analytical approaches to ascertain a specific resolution within a pertinent legal framework.

١.٤.١ LIBRARY-BASED RESEARCH (LITERATURE SURVEY)

Library research involves the utilization of primary and secondary sources. Primary sources encompass statutes, case law, law reports, and legal articles like the Civil Code of Iran, the Commercial Code of Iran, the Vienna Convention, and the UK Sale of Goods Act ١٩٧٩. On the other hand, secondary sources comprise books, journals, articles pertaining to the subject matter, and online materials. These resources collectively offer a comprehensive understanding of the study.

[٢١]. Alireza Nazim*, 'Obligation of parties in The Vienna Sale Convention & Iranian Law'* [٢٠١١] Kanoon e Sardaftaran <http://www.notary.ir/content-news-letter/٢٩١> Accessed ٠٨ June ٢٠١٤.

١.٤.٢ COMPARATIVE METHOD

The comparative method involves the comparison of two or more legal systems in order to discover principles regarding one or all of the provisions within these systems. This approach frequently employs multiple regulations within a single study. “Comparison plays an important part in the most diverse branches of the humanities and the social sciences alike”.[٢٢]

There are two possible ways to organize this method. Initially, one can examine a specific area of research, such as the UK Sale of Goods Act ١٩٧٩, and then apply the same approach to another area of research, like the Iranian Civil Code, concluding with a separate chapter. The comparative method, when employed to compare two or more legal systems, proves to be superior to other methods in terms of enhancing and advancing a nation's laws. By identifying the similarities and differences between different legal systems, this method effectively highlights the issues within each system.

This study thoroughly compares and examines the similarities and differences between the Iranian Civil Code and the Vienna Convention in terms of the delivery of goods and its effects. The main objective of this comparison is to identify more effective approaches for enhancing the Iranian legal system. Initially, the study focuses on the problems within the Iranian Civil Code and the Vienna Convention. The provisions of the Sale of Goods Act of ١٩٧٩ analyzed in this context, and the resulting outcomes serve as the foundation for this comparative study.

١.٥ CAN THIS STUDY ASSIST IRAN TO RATIFY THE VIENNA CONVENTION?

The Vienna Convention is an important international instrument that resulted from a sustained period of comparative legal study.[٢٣] Through a comprehensive examination of numerous legal systems, lawmakers meticulously created the Vienna Convention. As a result, ٩٦ states have recognized, adopted, and become parties to this Convention. Due to its importance, it is crucial to determine the reasons behind Iran's government not ratifying

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[٢٢]. Reza Azarian, ‘Potentials and limitations of Comparative Methods in Social Science’ [٢٠١١] ١ International Journal of Humanities and Social Science <http://www.ijhssnet.com/journals/Vol._١_No._٤;_April_٢٠١١/١٥.pdf> Accessed ٢٤ July ٢٠١٤.

[٢٣]. Clayton P. Gillette and Steven D. Walt, *The CISG: history, methodology, and construction Theory and Practice* (٢nd edn, Cambridge University Press, ٢٠١٦) ١٢-٢٢.

it. The aim of this research is to explore the potential for incorporating the Vienna Convention into Iranian law.

In accordance with the Iranian Constitution, it is necessary that the provisions of any convention must align with the principles of Islamic law and not contradict them. Therefore, the Iranian government has yet to allow the signing of the Convention partly because the government has not decided whether the Vienna Convention is contrary to the principles of Islam. Since Iranian law is based on Islamic law, particularly *Shiah* law, the main concern is the existence of conflict between the concepts of the Vienna Convention and Islamic law. This study examines the reasons for non-ratification of the Vienna Convention by Iran and suggests some solutions for ratification.

The ratification of the Vienna Convention in Iran would aid coordination between business laws and would be highly advantageous which will be mentioned in chapter ٩.[٢٤] Research on the delivery of goods and its effects under the Vienna Convention might illustrate the similarities of the law related to delivery in different legal systems.[٢٥]. A lack of conflict between national law and uniform law guarantees even application of the uniform law. However, Iranian courts are unwilling to apply uniform laws if they are not in harmony with or contradict national laws. In the case of the Vienna Convention, the situation is more serious because the Convention has no fixed jurisdiction to deal with cases governed by the Vienna Convention. Thus, these cases are often decided by national courts.

This comparative study seeks to elucidate any potential conflicts that may arise between Iranian law and the Vienna Convention. Should there be any inconsistencies between the articles of the Vienna Convention and the laws of Iran; the Iranian Government has the right to utilize one of the reservations stipulated in the Vienna Convention.[٢٦] Since discussion of all of the issues surrounding the convention in a PhD project is impossible, the research will be limited to the delivery of goods and its effects on international commercial law and its relationship to the transfer of ownership, passing of risk, and lien in international sale.

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[٢٤] Chapter ٩, P. ٢١٢.

[٢٥]. Ronald Harry Graveson, *One law: on jurisprudence and the unification of law* (١st edn, New York, North Holland Pub, ١٩٧٦) ٣٩, ٥٤.

[٢٦] Four reservations are mentioned in Articles ٩٢, ٩٤, ٩٥, and ٩٦ of the Vienna Convention.

Engaging in discussions about the provisions of the Convention and emphasizing its benefits can effectively attract the attention of Iranian lawmakers and inspire them to adopt the convention. Furthermore, conducting research in this field will uncover any ambiguities and uncertainties present in the Convention, demonstrating that despite certain apparent differences between the Vienna Convention and Iranian law, the Convention can be ratified by incorporating specific reservations.

The UK Sale of Goods Act of ۱۹۷۹ is more advanced than the Iranian Civil Code on the subject of international sale. For example, the definition of sale in the Iranian Civil Code[۲۷] covers sale, exchange, and barter, while the UK Sale of Goods Act ۱۹۷۹ only covers sale. Therefore, there is no such problem like the problem in definition of sale, in the UK Sale of Goods Act ۱۹۷۹. Moreover, the definition of sale in Iranian law only covers specific goods, while the UK Sale of Goods Act covers specific and unascertained goods, making it more comprehensive.[۲۸]

Furthermore, ratification of this significant international instrument by Iran will probably lead to increase development of international trade, which will in turn stimulate economic growth. This will bring greater confidence for potential international contract parties to conduct businesses with Iran. However, ratification of the Vienna Convention does not mean that Iranian law does not need amendment. The Convention applies only to international sales, whereas domestic sales will still follow Iranian law.

۱.٦ STRUCTURE OF THE THESIS

This thesis comprises nine chapters. In this first chapter, a general introduction to the research is provided, including the research aims, the methodology, and the structure of the chapters in the thesis. The introduction explains, firstly, why ratification of the Vienna Convention is important for Iran, and secondly, why the issue of delivery was chosen. Finally, the chapter examines the possibility of Iran ratifying the Vienna Convention and hopes that this study will encourage the Iranian government to sign the convention.

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[۲۷]. The Iranian Civil Code Art ۳۳۸.

[۲۸]. "A contract of sale of goods is a contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price". U.K. Sale of Goods Act, S ۲.

Chapter two gives a brief introduction of legislature Agencies in Iran such as, the Constitution, The Islamic Consultative Assembly, and Council of Guardian and explains the sources of Trade Law in the Iranian legal system such as, Iranian Civil Code, Commercial Code, Custom and Usage and Judicial Precedent.

Chapter ۳ is dedicated to the Vienna Convention and the question of ratification. In this chapter, the following issues are examined in detail. Firstly, the historical background of the Convention. Secondly, the reasons behind codifying the Vienna Convention. Thirdly, the scope of application of the Convention. Fourthly, the possible advantages that Iran gains by ratifying the Convention. Fifthly, The weaknesses of Iranian Civil Code followed by the list of States adopting the Convention.

In chapter four, first, the central concept of delivery is explored. Second, the meaning of goods in two legal systems is examined. Third, the delivery of documents is discussed, and finally, the methods of delivery, including physical delivery, symbolic delivery, constructive (legal) delivery, and delivery to the carrier, are discussed.

Chapter five is devoted to discussing the place of delivery including delivery at a fixed place, at the place required by custom and usage, at the place where the contract was concluded, and at the seller's place of business and delivery to the wrong place. Comparisons are made between the Iranian Civil Code, the Vienna Convention and the UK Sale of Goods Act ۱۹۷۹.

Chapter six considers the time of delivery including immediate delivery, extension or stipulation of time of delivery, delivery before the due time, expenses of delivery compared and contrasted in relation to the Iranian Civil Code, the Vienna Convention, and the UK Sale of Goods Act of ۱۹۷۹.

Chapter seven analyses the quality and quantity of the goods, the shortfall and excess in delivery, the delivery of nonconforming goods, and the remedies for breach of the

contract terms concerning quality and quantity. In addition, the duty of the seller to preserve the goods after the sale and before delivery, and the seller's duties concerning the packaging of the goods are examined.

Chapter eight examines the delivery of goods and the legal consequences for breach of the duty, which are extremely important with respect to the international sale of goods. When goods are sold, they are at risk until they reach the buyer’s destination. These risks are of particular importance in international trade when the seller and the buyer are located in two different countries. The following question is often posed: who must bear these risks the seller or the buyer? To answer this question, one must consider the legal consequences of the delivery of goods as they are transferred from the seller to the buyer. Issues of particular concern include the transfer of property and the passing of risk. Issues concerning disruption, lien, and some other effects of delivery are also discussed in this chapter. This comparative study relates to the Iranian Civil Code, the Vienna Convention, and with reference to the UK Sale of Goods Act of ۱۹۷۹.

Chapter nine concludes this research with suggestions regarding ways in which the Iranian Civil Code should be amended to address gaps in the law relating to the delivery of goods and its effects. It also set up recommendations on how Iran may ratify the Vienna Convention into its legal system.

CHAPTER TWO

٢ SOURCES OF TRADE LAW IN IRANIAN LEGAL SYSTEM

٢.١ INTRODUCTION

The Constitution of the Islamic Republic of Iran (hereafter the Constitution) in the Iranian legal system is observed as the first source of law. Then, there is the Enact of the Islamic Consultative Assembly (*mağles-e shorā-ye eslāmi*), the Decisions of the Council of Ministers, the Decisions of the Council of the Guardian (*shurā-ye negahbān*) and the Expediency Council (*mağm'a-e tashkhis-e maslehat-e nezām*),[٢٩] which are all regarded as the sources of law in accordance with Iranian legal system.[٣٠]

Moreover, the Iranian Civil Code, the Code of Commercial Law, Custom and Usage, and the International Conventions, in case of ratification by the government, are all regarded as sources of trade law and sale of goods.

Furthermore, the Supreme Court of Iran has been authorized by The Iranian Constitution to establish a binding procedure for all the other courts in certain situations.[٣١] In addition, the comments of jurists, as a supplementary source, have an important position in the explanation of codes and provisions.[٣٢]Above all these, the rules of Islamic law have a

[٢٩]. Adineh Abghari 'Introduction to the Iranian Legal System and the Protection of Human Rights in Iran' [٢٠١٣] European Journal of International Law Volume ٢٠, (٤) <http://ejil.oxfordjournals.org/content/٢٠/٤/١٣١٢.full?sid=٦٢e٧٦d٩d-٨٤٤٦-٤bac-٩c٩c-f٥٤٩e٢cd٣e٥٨>٢٨-١٠-> Accessed ١٥ September ٢٠٢٣.

[٣٠] Rabia'Eskini, *Huquq –e- Tijarat* (١١th edn,Tehran, SAMT Pub, ٢٠١٣) ٢١.

[٣١]. *Ibid,* p. ٢٤

clear position in the Iranian legal system as a criterion of the acceptance of the other sources and as a supplementary source when the codes are silent.[٣٣]

Therefore, the variety of sources, and the lack of a clear classification of sources, may cause confusion and misunderstanding for the courts in finding an applicable rule between supplementary sources. Misunderstandings may happen mainly when the codes and statutes are unclear, or silent, on a subject to answer to the issue. This chapter aims to describe governmental agencies under the auspices of which legislations are passed and the origins from which the law of trade applied in Iran are stemmed.

٢.٢ LEGISLATURE AGENCIES

In the Islamic Republic of Iran, according to the type of system and the different goals it pursues, it can be seen that many legislative institutions have the right to legislate within different legal limits. However, some professors of fundamental law did not have such an opinion about the system of the Islamic Republic of Iran and believe that the only legislative body is the Parliament and have argued in this regard.[٣٤] It seems that the institutions with the right to legislate in the Islamic Republic of Iran are more than one institution, but the main and primary duty of legislation in most matters is the responsibility of the Islamic Consultative Assembly. In addition to this authority, which is composed of elected representatives of the people, some other institutions have been granted the legal authority to make rules to meet certain needs, including the Expediency Council, the Council of Leadership Experts, the Supreme National Security Council, and the Supreme Council of the Cultural Revolution. , the Supreme Council of Cyber Space, and the leadership pointed out. Of course, all these institutions were not created in a uniform manner and do not have completely similar and identical functions. These institutions have the right to legislate according to the duties they have been created to fulfill in certain matters that the law has prescribed for them. The main difference between these institutions and the legislative branch is in the main function of that branch in the legislative discussion; In other words, other institutions' primary and main function is not the issue of legislation, but they have

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[٣٢]. *Ibid*, p.٢٦

[٣٣]. *Ibid.*

[٣٤] Research Institute of the Guardian Council of the Constitution, *Multiplicity of legislative authorities in Iran* <https://ccri.ac.ir/> Accessed ١٥ December ٢٠٢٣.

other duties, in addition to which, depending on the case and need, they may also enact laws.

٢.٢.١ THE IRANIAN CONSTITUTION

The Constitution of the Islamic Republic of Iran clarifies cultural, social, political and economic organizations of the country in accordance with the criterion and the principles of Shi'a Islam.[٣٥]

The Constitution stipulates how, and in what situation, laws should be approved. In addition, in what circumstances other enactments and decisions, which come from other organizations, become valid.[٣٦] Also, a few general principles concerning judicial affairs, such as the right of ownership[٣٧], have been expressed in the Constitution.

Based on the Constitution, the Legislature cannot establish laws contrary to the principles of Islam and to the principles of the Constitution.[٣٨] For this purpose, the Council of Guardians, which consists of jurists and lawyers, controls all of the laws approved by the Legislature.[٣٩] According to the Constitution, judges are under a duty to decide cases in accordance with codified laws. Article ١٦٦ of the Constitution provides that:

> *"The verdicts of courts must be well reasoned out and documented with reference to the articles and principles of the law in accordance with which they are delivered".*

Furthermore, the majority rule of statutory provisions in the Iranian legal system and the impossibility of drafting statutes in a way to cover all of the possible situations require interpretation of the laws by the judges.

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[٣٥]. The Iranian Constitution, Article ٤.
[٣٦]. Rabia Eskini, *Huquq –e- Tijarat* (١١th edn, Tehran, SAMT Pub, ٢٠١٣) ٢١.
[٣٧]. The Iranian Constitution, Article ٤٧ provides that: "Private ownership, legitimately achieved, is to be respected. The relevant criteria are determined by law".
[٣٨]. The Iranian Constitution, Art, ٨٥.
[٣٩]. *Ibid.*

Therefore, Article ٧٣ of the Constitution states that, "*the interpretation of ordinary laws falls within the competence of the Legislature".*

The provision of Article *٧٣* does not contradict the doctrine jurists in that it confers the right of interpretation on the members of the Parliament who have expertise in the legal affairs. In addition, amongst them they are members that are familiar with both legal and Islamic issues and can release reliable decisions.

The Doctrine of Jurists argues that "ordinary laws" that the Parliament shall pass in accordance to the Constitution Law are to be interpreted by this "legislative agency" itself. On the other hand, the Guardian Council plays a complementary role as its members re-examine the decisions of the Parliament in both aspects. This role shall not be confused by the entitlement of the Parliament for interpreting its own legislations.

٢.٢.٢ THE ISLAMIC CONSULTATIVE ASSEMBALY (PARLIAMENT)

According to the Constitution,[٤٠] the Islamic Consultative Assembly, or Iranian Parliament (mağles-e shorā-ye eslāmi), is the main pillar of legislation in the Islamic Republic of Iran. The Parliament has ٢٧٠ representatives as the Legislature, and can draft law on all matters in accordance with the Islamic Sharia law within the limits of its competence.

After the establishment of Islamic Republic's Constitution, the Islamic Consultative assembly[٤١] is the most important source of law and legislation.[٤٢] Chapter ٦ of the Constitution explains its interworking with the Islamic Consultative Assembly.

٢.٢.٣ THE GUARDIAN COUNCIL

The Guardian Council of the Constitution (*Shora-ye Negahban-e Qanun-e Assassi*) is an appointed, and constitutionally-mandated, ١٢ member board, which wields considerable

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[٤٠]. The Iranian Constitution Art. ٧١.

[٤١]. The Islamic Parliament of Iran constituted by the people's representative elected directly by secret ballot. The term of membership for Parliament is ٤ years. The Parliament has ٢٧٠ representatives. See; <http://en.parliran.ir/>.

[٤٢]. The Parliament has no legal status without the Guardian Council. Any bill passed by the *Majlis* must be reviewed and approved by the Guardian Council to become law.

power and influence in the Islamic Republic of Iran. The Iranian Constitution calls for the Guardian Council to be composed of six Islamic *Fuqaha'* (Jurisprudents), conscious of the current needs and issues of the day, which are to be selected by the Supreme Leader of Iran, along with six other jurists, who specialize in different areas of law. These six jurists, who assist the Supreme Leader in choosing the Council, are to be elected by the Iranian Parliament, and chosen from among the Muslim jurists nominated by the Head of the Judicial Power.[٤٣] According to Article ٩٦ of the Constitution, the Guardian Council holds veto power over all legislation approved by the Iranian Parliament. It can nullify a law based on two accounts: being against Islamic law, or being against the Constitution itself.[٤٤] While all the members of the Council choose laws which are compatible with the Constitution, only the six clerics vote on them being compatible with Islam. If any law is rejected, it will be passed back to the Parliament for correction. If the Parliament and the Guardian Council cannot decide on a case, it is passed up to the Expediency Council for a decision.[٤٥] The Guardian Council is uniquely involved in the legislative process, with equal oversight with regards to economic law and social policy, including such controversial topics as abortion.

٢.٣ SOURCES OF IRANIAN TRADE LAW

Since Iran has always been an Islamic country, its business affairs have also been subject to religious regulations. People followed religious leaders and religious books for commercial matters, and Islamic jurists had provided books such as "*Makasab*" that discussed lawful (*halal)* and unlawful (*haram)* business as a reference for business laws.

In ١٩٥١ and ١٩٦١, by adapting French laws, Iran's first commercial law was approved in ٣٧٨ articles. In this law, the principles related to commercial offices and documents, companies and bankruptcy are discussed.

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[٤٣]. Mahmoud Erfani, *Hoghogh e Tijarat* (٧th edn, Iran, Tehran, mizan Publisher ٢٠١٣) ٢٥.

[٤٤]. The Iranian Constitution Art. ٨٥.

[٤٥]. Rabia Eskini, *Huquq –e- Tijarat*, (١١th edn, Tehran, SAMT Pub,٢٠١٣) ٢٧.

٢.٣.١ THE IRANIAN CIVIL CODE

The Iranian Civil Code is regarded as the main source concerning the Law of Contract in the Iranian legal system. The Code, which contains ١٣٣٥ articles, was drafted and gradually enacted between ١٩٢٨ and ١٩٣٦.[٤٦] The Iranian Civil Code was drafted by Muslim Jurists, along with secular jurists, who had been educated in Europe.[٤٧] The Draft Committee took into account Islamic law, as well as the Napoleonic Code and other European civil codes, such as the Civil Codes of Belgium, France, and Switzerland.[٤٨] However, the Iranian Civil Code, which was finally approved, is a general codification of Islamic law, for the most part, including the law of contract, property, and family. European law has its influence on the structure of the code as a pattern. Moreover, European law is accepted in some limited areas such as Nationality and Domicile. To remove non-Islamic provisions, the Iranian Civil Code was partially amended by the Civil Code Amendment Act of ١٩٨٣ and ١٩٩١. Nevertheless, the structure of the Code, its basic provisions in general, and its provisions on contracts and sale in particular, have remained unchanged.[٤٩]

٢.٣.٢ JUDICIAL PRECEDENT

The decision of the courts is a supplementary source of Iranian law.[٥٠] Although according to Article ١٦٥ of the Constitution, trials are to be held openly, but judgments of courts are neither reported nor published. In addition, a very limited rule has been given to the Supreme Court to fulfill its constitutional duties. According to Article ١٦١ of the Constitution, the Supreme Court should supervise the correct implementation of the law by the courts, and ensure uniformity of judicial precedent. On the role of judicial precedent in the structure of Iranian law, scholars and jurists have expressed different viewpoints.

Some believe that the outputs of the Courts can be decisive and constructive in shaping the entire structure of Iranian Law. By relying on Articles ٧٣ and ١٦٧ of Constitutional Law, they go even further and express that these decisions are legally capable of creating principles of law.

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[٤٦]. Mahmoud Erfani*, Hoghogh e Tijarat*, (٧th edn, Iran, Tehran, Mizan Publisher ٢٠١٣) ٢٤.

[٤٧]. Hamid Bahrami, 'Tarikhche Tadvine Qanoone Madani' (The Development History of Iranian Civil Code) (٢٠١٣) Imam Sadiq University Journal (٢٤) <http://www.isu.ac.ir/publication/research-quarterly/research-quarterly_٢٤/Research-Quarterly_٢٤٠٢.htm> Accessed ٢٥ July ٢٠٢٣.

[٤٨]*.Ibid.*

[٤٩]*.Ibid.*

[٥٠]. N. Katozian, *Mugaddama-'i 'ilmHuquq* (٦th edn, Tehran, Iqbal, ٢٠١٣) ١٥.

On the contrary, the opposing view believe that judicial precedents are not the source of law in the law of Iran and shall not be confused with systems such as Common Law where it is an inseparable facet of it. They argue that Iranian Law is essentially based on acts that are codified in accordance with the Constitutional Law and be passed by the Parliament. (See "the role of judicial precedent in the law of Iran").

Beside the opinions expressed by scholars, judicial precedent can be relied on by disputing parties before the court and is able to form a legal ground on which a legal argument can be based.

Clearly legal opinion of judges and arbitrators in dealing with cases that interpret CISG articles may not bound Iranian judges when they are faced with international legal cases or even contracts of sale governed by the Convention , yet as the role of judicial precedent in Iranian law, they may assist the judge to issue a fair and just judgment. Therefore, on the following occasions the Supreme Court can establish a judicial precedent:

١. The Supreme Court may fulfill its duty to ensure the uniform implementation and interpretation of the laws by establishing a Judicial precedent on two occasions: Firstly, when there is a conflict between the judgments of the different branches of the Supreme Court in similar cases; and secondly, when the courts have taken various approaches in the interpretation of a code or statute, then the matter of dispute will be decided by the Supreme Court. The decision of the General Board of the Supreme Court on that particular subject is binding and enforceable for all the courts in similar.

٢. The Supreme Court may give an instruction to the courts with regard to a particular case, and the instruction should be followed by the court, which deals with that case. According to Article ٥٧٦ of the Iranian Civil Procedure Law, when an appeal from a judgment is allowed by the Supreme Court, but the court, which is in its second trial, insists on its previous judgment, in result and reasoning, the case shall be referred to the Supreme Court again. The Supreme Court does not deal with a case on its merit, but rather it will give opinion about the case, which has to be decided by another court. The opinion of the Supreme Court on this case should be followed by the court, which finally deals with the case. The opinion of the Supreme Court does not have any effect on other cases and is not binding on any other court.

٢.٣.٣ CUSTOM AND USAGE

Custom and Usage are supplementary sources of Iranian law, which means that they can find a place as a source of law only when the statutes expressly refer to them, or prescribe reference to them.[٥١] Before going to the instances in which custom and usage may play a role as sources of law it has to be mentioned that there is no definition concerning these concepts in Iranian codes and statutes. It has been said that a norm can be constituted a custom or usage when it exists in society; this has been commonly and continuously practiced; and has received a considerable amount of acceptance from society.[٥٢] The famous jurist and author Dr. *Hassan Imami* believes that:

"The customs and the usages that could be referred by the court as custom and usage of the society are the norms to which society, as a result of continuous reference to them, become accustomed, and ignoring them or acting upon them is considered by society as an offense. These kinds of customs and usages usually take their origin from religious law in order to preserve the order and tranquility of society, and in respect to these sorts of customs, makes them obligatory. But, when a custom or practice has not achieved any degree of efficiency and certainty, there is no room for it amongst the laws".[٥٣]

According to this definition, only very few rules can qualify as a custom and usage. This definition might be considered as a definition of custom within the framework of criminal or social laws, but it is not a proper definition with regard to commercial and contract law. One can hardly say that acting upon a commercial custom is unpleasant to society, whereas that particular rule may achieve a wide acceptance between merchants. Therefore, it seems necessary to distinguish between the concept of custom in the law of contract and its meaning in criminal or family law.

Commercial customs are very often established in industrial countries, and merchants are fully aware of them. However, the question of possible conflict between commercial custom

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٥١. For example in relation to the law of contract, Article ٢٢٠ of the Civil Code provides: A contract not only binds the parties to execute what it explicitly mentions, but both parties are also bound by all consequences which follow from the contract in accordance with custom and practice, or by virtue of a law.

٥٢. N. Katozian, *Mugaddama-'i 'ilmHuquq* (٦th edn, Tehran, Iqbal, ٢٠١٣) ١٥.

٥٣. Hassan Imami, *Huquq-iMadani* (٤th edn, Tehran, ٢٠١٣, Islamiyah, ١٣٦٤)١٧.

and Islamic law is surprising. Article ٣ of the Iranian Civil Procedure gives a gap-filling role to the significant usages and customs. On the other hand, Article ١٦٧ of the Constitution initiates the judge to refer to the Islamic sources when the law is silent or is unclear. Therefore, the question is, as a gap-filling rule, whether Shi'a law takes precedence to the customs, or not.

٢.٣.٤ THE DOCTRINE OF JURISTS

It is impossible to draft statutes in a way to predict and cover all possible situations. Therefore, judicial interpretation finds a very important role in reasoning and deciding cases.[٥٤] Legal literature relating to a code is a helpful source for the judges to understand and interpret the statutes correctly. In this way, the Doctrine of Jurists, which is where the codes are interpreted, or their roots and foundations are judged and explained, can provide guidance in implementing the codes in different cases.[٥٥] Moreover, according to article ١٦٧ of the Constitution, the opinion of Muslim jurists, as a supplementary source of law, has been introduced to the judges. Distinction should be made between the authority of the doctrine of commentators on the codes, and the opinion of the Muslim jurists (fatwa). The interpretations of the jurists concerning an article of a code, does not bind the judges to follow that interpretation, whereas the reputable opinion amongst Muslim jurists should be followed by the court, when the laws are silent.[٥٦] In other words, both jurists provide guidance and opinions as to the interpretation of those parts of the Code being unclear or left non-interpreted. These parts are, therefore, reviewed both legally and under Sharia law of Islam. However, only the decisions made by Muslim jurists have binding effect. In other words, judges seating in the Courts are bound by the interpretation that Muslim Jurists have made and must not issue any judgment that contradict with it. The Doctrine, in contrast, merely guides the judges to draw a fair and legal conclusion, yet they are not binding on them.

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٥٤. Rabia Eskini, *Huquq –e- Tijarat* (١١th edn, Tehran, SAMT Pub, ٢٠١٣) ٤٠.
٥٥. *ibid*, p.٤٣.
٥٦. The Iranian Constitution Principles ٤, also Arts, ٦١, ٧٢ and ١٧٠.

٢.٣.٥ THE IRANIAN COMMERCIAL CODE

The Iranian Commercial Code is the most important code in the field of trade. It was enacted in ١٩٣٢, and has ١٦ chapters including Merchants, Commercial Offices, Sales documentation, Transportation, Bankruptcy etc. This Code, as a whole, was taken from the French Commercial Code of ١٨٠٧.[٥٧] Therefore, it could be said that the Iranian trade law has been severely affected by the foreign law. This Code, which is located in the lower level, is about content and division of content. Also the Code has not indicated Maritime regulations, Bank, Insurance, Industrial Property, Exchange (Bourse) or Key-Money.[٥٨] These areas are codified separately in other legal systems. In common law, for instance Maritime law is primarily divided into the law of carriage of goods by sea and the law of marine insurance. In terms of insurance, the Insurance Act deals with legal disputes between insurers and insured. Similarly, other aspect of commerce are dealt with separately in a specific Act because of the development of commercial exchanges.

According to the Iranian Commercial Code, commercial sales are distinguished from civil sales. As the Commercial Code provides; a sale is considered commercial when it is made for the purpose of resale or hire,[٥٩] or it is made by a person engaged in commercial activities.[٦٠] Nevertheless, there is no difference in the applicable law to these two types of sales. Since there is no provision regarding commercial sales in the Commercial Code, the rules of the Civil Code apply to commercial sales as well as non-commercial sales.[٦١] Also, while the Commercial Code contains some regulations concerning "contract of carriage",[٦٢] and "carriage of goods by sea" which have also been addressed by the Iranian Maritime Code,[٦٣] the latter regulation is mainly about the relationships between the sellers and the carriers, rather than the sellers and buyers. Therefore, it is correct to say that the Civil Code is the only source concerning sale in the Iranian law.[٦٤]

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٥٧. Rabia Eskini, *Huquq –e- Tijarat* (١١th edn, Tehran, SAMT Pub,٢٠١٣) ٥٥.
٥٨. *Ibid, p.* ٢٣.
٥٩. The Iranian Commercial Code Arts, ٢ &١.
٦٠. The Iranian Commercial Code Art ٣.
٦١. Rabia Eskini, *Huquq –e- Tijarat* (١١th edn, Tehran, SAMT Pub,٢٠١٣) ٢٦.
٦٢. The Iranian Commercial Code, Arts ٣٧٧-٣٩٤.
٦٣. The Iranian Maritime Law, Chapter IV, Arts ٥٢-٦٨.
٦٤. Rabia Eskini, *Huquq –e- Tijarat* (١١th edn, Tehran, SAMT Pub,٢٠١٣) ٣٥.

٢.٤ STATUS OF INTERNATIONAL CONVENTIONS AND FOREIGN LAW

According to Article ٩ of the Iranian Civil Code, regulations of international agreements, which have been concluded or ratified by the Iranian government, have the same value as statutes. According to the Constitution, the process of ratification of any convention consists of three steps: the Convention should be approved by the Legislature; the Guardian Council should then approve the lack of conflict between the Convention and the principles of Islam and the Constitution, and the President the signs the contract. Therefore, when an international Convention contains some regulations, which are contradictory to the principles of Islam or the Constitution, it may not get the approval of the Guardian Council. Conflict with the principles of Islam will not arise unless the Convention contains an article which either permits the forbidden or forbids what is permissible in Islam. As the primary source of law in Iran is Islamic Law, attention must be taken that nothing contradicts Islamic obligations. As previously stated, they are "legislative agencies" that are appointed specifically for assessing the compliance of laws released by the Parliament to Islamic limits such as the Guardian Council.

The same is true for the contracts the subject matter of which is the illegitimate and unlawful according to Islamic rules and principles. In this case, the contract is void and has no effect on the parties' contractual relations at all.

To exemplify, any law that may dominate enemies of an Islamic State over that State or weaken it economically would be unlawful and barred by Islam.

A historical example can be traced back to Iran's agreements with other foreign states that allowed exploitation and misusage of natural resources like exploitation of national oil by western companies.

It seems that, principally, international Conventions such as the Vienna Convention in itself does not have an unlawful character and is unlawfulness is extremely doubtful. The silence of *shari'a* on a subject will not cause any conflict when the law intends to establish some regulations concerning that issue. For instance, the issue of bills of lading has not been addressed by Islamic law, but this does not mean that the regulations concerning bills of lading are in conflict with *shari'a*. However, possible conflicts can be prevented by exercising the right of reservation as to the articles, which may contain an element of contrast.

Moreover, Iranian law respects the principle of a parties' autonomy in choosing the applicable law of their contract. Article ۹۶۸ of the Iranian Civil Code lays down a rule of conflict of laws with regard to the contracts as follows: Obligations caused by the contracts are subject to the law of the country where the contract is concluded, unless the parties to the contract, implicitly or explicitly, choose another law as the law of their contract.

۲.۵ SUMMARY

To conclude, the Iranian Civil Code and the Code of Commercial Law are considered the main sources of trade law in the Iranian legal system. Nevertheless, a variety of sources and the lack of a clear classification of sources may cause confusion for the courts to find an applicable rule between supplementary sources.

Legislation concerning contractual and commercial matters is less likely to give rise to a serious conflict with Islamic criteria. Islamic law, as well as custom and usage, may be referred to as supplementary sources. Performance of custom and usage as well as international law, are all subject to the control of the courts. The distinction in sources of law, applicable customs to the contract and the judicial control over the parties' choice of law, and the lack of distinction between domestic and international contracts, may give a feature from Iranian law, as well as Iranian courts, that is undesirable for the merchants. Besides that, the very restricted responsibility of judicial procedure decreases the possibility of achieving the uniform application of law that is extremely needed. If these barriers are eliminated, then Iranian law and Iranian courts can draw the attention of international traders. Ratification of International Conventions, such as the Vienna Convention, can be the first step towards this aim.

CHAPTER THREE

٣ VIENNA CONVENTION AND ITS RATIFICATION

٣.١ INTRODUCTION

Over the past decade, developing countries have been keen to reform their legal and economic systems. New, modern and flexible laws have been adopted, or existing ones amended. These reforms have been undertaken in an attempt to act as a stimulus to attract foreign investment and encourage merchants from other nations to invest in these countries. In seeking to carry out these reforms, the Vienna Convention on Contracts for the International Sale of Goods (hereinafter called the Vienna Convention or CISG) is an important model for countries all over the world.[٦٥]

The Vienna Convention is the product of a diplomatic conference, which was organized in Vienna between ١٠ March, and ١١ April ١٩٨٠ by the Secretary-General of the United Nations, acting upon a resolution of the UN General Assembly dated ١٦ December ١٩٧٨. The pursuit of a uniform law for international sales has a history extending back to ١٩٢٩.[٦٦] The Vienna Convention has been recognized as the most successful attempt to unify a broad area of commercial law at the international level.[٦٧]

The Convention aims to reduce obstacles to international trade, particularly those associated with choice of law issues, by creating modern substantive rules governing the rights and obligations of parties to international sales contracts. At the time of writing, the

[٦٥]. Nisreen Mahasneh, 'The Ratification of the United Nations Convention on Contracts for the International Sale of Goods by Jordan: the Legal Perspective and Impact' [٢٠١١] https://academic.oup.com/ulr/article-abstract/١٦/٤/٨٤٣/١٧٣٤٨٩٥ Accessed ٢٠ September ٢٠٢٣.

[٦٦]. Peter Schlechtriem, 'Uniform Sales Law: The UN-Convention on Contracts for the International Sale of Goods' [١٩٨٦] https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=١٦٩٨&context=gjicl>, Accessed, ١٥ September ٢٠٢٣.

[٦٧]. See Peter Huber, 'Comparative Sales Law' [٢٠١٩] Oxford Academic in Mathias Reimann, Reinhard Zimmermann, 'The Oxford Handbook of Comparative Law'[٢٠١٩] Oxford University Press ٩٣٧-, ٩٣٩

Vienna Convention has attracted ٩٦ Contracting States[٦٨] ,which between them account for well over two thirds of international trade in goods, representing extraordinary economic, geographic and cultural diversity.

The Vienna Convention began as a project of the United Nations Commission on International Trade Law (UNCITRAL), which in the early ١٩٧٠s undertook to create a successor to two substantive international sales treaties: (١) The Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF); and (٢) the Convention relating to a Uniform Law for the International Sale of Goods (ULIS), both of which were sponsored by the International Institute for the Unification of Private Law (UNIDROIT). The aim of UNCITRAL was to create a Convention that would attract increased participation in uniform international sales rules. The text of the Vienna Convention was finalized and approved in the six official languages of the United Nations at the United Nations Conference on Contracts for the International Sale of Goods, held in ١٩٨٠ in Vienna. As *Fletchner* has noted:

"The Vienna Convention governs international sales contracts if (١) both parties are located in Contracting States, or (٢) private international law leads to the application of the law of a Contracting State". [٦٩]

The autonomy of the parties to international sales contracts is a fundamental theme of the Convention: the parties can, by agreement, derogate from virtually any CISG rule, or can exclude the applicability of the CISG entirely in favor of other law. Parties' autonomy as a commonly accepted principle established in general principle of law confers on contractual parties the entitlement to agree on the rights and obligations deriving from the Convention.

It may be argued that the stipulation of autonomy principle would benefit Iranian traders as it renders the sale contracts more subjective. Iranian business men who tend to

٦٨. See (United Nations Treaty Collection <https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status>Accessed, August ٢٠٢٣.

٦٩. Article ١ of the United Nations Convention on Contracts for international Sale of Goods states the sphere within which the Convention applies: "(a) when the States are contracting States (b) when the rules of private international law lead to the application of the law of a Contracting State".

enter into international market and expand their business beyond national boundaries and are seeking for rules and regulations that universally accepted, the Convention would be an appropriate choice due to its autonomy principle. If the Convention had not recognized the possibility to select the obligations that contractual parties will be bound by, few traders would have stated the Convention as the governing law of their sale contracts.

The divisibility of the conventional rules respects the party autonomy principle. Hence, Iranian traders are no longer obliged to be under obligations that would not save their interests.

If a sale contract is concluded and expressed the Convention as the governing law, the question arises whether it would apply to all aspects of the contract or it is restricted to some rights and obligations?

Article ٤ of the Convention replies to this question. This Article limits the effects of the Convention and excludes "validity of the contract or any provision of it" and the proprietary issues arising from the contract in question.

Consequently, the parties entering into a contract of sale under the Vienna Convention should bear in mind that they could not rely on the Convention in order to render the contract invalid or challenge the property of one of the contractual parties.

The fact that the Vienna Convention does not deal with all the issues which can arise from international sale contracts can be easily derived from the text of the Vienna Convention itself. For example, Article ٤ expressly and compulsorily excludes matters of validity and third party claims. In determining what are the issues that fall within the sphere of this Article. The provision of Article ٤ does not allow the deciding court to escape from the Convention simply because it determines that this Article applies. It is permissible to recourse to domestic court and set aside the Convention only if all relevant articles are take into consideration[٧٠].The reason for this exception is that the rules governing these issues are compulsory rule,[٧١] that differ from country to country and it is difficult to reach an international agreement. For example, regarding validity of contract domestic laws have

[٧٠] Bruno Zeller, *CISG and the unification of international trade law* (١ st edn, USA Routledge-Cavendish ٢٠٠٧) ٧١.

[٧١]. There are rules that people cannot object them even if they want to. These types of laws are related to public order and good morals, or to protect individuals from harm. For example, the necessity of registering immovable property is compulsory rule.

different approaches. For instance, the legal effects of duress or mistake on the validity of a contract is closely linked to the legal system under which it is made. Whether a contract is made under Common Law or Civil Law directly affects its validity. It may be because of these differences that the Convention does not intrude in assessing the validity of contracts. Thus, the Vienna Convention does not deal with them. Also, the Convention does not define some key terms such as delivery, goods and passing of property because, there are different definitions in legal systems and it is difficult to reach one international definition thus they have been left by the Convention to be defined by national law.

The Vienna Convention addresses significant provisions such as: (١) the role of practices established between the parties, and of international usages; (٢) the seller's obligations with respect to the quality of the goods as well as the time and place for delivery, (٣)the buyer's remedies for breach of contract by the seller, including rights to demand delivery, to require repair or replacement of non-conforming goods, to avoid the contract, to recover damages, and to reduce the price for nonconforming goods; (٤) the seller's remedies for breach of contract by the buyer, including rights to require the buyer to take delivery and/or pay the price, to avoid the contract, and to recover damages, the passing of risk in the goods sold and anticipatory breach of contract;

The Vienna Convention also includes a provision, which eliminate written-form for international sales contracts from its scope. In other words, Article ١١of the Convention reads that:

"A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses"

Unlike other Conventions that may demand the contract to be restrictively formed in writing in order to be given effect, the Vienna Convention recognizes contracts that their conclusion can be proved by any means. However the Convention authorizes Contracting States to reserve this provision, and a number have done so.[٧٢]

[٧٢].Some state members have declared that any provision of Article ١١, Article ٢٩ or Part II of the Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or

٣.٢ BENEFITS TO IRAN OF SIGNING UP TO THE CONVENTION

As previously stated, lawmakers drafted the Vienna Convention after a careful review of a number of legal systems and after comparing their principles in both contracts of international sale and domestic contracts of sale. This is why many states accepted, adopted and acceded to this Convention.

Ratification of this significant international instrument by Iran will lead to increased development of international trade, which will in turn stimulate economic growth and bring about greater confidence for potential international sale contract parties to conduct businesses with Iran. It would also lead to reducing trade disputes by choosing the Vienna Convention as the governing law, the business security will be promoted to the contract also will be stronger and will be more transparent However, It does not mean that the ratification of the Vienna Convention does not mean that Iran's laws do not need to be reformed. The Convention applies only to international sales, whereas domestic sales would still follow Iranian law.

This research will illustrate the essential unity and similarities of the law related to delivery in different legal systems. Presumably, there is no apparent contradiction between Uniform Law and National Law. In principle, these two are consistent unless otherwise is proven. Having said that, national courts are not willing to give effect to Uniform Laws when they do not comply with national laws. Therefore, national laws have privilege over uniform laws and prevail over them. However, Iranian courts are unwilling to apply uniform laws if they are not in harmony with national laws. In the case of the Vienna Convention, the situation is more serious because the Convention has no fixed jurisdiction (e.g., an international court or an arbitration tribunal) to deal with cases governed by the Vienna Convention. Thus, these cases are often decided by national courts.

other indication of intention be made in any form other than in writing does not apply. See; < http://iicl.law.pace.edu/cisg/page/cisg-list-contracting-states>Accessed, ١٥ September ٢٠٢٣.

In addition to the above mentioned, the unification of the law of international trade is highly desirable; unification eases trade, and removes difficulties of conflict and choice of law in international transactions. However, ratification of a uniform law requires a certain degree of tolerance and compromise from the countries which intend to adopt the law. This compromise allows the contracting country to take advantage of applying a uniform law, although on some occasions its national law might be superior to the uniform law. Ratification of the Vienna Convention by Iran not only enables Iran to benefit from the advantages of uniformity, but is also a clear and proper response to the need for a law which addresses adequately and properly the problems of international sale, in circumstances where the existing law is not a clear and capable law in this regard.

۳.۳ DEFECTS IN THE IRANIAN CIVIL CODE

Iranian law, as far as sales is concerned, derives from Islamic law, which is a scholar-made law. Islamic law is based on some divine principles which cannot be compromised, and consequently, reduce the flexibility of the law. For example, Islamic law did not validate a woman's witness[۷۳], which is accepted by all law systems. The Iranian Civil Code, as the main source of the Iranian sale of goods law, has been adopted from the text books on Islamic law which were mainly written at least three centuries ago. The fact that since Iran is an Islamic country and govern by an Islamic government thus according to its constitution all laws should not be opposed with *Sharia* law consequently sources of the Iran Civil Cod came from *Shiah* Muslim jurisprudence books.[۷٤] The main source of Iranian Law is Islamic jurisprudence of *Shia*. It is the main premise against which no derogation is permitted. The Constitution Law of Iran exclusively acknowledges the prevalence and superiority of Islamic jurisprudence over other laws. It disallows and calls unlawful any law being incompatible with Islamic jurisprudences. In case any inconsistency or incoherence with it is proven, the inconsistent law will be null.

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[۷۳]. Iranian Civil Code Art ۲۳۱.

[۷٤]. Hamid Bahrami, 'The Development History of Iranian Civil Code' [۲۰۰٤] Imam Sadiq University Journal۲٤) <http://www.isu.ac.ir/publication/research-quarterly/research-quarterly_۲٤/Research-Quarterly_۲٤۰۲.htm>. Accessed, ۱٦ September ۲۰۲۳.

In consequence, there is indeed a hierarchy at the top of which Islamic jurisprudence is placed, the rules and regulations that stem from Islamic law can nullify a law even if that law has passed the legal process required by the national law of that Sate.

The Islamic law that is practiced and officially recognized under the Constitutional Law is the law theorized and designated by Shia scholars known as "*Fiqh*".

As pointed out in Chapter one, Muslim jurists are intentionally appointed to judge the consistency, as they are experts that have obtained this authority by the domestic law of Iran. Hence, the language of the Code,[٧٥] its terms and its examples[٧٦] are not appropriate to international sales. However, commentators[٧٧] on the Code have tried to interpret the Code in such a way to fill the gaps and provide answers to newly raised questions. In fact, the need for a law which can properly deal with the problems of international sale in Iran is urgent. The area of Iranian sale of goods law remains one which adheres strictly to medieval Islamic law. In Iranian law, other areas of trade have been brought more up to date. The reason is that Islamic law contains full and detailed regulations concerning sale, such as *Javaher Al Kalaam, Makasib, Al Shariat Al Islam*, whereas some other areas such as transport or negotiable instruments have not been discussed or not regulated by Muslim jurists. Therefore, as regards issues unaddressed by Islamic law, when codification was proposed, the law of western countries was adopted and, sometimes, Iran welcomed the relevant international convention, such as the "Convention for the Unification of Rules Relating to International Carriage by Air, Warsaw, ١٩٢٩" in its legislation. Further, Iran, is a member of other conventions such as the:

- International Convention on Oil Pollution Preparedness, Response and Co-operation,[٧٨]
- International Convention on the Harmonization of Frontier Controls of Goods;[٧٩]

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[٧٥]. The language of the Civil Code is Old Persian language which is full of Arabic terms.

[٧٦]. Since the Civil Code has been written for domestic law, the examples are not related to the international sale and sometime the examples are very old subjects.

[٧٧]. Farhad Bayat, *Comprehensive description of civil law* (١٤th edn, Arshad Pub, ٢٠١٨) ٨٧.

[٧٨]. This is an international maritime convention establishing measures for dealing with marine oil pollution incidents nationally and in co-operation with other countries.

[٧٩]. This is a ١٩٨٢ United Nations Economic Commission for Europe (UNECE) treaty whereby states agree to co-operate in harmonizing and simplifying international border control. For goods in transit, the states that ratify the Convention agree to implement "simple and speedy treatment. by limiting their inspections to cases where these are warranted by the actual circumstances or risks". The Convention was developed by the Inland Transport Committee of the UNECE concluded at Geneva on ٢١ October ١٩٨٢. It was signed by ١٣ states and

- Intergovernmental Organization for International Carriage by Rail.[٨٠]

However, according to the Iranian Constitution, the law concerning sale cannot be changed, and neither can the Vienna Convention be ratified, unless it becomes clear that there is no conflict between the proposed law, or the Convention, and the principles of Islamic law. Further, Iranian courts do not give effect to the terms of the private contracts, or to the foreign law which is chosen by the parties as the law applicable to the contract, when the agreed term or law contradicts the public policy or public morality of Iranian society. The purpose of the research is to prove that there is no conflict between the Vienna Convention and the Islamic law in the area of sales.[٨١]

The Vienna Convention is the latest and most successful effort of the international organizations which are concerned with the uniformity and harmonization of the law of international trade, in general, and international sales in particular.[٨٢] The Vienna Convention cannot be ignored, even by non-contracting states, as its provisions are considered as "generally accepted trade usage" by the International Court of Arbitration of the International Chamber of Commerce.[٨٣] Aside the question of ratification of the Convention by the Iranian government, this study can benefit commercial lawyers and merchants in drafting a contract when Iranian law has been chosen as the applicable law to the contract, or when Iranian courts may have jurisdiction over the disputes which might arise from the contract.

A comparison between Iranian law and the Vienna Convention, with an indication of the similar rules in English law, will reveal whether English law or the Convention can be applied as the law of contract by Iranian courts or not, and also whether or not a term or a clause which is valid under English law and the Vienna Convention is enforceable under Iranian law as well.

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came into force on ١٥ October ١٩٨٥. It is open to ratification by any state, and in ٢٠٢٠٢٣ had ٥٦ parties. A number of states outside of UNECE have ratified the treaty.

[٨٠]. This is an intergovernmental organization, which governs international rail transport. According to the official website, www.otif.org it now has ٥٢ Member States and ١ Associate Member.

[٨١]. Sales are governed under The Iranian Constitution Article ٧٢.

[٨٢]. Richard Schaffer, *International Business Law and Its Environment* (١٠th edn, South-Western Cengage Learning ٢٠١٧)١٩١.

[٨٣]. *Ibid*.

٣.٤ LIST OF CONTRACTING STATES OF THE VIENNA CONVENTION

To date, ٩٦ countries have adopted the Vienna Convention sale of goods as follows:

Albania, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahrain, Belarus, Belgium Benin, Bosnia-Herzegovina, Brazil, Bulgaria, Burundi, Cameroon, Canada, Chile, China, Costa Rica, Colombia, Croatia, Cuba, Cyprus, Czech Republic, Democratic People's Republic of Korea (N. Korea), Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Estonia, Finland, Fiji, France, Gabon, Georgia, Germany, Greece, Guatemala, Guinea, Guyana, Honduras, Hungary, Iceland, Iraq, Israel, Italy, Japan, Korea (S. Korea), Kyrgyzstan, Laos, Latvia, Lebanon, Lesotho, Liberia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Madagascar, Mauritania, Mexico, Moldova, Mongolia, Montenegro, Netherlands, New Zealand, Norway, Palestine, Paraguay, Peru, Poland, Portugal, Republic of Congo, Republic of Korea, Romania, Russian Federation, Saint Vincent & Grenadines, San Marino, Serbia, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Syria, Turkey, Turkmenistan, Uganda, Ukraine, United States, Uruguay, Uzbekistan, Vietnam, Yugoslavia, Zambia.[٨٤]

The above list shows that many of the world's major trading economies, such as Australia, Canada, China, and the United States, and many developing countries, and most of the industrialized countries, including, France and Italy have ratified the Vienna Convention. The United Kingdom has not signed even though the majority of the other Member States of the European Union are signatories. The list also shows that the common law countries such as; the United States of America, Canada, Australia, New Zealand, as well as civil law countries such as France, Austria, Germany, Belgium, Netherlands, Spain, Sweden, Switzerland, and Brazil, have signed up and ratified the Convention. Therefore, leading trading states worldwide whose combined economies makeup nearly two-thirds of all world trade are parties to the Convention. In order to grasp what type of States

[٨٤]. See; Institute of International Commercial Law (IICL) official website, <http://iicl.law.pace.edu/cisg/page/cisg-list-contracting-states>. Accessed,١٤ August ٢٠٢٢.

have interest in ratifying the Convention or, to put it differently, is the Convention bias when it comes to world powers or it can be practice evenly?

Some commentators argue that no matter the position of contracting State economically whether that State is a developed, developing or under developed, the provision of the Convention would benefit the contractual parties “ex post” rather than “ex ante”.

It would be advantageous once the contract of sale is completely finalized and concluded. For instance, when a dispute arises from the contract or is related to the contract, the Convention would benefit parties irrespective of their political or economic position in the world.

In terms of the question of how the Convention has been divided amongst nations. Camilla Baasch Anderson in “International sales law and jurisconsultorism (p١٦١)” argues that CISG has been signed and ratified by ٢٢ Western, ١١ Asian and ٢٩ third world States.

The list also shows that the majority of the Islamic and Arab countries such as; Bahrain, Egypt, Iraq, Lebanon, Syria and Turkey are members of the Vienna Convention. However the Iranian law is different from other Islamic countries such as the above mentioned countries; because the Iranian Law is based on Islamic *Shiah* Law, while other Islamic countries law, are based on Islamic *Sunnah* law. In other words, the religion of Islam has two main branches: *Sunnah* and *Shiah*. The majority of Muslims which are living in Saudi Arabia, Egypt and Turkey are following *Sunnah* school of Islam which they follow and get benefit from different jurisprudence while *Shiah* Muslims in some of countries are too much such as; Bahrain and Iraq. Also some of those countries are govern with Islamic law and Islamic jurisprudence. Therefore since Iran is an Islamic country with Islamic government and following Islamic law and jurisprudence and the Iranian law is based on *Shiah* school of Islam, the way of ratification to the Convention by Iran is different to other Islamic countries which have ratified the Vienna Convention.

٣.٥ THE VIENNA CONVENTION AND NATIONAL LAWS

In the context of international sale, there has always been the need for an internationally accepted rule that is able to unify domestic laws. International transactions have been multiplied thanks to the modern era and the evolution of technology. This has created the extreme need of an unprecedented international instrument enabling the unification of national laws in spite of their possible inconsistencies. In order to understand the significance of that unified law in international trade area it would be necessary to examine the so-called "travaux preparatoire" or the historical development of the Convention.

Initially, the disputes and conflicts arising between merchants in international sale were settled on the basis of the rules of private international law, more particularly those concerning conflict of laws. The implementation of private international rules was intended to facilitate trade amongst merchants throughout the world and resolve dispute in an effort to guarantee trade is exercising as smoothly as possible. On the contrary, the pragmatic results have not met the expectations and "these laws created barriers and hindered international trade".[٨٥]

Despite the failure of private international law, it is necessary to create an international document that would be universally recognized by all traders, regardless of their nationality, race or religion led the jurists and lawmakers towards the adoptions of new international instruments such as the is The Convention concerning International Carriage by Rail (adopted ١٩٨٠), Convention for the unification of certain rules relating to international carriage by air signed at Warsaw on ١٢ October ١٩٢٩ (WARSAW CONVENTION), and the International Convention for the Unification of Certain rules of law relating to Bills of Lading (Hague Rules) signed at Brussels, August ١٩٢٤.[٨٦]

The historical development of CISG traces back to the meetings of UNIDROIT committee. Shedding light on the content, discussions and attendees of these meetings

[٨٥]. Sindija Damberga, *Historical development of the CISG* (٣rd edn, DAUGAVPILS UNIVERSITĀTES ٢٠٢٠) ٦٣, ٤٥-٤٦.
[٨٦]. *Ibid.*

uncovers the reason d'ệtre of CISG as an international instrument. CISG is fundamentally based on limited legal jurisdictions Anglo-Saxon, Latin, Germanic and Scandinavian. Therefore, the absence of representing other important jurisdictions such as the jurisdiction of Islamic States in the course of the travaux preparatoire can seriously challenge the universality of the Convention.

A further point that has to be emphasized is that CISG is a Convention in line with its precedent Conventions i.e. Convention relating to a Uniform Law on the International Sale of Goods (ULIS) and the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (ULFC).[٨٧] It is important to note that the two previous Conventions are hugely affected by the ambience of the Second World War. Similar to other international instruments, major powers of that time attempted to impose their views on how international trade shall function to the rest in as much their interest is preserved. This characteristic of international instrument is also challengeable as it is unable to regulate international trade constantly.

In fact, as long as the legal view towards international trade is merged with international relations and the effects of power upon it, it fails to provide a constant resolution to international disputes. The ambit of Vienna Convention should be broadening to the extent that all jurisdictions, despite their differences, are taken into account or the provisions of the Convention are so equal that it is enforceable in an unbiased manner.

٣.٦ CONCLUSION

The Vienna Convention designated to concentrate on international sale contracts has gone a long way so far. Numerous States have practiced it since ١٩٨٠ and now it is wise to examine whether States ratifying it into their domestic laws are satisfied and, thanks to this Convention, could increase the quantity of their sale contracts or they may be indifferent.

[٨٧]. *Ibid.*

It is arguable that so far, Iran could not develop its commercial activities, yet now Iran has the fortune to enter into international markets actively and by doing so the ratification of this Convention will bring about fruitful consequences.

The majority of international contracts' governing law provision is English law. Under the choice of law provision, contracting parties opt for English law. A reality that has threatened the international character of international sales and may be considered a new form of imperialism in the domain of merchandise.

Several leading common law contract cases the mainstay of English contract textbooks[٨٨] have involved parties using English law as a weapon in commodity markets. Merchants already exclude the Convention in commodity contracts governed by English law. The prevalence of English law in international contracts over international Convention has only reinforced the legal position of UK and has undermined the existence of the Convention as it is practically left unused. The interrelation between commodity goods and Common Law addressed in Chapter one would be a good example.

The fact that a unified legal Regime that does not preserve the interests of a particular regime of law would benefit the international community as a whole. To put it simply, if the choice of law of the contracting parties is led to unified/uniform law the basic principles such as fairness and equality are more accessible. No state can impose its domestic law as the standard governing law just because of its dominance over the market. This is why the inclusion of CISG would provoke beneficial results for all traders.

As put by Bridge, "[a] brief practical guide about some of the pitfalls in the CISG, and about some of the choices that contracting parties might want to make, would have much to commend it.[٨٩]

[٨٨]. See, eg, H Beale (ed), *Chitty on Contracts* (٣٥nd edn, Sweet & Maxwell ٢٠٢٣) ٤٥.
[٨٩]. Michael Bridge, *Avoidance for Fundamental Breach Of Contract under the UN Convention on the international sale of goods* (٤th edn, Cambridge University Press,٢٠١٠) ١٤٢.

The international character of Vienna Convention is uncertain as there are States having expressed their abstention towards its ratification. One of these Sates is United Kingdom that has taken an indifferent view towards its ratification.

According to this passage, apparently, scholars in UK urge the State to take part in favor of the Convention.

In a research led by Sally Moss ('why the UK has not ratified CISG?-JL&Com. pp٤٨٤-٤٨٥) one of the opposing view towards ratification is that "there was a danger that London would lose its edge in international arbitration and litigation" and the most important points put forward by the arbitrators and academics in favor of the Convention are:

"A political benefit is rebutting the negative perception of the UK as being reluctant participant in international trade law initiatives"

Additionally on the effect of the Convention on international sale contract made by UK companies, it is suggested that:

"Even if we do not adopt the Convention, UK companies will not be able to ignore it completely. If the contract is with a company in a country which has adopted the Convention, they may well press for the Convention to apply" Consider the view of Barry Nicholas in ١٩٩٣:

"Now that the Vienna Convention is in force and, more importantly, now that it has been ratified by the United States and other [c]ommon law countries and by our main trading partners in the European Community, can the United Kingdom afford to remain outside?" [٩٠]

At that time, the Convention's Contracting States were not nearly as numerous as they are now, and the Convention has since become an expression of customary international trade law adopting the Convention is consistent with merchant interests.[٩١] Even aside from any desire of some powerful states such as UK from being part of global legal and trading communities, accession would also be a matter of good governance.

[٩٠].Though the Convention is over ٤٣ years old, debate surrounding the UK and its position on the CISG continues.

[٩١]. Camilla Andersen, '*Breaking the Mould of Scope: Unusual Usage of the CISG' [٢٠١٢] ٢ VJ,* <http://vjournal.wpengine.com/vjarchive/> Accessed ١٥ October ٢٠٢٣.

The assembly of states, considering their diversity and plurality of jurisdiction contributes to its universality. On the one hand each single states would essentially take its business interest into consideration while examining the ratification of an international Convention, yet it is also true that the unification of rules and laws in favor of a Convention can only be beneficial (in the true sense of the word) where all sates are in a perfectly unbiased position.

It may be questioned, if the Convention had been effective, states that actively participated in its formation would have ratified it. The DTI recognized this in ١٩٩٧, when the number of Vienna Convention ratifications had doubled and it expressed concern that the UK would isolate itself, disadvantage its traders and rob its courts of the opportunity to help shape the Convention.[٩٢] That was over ٢٠ years ago, and the justifications for UK adoption are as relevant today as they have ever been.

The details of Parliamentary sessions would help to better comprehend the reason(s) of non-ratification. Principally, there is no limit posed on the Government for disapproving ratification of international Conventions, therefore, the burden of proof falls on those opposing ratification.

[٩٢]. Department of Trade and Industry, A Consultation Document (n ١٦) [٢٢]-[٢٣]. <https://webarchive.nationalarchives.gov.uk/ukgwa/٢٠٠٧٠٦٠٣١٦٤٥١٠/http://www.dti.gov.uk> Accessed, ٢١ September ٢٠٢٣.

CHAPTER FOUR

٤ THE CONCEPT, METHODS, AND EXPENSES OF DELIVERY

٤.١ INTRODUCTION

Delivery is undoubtedly a vital component of sellers' duties in the context of international sale of goods. However, its essence necessitates reconsideration, as the fact of delivery and the concept of delivery, and its relationship with other duties of seller, is not easy to understand. The interpretation of the concept of delivery is significant in that it affects different interpreting elements of sale contract; inter alia, transfer of property, passing of risk and the validity of the contract. This chapter will be dedicated to exploring the definition of delivery by conceptualizing delivery of goods and developing its methods in sale contracts. The first part of the chapter will analyse the concept of delivery under Iranian law, Vienna Convention and with reference to the English law. The second part will examine three different definitions of "goods" offered by the three legal systems in issue. Various methods of delivery will be mentioned in the third part of this chapter. The final part will elaborate the expenses of delivery customary in international sales.

Despite the fact that the demonstration of the concept of delivery is of utmost importance, absence of an unambiguous and unanimous definition within international trade law can be observed. Generally, international trade law provides three different definitions for delivery each of which stresses one particular angle of the concept, namely; lexical, idiomatic and statutory.

Under lexical meaning of delivery,[٩٣] the transmission of goods is considered. Accordingly, sellers are under obligation to carry goods to the place appointed by buyers. According to the idiomatic or legal approach, delivery of goods is fulfilled through the act of sending contractual goods by a (contractual) vehicle towards the buyers' destination. Delivery in its statutory sense is to put the goods at the disposal of buyers.

The existence of three different views towards the concept of delivery has yielded vagueness in the contractual duties of sellers. Unless otherwise agreed, prima facie it is not part of the sellers' obligation to dispatch the goods for the interest of buyers. It should be noted that the concept of delivery, in itself, has not generated imprecision; whereas, the methods, deriving from the legal approach, are practiced differently. In other words, The concept of delivery is implicitly precise and clear in itself, what has generated imprecision is the methods that delivery could take. The methods of delivery are diverse and can create misunderstanding and can affect the legal meaning of delivery. The means of transportation by sea, air or rail affect whether the goods are deemed to be legally delivered or undelivered.

Delivery is regarded as an absolute condition under *Fiqh*[٩٤], which is the primary basis of Iranian Civil law. The importance of delivery has been expressed under the ability of the subject-matter of sale to be delivered by sellers. That is to say, if sellers are unable to deliver the goods to buyers the contract of sale becomes invalid. For example, sale of a bird as subject matter of sale is, accordingly, valid provided that the bird is deliverable to buyers. Therefore, failing to meet the delivery requirement invalidates the entire contract of sale.[٩٥]

The right of lien has been acknowledged implicitly in *Fiqh* where both sellers and buyers can retard delivery or payment conditionally. It has been suggested that the sellers' right of lien is weaker than the buyers in that payment follows delivery and that the former prevails the latter as a contractual obligation. Hence, if the rules do not oblige sellers to comply with the delivery duty buyers can ignore payment until delivery. It should be marked

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[٩٣]. Cambridge Dictionary, <http://dictionary.cambridge.org/dictionary/english/deliver>. Accessed ٠٤ December ٢٠١٦.

[٩٤]. *Islamic Shariah*.

[٩٥]. A. Amini & M. Ayati, *Figh Estedlali* (٣rd edn, Taha Ketab, Tehran,٢٠٢٠) ٢٦٠.

that, delivery in the latter sense is having control over the contractual goods. Consequently, the right of lien emerges where delivery goes further than mere disposal of goods and enables buyers to have control of them.[٩٦]

The nature of the subject matter of sale impacts the definition of delivery in the sense that the custom of trade applied to the object of sale determines whether it has been contractually delivered or not. By way of example, in the case of real property the process of delivery is shorter and easier than sale of goods in that the latter warrants various stages i.e. transmission, measurement or weighting of goods. On the contrary, in respect of real property as long as the disposal of goods is done the goods are legally delivered and no other obligation can be imposed on sellers. Equally, awareness of the buyer as to the arrival or disposal of goods depends upon the nature of the subject of sale. To illustrate, the awareness of buyers in sale contracts is subjective and there is no general rule applicable to all cases. Similarly, under the doctrine of *Fiqh* the meaning of delivery differs for movable and immovable goods. The delivery of movable goods is performed through transmission. In contrast, in circumstances where immovable goods are subject matter of sale, sellers have to eliminate actual and posterior obstacles in the way of delivery. In the case of immovable goods the conduct of elimination by sellers is contemplated as the indispensable condition of delivery.[٩٧]

Sellers are in possession of goods until delivery, and in terms of post-delivery effect, the possession will be transferred to buyers no matter they have already gained control over the goods or not. Control is tied into property and determines passing of it being a notion disconnected with possession. Even though buyers may have possession in goods they cannot claim to have property on that ground.

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[٩٦]. *Ibid*. ٢٩٨.
[٩٧]. *Ibid*. ٢٩٨.

٤.٢ THE CONCEPT OF DELIVERY UNDER IRANIAN LAW

Article ٣٦٧ of Iranian Civil Code signifies that "delivery consists in the object sold being placed at the disposal of the buyer so that he has absolute control of it and can benefit from it in any way he likes. Taking delivery is affected when the buyer assumes control of the object of sale". It might be argued that delivery is a twofold concept and encompasses disposal as well as legal control of the goods. Accordingly, in order for delivery to be legally fulfilled these two conditions are to be met collectively in that if the goods are at the disposal but not under the control yet, delivery is incomplete.[٩٨] However, as it can be interpreted from the general meaning of the article, the mere fact that the subject matter is disposed to the buyer suffices for that it is deemed to be legally delivered.[٩٩] That is to say, the disposal of goods is illustrative of delivery and whether the buyer has subsequently control over them or not does not affect the completion of delivery. Furthermore, Contractual goods should be disposed by sellers to buyers to the extent they can absolutely benefit and utilize them. The assessment of the sellers' duty is dependent upon the custom of trade as well as the intention of contractual parties. Therefore, it is implicit in the meaning of "disposal" that sellers have to remove any probable or actual impediment(s) that buyers may encounter so that they can benefit from the goods as per the contract of sale.

It has been argued that one of the consequences resulted from delivery of goods is the transfer of property from sellers to buyers. In this regard, as far as Iranian Civil law is concerned, property in goods is not transferred to the buyers unless they have control over them. In other words, under Iranian law, the transfer of property requires control over goods and property is extended further than delivery. Article ٣٦٨[١٠٠] defines "disposal" as transmitting the subject matter of sale for the interest of buyers even if they are unable or unwilling to take" physical possession". The article accentuates the sufficiency of disposal of goods to buyers and diminishes the necessity of "taking control" and the essentiality of taking physical possession arguments[١٠١]. In some cases,

[٩٨]. N Katouzian, *Ughud -e- Moayan* (Vth edn, Ganjedanesh, Tehran, ٢٠٢١)١٦٦.
[٩٩]. Mahdi Shahidi, *Ughud -e- Moayan* (١٤th edn, Majd, Tehran, ٢٠٢٠) ٣٦.
[١٠٠]. Article ٣٦٨ - The delivery takes place when the object sold is placed at the disposal of the buyer even if the latter has not actually taken physical possession of it.
[١٠١]. N Katozian, *Hoghogh Madani* (Vth edn, Ganjedanesh, Tehran, ٢٠٢١)١٦٦-١٦٧.

the disposal of goods is closely connected to control of goods. The interconnection between disposal and taking control obliges sellers to comply with both obligations. The custom of trade practiced to the subject matter of sale in question shapes the scope of seller's duties.

On the other extreme, It might be argued that the apparent meaning of the phrase "absolute control of it and can benefit from it in any way he likes" in article ٣٦٧ is that the object of sale must be put at the disposal of the buyer in a way which will enable him to take the appropriate physical or legal control of the goods. For example, if the object of sale is a car, the buyer must be able to use it 'at ease' and be able to sale it to someone else.[١٠٢] Nonetheless, the interpretation of Article ٣٦٨ is complementary as it demonstrates the intended definition of "disposal". Notwithstanding the language expressed in Article ٣٦٧, the following Article points out that the wording of the Article is an explanation of the word "disposal". In other words, the buyer must be able to gain possession of the goods (potentially or actually) whenever he wishes, even though it may not yet be in his physical control.

The vital position of delivery of goods is also emphasized by Article ٣٨٧ provides:
"If the object sold perishes before delivery, even without fault or neglect of the seller, the sale will be cancelled and the consideration restored unless the seller has already applied to a magistrate or his substitute for the enforcement of the delivery, in which case the loss will be borne by the buyer only".

Accordingly, in the event that the subject matter of sale is perished prior to delivery, regardless of its causality, it has been prima facie established the contract of sale is "cancelled". In spite of the use of the term "cancelled" in the wording, one can argue that avoidance of the contract is meant. In other words, failing to deliver goods avoids the contract ab initio where the subject matter is no longer in existence leading parties to their initial position i.e. before entering into the contract of sale. Avoidance of the contract due to lack of delivery due to perishing authenticates the legal significance of delivery.

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١٠٢. Abdullah Kiyaie, *Obligations of Seller and Buyer Before and after the Delivery of Goods* (١st edn, Tehran ٢٠٢٠) ٤٧.

Islamic Fiqh differentiates delivery of movable and immovable goods. The fact that the goods contracted in sale agreement have to be displaced to the destination appointed by the buyers is material in that the validity and enforceability of the sale agreement firmly depends on the delivery being performed as per the contract. Delivery is directly connected to the nature of the goods contracted under the sale contract. Delivery differs when goods are ascertained or unascertained, movable or immovable.

٤.٢.١ DELIVERY UNDER THE VIENNA CONVENTION

Despite the importance of delivery within international sale contracts there is a vagueness of its definition in Vienna Convention. The absence of provision has left the concept of delivery open for interpretation as it is viewed by some commentators as the sellers' action of bringing the goods under the buyers' control.[١٠٣] This inference stems from Article ٣١ of the Convention where delivery implies placing the goods under the control of purchasers. The wording of Article ٣١ includes taking control of the goods and is not restricted to mere disposal. The language appears to be identical to the one employed in Articles ٣٦٧ of Iranian Civil law. By analogy with Article ٣١ of the Convention, Article ٣٦٧ tacitly excludes the inclusion of control of goods as sellers' contractual obligation but cannot be regarded as the dividing line because of lack of an explicit language. However, the involvement of transfer of property in Article ٣٠ of the Convention draws a line between the views taken vis-à-vis the legal duties of sellers. Article ٣٠ of the Convention provides: "The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention". Accordingly, sellers are under obligation to transfer property to buyers alongside their duty to deliver the goods. Giving equal weight to delivery of goods and transfer of property distinguishes the two legal systems. Under Iranian Civil law passing of property plays a role where sellers tend to make the goods under the buyer's control or by enabling them to take control of the goods which is not necessarily regarded as a duty of sellers. On the other hand, it can be inferred from Article ٣٠ of the Convention that sellers will not fulfill their obligations unless they have delivered both goods in conjunction with contractual documents and transfer property

١٠٣. Safai, S. H., *The Law of International Sale of Goods A Comparative Study* (٢nd edn, Tehran University of Tehran Press, ٢٠١٣)١٢٣.

of goods to buyers. It is arguable that Article ٣٠ ties delivery to passing of property and widens the concept of delivery to delivery of both goods and documents.

In terms of delivery of non-contractual or non-conformity goods, Article ٣١ provides that: *"If the seller is not bound to deliver the goods at any other particular place, his obligation to deliver consists:*

(a) if the contract of sale involves the carriage of the goods--in handing the goods over to the first carrier for transmission to the buyer;

(b) if, in cases not within the preceding subparagraph, the contract relates to specific goods, or unidentified goods to be drawn from a specific stock or to be manufactured or produced, and at the time of the conclusion of the contract the parties knew that the goods were at, or were to be manufactured or produced at, a particular place--in placing the goods at the buyer's disposal at that place;

(c) In other cases--in placing the goods at the buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract".

It can be determined that from Article ٣١ that the compliance of goods with the contract specification is an obligation supplementary to delivery of goods.[١٠٤] Thus, the delivery of defective goods is also regarded in the Convention as a legal delivery and discharges the seller from his duty to deliver the goods.[١٠٥]

Regarding the English law, the efficiency of delivery is limited under English law since Property in goods can, arguably, be transferred to buyers irrespective of the time of delivery. Depending on the situations it might be passed before, after or at the time of delivery.[١٠٦] Yet, the concept of delivery is defined differently in English law as under this legal mechanism "making the goods available" denotes delivery of goods. The availability of goods implies disposal of them since both stress the ability of buyers to benefit and utilize the subject matter of sale. Additionally, it implies the duty of sellers of "making" the goods in use for the interest of the buyers.[١٠٧] However, care would need

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١٠٤. Abduallh Kiyaie, *Obligations of Seller & Buyer Before and After delivery of Goods* (١st edn, Tehran, ٢٠٢٠)١٢٥.

١٠٥. Alireza Nazim, Obligation of parties in The Vienna Sale Convention & Iranian Law, [٢٠١١] Kanoon e Sardaftaran <http://www.notary.ir/content-news-letter/٢٩١> Accessed ٠٨ June ٢٠١٤.

١٠٦. Michael Bridge, *Benjamin's Sale of Goods* (١١th edn, Sweet & Maxwell ٢٠٢٠) ٤١٠.

١٠٧. Jason Chuah, *Law of International Trade* (٦th edn, Sweet & Maxwell, London, ٢٠١٩) ١١.

to be taken to the wording of Section ٦١ of the Sale of Goods Act ١٩٧٩ where "voluntary transfer of possession" signifies the concept of delivery. The key legal dispute is over "voluntary" requisite of the section. The Act authorizes sellers to avail themselves of the "voluntary" requirement and be released from their contractual obligation i.e. to deliver goods contractually. That is to say, it can be inferred from the wording of the Section that sellers cannot be forced to transfer possession of goods until a voluntary time otherwise no delivery would be deemed legal because of being made involuntarily. Assuming the appropriateness of the Section the concept of delivery would be defined as the readiness and willingness of sellers to transfer possession to buyers.

The common point that two national laws i.e. Iranian law and English law in conjunction with Vienna Convention collectively share is that delivery means the disposal of goods to the purchaser enabling him/her to have control over them.

The point commonly highlighted by the three legal systems, including English law, to which equal attention is given would be the intention of contractual parties. The initial intention stipulated by parties before entering into the contract of sale determines whether the act of sellers ought to be judged as taking possession of goods or not. Section ٢٩ of the Sale of Goods Act reads: "Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied between the parties". Yet, the majority of disputes arise where the parties' intention is neither stated explicitly nor can be observed implicitly. It would not be helpful to assert passing of possession in goods through the examination of this Article since both parties endeavor to escape from probable liabilities deriving from transfer of possession. On the other hand, under some circumstances the contrary intention of parties might be concluded from the conduct of parties. In *Wiskin* v *Terdich Bros*[١٠٨] the court was of the view that the buyers' order in the form of 'please supply us with the following goods' demanded sellers to send the goods giving rise to a binding obligation.[١٠٩]Moreover, the definition refers to lien and duress in delivery by using the term "voluntary".[١١٠] The definition is also able to

١٠٨. Wiskin v Terdich Bros Pty Ltd [١٩٢٨] Arg LR ٢٤٢.

١٠٩. John Atiyah N. Adams, Hector Macqueen, *Atiyah's Sale of Goods* (١٣th edn, Pearson Education Limited, ٢٠١٦) ١٥٥.

١١٠. Goode Roy, *Commercial Law* (٥th edn, london: penguin group, ٢٠١٧) ٢٦٣.

cover any forms of transfer of possession,[١١١] for delivery may take place without the transfer of actual physical goods from one person to another.[١١٢] For instance, when a bailee of the goods on behalf of the seller acknowledges that he holds them on behalf of the buyers, there is delivery of the goods to the buyer even though there is no change in their actual physical custody.[١١٣] Thus, the seller must make the goods ready for handing over at the place and time which set out in the contract and remove his control over the goods.

Under English Law, possession has a different meaning depending on the nature of the subject in which the question of possession is raised.

"Despite the fact that many eminent commentators have expended much energy to explain the concept of possession in English law the whole terminology of the word remains an enigma".[١١٤]

A clear distinction exists between ownership and possession when one takes a look at the property laws that include these two concepts.

Ownership:

When an individual has complete dominion over a property, he is said to own it. Ownership is a right that grants a complete proprietary power to use or to allow others to use that thing or to transfer that object to another person in such a manner that the thing is said to completely belong to that person. If a person owns something in the eyes of law, that means the thing belongs to him to the exclusion of others. For example, when a home is bought through financial help from a bank, once you paid all the installments of the loan, you get a complete dominion or ownership over that house.

Ownership can be proved beyond doubt by title to a property. If there is a dispute over a property with two people claiming ownership while one of them has the physical possession of the land, the court decides in favor of the person who has the title deed in his favor.

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١١١. *Ibid.*
١١٢. Michael Bridge, *Benjamin's Sale of Goods* (١١th edn, London, Sweet & Maxwell ٢٠٢٠) ٤١١.
١١٣. *Ibid.*
١١٤. L S Sealy and RJA Hooley, *Commercial Law: Text, Cases, and Materials* (٤th edn, OUP, ٢٠٠٨) ٤٠٠.

Possession:

However, if one rents an apartment, you can say that he is in possession of that apartment for the duration of the rent, but that does not give him complete proprietary control over that apartment, because in fact he will only have a possession over the property and not ownership of it. This is because ownership comes with the title of the apartment, while possession does not. Similarly, you own a pen you bought, but if you lease a pen, you only possess that pen.

Possession may at most lead to the right to use a property, but not to have the title over it. For example, a rented house that a tenant lives in it with his family is said to be under his possession and so are all other things that he legally keeps under his control and use without title. Possession does not automatically imply ownership in many occasions. This is true for most of the time in our lives except when we are talking about objects and valuable that is owned by us.

A criminal may be in possession of the stolen property or money that actually belongs to another person. Often, possession of a weapon from a suspect is held against him as if he has used it to commit a crime.

In conclusion, the difference between ownership and possession is; ownership relates to the title of the property, even when there is no possession of that property by the one who has the title, while possession mostly relates to the control and use of the property, without the need to have the title over that property. For instance, the buyer of a car, who has the title and owns it, may lend it to a driver who is in possession of the car. Actual possession means physical control of a thing, whereas ownership means having the title deed.

٤.٢.١ DELIVERY UNDER FOB AND CIF CONTRACTS

Since the emphasis is put upon the concept of delivery and in practice contracts made in the context of international trade frequently use INCOTERMS,[١١٥] examination of the most practical terms would contribute to apprehend that concept.

[١١٥]. Discussion of CIF & FOB terms is provided in this thesis since these terms are the most popular of the trade terms used in international sale contracts also these terms are commonly used in contract involving sea carriage and most export cargo is transported by sea.

INCOTERMS as standardized trade usages are defined "the rules regulating the distribution of responsibilities and costs between the parties at the stages of transportation and delivery of goods, regulated by the International Chamber of Commerce".[١١٦] These terms have been evolved and completed by practicing mercantile customs and have been adjusted to the needs of traders.

The drafters of the Vienna Convention do not cite any of these terms, as "trade terms are dynamic and susceptible to developments in commercial practice".[١١٧] The Convention is flexible and predictable for expanding international commerce as much as possible. Nevertheless, the concept of delivery under INCOTERMS, especially the most exercised ones i.e. CIF and Fob, should be elaborated. The reason of elaboration is that most of international contracts for the sale of goods incorporate INCOTERMS. In this case if the contract is governed by Vienna Convention, INCOTERMS will be the basis to determine the contractual matters such as "delivery and the passing of risk".[١١٨]

On the other hand, the necessity of unifying national laws to create a "harmonized law" system is achievable when the terms of trade usages and customs are addressed. These terms determine the methods of delivery and due to their effects on the concept of delivery, other legal grounds such as property and the contract enforcement will be also engaged.

Trade terms describe forms of transaction beyond the scope of domestic stipulations the most common of which are namely; FAS, FOB and CIF.[١١٩] This part concentrates upon the concept of delivery under CIF and FOB contracts and examines in great depth the characteristics of delivery peculiar to these two trade terms. Although CIF and FOB contracts share similarities, there are distinctions affected by the delivery point of goods. Under FOB ("Free On Board") contracts sellers are under obligation to deliver goods to the ship and to bear all expenses up to the time of boarding[١٢٠]. The classic definition is provided by Buckley LJ in Wimble Sons v Rosenburg & Sons[١٢١]: "An f.o.b.

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١١٦. Celil Durdag, Gul Esin Delipinar, Journal of Economics Library [٢٠٢٠] EL <http://kspjournals.org/index.php/JEL > Accessed ١٥ October ٢٠٢٣.

١١٧. Juana Coetzee, 'The interplay between Incoterms and the CISG, [٢٠١٣] ٣٢ LC https://jlc.law.pitt.edu/ojs/jlc/article/view/٣٩> Accessed ١٥ October ٢٠٢٣.

١١٨ *Ibid*.

١١٩. Clive M. Schmitthoff and others*, The law and practice of international trade* (١٢th edn, Sweet & Maxwell, London ٢٠١٢) ٧.

١٢٠. *Ibid*.١٧.

١٢١. [١٩١٣] ٣ KB ٧٤٣, ٧٥٢.

contract is one under which the seller is to put the goods on board at his own expense on account of the buyer".

The fact that delivery point is set in FOB contracts as to the ship is a fixed and unchangeable aspect of the contracts. The question may arise, what if the contract based on the parties' intention has added a delivery clause permitting later delivery? The question is put forward in *Frebold and Sturznickel (Trading as Panda OHG) v Circle Products Ltd*[١٢٢] where a delivery term included in the contract left the possibility of later delivery. The Court of Appeal refused to give effect to this term on the ground that once the provisions are indicative of FOB contracts and conclusion can be drawn that the parties' intention was to contract in FOB terms, the stipulation of a later delivery is ineffective. The fundamental question is to classify the contract and observe its nature once it is done all provisions peculiar to that contract have to be complied. In effect, in the normal course of events parties agreed on the port of shipment by making an FOB contract.

Under a CIF contract, delivery takes place when the goods reach the port of destination physically, this refers to physical delivery or when the Bill of Lading is transferred, and this is constructive delivery. Documents play a very important role in CIF contract, when the documents are tendered to the buyer, the constructive possession of the goods has been transferred to the buyer, so this also constructive delivery of goods.

Under a CIF contract the risk passes on shipment and property/title (ownership) is transferred at the time when the documents (bill of lading, insurance policy and commercial invoice) are tendered to the buyer and the price of the goods is paid.

The fact that freight and insurance are included in the CIF price[١٢٣] is de facto because in CIF contracts the port of destination is the delivery point. In fact, as stated in *Biddell Brothers v E. Clemens Horst Co,*[١٢٤] in its formulation, Hamilton J said that CIF sellers have several obligations to obtain a contract of carriage that the goods will be

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١٢٢. [١٩٧٠] ١ Lloyd's Rep ٤٩٩.

١٢٣. *Ireland v Livingston* (١٨٧٢) LR ٥ HL ٣٩٥.

١٢٤. [١٩١٢] AC ١٨. *The Biddell Bros definition is repeated in Manbre Saccharine v Corn Products* [١٩١٩] ١ KB ١٩٨, and further (similar) definitions can be found in Arnhold Karberg & Co v Blythe, Green, Jourdain & Co [١٩١٦] ١ KB ٤٩٥, and C. Groom Ltd v Barber [١٩١٥] ١ KB ٣١٦.

delivered to the destination specified in the contract and to provide shipping documents stating the amount of freight payable by the buyers. This passage approved by the Supreme Court proves that even though contractual goods are to be delivered to the contractual ship, there is a second phase of delivery at the point of destination. Equally, it can also be inferred from *Biddell Brothers v E. Clemens Horst Co* that physical delivery of goods is to the ship and the port of destination regardless of its statement in the contract is not where the goods are to be physically delivered[١٢٥]. On the other hand, tender of contractual documents is crucial under CIF contracts as in the absence of which delivery is incomplete. Therefore, it can be concluded that delivery in CIF contracts embraces two stages i.e. physical delivery to the ship followed by constructive delivery performed by tender of documents.

٤.٣ THE CONCEPT OF TAKING DELIVERY

Delivery and taking delivery are synonymous terms that represent different stages of a single process. To clarify, delivery refers to the act of transferring the goods to the buyer's control, while taking delivery signifies the goods being received in an acceptable condition. There is a distinction between "delivery" and "taking delivery," as they involve separate processes that can be initiated through a single action.

٤.٣.١ THE CONCEPT OF TAKING DELIVERY UNDER IRANIAN LAW

Article ٣٦٧ of the Iranian Civil Code defines taking delivery as follows: "*Taking delivery is effected when the buyer assumes control of the object of sale*", and Article ٣٦٨ adds that, *"even if the latter has not actually taken physical possession of it*".

Therefore, taking delivery can take place without the goods being under the physical possession of the buyer, i. e. when the buyer is able to receive the possession of the goods. In addition, 'delivery' and 'taking delivery' are the same subjects and are two stages of one reality. In other words, placing the goods under the buyer's control is delivery, and the goods being in such a condition is taking delivery.[١٢٦] For instance, when the goods sold have been placed at the agreed place to be collected by the buyer and the seller has informed the

[١٢٥]. Paul Todd, *Cases and materials on international trade law* (١st edn , Sweet & Maxwell, London,٢٠١٤) ٦١.
[١٢٦]. N Katouzian, *Ughud -e- Moayan* (Vth edn, Ganje danesh Tehran, ٢٠٠٠) ١٦٦.

buyer that the goods are ready for collection, the delivery, as well as taking delivery, has taken place. However, in view of the fact that delivery is both the duty and the work of the seller, and taking delivery is the duty and the act of the buyer it can be said that, "delivery" and "taking delivery" are two different matters which can take place by the exercise of a single action. As mentioned earlier, in some cases the awareness of the buyer is not necessary. Examples of this are the delivery of newspapers and the act of putting the goods at the disposal of the buyer is taking delivery because with this act the buyer is able to benefit from his goods. However, Iranian law did not discriminate between moveable goods and non-moveable goods. It is obvious that 'delivery' and 'taking delivery' depend on the type of goods. For example, the delivery of a bicycle differs from the 'delivery' of a house or an apartment. Consequently, as one eminent jurist has pointed out,[١٢٧] taking delivery is the "discharge" or the removal of power and the possession of the goods from the seller. It means that the mere removal from the seller's possession and control of the goods is taking delivery which sometimes occurs by delivery of the key of the house which has been sold and sometimes by an agreement to sell the fruits on the tree and also sometimes by taking the goods itself from the seller's warehouse or his factory or some other place.

٤.٣.٢ THE CONCEPT OF TAKING DELIVERY UNDER THE VIENNA CONVENTION

Article ٥٣ of the Vienna Convention creates the general obligation on the part of the buyer to take delivery.[١٢٨] Article ٦٠ tries to emphasize the positive aspects of this duty in a rather general manner as follows: "The buyer's obligation to take delivery consists of (a) in doing all the acts which could be reasonably expected of him in order to enable the seller to make delivery; and (b) in taking over the goods." The first part of this Article orders the buyer's preparation to put the seller in a position to make delivery, and the second part focuses on the actual act of the buyer taking possession. However, the buyer's obligation to take delivery corresponds to the seller's obligation to deliver as provided in Article ٣٠ of the Convention. Important aspects of the obligation to take delivery are determined by the

[١٢٧]. Mortaza Ansari, *Al-Makasib* (٢٠th edn, Al-Noman, Beirut, ٢٠٢١) ٣١٤.

[١٢٨]. Art ٥٣ provides: "The buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention".

obligation to deliver.[١٢٩] Thus, we say everything we said in the definition of delivery, which consists of the placement of the goods at the buyer's disposal or at the buyer's control. Thus, 'taking delivery' takes place when the seller delivers the goods, and hands over all the documents relating to the goods and transfers the property, and the buyer thus obtains the possession and the control of the goods. The situation is the same when a contract has been made on FOB or CIF terms. According to these terms, the seller has a duty to deliver the goods at the named port of shipment and the buyer must take delivery and accept them when the goods have been delivered to the port of shipment in FOB[١٣٠] and to the port of destination in accordance with CIF terms. [١٣١]

It seems that the essential element of an effective delivery, in Iranian Law and the Vienna Convention, is the placement of the goods and their possession under the buyer's control. The goods are delivered when the seller transfers control to the buyer, thus delivery and taking delivery take place at same time by one action.

٤.٤ THE CONCEPT OF GOODS

In the past, the term "goods" was solely associated with physical objects. Nevertheless, in contemporary times, the definition of goods has broadened to encompass a range of assets, such as land, movable property, and intellectual property. As a result, goods can now be classified into tangible and intangible, movable and immovable goods, without necessitating further explanation. Within the context of this discourse, the term "goods" specifically denotes tangible and movable items.

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[١٢٩]. Dietrich Maskow, in Bianca-Bonell, *Commentary on the International Sales Law* (Giuffrè: Milan, ١٩٨٧) ٤٣٥,٤٤١.

[١٣٠]. Incoterms ٢٠١٠: ICC Official Rules for the Interpretation of Trade Terms.
<http://www.searates.com/reference/incoterms/> Accessed ٦ June ٢٠١٣ – FOB Delivery, A٤; the seller must deliver the goods on the date or within the agreed period at the named port of shipment and in the manner customary at the port on board the vessel nominated by the buyer.

[١٣١]. Incoterms ٢٠١٠: ICC Official Rules for the Interpretation of Trade Terms.
http://www.searates.com/reference/incoterms/ accessed ٦ June ٢٠١٣ – FOB Taking delivery, B٤: the buyer must take delivery of the goods when they have been delivered in accordance with A٤ Incoterms ٢٠١٠: ICC Official Rules For The Interpretation of Trade Terms [٢٠١٠] <http://www.searates.com/reference/incoterms/> accessed ٦ September ٢٠١٤ CIF, Delivery, B٤: the buyer must accept delivery of the goods when they have been delivered in accordance with A٤ and received them from the carrier at the named port of destination.

٤.٤.١ THE CONCEPT OF GOODS UNDER IRANIAN LAW

The Iranian Civil Code has not defined the term "goods". Some scholars have defined "goods" as "A thing which has worth to bargain and pay money or property in exchange of it"[١٣٢] such as, an apartment, a car or jeweler. However, a consideration of articles ٨٧٢, ٩٤٦, ١٢١٤ and ١٢١٧ shows that the legal writers intended its wider meaning, which covers all things and rights, which have economic value. It is inferred from article ٣٤٨ of the Iranian Civil Code that four characteristics must be in the subject matter; a) its transaction has to be permitted by law, thus trust[١٣٣] cannot be placed as the subject matter of a contract, because articles ٢٣ to ٢٧ of the Iranian Civil Code state that the sale of such goods is not allowed. b) The subject matter has to be valuable to be able to have a price. The value of things may differ in different customs, yet generally, anything that can be possessed in exchange of paying price is valuable. The examples of items that are forbidden under Islamic jurisprudence are selling any drink that contains alcohol. In this case, whether the drink is delivered as per the contract or not is immaterial since the contact is void. c) it must be of rational benefit, i.e. the payment of money in exchange of that thing allowed by custom and usage such as narcotic drugs d) it must be capable of being delivered logically, i.e. the seller must be able to deliver the goods to the buyer without any obstacle.[١٣٤]For instance, the seller cannot sell the birds in the sky because he cannot take them for delivery to the buyer. In cases where one of the aforementioned conditions is absent the contract will be void.

The value of goods can be determined by Islamic teachings. Islamic scholars have clearly forbidden the trade of some items. The majority of Islamic clerics have banned the trade of dogs when they are to be used for entertainment. If the dog is intended to be used as a guardian or for hunting, the contract of sale would be legitimate under Islamic law and, therefore, lawful under Iran's Civil law.

The sale of other animals should also be examined case by case as Islamic jurisprudence protects the right of animals and provide making contracts that may endanger species. Here the significance of Islamic law and its superiority over other laws has affected the validity of the contract.

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[١٣٢]. N Katuziyan *Amval va Malekiyat* (Vth edn, Mizan, Tehran, ٢٠٢١) ١٠.

[١٣٣]. There is no exact equivalent term for trust in Iranian law. The term *Vaghf* is a religious term which shows that the properties or the land are the goods dedicated just for public usage.

[١٣٤]. The Iranian Civil Code Art ٣٤٨.

One of Iran's leading scholars[١٣٥] defined "goods" as follows: Goods must have at least two principal components. It must be: a) capable of being exchanged and b) capable of being allocated to a person, e.g. a bicycle, but the air and the sky are excluded from this definition. However, this definition is not comprehensive because some goods has not rational benefit but is capable of exchange like alcohol in accordance with *sharia* law.

It may be said that in Iranian Law "goods" can be divided into four categories; a) tangible goods, which are the subject of legal transactions such as, houses, cars, vessels and aircraft, b) Intangible or virtual goods, like software. c) Financial rights which allow people to take advantage of goods like stock of a company. d) Future goods, which normally will be prepared after the making of the contract of sale. For instance, the sale of future crops is valid as future goods.[١٣٦]

In other words, the definition of goods covers tangible goods, which are the subject of a bargain like a house, a car or a carpet, and virtual goods like software and e-books or all types of rights in property, which give permission to individuals to benefit from a right of passage.

٤.٤.٢ THE CONCEPT OF GOODS UNDER THE VIENNA CONVENTION

There is no explicit definition of 'goods' in the Vienna Convention despite it being the main subject of the Convention. If we examine the seller's obligations, the necessary elements for 'goods' will become clear.

According to article ٣٠ of the Vienna Convention, the seller must deliver the goods and hand over any documentation relating to them and transfer the property in the goods. Goods must be moveable to be the object of 'delivery'. Moreover, it must be possible to

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١٣٥. N Katouzian, *Amval va Malekiyat* (Vth edn, Mizan, Tehran, ٢٠٢١) ١٠.
١٣٦. *Ibid*.

transfer the property in the goods to the buyer. This does not necessarily mean that 'goods' as defined by the Convention can only be things, which are the seller's property.[١٣٧]

There is the question of whether the Convention covers 'virtual goods or not.' According to the opinions of most legal writers,[١٣٨] the sale of software may fall under the Convention's substantive sphere of application, although software is not a tangible good and as long as it is not custom-made or, even where it is standard software, as long as it is not extensively modified to fit the buyer's particular needs.

This view has been justified on the grounds that in this line of cases (not unlike in cases where books or disks are sold) the intellectual activity is incorporated in tangible goods. Ultimately, this view would, however, exclude the sale of software from the Convention's substantive sphere of application whenever it is not incorporated in a tangible good, as in those cases where the software is sent electronically.

It is apparent that a clarification of whether software should be considered as 'goods' in the sense of the CISG would be useful in order to ensure uniformity. If one were to extend the Convention's sphere of application to include software, one would have to consider the scope of such an extension. One would have to decide whether it would be appropriate to have the Convention cover the sale of software only where the software is incorporated in tangible goods or whether it would be better to have it governed regardless of the manner in which it is delivered.[١٣٩]

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[١٣٧]. C.M. Bianca-M.J. Bonell, *Commentary on the International Sales Law*, (Giuffrè: Milan ١٩٨٧) ٤٣٥-٤٤١.

[١٣٨]. Trevor Cox, Chaos versus uniformity: the divergent views of software in the International Community, Business Law International, and <http://www.cisg.law.pace.edu/cisg/biblio/cox.html> Accessed ٠٨ September ٢٠٢٣.

[١٣٩]. Franco Ferrari, 'Brief remarks on electronic contracting and the United Nations Convention on Contracts for for the International Sale of Goods' Journal of International Commercial Law & Arbitration [٢٠٠٢] ٦ (٢٨٩-٣٠٤) Audiovisual Library of International Law <http://legal.un.org/avl/ha/ccisg/ccisg.html> Accessed ١٤ August ٢٠١٤.

٤.٥ THE METHODS OF DELIVERY

Delivery has been defined as the transfer of control of the goods from the seller to the buyer as follows;

"Delivery consists in the object sold being placed at the disposal of the buyer so that he has absolute control of it and can benefit from it in any way he likes…". [١٤٠]

Accordingly, all methods, which transfer the control of the goods from the seller to the buyer, are accepted and recognized as effective delivery. The delivery of the goods to the buyer may be made by methods in which the parties are agreed. Some legal systems such as the common law system have indicated methods of delivery in detail and others like the Iranian legal system mentioned the issue in brief.

٤.٥.١ METHODS OF DELIVERY UNDER IRANIAN LAW

All delivery methods, as long as they are consistent with custom and usage, comply with Iranian law. The contracting parties have the right to choose the delivery method. Regardless of the agreed delivery method, the delivery takes place when the buyer has control of the contract goods.[١٤١] This control sometimes takes place by physical delivery and sometimes by symbolic delivery such as the delivery of documents of title. Article ٣٦٩ of the Civil Code explains this concept as follows:

"Delivery is operative in various ways according to the varying nature of the object sold. It must be done in a way that is accepted as valid according to common usage".

According to this article, delivery is operative in various ways because the objects of sale are different and in any case delivery is a common subject which does not have any strict legal rule. Thus the delivery of movable goods takes place with the transfer of goods

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١٤٠. The Iranian Civil Code Art ٣٦٧.

١٤١. N Katouzian, *Ughud -e- Moayan*,(Vth edn, Vol.١, Ganje danesh Tehran, ٢٠٢٠) ١٦٦.

from the seller to the buyer. Also delivery in immovable goods, such as an apartment, occurs with the handing over of its key to the buyer. Since the stipulation of a rule for delivery of each type of goods is difficult and sometimes seems to be impossible, the Iranian legislator has avoided stipulating the various methods for delivery of different goods and has allowed it to be specified by relevant trade custom and usage and circumstances. Therefore a decision as to whether a delivery has taken place or not has to be addressed by the relevant custom and usage.

In any case, the object of sale must be put at the disposal of the buyer so that he can benefit from the goods as and whenever he wishes. However, this varies with the different type of goods, circumstances and trade custom and usage. For example, the delivery of a newspaper takes place by putting it in the letterbox of the buyer's house but the delivery of a land occurs by handing over its relevant documents like its title deed. Therefore, the specification of whether delivery in diverse goods has taken place or not according to law is not only based on custom and any understanding but also it will also depend on the parties' agreement and in others, it will be decided by the circumstances.[١٤٢] When the goods are already in the buyer's possession the seller is not obliged to make a fresh delivery. Article ٣٧٣ of the Iranian Civil Code provides that:

> *"When the goods are already in the buyer's possession, a fresh delivery is not necessary; the same applies to the consideration of the sale".*

It can be said that Iranian law has accepted various methods of delivery, which are accepted by the agreement of the parties, the circumstances and in accord with the relevant trade's custom and usage. However, articles ٣٦٩ and ٣٧٣ of the Civil Code clearly mention three methods of delivery namely, physical or actual delivery, symbolic delivery and constructive delivery.

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١٤٢. Mohammad Ja'afari Langaroodi, *Daeratol ma'ref e hoquq Madani va Tejarat*, (١st edn, Vol ١, Tehran, ٢٠٠٨) ٨٢٠.

A. PHYSICAL DELIVERY OR ACTUAL DELIVERY

Physical delivery occurs when the seller hands over the goods to the buyer with all relevant documents so that he has the right to benefit from the goods at any time without hindrance and to keep, sell or benefit from them.[١٤٣] For example, in the case of the sale of a computer, the seller must hand over the computer itself to the buyer or in the case of the sale of animals, the seller must hand them over to the buyer. However, the question whether the concept of delivery includes the conformity of the goods with the contract or not, will be answered in Chapter Six.

B. SYMBOLIC DELIVERY

This method of delivery is affected when the seller transfers control of the goods and puts the goods under the possession of the buyer by delivering its documents or by the delivery of the keys of storage when the goods are stored. This process then allows him to use or sell the goods as he wishes.[١٤٤] However, nowadays this kind of delivery is normally applied to the transfer of ownership of immovable goods. For instance, the seller transfers the control of the property to the buyer by giving the keys of a property to the buyer.

C. LEGAL DELIVERY OR CONSTRUCTIVE DELIVERY

Here, the buyer already has control of the goods as the bailee of the seller and he becomes entitled to possession in his own right by making a contract for the purchase of the goods. Consequently, a fresh delivery is not necessary, because the goods were already in the buyer's possession, as the bailee of the seller. For example, when the seller sells a property to the buyer who was living at that property as a tenant so a fresh delivery is not necessary in this case. In this situation, the mere agreement of parties is sufficient for delivery and fresh delivery is not necessary, so the buyer continues his possession' as the owner after the conclusion of the contract of sale.[١٤٥] There is another example of legal

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[١٤٣]. Hasan Imami, *Huquq e Madani* (٣rd edn, Vol ١, Tehran, Islamiyeh, ٢٠٢٠) ٤٤٩.

[١٤٤]. Abdullah Kiyaie, *Obligations of the Seller and the Buyer before and after the Delivery of the Goods* (١st edn, Tehran, ١٩٩٨) ٦٧.

[١٤٥]. The Iranian Civil Code Art ٣٧٣.

delivery when the buyer, after the conclusion of the contract, leaves the goods at the disposal of the seller (i.e. assigns them to the seller) by making a contract to rent, or as a loan or to give the property over to the seller in the form of a trust.[١٤٦]

It is clear that the specification of these three methods does not mean that other methods could not be accepted by the Iranian Civil Code, because the substantiation of placing of delivery depends on the type of goods, the agreement of the parties and also the trade's custom and usage.

By analogy with Iran Civil Code, English law differentiates delivery of goods to two different steps. Iranian Civil Code highlights the steps taken in order to transfer possession from the seller to the buyer. Even though transfer of possession is not essentially amount to contractual delivery, the two concepts are intertwined under Iranian and Common Law.

According to the Sale of Goods Act ١٩٧٩, delivery is the voluntary transfer of the possession of goods from the seller to the buyer,[١٤٧] which is effected either by 'actual delivery' or by 'constructive delivery'. The term 'actual delivery' refers to the transfer of the physical possession to the buyer or his agent. This method is the most common method of delivery in domestic business. 'Constructive delivery' denotes the transfer of ownership of the goods to the buyer without physical possession, which is widely used in international transactions. In other words, English law states that the seller has to deliver the goods as one of his main duties, but the seller's duty is not always to dispatch the goods to the buyer. The parties usually determine in their agreement whether it is the duty of the seller to dispatch the goods to the buyer or whether the buyer has the duty to take the goods from the seller's place of business. In the absence of such an agreement, the place of delivery is the seller's place of business if he has one, otherwise, his residence will be the place of delivery.

The methods of constructive delivery in English law have been classified according to five types[١٤٨] as follows:

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[١٤٦]. Hasan Imami, *Huquq e Madani* (٣rd edn: Vol ١, Tehran, Islamiyeh, ٢٠٢٠) ٤٥٠.

[١٤٧]. UK. Sale of Goods Act ١٩٧٩ S ٦١.

[١٤٨]. Michael Bridge, *Benjamin's Sale of Goods* (١١th edn, London, Sweet & Maxwell, ٢٠٢٠) ٤١٢.

A. THE TRANSFER OF TITLE

The parties should specify all the documentation needed for the transfer of title. Therefore, the seller should transfer the title, because by transferring the title to the buyer and with the intention of delivering possession of the goods to him, legal ownership of the goods will be delivered to the buyer. In another words, the transfer of possession and the control over goods does not amount to the transfer of title/ownership of the goods if the buyer has not paid the price of the goods. Under English law, there are two essential requirements for transfer of property:

١.Goods must be ascertained or specific: Unless the goods are ascertained, they cannot pass from the seller to the buyer. Thus, where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained.[١٤٩]

٢.Intention to pass property in goods must be there: In a sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be, regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.[١٥٠] Therefore if the parties reach agreement in the contract on the transfer of the property in goods, the parties' intention will prevail.

Under Iranian Civil Code[١٥١], "A sale consists of the giving possession of specified goods in return for known consideration." It means that under Iranian law the essence for a sale contract is that the buyer possesses the goods sold.

[١٤٩]. U.K. Sale of Goods Act ١٩٧٩ S ١٦.
[١٥٠]. U.K. Sale of Goods Act١٩٧٩ S ١٧.
[١٥١]. The Iranian Civil Code Art ٣٣٨.

B. THE DELIVERY OF SUBJECT MATTER OF SALE GIVING PHYSICAL CONTROL

This kind of delivery is normally applied to the transfer of ownership of immovable goods. For instance, the seller transfers the control of the property to the buyer by giving the keys of the property to the buyer. This method also applies where there is a delivery of the keys to the buyer where the goods are stored.

C. ATTORNMENT

"In this method the seller either transfers the goods to the buyer by means of legal acknowledgment that the goods which he has held for himself or another are now kept as the buyer's bailee or where the goods are held by a third party. For example, if a warehouseman keeps the goods on behalf of the seller, he is undertaking to keep the goods. The third party who is undertaking to hold the goods for the buyer is an attornment and gives constructive delivery to the buyer by permission of the seller. This kind of delivery will be affected when the attornment is related to identify goods".[١٥٢]

D. BUYER'S CONTINUANCE OF POSSESSION IN HIS OWN RIGHT

This kind of delivery has effect when the buyer has control of the goods as the bailee of the seller, then when he makes the contract and buys the goods he becomes entitled to possession in his own right. Thus, fresh delivery is not necessary, because the goods were already in the buyer's possession, as the bailee of the seller.[١٥٣] This kind of delivery is known as legal delivery, because the main purpose of delivery is the transfer of the possession and the control of the goods from the seller to the buyer.

[١٥٢] Michael Bridge, *Benjamin's Sale of Goods* (١١th edn, London, Sweet & Maxwell, ٢٠٢٠) ٤١٢.
[١٥٣]. *Ibid.*

٤.٦ DELIVERY OF PART IN THE NAME OF THE WHOLE

The nature of goods that sellers should deliver to buyers may be unascertained affecting the legality, time and method of delivery. The characteristics of the contract of sale of unascertained goods have been dealt in Section ١٨ named as "rules for ascertaining intention". Unascertained goods' parameters are distinctive in various aspects; there are specific rules that have regularized passing of property and risk which, in turn, are closely depended on the method of delivery.

The third Rule under Section ١٨ "Rules for ascertaining intention", reads that: "Where there is a contract for the sale of specific goods in a deliverable state but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until the act or thing is done and the buyer has notice that it has been done"

This Rule asserts that if the goods are in circumstances ready for delivery, however the ascertainment needs an action the contractual goods cannot be delivered unless the action needed has been performed properly and its notice is received by the buyers.

If the contractual goods are partly unavailable, it may be questioned what would be its effect on ascertainment and delivery?

> *"Where the contract is formed for the sale of wholly unascertained goods and the seller is unable to tender delivery because the stock from which he intended to meet the order is destroyed or his expected source of supply is destroyed. Then, as the subject matter of the contract is unascertained goods, the seller must supply them from other sources. In cases where the available amount of all of the other sources constitutes only a part of the goods, then this part must be delivered in the name of the whole of the contracted amount".*[١٥٤]

[١٥٤]. *Ibid.*

٤.٦.١ DELIVERY OF PART IN THE NAME OF THE WHOLE UNDER THE VIENNA CONVENTION

As mentioned, the Convention does not present a specific definition of delivery, but delivery is discussed in some of its provisions. Delivery is sometimes given effect by the mere putting of the goods in the possession of the buyer and sometimes by the transmission or hand over of the goods themselves from the seller to the buyer.[١٥٥] The method of delivery in the Convention depends on the nature and quality of the 'sold' goods. Therefore, the method of delivery under the Convention may be categorized according to three methods: physical or practical delivery, symbolic delivery and legal delivery. When the goods are put at the disposal of the buyer in a way in which he will be able to benefit from them and have control of the goods, this is termed physical delivery. According to the Convention in some cases delivery occurs with symbolic delivery. For instance, when the goods are in storage, delivery is affected by the handing over of the key for the storage or by the delivery of a document of title. In this type of delivery, the control of the goods transfers to the buyer by the handing over of 'the key' or by the transmission of document of title.[١٥٦] Constructive or legal delivery takes place when the buyer already has control of the goods as the bailee of the seller and he becomes entitled to possession in his own right by making the contract for buying the goods. In these circumstances fresh delivery is not required.[١٥٧]

However, according to the Convention sometimes delivery occurs indirectly[١٥٨] that is to say, when the contract of sale, involves the carriage of goods, the seller is bound to hand over them to the first carrier for transmission to the buyer. In some cases, where the contract is related to the specific goods, the seller must hand over the goods at a particular place and place the goods at the disposal of the carrier as the agent of the buyer.[١٥٩]

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[١٥٥]. The Vienna Convention Act ١٩٨٠ Art ٣١(a).
[١٥٦]. Heshmatollah Samavati, *Huquqe Moamelat e Bainolmelali* (٢nd edn, Tehran, Qoqnoos publications ٢٠٢٠) ٥٩.
[١٥٧]. *Ibid.*
[١٥٨]. The Vienna Convention Act ١٩٨٠ Arts ٦٧, ٦٨.
[١٥٩]. *Ibid.*

٤.٧ DELIVERY TO THE CARRIER

٤.٧.١ DELIVERY TO THE CARRIER UNDER IRANIAN LAW

Article ٣٧٨ of the Iranian Civil Code provides that the seller has a duty to dispatch the goods to the buyer only when the parties have been agreed by an implied or explicit term in the contract. Thus, a contract of sale involves the carriage of goods only when the seller is obliged to dispatch the goods to the buyer. The question is whether the delivery of the goods to a carrier for the purpose of transmission to the buyer is delivery of the goods to the buyer and he discharges the seller from his duty or not.

According to article ٣٧٨ of the Iranian Civil Code a contract of sale is in reality a contract of agency and the carrier is the agent of the party who enters into the contract of carriage so he must follow the dispatcher's instructions. Therefore, the dispatcher can ask the carrier to return the goods to him as long as the goods are in the possession of the carrier.[١٦٠] This article allows for an expansion of the rights of the dispatcher. Under this article the dispatcher on some occasions cannot ask the carrier to return the goods to him. In these cases, the carrier must follow the instructions of the receiver:

a. when the dispatcher has been supplied with a bill of lading and the bill of lading has been transferred to the dispatcher by the carrier;
b. if the carrier has handed over a delivery receipt to the dispatcher he/she cannot return it to the carrier.
c. when the carrier has informed the seller or the dispatcher that the goods have arrived at the destination and asked the receiver to take possession of them; and
d. When the goods have been delivered to the destination and the dispatcher has requested the carrier to return the goods.

Delivery to the carrier or the consignee instead of the buyer shall be legally justified. In fact, in principle, the contracted goods should be delivered to the buyer as the person that has purchased the goods and is entitled to collect them. The four situations of Article ٣٧٨ of the Iranian Civil Code describe the possibility to deliver goods to someone other than the buyer i.e. the carrier or the consignee. In this case, the contract of sale encounters an additional

[١٦٠]. The Iranian Civil Code Art ٣٨٢.

contract i.e. the contract of carriage of goods. The contract of carriage is consisted of different parties and can impact the legal relation established between sellers and buyers.

Numerous elements are involved in determining the legal consequences of delivery, for instance, the instruction of the shipper or dispatcher in respect of delivery may enable the carrier to collect goods. Civil law in Iran as it mostly relies on codified articles more than case law the four primary circumstances affecting delivery to a contractual party other than the buyer are presented.

In contrast, legal regimes in which case law plays an active role such as English law a variety of probable situations are not addressed. English law briefly deals with this presumption in delivery and leaves further consideration to disputes arising out of the contract of sale.

By section ٣٢(١) of the Sale of Goods Act ١٩٧٩;

> *"Where, in subsequent of a contract of sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier (whether named by the buyer or not) for the purpose of transmission to the buyer is prima facie deemed to be a delivery of the goods to the buyer."*
>
> This article clearly specified that delivery of goods under English Law through carrier is considered as delivery of goods to the buyer.

٤.٧.٢ DELIVERY TO THE CARRIER UNDER THE VIENNA CONVENTION

Article ٣١ (a) of the Convention states: 'If the seller is not bound to deliver the goods at any other particular place, his obligation to deliver consists: (a) if the contract of sale involves carriage of the goods—in handing the goods over to the first carrier for transmission to the buyer.

Consideration in sale contracts payment of price against delivery of goods may be limited to transactions and commerce within national law. International trade consists of other elements and accordingly other legal rights and obligations are involved as a result. Payment within international trade law is not as simple as domestic transactions in that, as the Vienna Convention makes clear under its first article, the places of business differ. The international character of the sale contract necessitates the involvement of two or more banks. The simplest form is that one of each party nominates a bank and payment is made by these two nominated banks. In addition to the involvement of banks, another material

point is that payment will not be made unless documents are tendered by the sellers. Therefore, a further obligation that sellers have to bear is tendering contractual documents.

٤.٨ DELIVERY OF DOCUMENTS

The transfer of documents associated with the goods is a vital component of the sales process. The seller is obligated to deliver and transfer all pertinent documents of the goods to the buyer.

٤.٨.١ DELIVERY OF DOCUMENTS UNDER IRANIAN LAW

The seller in an international sale contract is obliged to hand over all relevant documents relating to the goods sold to the buyer. There is no clear obligation in Iranian law which binds the seller to deliver the documents relating to the goods. Therefore, on an initial view it seems that Iranian law does not oblige the seller to hand over the relevant documents of the 'sold' goods. However, it may be inferred from the Iranian Civil Code that, the seller is bound to hand over the relevant documents of the goods as a condition of the contract.

In paragraph ٣ of Article ٢٣٤ of the Iranian Civil Code,[١٦١] it is stated that if no such obligation is stipulated in the contract, it may be inferred from Article ٢٢٠ of the Civil Code that the seller is bound to deliver the documents relating to the goods to the buyer.
Article ٢٢٠ of the Civil Code provides that:

> *"A contract not only binds the parties to execute what it explicitly mentions, but both parties are also bound by all the consequences which follow from the contract in accordance with customary law and practice, or by virtue of a law".*

[١٦١]. Art ٢٣٤ of the Iranian Civil Code states that; Conditions are of three different kinds: I - Conditions of description. ٢ - Conditions of collateral events ٣ - Conditions about the performance of a contract. Of these the first category refers to the quantity or quantity of the object. The second provides for the fulfilment or the happening of some extraneous event; and the third arises when a condition is made as to the performance or non-performance by one of the two parties or by a third party.

Also article ٣٥٦ of the Civil Code, relying on a position of common usage in trade law, provides that:

"Anything which according to common usage and practice should form part of the object sold or is considered as an attachment to it or which is indicated to be a part of this object forms part of the sale and belongs to the purchaser, even if this has not been clearly stated in the contract of sale and even if the two parties of the contract were not aware of the common usage".

Also article ٢٢٥ of the Civil Code provides that;

" If certain points that are customarily understood in a contract by customary law or practice are not specified therein they are nevertheless to be considered as mentioned in the contract".

Also article ٣٨٣ of the Civil Code states that; "The delivery should also contain all the elements which are the parts and appurtenances of the object of sale".

In other words, delivery includes all the appurtenances which are needed for the use and operation of the goods. For instance, when a car is sold the jack, the spare wheel and its documents should be delivered to the buyer. Therefore, it may be said that the obligation of the seller to deliver documentation in conformity with customary law and practice is seen as the seller's obligation.

Generally, in English law it is inferred from the concept of the obligations of the seller and other related obligations concerning the delivery of goods that, the seller must perform any action which is needed to empower the buyer to have control and use of the goods. For example, when the seller is bound to dispatch the goods to the buyer he has to

make a contract with a carrier[١٦٢] also he must pay for all the expenses of shipment to put the goods in a deliverable state.[١٦٣] These are additional obligations of the seller which are necessary for the completion of the delivery of goods to the buyer[١٦٤] Consequently under English Law the seller has to hand over all the documents relating to the goods which are needed by the buyer to have full control of the goods and be able to take advantage of them.

It must be said that sometimes delivery of goods which is performed by delivery of documents, consider as the actual delivery of goods in international transactions, but the English law has failed to set up rules whereby the seller must hand over the goods' documents. It was expected that English law would clearly establish the rules relating to the delivery of documents in detail and avoid leaving this aspect to be decided by trade usage. This is as same as Iranian law; Equally, it is expected from Iranian law to set up clear rule regarding delivery of document. Because delivery of goods without its document regarded as defective delivery and the buyer can do nothing without documents of goods so the fact that the control of goods still in the hand of the seller.

٤.٨.٢ UNDER THE VIENNA CONVENTION

The obligation of the seller to hand over the goods and its documentation is dealt with in articles ٣٠ and ٣٤ of the Vienna Convention. According to article ٣٠ of the Convention, "The seller must deliver the goods, [and] hand over any documents relating to them".[١٦٥] But, "The Vienna Convention does not list the kind of documents which the seller is required to hand over to the buyer"[١٦٦] and has left it to be decided by the contractual parties or relevant custom and usage. Nevertheless, it is usual in international sales for the seller to require "certificates of origin, quality, transport documents, and other documents required for customs clearance"[١٦٧] also may require other documents such as warehouse

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١٦٢. U.K. Sale of Goods Act ١٩٧٩ S ٣٢(١).
١٦٣. U.K. Sale of Goods Act ١٩٧٩ S ٢٩(٦).
١٦٤. Safai, S. H., *The Law of International Sale of Goods A Comparative Study* (٢nd edn, Tehran, University of Tehran Press, ٢٠١٣) ١٤٢.
١٦٥. The Vienna Convention Act ١٩٨٠ Art.٣٠.
١٦٦. I. Carr, and Stone, P., *International trade law* (٦th edn, published, Routledge, ٢٠١٨) ٧٦.
١٦٧. *Ibid.*

receipts, certificates of examination and insurance policies, negotiable Instruments and Documents of Evidence or Receipt and Bill of Lading.[١٦٨] When incoterms such as CIF are used in sale the contract will clarify what types of documents are to be handed over to the buyer. For instance, if a contract has been concluded under CIF terms the following documents are needed: Bill of Lading, On Board Bill of Lading, an Insurance Policy and the Certificate of Origin. Documents of goods must be handed over to the buyer at the place and time of delivery of goods and in the form required by the contract.[١٦٩] Under this principle, the seller must hand over the related documentation which will allow the buyer to clear the goods through customs once the goods have arrived.

However, it seems that there is some inconsistencies between article ٣٤ and article ٣٠ of the Vienna Convention. According to article ٣٠, handing over the documents from the seller to the buyer is necessary and is regarded as one of the obligations of the seller, but it is inferred from article ٣٤ that the seller is obliged to hand over the related documents only when the parties have required this and have so stipulated in the contract. It is clear that the contractual requirements[١٧٠] of the contract and the contractual requirements which the parties are bound to carry out without stipulation in the contract, are different.

Some commentators believe that currently, delivery in international trade, does not follow the form required for delivery and taking delivery and has been replaced by the delivery of documents instead of the physical delivery of goods.[١٧١] Therefore the seller is bound to hand over all of the related documents concerning the goods which enable the buyer to control and benefit from the goods, so the delivery of documents has significant importance in like manner to the delivery of the goods.

It could be concluded that, these types of obligations provided in the Convention are based on trade usage. Consequently, it is acceptable in Iranian law as well. In other words it could be said that such obligations, like the delivery of documents, are

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[١٦٨]. Safai, S. H., *The Law of International Sale of Goods A Comparative Study* (٢nd edn, Tehran, University of Tehran Press, ٢٠١٣) ١٤٣.
[١٦٩]. The Vienna Convention Act ١٩٨٠ Art.٣٤.
[١٧٠]. Contractual commitment.
[١٧١]. M Nasiri, *Hoquq e Chand Melliyati*, (١st edn, Tehran, Amir Kabir, ٢٠١٩) ١٦٦.

accessory obligations of the seller for the delivery of goods without documentation is useless.[١٧٢] As mentioned in this chapter, delivery is the transfer of control of goods from the seller to the buyer. Without its documents the buyer would not be able to exercise control over them. Also, the "transfer of that document to the buyer gives legal control, and thus constructive delivery, of the goods themselves if so intended by the transferor. For the transfer to be effective, the buyer must be given possession of the documents, which must in addition indicate that the buyer's possession of it is authorized".[١٧٣]

٤.٩ THE EXPENSES OF DELIVERY

The seller is obligated to bear the costs associated with delivering the goods. We will examine the regulations regarding delivery expenses in different scenarios and legal frameworks.

٤.٩.١ THE EXPENSES OF DELIVERY UNDER IRANIAN LAW

According to Iranian, law "in committing to do something one must fulfill its conditions".[١٧٤] By virtue of this rule, everyone who commits to perform an agreed task should take all necessary steps needed for its performance.[١٧٥] According to Iranian Law,[١٧٦] the expenses of the goods such as the expenses of the delivery of goods to a delivery point, the cost of (counting) numbering, the weighing, the packaging etc. should be borne by the seller unless otherwise agreed or the custom and usage provides otherwise. However, the expenses of taking delivery must be paid by the customer. In addition, article ٣٨١ provides that; "the expenses of the transfer is duty of the seller, unless the contrary is provided".[١٧٧] The Civil law distinguishes between the costs incurred for taking delivery and Parties are able to agree and stipulate in the contract to pay all the costs of delivery or of some of them by the buyer, so he must pay for them in accordance with the necessity of performance of the contract.[١٧٨] The obligation may differ if so provided by relevant custom and practice.

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١٧٢. Alireza Nazim, '*Obligation of parties in The Vienna Sale Convention & Iranian Law*', [٢٠١١] Kanoon e Sardaftaran <http://www.notary.ir/content-news-letter/٢٩١> Accessed ٠٨ June ٢٠١٤

١٧٣. *Ibid.*

١٧٤. This rule is taken from principles of Islamic law and their use in Iranian law.

١٧٥. Abduallah Kiyaie, *Obligations of the Seller and the Buyer before and after the Delivery of the Goods* (٢ed edn, Tehran, ٢٠١٧) ٢٠٤.

١٧٦. The Iranian Civil Code Art ٣٨٢.

١٧٧. The Iranian Civil Code Art ٣٨٢.

١٧٨. The Iranian Civil Code Art ٣٧٣.

Article ۳۸۲ of the Iranian Civil Code provides that; “When there is not any such agreement, it is necessary for the parties to refer to the custom and usage”.

This Article refers to article ۲۲۵ of the Civil Code which states that: *“where custom and usage is commonly applied then custom and usage will be treated as equal to its stipulation in the contract”.*

Some scholars believe that, the costs incurred for delivering goods are borne by buyers. The reason of this argument is that buyers should place goods in a place that they intent to be. Since the choice of that place is conferred to the buyers, they should also bear the relevant costs. It is different with the delivery of the goods and it is beyond the seller’s obligation.[۱۷۹] It seems that, the expenses of delivery to the delivery point and the preparation of the goods to allow delivery to take place is the seller’s obligation. However, the payment of expenses for delivery to anywhere which the buyer wishes is not the seller’s duty. As was mentioned before, delivery is putting the goods at the disposal of the buyer, so that the expenses of delivery means the expenses which are necessary for placing the goods into the deliverable state in order to allow delivery to take place. It does not indicate that there is an obligation to pay all of the costs of the transportation of goods to the buyer.

According to English law, the responsibility of each party relating to the expenses of delivery will be fixed by a stipulation in an agreement. In cases where such a stipulation is absent or where there is a contrary agreement the expenses relating to the handing over of the goods at the agreed place to the buyer or to the carrier, should be paid by the seller.[۱۸۰] Also, the expenses of preparing the goods for delivery fall on the buyer unless the parties have agreed otherwise.[۱۸۱]

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[۱۷۹]. The Iranian Civil Code Art ۷۰۷.

[۱۸۰]. Michael Bridge, *Benjamin’s Sale of Goods* (۱۱th edn, Sweet & Maxwell, London, ۲۰۲۰) ٤۱٥.

[۱۸۱]. Re *Shell Transport and Trading Co and Consolidated Petroleum Company* (۱۹۰٤) ۲۰ TLR ٥۱۷.

٤.٩.٢ THE EXPENSES OF DELIVERY UNDER THE VIENNA CONVENTION

There is no single article in the Vienna Convention relating to the expenses of delivery. However, it should be noted that article ٣٢ of the Convention states that:

"(١) If the seller, in accordance with the contract or this Convention, hands the goods over to a carrier and if the goods are not clearly identified to the contract by markings on the goods, by shipping documents or otherwise, the seller must give the buyer notice of the consignment specifying the goods.

(٢) If the seller is bound to arrange for carriage of the goods, he must make such contracts as are necessary for carriage to the place fixed by means of transportation appropriate in the circumstances and according to the usual terms for such transportation.

(٣) If the seller is not bound to effect insurance in respect of the carriage of the goods, he must, at the buyer's request, provide him with all the available information necessary to enable him to effect such insurance".

In this article, the obligations of the seller regarding the transfer of goods are mentioned. It is also provided in the incoterms' provisions. In fact, the contents of this article are used as an alternative to incoterms. In paragraph ١ of the article ٣٢ it is stated that the seller is obliged to give the goods in accord with for contract, when delivering them to a carrier. This identification is normally fulfilled by markings on the goods or by the shipping documents; otherwise, the seller must give the buyer notice of the consignment specifying the goods.[١٨٢]

If the seller is bound to arrange for the transfer of the goods, paragraph ٢ of this article obliges the seller to make a contract for the necessary carriage. In this case, the seller must choose the transportation method which is usually used for the transportation of such goods. CIF & C&F terms, specify the obligations of the seller in such circumstances,

[١٨٢]. Schlechtriem & Schwenzer, *Commentary on the UN Convention on the International Sale of Goods* (CISG) (٣rd edn, Edited by Ingeborg Schwenzer OUP ٢٠١٠) ٢٧٥.

therefore, in cases where these terms are used, paragraph ٣ of article ٣٢ is not executable.[١٨٣]

The absentia of the Vienna Convention of providing which party shall pay the expenses regarding delivery of goods is undoubtedly one of the most important deficiencies of the Convention. . The question of how delivery fees will be paid or how much should be paid and to which point of delivery should be paid by each party has not been given the answer by the Convention.

In summary, since there is no single article in the Vienna Convention relating to the expenses of delivery, the parties in international trade should expressly or impliedly indicate it in their contract to avoid any dispute in future.

It seems that there is no difference between the Iranian law and the Vienna Convention in this matter. As mentioned earlier, under Iranian law, the expenses of delivery are borne by the seller but the parties are able to agree differently and so stipulate in the contract or refer to custom and usage.[١٨٤] Both Iranian law and the Vienna Convention also, the UK Sale of Goods Act ١٩٧٩ leaves the question of the expenses of delivery to be decided by the parties in the contract. Therefore the expenses of delivery depend on the type of goods and the parties' agreement but also on custom and usage. But it is clear that the seller cannot to be expected to pay the expenses of delivery to any location of the buyer's choosing, nevertheless he should bear the expenses of preparing the goods until they are in a deliverable state. Ambiguity of the Convention in this important subject which is source of some dispute and leaving it to be decided by the parties or custom and usage is not expected and is not acceptable to such international convention.

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١٨٣. *Ibid.*
١٨٤. *Ibid.*

٤.١٠ SUMMARY

It seems that there are differences in the matter of “delivery” between Iranian law and the Vienna Convention. As indicated earlier delivery in legal terms is defined as the putting the object of sale in the possession of the buyer in order that he may take full advantage of the goods in accordance with the characteristics of the contract. ‘Delivery’ is divided into two types: physical and legal. Physical delivery is defined in the article ٣٦٧ of the Iranian Civil Code.[١٨٥] Legal delivery takes place either once the contracting parties reach an agreement or before the conclusion of the contract where a situation has taken place by which the object of sale is put in the possession of the buyer; in this case the obligation of the seller as to the delivery of goods is regarded as fulfilled. Thus, the key point in the definition of delivery in Iranian law is “control”. In English law “possession” is the key point in the delivery of the goods i.e. delivery takes place when the possession of the goods transferred from the seller to the buyer. The Vienna Convention defines delivery as “any kind of action which allows the buyer to bring the goods under his control and his possession”. Butif one takes a closer look at the definition of delivery in these systems it can be seen that there are no actual differences between these systems, because the essential element of an effective delivery in Iranian Law, English Law and the Vienna Convention, is the placing of the goods and their possessions under the buyer’s control. The goods are delivered when the seller transfers his control to the buyer. The control over these goods may sometimes be seen by the handing over of the goods and sometimes by the transfer of the documents of title or by granting access to their place of storage. Thus, delivery is one concept but one which finds its expression in different forms. Furthermore, ‘delivery’ and ‘taking delivery’ in most cases take place at same time by a single action.

There are also disparities and differences in the methods of delivery. The substantial difference in this case is that both Iranian and English law create general criterion for constructive delivery, but the Vienna Convention has not done this. The Vienna Convention provides for various methods of delivery i.e. ways in which the seller becomes discharged from his duty. In other words, in accordance with Iranian law the method for the delivery of goods is one accepted by custom and usage or by the agreement of parties whilst according

[١٨٥]. “Delivery consists of the object sold being placed at the disposal of the buyer so that he has absolute control of it and can benefit from it in any way he wishes. Taking delivery is brought into effect when the buyer assumes control of the object of sale”.

to English law delivery is the voluntary transfer of the possession of goods from the seller to the buyer, which is effected either by 'actual delivery' or by 'constructive delivery. Some commentators[١٨٦] on the UK Sale of Goods Act ١٩٧٩ have developed the concept and the meaning of "possession" to cover customary methods of delivery and to escape from the deficiency in that Act relating to the definition of delivery, including physical possession, as well as constructive and symbolic possession. According to these systems the main point in effective delivery is that all the methods are acceptable when the control of the goods is transferred from the seller to the buyer. Therefore the delivery of the means of control, such as the delivery of the keys to a warehouse[١٨٧] or of some other place where the goods are stored[١٨٨] or when the seller gives a license to the buyer to remove the goods,[١٨٩] are considered to be constructive delivery. Similarly, the tender of documents of title is considered as an effective method of delivery. Moreover, delivery can also be affected when there is no change in the possession of the goods, but when the character of the possession is changed. Whether the goods are in the seller's possession, or in the possession of a third party, there is an effective delivery. When a third party holds the goods as the buyer's agent or as his bailee according to section ٢٩(٤) of the Sale of Goods Act ١٩٧٩, a bailee or other third person who is in possession of the goods must attorn to the buyer that thereafter he takes possession of the goods on his behalf and not as the seller's bailee.

There are many gaps and unaddressed issues, which could be solved by an accurate interpretation of the codes. In other words, the absence of clear law discourages merchants from accepting Iranian law as the governing law for their contracts, for instance, the regulations of the Iranian Civil Code concerning sale were not drafted to deal with international sales, so this may be the source of some differences with contracts negotiated

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١٨٦. John Atiyah N. Adams, Hector Macqueen, *Atiyah's Sale of Goods* (١٣ edn, Pearson Education Limited, ٢٠١٦) ١٢٤.

١٨٧. *Dublin City Distillery v Doherty* [١٩١٤] AC ٨٢٣; *Chaplin v Rogers* (١٨٠٠) ١٠٢ ER ٧٥.

١٨٨. *Gough v Everard* (١٨٦٣) ١٥٩ ER ١; Wrightson v. McArthur and Hutchinsons (١٩١٩) Ltd. [١٩٢١] ٢ K.B. ٨٠٧; Milgate v Kebble (١٨٤١) ١٣٣ ER ١٠٧٣; Ancona v Rogers (١٨٧٦) ١ Ex D ٢٨٥.

١٨٩. *Congreve v Evetts* - (١٨٥٤) ١٥٦ ER ٤٥٧; Nicholls v White (١٩١٠) ١٠٣ LT ٨٠٠.

according to other legal systems and with new areas of regulation such as the Vienna Convention. Also Iranian law has paid attention solely to the primary form of transfer of control i.e. the transfer of control from the seller to the buyer. For instance, the seller's duty when the contract of sale involves carriage of goods has not been regulated by Iranian law. However, delivery to the carrier, in which, the delivery of the control of the goods does not directly transfer to the buyer has been addressed by this approach. The reference to some methods of delivery, such as the delivery to the carrier and the tender of documents in the Iranian Civil Code is necessary. The clear suggestion which should be made is that the Iranian Civil Code should urgently address the issues of ‘delivery to the carrier’ and the ‘tender of documentation’ and establish a new code concerning international sale or alternatively ratify an international sale convention such as the Vienna Convention of Sale of Goods Act١٩٨٠.

CHAPTER FIVE

۵ THE CONCEPT OF PLACE OF DELIVERY

۵.۱ INTRODUCTION

The concept of delivery involves two significant aspects i.e. time and place of delivery. Both are subject to the agreement of the parties, yet the contract may leave the relevant terms imprecise. Under Iranian Civil Law, in the absence of any provision the time and place of delivery should be determined either by the relevant custom and usage or by the implied terms of the contract.[۱۹۰] In spite of the fact that delivery at a wrong place or a wrong time does not discharge the seller from his duty, its legal effects ought to be rethought. This chapter focuses on the terms of the contract of sale corresponding to time and place of delivery on the basis of Vienna Convention and the Iranian Civil Code. It aims to determine whether there are any lacunas in this respect and consider any solutions in an effort to ameliorate Iranian Civil Law. This section analyzes whether there is any contradiction or inconsistency between Iranian Civil Law and Vienna Convention and also the question of whether the former requires ratifications in respect of potential lacuna(s).

۵.۲ THE PLACE OF DELIVERY

۵.۲.۱ THE PLACE OF DELIVERY UNDER THE VIENNA CONVENTION

The place of delivery deals with the way in which a seller carries out the "performance of obligation." Under the provisions of the Vienna Convention a seller is bound to deliver goods at the place which has been nominated in the contract. It may be argued that the main contract made and concluded between the contractual parties determines the place of delivery i.e. the place that is agreed as the actual place where the goods should be delivered in order to consider a contract performed. Therefore, the main

[۱۹۰]. The Iranian Civil Code Art ۲۸۰ & ۳۷۵.

provisos of a contract in the majority of cases clearly state the place of delivery and failing to meet this contractual obligation will leave the contract unperformed. Vienna Convention obligates parties entering into contract to name a place of delivery yet does not provide any restriction as to the place. Article ٣١ of the Vienna Convention sets forth the obligations of the seller with regard to the delivery of goods stating that the place and time of delivery should be stipulated in the contract. However, Article ٣٣ (a) declares that the parties are free to agree on the place and the time for the delivery of goods. The question arises in case the place of delivery is not stipulated in the contract and the parties have left one of the most crucial parts of its performance unstated. By examining various cases in international trade, it can be observed that this has been a controversial matter that directly depends upon the jurisdiction and domestic law determining the place of delivery in the absence of any provision. In *Car Trim GmbH v KeySafety Systems Srl*[١٩١] the European Court of Justice was of the view that the place of physical transfer of the goods to the buyer is to be regarded as the place of delivery in case it cannot be determined on the basis of the contract's terms and conditions. Alternatively, the place where the goods were delivered to the first carrier for further transmission to the buyer would be the place of delivery. "It was a matter for the referring court to determine firstly whether the place of delivery was apparent from the provisions of the contract. If it was able to do so, then that was the place where the goods were delivered or should have been delivered for the purposes of the first indent of art.٥ (١) (b). Where the contract did not indicate the parties' intentions concerning the place of delivery, it was necessary to determine that place in accordance with another criterion which was consistent with the origins, objectives and scheme of the Regulation. The place where the goods were or should have been physically transferred to the purchaser was most consistent with those requirements, given that it was highly predictable and met the objective of proximity in so far as it ensured the existence of a close link between the contract and the court called upon to determine the case".[١٩٢] In considering the place of delivery and so far as it is determinable, the terms of the contract relevant to the delivery of contractual goods should be considered entirely on the basis of the customs established in international trade. Supporting this argument, the Danish Court in *Masai Clothing Co APS v Targa di Badash Tzuri Sciaddai*[١٩٣] states that ", independently of the

[١٩١]. GmbH v Key Safety C-٣٨١/٠٨. EU: ٢٠١٠

[١٩٢]. *Ibid* paras ٥٤-٥٧, ٦٠-٦١.

[١٩٣]. This case deserves to be added as CISG governs the contract of sale and the question of how the delivery term will be interpreted and applied by a domestic court is one of the central issues of the case.

substantive law applicable to the agreement between the parties, including the CISG, the place of delivery should be the place where the buyer in fact obtained possession of the goods at the final destination of the transaction". [١٩٤] On the other hand, once the referring court concludes that CISG does govern the contract in question, the subjective intend of parties when forming the contract would be the deciding ground. The intention of the parties can be extracted on the basis of Article ٨(٣):

"In determining the intent of a party or the understanding [that] a reasonable person would have had, due consideration is to be given to all [the] relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties".

On the other hand, Article ٩(١) emphasizes the role of practice or customs as a means of assessing the intention of contractual parties:

"The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves".

A conclusion may be drawn that the parties should refer the determination of the place and time delivery to custom and usage in issue on condition that the contract is silent.

Before addressing the Articles of CISG indicating the place of delivery and its impact upon contractual relations, it should be noted that the place of delivery is not necessarily limited to the place of destination where the goods are to be transported to. The place of delivery essentially implies broader and more conspicuous concepts such as risk and property. To illustrate, if the place of delivery is determined, its implication would affect the determination of risk and property. In other words, if the parties directly or by means of a domestic court could determine a particular place as the place of delivery, that would benefit one of the contractual parties in dealing with the question of where and when the property is plausibly transferred from seller to the buyer and on which party does fall the risk of such passing.

[١٩٤]. Ronald A Brand, 'When substantive Law rules affect jurisdictional result' Journal of L.C[٢٠١٥] ٨٠-٨٢< https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/brand.pdf> Accessed ١٥ December ٢٠٢٣

On the contrary, the place of destination is material in examining the description, quality and quantity of goods. In fact, the place of destination which is not necessarily the place of delivery will not clarify the time and place of passing of property nor passing of risk. Yet, quite the opposite, the place of destination may contribute to the determination of elements that are important in the calculation of damages from the difference of the quantity and quality of the amount of goods that is actually delivered to what should have been delivered contractually.

Articles ٣٠ to ٤٤ of CISG cope with three primary aspects of international sales i.e. delivery of goods, transfer of documents and passing of property. However, the two obligations of the seller delivering of goods and transferring documents are narrowly addressed in Articles ٣٠ to ٣٤.

Article ٣٠ includes two obligations of the seller; delivering contracting goods and tendering corresponding documents respectively. The most disputing aspect of this particular article would be the passing of property from the seller to the buyer which may vary in accordance to the domestic law to which the interpretation is referred. The transfer of property may be tied to delivery on the basis of some jurisdiction. Accordingly, determining the place of delivery may have double importance since it not only proves that the subject matter of the contract is contractually handed over to the buyer, but also may be the basis for passing of property. It is acknowledged that CISG, in and of itself, would not be a ground for judging whether property is plausibly passed to the buyer or not yet it will be argued that the obligation to pass property is borne by the seller. The latter will be demonstrated in detail in its specific Chapter “The effects of delivery”.[١٩٥]

Article ٣١ denotes the place of delivery. The place of delivery matters in order to assess whether the seller has fulfilled his/her contractual obligation. More importantly, the place where the goods are delivered affects the time and location of risk transference. In fact, the

[١٩٥]. Chapter ٨ the effects of delivery.

risk is passed to the buyer once they are delivered. Therefore, prior to that point, no risk is borne by the buyer. Also, Article ٣١ provides supplementary rules for cases where the parties have not determined the place of delivery in their contract. These rules vary depending on whether the contract involves the carriage of goods.[١٩٦] In this case, passing of risk occurs when the goods are delivered to the first carrier for transmission. If the contract is silent as to the place of delivery, in the normal course of events, it is customary that both parties determine it as per the Incoterms governing the carriage of goods otherwise the place of delivery to the first carrier would be the place where the goods are actually delivered. In another word, if the contract, regardless of the reason, does not mention the place of delivery in international transactions the existing custom is that both contractual parties invoke to Incoterms. In fact, Incoterms will be referred to for determining the place of delivery in accordance of the carriage of goods arrangements. In case, Incoterms fail to determine the place of delivery, delivery to the first carrier would be accounted as the place of actual delivery. In terms of goods having peculiarities or not being identified, the place of delivery would be determined thanks to the related customs placing the goods at the buyer's disposal. Hence, as soon as the goods have been placed at the disposal of the buyer, the seller is discharged from his/her contractual liabilities and the obligations are deemed fulfilled regardless of any probable defection in their quantity or quality. In this case, the goods are perfectly contractually delivered as a result of which passing of risk and property may be determined. However, the very fact that the goods placed at the buyer's disposal do not comply with the terms and conditions of the contract of sale will not affect the legality and lawfulness of the delivery. To illustrate, even though under Article ٣٥ par (١), the seller is liable to deliver goods that conform both in respect of quantity and quality to the corresponding terms of the contract the non-conformity of goods is unrelated to the determination of whether the delivery of goods is effective or ineffective despite the fact that its non-conformity may create the right to take subsequent legal action.[١٩٧]

[١٩٦]. I. Carr and, P. Stone *International trade law* (٦th edn, published, Routledge, Oxon, ٢٠١٨) ٤٧.

[١٩٧]. In case the seller fails to meet the conformity requirement, and as a result, the goods do not comply with the description, the conformity of goods can be assessed by the purpose understood by the seller impliedly or expressly. In this case, there should be grounds proving that the seller has delivered goods according to his understanding. There should be evidence for instance correspondence(s) proving that the buyer impliedly or expressly has declared the description of goods.

In case the delivered goods differ from those contracted the conformity of goods may be confirmed if their description is in inconformity with the purpose understood by the seller impliedly or expressly. The latter may be given effect where there are grounds for believing that the buyer described the description of goods that are expected to be received to the seller regardless of its manner i.e. explicitly expressed in the contract or understood impliedly at the time of the conclusion of the contract. [۱۹۸] Principally, the buyer should have relied upon the description being understood on behalf of the seller unless reasonable grounds suggest the reverse. The above-mentioned ineffectiveness is extendable to passing of risk and property. Whether delivery is performed in accordance with the contract is unrelated to the effects of delivery such as risk and/or property.[۱۹۹] In other words, risk or property may be transferred regardless of the fact that the delivery of goods is performed as per the contract descriptions.

۵.۲.۲ THE PLACE OF DELIVERY UNDER IRANIAN LAW

Referring back to Iranian law,[۲۰۰] delivery is effective merely when the object of sale is placed at the disposal of the buyer at an agreed place at the time of the conclusion of the contract. Iranian law states that the parties are free to determine any place for the delivery of the goods, but if they do not determine a place of delivery in the contract, the place of delivery will be determined by customary law. Under articles ۲۸۰[۲۰۱] and ۳۷۵[۲۰۲], in principle, unless otherwise agreed, the place where the contract is made would be the place of delivery. Additionally, in case the subject matter of sale is subject to a particular custom in

[۱۹۸] In case the seller fails to meet the conformity requirement, and as a result, the goods do not comply with the description, the conformity of goods can be assessed by the purpose understood by the seller impliedly or expressly. In this case, there should be grounds proving that the seller has delivered goods according to his understanding. There should be evidence for instance correspondence(s) proving that the buyer impliedly or expressly has declared the description of goods.

[۱۹۹]. The same applies to passing of risk and property. The fact the goods do not conform to the descriptions stipulated by the contract is irrelevant to passing of risk and property. Risk and property passes according to the terms of the contract even if the goods fail to conform to their descriptions.

[۲۰۰]. See Chapter ٦.

[۲۰۱]. The Iranian Civil Code, Art ۲۸۰: The performance of the obligation in a contract must be completed at the place where the contract is concluded, unless the parties have made a special arrangement or unless usage or custom demands another procedure.

[۲۰۲]. The Iranian Civil Code, Art ۳۷۵ states that: Delivery should be made where the contract is concluded unless another place is required by common usage or unless a place for delivery has been identified in the contract of sale.

terms of delivery, it is binding on both parties and the delivery must be conducted accordingly.

It can thus be inferred from the wording of these two provisions that the parties are free to supplement or modify their agreement to determine a specific location as the place of delivery. If the contract does not contain any terms regarding the place of delivery and if there is not any common usage in this regard, the place of delivery is the place at which the contract is concluded.[٢٠٣] However, this rule is applicable solely to moveable goods. The delivery of immovable goods, such as real property, takes place at the location of the property which has been sold.[٢٠٤]In accordance with Iranian Civil Law, the place of delivery is not a condition of the contract rendering the contract null and void[٢٠٥], hence, the parties can leave it to be determined by trade custom and usage.

In international sales the issue of delivery is considerably more complicated in that contracts are often not made at the parties' home locations and the delivery of goods must take place where it is both reasonable and practicable to store the goods.

٥.٢.٣ DELIVERY AT A FIXED PLACE

Contracting parties may determine a specific place for the delivery of goods and can stipulate the trade terms that they will use to arrange the delivery. Depending on the trade term selected, the obligation of delivering goods may vary. For instance, if the contract is made under FOB, the seller must deliver the goods on board the vessel, and when the contract is made under CIF the place of delivery is the destination port. Muslim scholars have accepted the autonomy of the contracting parties and their ability to regulate the contract and to attach conditions to it.[٢٠٦] In other words, according to Islamic Law, which is the principle premise of Iranian Law, contracting parties may select the place of delivery for their goods. On the other hand, they may also conclude their contract by stipulating a special trade term such as FOB or CIF. Accordingly, stipulations relating to any condition may

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[٢٠٣].The Iranian Civil Code Art ٢٨٠.

[٢٠٤]. N Katouzian, *Ughud -e- Moayan* (Vth edn, V. ١, Ganje danesh Tehran, ٢٠١٣) ١٥٦.

[٢٠٥]. The Iranian Civil Code Art ١٩٠.

[٢٠٦]. David Pearl, '*Commercial Law in the Gulf States: The Islamic Legal Tradition'* [١٩٨٥] CLJ, P.٥٠٣, ٥٠٤.

be added inasmuch as they do not contradict with the main terms of the contract.[٢٠٧] Moreover, the contractual parties principally ought to have known the description subject matter of the contract[٢٠٨] if the place of delivery has not been mentioned in the contract but the contracting parties have agreed that the buyer can request delivery in a specific place, and then the seller must deliver the goods at the place specified by the buyer.[٢٠٩]

٥.٣ DELIVERY AT THE PLACE REQUIRED BY CUSTOM AND USAGE

Islamic law recognizes custom and usage as one of the most important sources of law. Accordingly, at the individual level, custom and usage is defined as a set of unwritten rules that emerges from people's behavior and may engender legal consequences.[٢١٠] Equally, in its broader sense it is defined as actions and methods that are developed within a society without being inferred from a legislative authority while being commonly accepted as binding rules.[٢١١]

In the light of the role of custom and trade usage plays within Islamic framework, the Iranian Civil Code stipulates that the obligations and liabilities of the contract of sale would go beyond of those expressed in the contract. The parties entering into a contract of sale are bound by both the obligations set in the contract as well as the existing trade customs regarding the subject matter of sale.

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٢٠٧. The Iranian Civil Code Art ٢٣٣.

٢٠٨. The Iranian Civil Code Art ٢٣٢ & ٢٣٣ Arts ٢٣٢ and ٢٣٣.

٢٠٩. Mahdi Shahidi, *Consequences of Contracts and Obligations* (٣rd edn, Majd Publications, Tehran ٢٠٠٧) ٢٥.

٢١٠. N Katouzian, *Hoquqe Madani: Amwal wa Malekiat*, (٧th edn: ٢٠٠٢, Tehran Dadgostar, ٢٠١٣) ٢٣, ٢٤.

٢١١. Zahra Ahmadi, Common Law (٢٠١٣) <http://marketingarticles.ir/ArtBank/orf dar hoghogh.pdf> Accessed ١٧ June ٢٠١٤.

Article ٢٢٠ of the Iranian Civil Code reads:

"Contracts not only oblige the parties to perform whatever is stipulated in the agreement, but also they are bound to perform certain acts that are understood from the contract by custom and usage, even though they are not specifically mentioned in the contract".[٢١٢]

٥.٤ DELIVERY AT THE PLACE WHERE THE CONTRACT WAS CONCLUDED

In the cases where the parties have not fixed a place of delivery, and where there is no relevant custom concerning the place of delivery, the goods should be delivered to the place where the contract was concluded. Arguably, in the absence of any provisions the parties reverts to the foregoing principle i.e. the place of conclusion. Article ٣٧٥ of the Iranian Civil Code states that:

"The objects of sale (goods) should be delivered to the place where the contract was concluded unless custom and usage specifies another place or the place of delivery has been determined by the parties to the contract".[٢١٣]

The place where the contract is concluded generally depends on the time at which the contract is concluded. However, fixing the place which contract has been concluded may be undeterminable and complex in some cases.

٥.٥ WHEN THE CONTRACT IS CONCLUDED

Similar to general contract law governing the sale contract under the Iranian Civil Code[٢١٤] a contract of sale is formed by an offer and acceptance. The same criterion applies to the time and the place of delivery. Accordingly, the time and place of delivery is

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[٢١٢]. The Iranian Civil Code Art, ٢٢٠.

[٢١٣]. The Iranian Civil Code Art, ٣٧٥.

[٢١٤]. The Iranian Civil Code Art ٣٣٩.

determined by the time and place where the offer has been accepted. If the contract was made in the presence of both parties, the place where the parties met for the purpose of making the contract would be the place where the contract was concluded. Thus, in these cases, the Iranian Civil Law has no difficulty determining the time and place of the conclusion of the contract. When the contract is concluded by telephone, the time and place is when the offer is accepted by telephone. However, if the contract is made by written communication, such as by letter or telex,[٢١٥] there are four theories[٢١٦] concerning the time of the conclusion of the contract.

١. Firstly, the contract is concluded when the offeree declares his intention to accept the offer, even though the offerer has not been informed.[٢١٧]

٢. Secondly, the theory of dispatch. The contract is concluded when the offeree sends his acceptance to the offerer. This means that once the acceptance letter has been delivered to the post office it cannot be withdrawn and the contract is deemed concluded. The postal acceptance rule came from the case Adams v *Lindsell*.[٢١٨]

٣. Thirdly, the theory of reception. According to this theory, the contract is made when the offeror receives the letter of acceptance but it is not necessary for offeror to be aware of its content. Consequently, the contract is concluded at the place where the acceptance letter is received.

٤. Fourthly, the theory of information. According to this theory, the contract is concluded when the offeror becomes aware of the acceptance of the offer by the offeree.

It is arguable that amongst the four theories, the theory of dispatch coincides with the Iranian Civil Code. Article ١٩١ states:

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[٢١٥]. Other written communications such as by email and by social media is outside the ambit of this thesis.

[٢١٦]. M Jafari Langarudi, Huquq-i Ta'ahhudat, *The Law of Obligations* (٢nd edn, Vol. ١, Tehran University Press, ٢٠٠٣) ١٥٥, ١٦٢.

[٢١٧]. Case C-B.N.S. ٨٦٩; *Felthouse v. Bindley* [١٨٦٢] EWHC CP J٣٥.

[٢١٨]. Case EWHC KB J٥٩, *Adams v. Lindsell* [١٨١٨]١ B. & Ald. ٦٨١.

"A contract only becomes complete with the real intention of the contractor, and this real intention must be accompanied by some factor which proves that there was such an intention".[٢١٩]

Thus, a mere declaration, without any proof to demonstrate the intention of the offeree regarding his acceptance, will not be legally effective. At this point, the acceptance is still revocable. In fact, the acceptance is perfectly effective where it cannot be withdrawn. It may be concluded from this Article, as well as from other provisions of the Iranian Civil Code, that the confirmation of acceptance by the offerer is unnecessary and futile in respect of contract formation. Nevertheless, the time and the place where the contract was concluded can be altered with the mutual consent of the parties. For example, the parties can agree that the contract will be concluded when the acceptance is received by the offerer.[٢٢٠]

٥.٦ DELIVERY TO THE SELLER'S PLACE OF BUSINESS

In pursuit of previous elaborations on the matter of delivery, when the place of delivery has not been determined by the contracting parties, the place of delivery will be determined by relevant custom and usage. Where there is no background of custom and usage the seller's duty is to dispatch the goods and put them at the disposal of the buyer in his (the seller's) business place or at the place where the goods are located, as appropriate.[٢٢١] In other words, if it is inferred from the circumstances that the parties have not intended to deliver the goods at the place where the contract was concluded, the goods should be delivered to the seller's place of business, or to the place where the goods are stored. In accordance with the principle of clearance,[٢٢٢] the seller does not have the duty to carry the goods to another place. The principle of clearance would ease the question of where goods are to be placed since the seller is accordingly discharged from any obligation unless otherwise

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[٢١٩]. The Iranian Civil Code Art ١٩١.

[٢٢٠]. N Katouzian, *Hoquqe Madani: Amwal wa Malekiat* (٧th edn, Tehran, Dadgostar, ٢٠٠٢) ٢٣, ٢٤.

[٢٢١]. *Ibid.*

[٢٢٢]. The presumption of clearance is a principle of Islamic law and applies when the existence of an obligation is doubtful. According to this presumption: "everyone is free of any obligation, unless the obligation is proved".

proved. Under the principle of clearance, the burden of proving whether the seller bears any duty as to the delivery of goods to a particular place falls on the buyer.

۵.۷ DELIVERY TO THE WRONG PLACE

According to Articles ۳٦۷, ۳٦۹ and ۳۷۵ of the Iranian Civil Code the delivery to the wrong place does not discharge the seller from his duty. Such a delivery means that the goods are not put at the disposal of the buyer and the buyer is, as a result, not able to take control of the goods. Given that the main purpose of delivery is to transfer the control of goods to the buyer failing to satisfy this requirement would render the seller liable. Delivery to the wrong place would deprive the buyer of taking control of goods. In case of wrong delivery, the obligation to deliver goods contractually shall be fulfilled. Therefore, delivery at a wrong place would not refrain the seller from delivering goods. However, in this case redelivery of goods to the intended place of delivery remains a contractual obligation and failing to redeliver goods may entitle the prejudiced party to repudiate from the contract and claim damages.

۵.۸ AN ANALYSIS OF THE PLACE OF DELIVERY

The place of delivery is one of the most disputing elements of the contract of sales in its broad sense. However, it becomes more material where the contract of sale involves an international character and falls within the ambit of international convention peculiar to international sales such as Vienna Convention. In such cases, the interpretation of the place of delivery will be borne by the court where the dispute will be brought.

Scrutinizing Iranian law and CISG both give priority to the terms and condition of the contract as the manifestation of parties' intention. As a result of this privilege the parties' intention would prevail over any reference to CISG or any interpretation deriving from the Iranian law. Therefore, in case of non-compliance and inconsistency, the contract will override the law and CISG. A prevalence which is absolute by reason of the fundamental

principles of contract law. In respect of CISG, whether delivery is precisely mentioned in the contract and is unambiguously chosen within the contract of sale or it is indicated through Incoterms or is left unmentioned affect the extent to which the seller is obligated to fulfill his/her obligation. For instance, Article ٣١ does not apply if both parties opted a specific place as the place of delivery or if the delivery requirement of the chosen Incoterm will dictate how delivery is to be carried out. Nonetheless, by analogy, in the event that the contract of sale is governed by Iranian Civil Law other elements emerge in determining the place of delivery and in consideration of seller' s obligation to deliver contractual goods. These elements are not essentially identical to the ones stipulated by Iranian Civil Law as the latter accentuates the place of business, the place of where the contract is legally concluded and, finally, the custom and usage. Although, there may be some convergence in judging the place of delivery in case any difference arises, the international character of contract detaches it from any particular jurisdiction and therefore is not bound by any domestic law. By way of example with respect to conclusion of the contract delivery at the place where the contract is concluded appears to be an impracticable rule. The Iranian Civil Code does not stipulate when and where a contract is concluded. Since the place of the performance of the contract is an important and practical issue, it should not be dependent on the place where the contract was concluded. This whole area is complex and theoretical and is unequivocal in determining the applicable law for a given contract. In international sales, it is difficult to determine when and where a contract has been concluded. Moreover, the rules of law in some areas, such as in the law of contract, are considered as implied terms of the contract. In fact, the law tends to fill in the gaps when the parties fail to decide upon an issue. The place of delivery is one of these subjects. In furtherance of determining the intention of the parties, the common practice of merchants would be contributive and in some cases even conclusive. Moreover, in international sales transportation is costly. That being so, whenever the place of delivery does not form part of the contract, and the contract does not contain any terms concerning the carriage of goods, it would be fair not to impose the incurrence of such costs on the seller.

When a contract is for the sale of specific goods, or the goods form part of a specified whole, and the buyer is aware of the goods location, then the goods should be kept at or delivered to that place. When the contract is for the sale of unascertained goods or the

place of the ascertained goods is unknown to the buyer, then delivery should be made at the place where the seller usually hands over the goods to his customers.[٢٢٣] A further example is the determination of the place of delivery through the place of business, on some occasions the seller's place of business may not be the place of delivery. For instance, when the seller's place of business is a city center office it may be impractical to deliver ١٠,٠٠٠ tons of steel to that location. Furthermore, trade usage will guide us as to the correct location in such a case. However, the seller should not be required to deliver goods to any place, other than that where he normally carries on his business, unless it has been otherwise agreed. The law should therefore reflect either the intent of the parties or common usage. The place of delivery should be the place which the parties would have chosen, had they considered the matter. In consequence, it is clear that drafting contracts under Incoterms is the best and easiest way for merchants in international trade, because Incoterms provides specific and simple rules in several types of contracts in order to overcome any difficulties that may arise between merchants.[٢٢٤]

٥.٩ CONCLUSION

Finally, the Vienna Convention provides an optional rule to determine the place of delivery of the goods by providing the place of business of the seller in cases other than those mentioned above.[٢٢٥]

According to Iranian civil Code, delivery must take place at the place where the contract is concluded, unless general usage requires another place or a special place of delivery is provided by a clause in the sale contract..[٢٢٦]

In current commercial arrangements the contract is often concluded at the place of business of the buyer. In cases where the place for the delivery of the goods has not been fixed in the contract, the goods must be delivered to the place where the contract was

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[٢٢٣]. Safai, S. H., *The Law of International Sale of Goods A Comparative Study* (٢nd edn, Tehran University of Tehran Press, ٢٠١٣) ١٣٣.

[٢٢٤]. Incoterms are international model law; they do not have binding effect until and unless the contractual parties incorporate them into their contract expressly or impliedly.

[٢٢٥].The Vienna Convention Act ١٩٨٠ Art ٣١.

[٢٢٦]. The Iranian Civil Code Art ٣٧٥.

concluded. This will probably be the place of business of the seller.[۲۲۷] This demonstrates (the place of business of the seller) that in the majority of cases, in practice, there is no serious contradiction between the Iranian Civil Code and the Vienna Convention. Thus, it may be inferred that practically, on the face of it, there is at least no draconian controversy between these two regimes in the context of place of delivery.

[۲۲۷]. But "In cases where the place for the delivery of the goods has not been fixed in the contract" the place where the contract was concluded (usually the buyer's place of business) would apply.

CHAPTER SIX

٦ TIME & EXPENSES OF DELIVERY

٦.١ INTRODUCTION

This chapter expounds upon the time and expenses of delivery of the goods under the Vienna Convention, and The Civil Code of the Islamic Republic of Iran. Article ٣٣ of the Vienna Convention indicates:

"The seller must deliver the goods: (a) If a date is fixed by or determinable from the contract, on that date; (b) If a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the buyer is to choose a date; or (c) in any other case, within a reasonable time after the conclusion of the contract".

Article ٣٣ of the Vienna Convention introduces some terms for the variations in the time of delivery, including a mainly "fixed" time set in the contract of sale or a "reasonable time after the conclusion of the contract". It is important to note that the buyer's duty to buy and receive the goods is independent of the seller's obligations regarding the time of delivery. In particular, sometimes delivery to the carrier is regarded as constructive delivery and discharges the seller from his duty, even if the goods have not yet arrived at the time of arrival.[٢٢٨]

All legal systems approve of the principle of party autonomy, including paragraph (a) of Article ٣٣ of the Vienna Convention and Article ٤٤٤of the Iranian Civil Code. Under the Vienna Convention, the time of delivery is recognized as the time fixed by the parties or

[٢٢٨]. Safai, S. H., The Law of International Sale of Goods A Comparative Study (٢nd edn, Tehran, University of Tehran Press, ٢٠١٣) ١٣٠.

determinable from the contract indicating the Convention's insistence on the party autonomy principle.

According to the Iranian Civil Code[٢٢٩] parties are free to make contracts, and fix the time and place of delivery. Article ٤٤٤ of the Iranian Civil Code states that parties should refer to the contract to fix the time of delivery and that if there is no agreement concerning the time of delivery, they should refer to the relevant custom, if possible. Article ٢٢٥ of the Iranian Civil Code states; "If certain points that are customarily understood in a contract by customary law or practice are not specified therein they are nevertheless to be considered as mentioned in the contract".

Therefore, there is no conflict between The Civil Code of Iran and the Vienna Convention in terms of the principle of party autonomy application. The default of any expression in the contract of sale necessitates understanding the time in accordance with evidence beyond the terms of the contract. To put it differently, the phrasing of Article ٣٣ of the Vienna Convention allows for an implied understanding of the time of delivery as "determinable from the contract".

The wording of Article ٣٣ of the Vienna Convention indicates that in case the parties, regardless of the reason, fail to determine a "fix" time for the delivery of goods, this time is "determinable" from the contract. The possibility to determine the time of delivery from the contract stresses that the Vienna Convention emphasizes party autonomy.

In addition, paragraph (b) of Article ٣٣ points out "the period of time" in which the goods can be delivered. Arguably, in this case, the sellers do not opt to deliver at any time within the fixed period. When goods are delivered within that period, the buyers cannot reject them because of not delivered at the designated time. In addition, the buyer must be made

[٢٢٩]. The Iranian Civil Code Art, ٤٤٤.

aware of a particular time of delivery within that period. In this case, the buyer could reject the goods merely if he/she had given notice as to the time of delivery.

The buyers should set a specific time of delivery and they should send a notice about it to the seller. If both conditions (i.e. setting a particular time of delivery and the notice obligation) are met and the buyers have not received the goods at the designated time, they have the right to reject goods.

When the two parties to the Vienna Convention cannot agree on the time of delivery, the goods must be delivered in a reasonable time. The reasonable time is evaluated based on the circumstances surrounding the dispute. The conditions surrounding the dispute include the previous negotiations between parties, common practices in identical situations, and what is considered "equitable".[٢٣٠] The reasonable time should be determined through an objective and unbiased approach toward both parties. If there are reasonable grounds suggesting the awareness of time or notice of time supporting the interest of one party against the other, then it is clear that the process involves conflicts of interest. The most significant point raised by paragraph (٣) of Article ٣٣ is about the time of conclusion of the contract. The reasonable time of delivery commences right after the conclusion of the contract.[٢٣١] Whether the contract is actually concluded or not is a question to be decided by the referring court.

[٢٣٠]. Ingeborg Schwenzer, Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (٥th edn, Oxford Legal Research Library ٢٠٢٣) ٥٧٦

[٢٣١]. *Ibid*, ٥٧٦

٦.٢ IMMEDIATE DELIVERY

٦.٢.١ UNDER IRANIAN LAW

The Iranian Civil Code does not point out immediate delivery but makes references to it in Articles ٣٤١, ٣٤٤, and ٣٧٠. According to Articles ٣٤١, ٣٤٤, and ٣٧٠, when the time of delivery is not fixed by the parties of the contract, immediate delivery is set in motion. For instance, Article ٣٧٠ of the Iranian Civil Code states:

"If parties of a contract fix a time for delivery the ability of the seller to deliver the object need not exist till this object has to be delivered. The ability to deliver need not exist at the time of concluding the contract".

Article ٣٧٠ indicates that if there is no agreement regarding the time of delivery, then immediate delivery is set in motion. Moreover, immediate performance is a legal presumption that applies to all obligations (i.e. if delayed performance is intended, then it must be expressed vividly by both parties). The suggestion above may be inferred from Islamic law based on which Iranian law. The performance of contract and fulfillment of contractual obligations is stressed in the Holy Qur'an.[٢٣٢] Many *Shiah* scholars believe that this code of conduct should be followed. Article ٣٤٤ of the Iranian Civil Code states:

"If in the terms of a sale contract, not conditions are laid down or no time limit has been fixed for delivery of its object or for payment of the price, the bargain is considered definite and the price should be paid at once, unless in accordance with established rules and local usage or commercial rules and practice certain conditions or time limit exist for commercial transactions even though they have not been stipulated in the contract of sale".

According to Article ٣٤٤, the goods need not be delivered immediately. Especially, if a large quantity of goods is to be delivered, the immediate delivery of goods is impractical.

[٢٣٢]. The Holly Quran, Chapter ٥, Verse ١.

Furthermore, the goods may not be at the place of delivery as stipulated in the contract, may need to be prepared for shipping, or might not have been manufactured yet. Nonetheless, according to customary law,[٢٣٣] the goods must be delivered within a reasonable time after the conclusion of the contract.

On the other hand, the Vienna Convention defines "immediate" delivery in different terms. Conditions used for delivery, including "as soon as possible", "immediately" and "immediately" are omitted from Article ٣٣ (a). If the time has not yet been set and needs to be set, then the correct delivery time cannot be set. The delivery time can therefore only be determined if the parties intend to deliver at an imprecise time. Article ٣٣ does not apply to an "immediate" delivery because it is not a "fixed delivery" or a supply made " reasonably after the conclusion of the contract".[٢٣٤]

It can be suggested that it is not necessary to deliver the goods immediately, but they should be delivered within a reasonable time. Therefore, in a contract of sale, when the time of delivery is fixed, the goods must be delivered at the fixed time. When no time of delivery has been agreed, or a period of time in which the delivery must be made has not been fixed, the customary law provides, as it usually does, an answer as to the time of delivery; the seller should deliver the goods at the time so provided.

In case of ambiguity due to a lack of statement in the contract of sale, it is argued that, the seller has the right to deliver goods at the time he/she opts as a reasonable time. This right stems from Article ٧(٢) providing a solution for "questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles".[٢٣٥]

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٢٣٣. A traditional common rule or practice that has become an intrinsic part of the accepted and expected conduct in a community, profession, or trade is treated as a legal requirement.

٢٣٤. *Ibid*. ١٢٥

٢٣٥ Ingeborg Schwenzer, *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods* (٥th edn, Oxford Legal Research Library ٢٠٢٣) ٥٧٦.

Since the terms of the contract have been agreed by the parties it seems that the criterion for the right to reject depends on the intentions of the parties which are illustrated by the terms of the contract. It does not depend on the economic advantages or disadvantages arising from the breach of the fixed time or the failure to deliver within a reasonable time. It seems that in fact the time of delivery should be fixed by the circumstances and the environment of the type of transaction; that is to say the time of delivery is something that depends on the type of goods and for this reason a reasonable time for delivery depends on the type of goods being delivered. For example, the time of delivery for ١٠٠٠ tons rice is different from the time of delivery for ١٠ aircraft because usually an aircraft manufacturer would start the construction process after the conclusion of the contract while the '١٠٠٠ tons of rice' will be usually ready in the seller's warehouse. Arguably, The Vienna Convention differentiates delivery of goods as per their nature. The reasonable time for the sale of goods that a third party undertakes to manufacture or produce would include the "average" time needful for the process of production and manufacturing of the subject matter desired products. In contrast, if goods are already in stock, the time of delivery will be considerably shorter.[٢٣٦]

٦.٣ STIPULATION OF TIME OF DELIVERY

The time of delivery is dependent upon the circumstances of the performance of the seller and delivery obligations. Article ٣١ of the Vienna Convention indicates that the seller's performance regarding the obligations concerning the time and place of delivery is primarily determined by the contract. Moreover, Article ٣١ details offsetting of the place of delivery of goods and paragraph (a) of Article ٣٣ expounds on the time of delivery and emphasizes the principle of autonomy of the parties. According to paragraph (٣) of Article ٨ of the Vienna Convention, the time and place of delivery can be specifically fixed by the parties or can be inferred from particular circumstances.

[٢٣٦]. *Ibid*, ٥٧٦.

Therefore, the parties have the authority to alter the primary trade regulations, which have been legally put in place by all countries. They can also change the fixed time of delivery fixed by the parties, or they can extend it. Much effort and precision should be employed to extend the time of delivery. As mentioned above, the conditions of a contract should be specified. When a condition creates a lack of understanding between the two parties, it is regarded as an unknown condition.[٢٣٧] Under Iranian law, Article ٢٣٣ of The Civil Code of Iran indicates that the contract is nullified if it contains "conditions which are unknown and of which lack of knowledge entails ignorance of the consideration". According to this provision, the ambiguity in the terms of the time of delivery, if it negatively impacts the consideration and the contract is nullified. In this context, the ambiguity of a term or condition warrants a lack of knowledge. The consideration shall be known by both contracting parties upon entering the contract and with regards to contract conclusion and performance.

This leads to the question of whether the parties can include an arbitration clause to determine the undecided terms of the contract, including the time of delivery, instead of deciding a fixed time of delivery. First, it is important to note that an arbitration clause includes two types of terms and clauses which are listed in the following:

(a) The terms and clauses which refer to, or have an effect on, the value of the subject of the contract, or have an effect on the consideration; and

(b) The terms and clauses which have no effect on the real value of the subject and consideration of the contract.

The first category of terms refers to the value of the subject matter of the contract, such as the price and the time of delivery. These terms cannot be left unspecified to be determined by the subsequent arbitration clause, because under the Islamic Law and the terms of the contract must be specific and previously decided. In other words, in a contract of sale, when the price or the object of sale is unknown, as with a sale with an unknown

[٢٣٧]. The Iranian Civil Code Art ٢٣٣.

stipulated clause, is void.[٢٣٨] Moreover, most Muslim jurists believe that when the price is unspecified in the contract and it is left to be fixed by a third party, the contract is void.[٢٣٩] Any uncertainty is prohibited within Islamic law.

Furthermore, a trade transaction might introduce risks only when the uncertainty leads to an unsolvable dispute. However, when the arbitration clause resolves the price or time of delivery, no financial loss[٢٤٠] will result. Therefore, the prohibition of initiating a contract based on an unspecified subject or consideration should be regarded as an exemption to a wider principle, namely the freedom of contract. Therefore, a contract will be void only when there is no way of eliminating that risk and uncertainty. Otherwise, the contract is valid because the uncertainty will be removed with the arbitration clause. Articles ٦٣٢ to ٦٨٠ of The Civil Code of Iran indicate the terms of the arbitration clause. Article ٦٣٣ which is concerned with international contracts states:

The parties to a contract may agree, as a clause in the contract or independently, to settle their disputes by arbitration. When one of the parties is of Iranian nationality and the other of foreign nationality, the Iranian party may not before raising the dispute bind himself to arbitration of a third party, or parties, or a group, of the same nationality as the other party. This clause has no effect and is regarded null (but does not nullify the contract.

When it comes to the correlation between avoidance and delivery the Vienna Convention invokes a “fundamental breach;” a term which is also left to be interpreted by the referring court. In this regard, a question comes to mind about the concept of fundamental breach: Would failing to deliver goods within the time set by the contract or determinable from the contract be considered a fundamental breach within the concept of the Vienna Convention?

In terms of avoidance of the contract, Article ٤٩ of the Vienna Convention reads:

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٢٣٨. The Iranian Civil Code, Art ٢٣٣.

٢٣٩. Makki al-Amili, Al-lum'at al-Dimishqiya, (٨th edn, Vol. ٢, Ganje Erfan, Qum, ٢٠١٩) ٨٣.

٢٤٠. In Islamic texts, the loss is referred to as *Gharar*.

The buyer may declare the contract avoided: (a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or (b) in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (١) of article ٤٧ or declares that he will not deliver within the period so fixed.

In other words, based on the Vienna Convention, avoidance of the contract is caused by a "fundamental breach" of the terms of the contract. However, under the avoidance of a contract occurs based on the knowledge about the consideration (both offer and acceptance) of the contract of sale. Under a contract of sale may be avoided if the consideration is unknown. It may be questioned whether failure to deliver goods in time fixed for delivery may cause the avoidance of the contract. This question will be addressed in depth in Chapter ٨.

٦.٤ DELIVERY BEFORE THE FIXED TIME

Another issue relating to the time of delivery is whether the seller can deliver the goods before the fixed time and whether the buyer is obliged to accept the delivery before the fixed time. The seller might deliver the goods before the fixed time, and the buyer has the option to accept or refuse them.[٢٤١] The seller has the right to decide the time of delivery. Therefore, he can deliver the goods before the fixed time. However, this principle is subject to some dispute because delivering the goods before the fixed time might cause problems for the buyer. For instance, the goods may need to be packed or insured. Furthermore, the buyer might be obliged to make the final payment sooner when he receives the goods before the fixed time of delivery.

[٢٤١]. The Vienna Convention Act ١٩٨٠ Art ٥٢.

In other words, delivery of goods before the fixed time may bring about extra costs, in terms of packaging and insurance of the goods, for the buyers. That is why the buyers are entitled to reject goods that are delivered before the time set as the time of delivery.

Furthermore, sometimes there might not be enough room within the buyer's warehouse to store the goods, and he may need more time to prepare the warehouse for storage. Article ٥٢ of the Vienna Convention states: "If the seller delivers the goods before the date fixed, the buyer may take delivery or refuse to take delivery".

Nevertheless, the principle of good faith indicates that the buyer should accept the goods if he can.[٢٤٢] However, if the goods are perishable, their quality might be compromised, or additional costs will be imposed on the buyer, the seller must deliver the goods in accordance with the fixed time of delivery in the contract. Nonetheless, if the seller's place of residence is far from the buyer's location indicating that the seller is not able to re-deliver the goods at any given time, considerable harm or damage can be caused to the goods. Article ٨٦ of the Vienna Convention states:

If goods dispatched to the buyer have been placed at his disposal at their destination and he exercises the right to reject them, he must take possession of them on behalf of the seller, provided that this can be done without payment of the price and without unreasonable inconvenience or unreasonable expense.

This provision does not apply if the seller or a person authorized to take charge of the goods on his behalf is present at the destination. If the buyer takes possession of the goods under this paragraph, his rights and obligations are governed by the preceding paragraph.[٢٤٣]

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[٢٤٢]. Safai, S. H., The Law of International Sale of Goods A Comparative Study (٢nd edn, Tehran, University of Tehran Press, ٢٠٠٨) ١٣٤.

[٢٤٣]. The Vienna Convention Act ١٩٨٠ Art ٨٦.

According to Article ٨٦, the buyer should do everything in his power to retain the goods and he has the right to request reimbursement for reasonable expenses. The buyer also has the right to keep the goods until he is reimbursed. Thus, the buyer is obliged to take possession of the goods to prevent them from perishing and should inform the seller if he intends to reject them in accordance with the Vienna Convention.[٢٤٤]

Under Islamic law, when there is a fixed time of delivery from which the buyer can make a lawful profit, the buyer has no duty to take delivery if the seller delivers the goods early. Thus, the delivery can be said not to have taken place and the risk has not been transferred.[٢٤٥] In other words, the obligation is to deliver the goods at the fixed time of delivery and not just to deliver them at any time. A delivery that does not enable the buyer to use the goods and to take control of them is not valid.[٢٤٦]

٦.٥ EXPENSES OF DELIVERY

One of the important issues in the contract is to specify the expenses of delivery. In other words, it should be specified in the contract who is responsible to pay expenses of delivery of the goods. In this section, we will discuss the delivery cost based on the Iranian Civil Law and the Vienna Convention.

٦.٥.١ EXPEMSES OF DELIVERY UNDER IRANIAN LAW

The seller's obligation to deliver the goods requires the seller to pay for the expenses of the delivery of the goods. According to the Iranian Civil Code "committing for doing something is obligation to his conditions"[٢٤٧] by virtue of this rule, everyone is required to be

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[٢٤٤]. The Vienna Convention Act ١٩٨٠ Art ٢٧.

[٢٤٥]. Rajab, Mohammad Ali, 'An overview of the Goods before due time in Iranian Law', (٢٠٠٩) International Journal of Research In Social Sciences < http://www.bamdadeno.com/index.php?option=com_content&view=article&id=١٦٠:l r&catid=٤٠:١٣٨٩-٠٨-٢٩-١١-٤٣-٠٠&Itemid=٦٢> Accessed ٢٠ September ٢٠١٩.

[٢٤٦].The Iranian Civil Code Art ٣٦٧.

[٢٤٧]. This rule is taken from the principles of Islamic law and is used in The Civil Code of the Islamic Republic of Iran.

committed to what he does and he must do everything which is related to that act.[٢٤٨] According to the Iranian Civil Code,[٢٤٩] the expenses of the goods such as expenses of delivery of goods to the delivery location and the cost of (counting) numbering, weighing, packaging, and other similar expenses should be borne by the seller unless agreed otherwise by the parties or following mercantile usage and custom. Article ٢٨١ states: "Any expenses incurred in connection with the payment of a debt must be borne by the debtor unless a provision to the contrary is made".[٢٥٠] Parties can agree and stipulate that all the expenses of delivery or some of them are to be paid by the buyer, and he must pay them in accordance with the terms of the contract.[٢٥١] Furthermore, this provision might be subject to change by the relevant custom and usage since based on Article ٣٨٢ of the Iranian Civil Code provides that; "When there is no any such agreement, it is necessity for the parties to refer to the custom and usage". Article ٢٢٥ of the Civil Code states: "being common of an issue in the custom and usage is equal to its stipulation in the contract".

As some scholars have pointed out, the expense of delivery is sometimes the buyer's duty, because the transfer of sold goods to a place that the buyer has chosen is different from the delivery of the goods and is outside the seller's line of duty.[٢٥٢] It seems that the expenses of delivery to and preparation of goods for delivery are the seller's duty. But, the seller is not responsible for the expenses of delivery to the buyer's desired location. As mentioned above, one of the definitions of delivery is putting the goods at the disposal of the buyer. That is to say, the expenses of delivery are the expenses necessary for preparing the goods for shipment and delivery. According to this definition, once the buyer receives the goods, the seller's duties are effectively terminated. This termination is effective in any aspects of delivery *inter alia* the delivery costs – the expenses that may occur from the point of delivery up to the point where the goods are at the disposal of the buyer. Therefore, while Article ٢٨١ places the obligation of paying "the expenses of the transfer" on the seller,

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٢٤٨. Abduallh Kiyaie, *Obligations of Seller & Buyer Before and After the Delivery of Goods*, (١st edn, Tehran, ٢٠٢٠) ٢٠٤.

٢٤٩. The Iranian Civil Code Art ٣٨١.

٢٥٠. The Iranian Civil Code Art ٣٨١.

٢٥١. Ali Haeri shahbagh, Sharhe Qanoon Madani Iran- Interpretation of the Iranian Civil Code (١st edn, Tehran, Ganje Danesh, ٢٠١٢) ٣٧٣.

٢٥٢. Hoseini Ameli, Meftah Al-keramah (١٠th edn: Vol ٤, Qum, Iran Alolbeit ٢٠١٢) ٧٠٧.

it does not suggest that the seller is responsible for paying the entire costs of transportation of the goods to the buyer's desired location.

٦.٥.٢ EXPENSES OF DELIVERY UNDER THE VIENNA CONVENTION

There is no particular provision in the Vienna Convention on the expenses of delivery. However, one may point to Article ٣٢ of the Vienna Convention:

> *"If the seller, in accordance with the contract or this Convention, hands the goods over to a carrier and if the goods are not clearly identified to the contract by markings on the goods, by shipping documents, or otherwise, the seller must give the buyer notice of the consignment specifying the goods. (٢) If the seller is bound to arrange for carriage of the goods, he must make such contracts as are necessary for carriage to the place fixed by means of transportation appropriate in the circumstances and according to the usual terms for such transportation. (٣) If the seller is not bound to effect insurance in respect of the carriage of the goods, he must, at the buyer's request, provide him with all available information necessary to enable him to affect such insurance".*

In Article ٣٢, the seller's obligations regarding the transfer of goods are detailed. Paragraph (١) of Article ٣٢ indicates that the seller is obliged to provide the contracted products by delivering them to a contract carrier. The contracted products can normally be identified through the markings on the goods or shipping documents. Otherwise, the seller must provide the buyer with a consignment inventory to specify the contracted products.[٢٥٣]

If the seller is responsible for the transfer of the goods, paragraph (٢) of Article ٣٢ obliges the seller to make "contracts necessary for carriage to the place fixed by means of transportation appropriate in the circumstances". In this case, the seller must choose a means of transportation for delivery of the goods which is normally used for such

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[٢٥٣]. M. B. Asghari and others, *The Consequences of the Passing of Risk in Contracts of Sale Involving the Carriage of Goods: A comparative study between Iranian law and CISG, International Proceedings of Economics Development and Research* (٢nd edn, vol.٢, Singapore, ٢٠١٢) ٣٦.

transactions. Cost, Insurance, and Freight (CIF) and Cost and Freight (C&F) terms specify the obligations of the seller in such circumstances. Therefore, when these terms are invoked, the terms specified in paragraph (٣) of Article ٣٢ of the Vienna Convention will become invalid.[٢٥٤]

On the question of which party is responsible for the costs and expenses incurred within a contract under The Vienna Convention, Article ٨٥ on the subject of the preservation of the goods indicates:

"If the buyer is in delay in taking delivery of the goods or, where payment of the price and delivery of the goods are to be made concurrently, if he fails to pay the price, and the seller is either in possession of the goods or otherwise able to control their disposition, the seller must take such steps as are reasonable in the circumstances to preserve them".

If the buyer fails to pay the price and cannot reimburse the costs incurred during the trade transaction, the seller has the right "to retain them until he has reimbursed his reasonable expenses by the buyer". Article ٨٥ implicitly indicates that when the price of the goods and expenses of delivery must be paid at the same time, the seller has the right of lien to retain the contracting goods. However, a question that bears asking is that if the price does not include the expenses of delivery, do buyers have the right to preserve the goods? The expenses of delivery and their possible outcomes have not been expounded upon in isolation in The Vienna Convention. Normally, the parties invoke the International Commercial Terms (Incoterms) to resolve the expenses of delivery.

To sum up, since the majority of international contracts are resolved by Incoterms, it is believed that international sale contracts are mostly drafted based on trade terms also known as delivery or price terms. The trade terms of contracts are closely connected to the mercantile usage and custom and practices which have evolved over time. However,

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٢٥٤. *Ibid*, ٨١.

mercantile usage and custom while being efficient in trade transactions are subject to change. The laws regarding mercantile usage and custom change depending on the place the contract of sale is intended to be practiced. As a result, international contracts are mostly initiated based on Incoterms in an attempt to avoid the instability of mercantile customs. “Although INCOTERMS' have ramifications for most aspects connected to the commercial sales transaction, the rules are exclusively formulated for use in the contract of sale”.[٢٥٥]

The parties in international trade contracts can initiate their contracts in accordance with the terms of trade set forward by Incoterms. If the parties wish to base their contract on the terms introduced by Incoterms, they must vividly adhere to Incoterms in their contract. Paragraph (١) of Article ١ of the Convention indicates:

(١) This Convention applies to contracts of sale of goods between parties whose places of business are in different States: (a) When the States are Contracting States; or (b) When the rules of private international law lead to the application of the law of a Contracting State.

When these conditions are met, the Convention automatically applies, unless the parties exclude the application of the Convention or some provisions of the Vienna Convention according to Article ٦.

No particular provision relating to the expenses of delivery is detailed in the Vienna Convention. The parties can also make an agreement as to how delivery fees will be paid or how much should be paid by either party. It appears that there is no difference between The Civil Code of the Islamic Republic of Iran and the Vienna Convention in this regard. As mentioned above, under The Civil Code of the Islamic Republic of Iran, the expenses of delivery are borne by the seller but the parties can agree and stipulate otherwise in the contract or act in accordance with mercantile usage and custom laws. Therefore, the expenses of delivery vary based on the type of goods, the agreements between the two

[٢٥٥]. Juana Coetzee, ‘The interplay between Incoterms and the CISG, [٢٠١٣] ٣٢ LC <https://jlc.law.pitt.edu/ojs/jlc/article/view/٣٩> Accessed ١٥ October ٢٠٢٣.

parties, and the laws surrounding mercantile usage and custom. As a result, the buyer cannot ask the seller to simply pay the expenses of delivery to anywhere he needs or asks. However, the seller should bear the expenses of preparing the goods until they arrive at the delivery point. Perhaps, it can be concluded that the Vienna Convention has left the question of expenses of delivery to be decided by the parties in their contract or by referring to mercantile usage and custom.

٦.٦ CONCLUSION

As a concluding note, it can be stated the principle of party autonomy concerning the time of delivery is approved within different legal systems. Article ٤٤٤ of The Iranian Civil Code indicates that parties should set a fixed time of delivery in the contract and if there is no agreement concerning the time of delivery, they should refer to the relevant custom if there is one. According to Article ٢٢٥ of Iranian Civil Code "being common of an issue in custom and usage is like the stipulation of it in the contract." Therefore, Iranian law and the Vienna Convention in this regard are similar.

When there is no agreement between the parties regarding the time of delivery, the Vienna Convention states that the goods must be delivered within a reasonable time.[٢٥٦] Other legal systems also approve of this rule.[٢٥٧]

The articles of time of delivery in The Iranian Civil Code are much narrower than their identical provisions of the Vienna Convention. Nevertheless, upon careful examination of the time of delivery in the contract of sales under Iranian Civil Code and the Vienna Convention, no inconsistency was observed.

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٢٥٦. The Vienna Convention Act ١٩٨٠ Art ٣٣.

[٢٥٧]. Safai, S. H., The Law of International Sale of Goods A Comparative Study (٢nd edn, Tehran, University of Tehran Press, ٢٠١٣) ١٢٣.

CHAPTER SEVEN

٧. CONFORMITY OF GOODS WITH THE CONTRACT

٧.١ INTRODUCTION

Contemporary studies show that most legal disputes between parties arise from the non-conformity of the delivered goods with the content of the contract. In other words, a substantial portion of all sales' litigation relates to buyers claiming that the goods are in some sense 'defective'. That is, they do not conform to the contractual agreement in some way. (That is, the goods contracted by the parties and the goods actually delivered are incompatible in the following aspects).

Sometimes, this is because of material non-conformity. The lack of conformity is material when the quality or the quantity of the goods, or both, is/are not in accordance with the sample or the given description of the goods. In some cases, it arises from a legal non-conformity that has resulted from a third-party claim. Legal conformity includes the right to sell the goods, the seller's ownership of the goods, the transfer of the goods, and the absence of any right of action by a third party in relation to the contract. In this chapter, the quality and quantity of the goods, the shortfall and excess in delivery, the delivery of non-conforming goods, and the remedies for breach of the terms concerning quality and quantity will be discussed. In addition, the duty of the seller to preserve the goods after the sale and before delivery, as well as his duty concerning the packaging of the goods will be examined in this chapter.

٧.١.١ CONFORMITY OF GOODS WITH THE CONTRACT UNDER THE VIENNA CONVENTION

Under the Vienna Convention, the seller must deliver goods that conform to the contract. Further, the seller must deliver goods that are free from any right or claim from a third party. These matters are regulated under the title of the "Conformity of the Goods and Third-Party Claims" and these matters are set out in Articles ٣٥ and ٤٤ of the Vienna Convention. Article ٤٤:

Notwithstanding the provisions of paragraph (١) of article ٣٩ and paragraph (١) of article ٤٣, the buyer may reduce the price in accordance with article ٥٠ or claim damages, except for loss of profit, if he has a reasonable excuse for his failure to give the required notice.

The conformity of goods with the relevant contractual terms of the contract of sale is significant as other contractual obligations are, in that its non-performance will have repercussions for the non-performing party. In those cases where there is a lack of conformity of the delivered goods with the contract, the buyer may request that performance guarantee.

As Article ٣٩ (١) points out, relying on the non-conformity of goods depends on the notice that should have been previously given on behalf of the buyers “to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it”. Hence, the time of notice plays a key role in identifying the time when the rights of buyers trigger. Similarly, the failure to give notice may lose the right of deriving from non-conformity if there is “no reasonable excuse for his failure to give the required notice”.[٢٥٨]

On the other hand, in accordance with Vienna Convention lack of conformity regarded as a breach of contract on the part of the seller enabling the buyer to require the delivery of substitute goods,[٢٥٩] or the carrying out repairs of the goods٢٦٠ or he may

[٢٥٨]. The Vienna Convention Act ١٩٨٠Art ٤٤.

[٢٥٩]. The Vienna Convention Act ١٩٨٠ Art ٤٦ (٢).

[٢٦٠]. The Vienna Convention Act ١٩٨٠ Art ٤٦ (٣).

declare the contract void in its entirety,[٢٦١] or he may claim damages by exercising his right other remedies or he may seek a reduction in the price.[٢٦٢]

٧.٢ GENERAL CONCEPT OF CONFORMITY AND NONCONFORMITY

The term "conformity" is a general word, thus the words "lack of conformity" which are used in the Vienna Convention illustrate a general concept that includes any deficiency in the quality and quantity of the delivered goods. In other words, the Convention accepts the general meaning of conformity which includes both hidden and apparent defects, any breach of condition or description, as well as delivery of different types of goods.[٢٦٣] For example, taking other jurisdiction into consideration, French law draws a dividing line between apparent defects and hidden defects. Accordingly, jurisdiction a breach of a performance guarantees nonconformity of goods and a performance guarantees implied defects are seen differently.[٢٦٤]

The way French jurisdiction regards the conformity as contractual obligation is distinctive in that it draws a dividing line between apparent and hidden defects. The latter recognizes the breach of performance where the goods delivered do not conform to those contracted.

Also, in English law, one can see differences between performance guarantees for breach of conditions and those for a breach of warranty.[٢٦٥] A breach of warranty gives the

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[٢٦١]. The Vienna Convention Act ١٩٨٠ Arts ٤٩ and ٥٢.

[٢٦٢]. The Vienna Convention Act ١٩٨٠ Art ٥٠.

[٢٦٣]. Peter Schlechtriem, *Commentary on the UN Convention on the International Sale of Goods* (CISG), (٥th edn, Edited by Ingeborg Schwenzer OUP ٢٠٢٢) ٢٧٥.

[٢٦٤]. Safai, S. H., *The Law of International Sale of Goods A Comparative Study* (٢nd edn, Tehran, University of Tehran Press, ٢٠١٣) ١٧٢.

[٢٦٥]. Jack Beatson, *Andrew Burrows & John Cartwright, Anson's law of contract* (٣١st edn OUP ٢٠٢٠) ٢٧٦.

injured party the right to bring a claim for damages whilst a breach[٢٦٦] of a condition that will permit the injured party to terminate the contract.[٢٦٧]

By way of example, in interpreting "warranty" in the view of English contract law is ranked as the most superfluous in terms of importance amongst other terms such as condition precedent or subsequent. Warranties are customarily cited expressly in the wording of the contracts and can automatically discharge other party of his/her liability from the time of breach. The more the term goes to the root or the essence of a contract the more its breach would be fundamental.

There is no such distinction in the Vienna Convention and all breaches are regarded as a lack of conformity. The concept of a fundamental breach which is addressed in Article ٢٥ of the Convention differs from a breach of warranty.[٢٦٨] But the Uniform Commercial Code made a distinction between express warranties and implied warranties in a different manner.[٢٦٩] According to the Vienna Convention, any breach of contract whether it be a breach of warranty, express or implied may void the contract. The Vienna Convention does not make such distinction because of its universality as such distinction between warranty and condition in the context of contract law is not universal and is restricted to some jurisdiction such as Common Law.

Therefore, a lack of conformity has a wide concept in the Vienna Convention. Of course, a performance guarantee which is due to this lack of conformity is at the disposal of the buyer, if he was not aware of the non-conformity at the time of the conclusion of the contract.[٢٧٠]

The time set for assessing the conformity of goods is provided by Article ٣٦, more particularly, where the risk passes from the sellers to buyers. The liability of the sellers is to

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[٢٦٦]. *Ibid.*

[٢٦٧]. *Ibid.*

[٢٦٨]. Peter Schlechtriem, *Commentary on the UN Convention on the International Sale of Goods* (CISG) (٥th edn, Edited by Ingeborg Schwenzer OUP ٢٠٢٢) ٢٧٦.

[٢٦٩]. Article ٢-٣١٣ of the Uniform Commercial Code (UCC) deals with express warranties whilst Article ٢-٣١٤ deals with implied warranties. However, the Vienna Convention does not recognize such distinctions.

[٢٧٠]. The Vienna Convention Act ١٩٨٠ Art ٣٦.

be assessed at that particular time regardless of its subsequent appearance. That is to say, it may happen that the lack of conformity is not apparent at the time the risk of goods passes from the sellers to buyers, yet the sellers are accordingly liable failing to fulfil his/her contractual obligation. It may be argued that the awareness of neither of the parties is material in determining lack of conformity. In accordance with Article ٤٠, one of the considerable effects Awareness of non-conformity of goods is that it avoids the sellers' right of reliance on Article ٣٨ and ٣٩. Article ٤٠ stresses that the sellers relinquishes his/her right to rely on the said Articles in an effort to be released from the conformity obligation where" the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer".

According to Iranian law,[٢٧١] a performance guarantee related to non-conformity is applicable in case the buyer was not aware of non-conformity at the time of the conclusion of the contract. However, in Iranian law[٢٧٢] there are differences between default and breach of description or the option of incorrect description.[٢٧٣]

To find out about the non-conformity of goods, we must first refer to the contract. Thus, the contractual Parties must observe every condition concerning the quality and the quantity under consideration and they must be aware that a breach of any condition will be regarded as a breach of contract. Under Vienna Convention whether the parties knows that the goods lack conformity or not is irrelevant and what counts is the time where the risk passes from the sellers to the buyers. In other words, once the risk passes to the buyers the conformity obligation emerges regardless of the fact that either parties is aware of the conformity of goods.

The parties generally do not describe and characterize the goods specified in the contract, therefore, the Vienna Convention has specified the elements which evaluate the

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[٢٧١]. The Iranian Civil Code Art ٤٢٦.

[٢٧٢]. The Option of Defect is mentioned in Article ٤٢٢ of the Iranian Civil Code and the Option of Incorrect Description is mentioned in Article ٤١٠ of the Iranian Civil Code.

[٢٧٣]. Khiyare Takhallof Az Vasf.

conformity and the non-conformity of goods within the contract as follows: quality, quantity, contained, or packaged.[٢٧٤]

٧.٣ DELIVERY OF THE RIGHT QUALITY

One of the fundamental conditions of a contract is that the object of sale must be clear and explicit. The required clarity in the object of sale is the provision that "the goods" must be obvious to the parties. Also, the object of sale must be acceptable to relevant customs and usage in order to remove ignorance and loss from the goods.

٧.٣.١ UNDER IRANIAN LAW

Under Iranian law, the quality and quantity of the object of sale should be known at the time the contract is made. Iranian law provides that;

"quantity, quality, and descriptions of the subject matter of the contract must be fixed in the contract. The determination of its quantity by weight, number, matters, area or observation is dependent on the local usage".[٢٧٥]

The delivery of goods must match to the contract. Thus, if the object of sale is specific goods, the seller must deliver them as described in the contract. If during delivery an alteration is found in the quality of goods, the seller must deliver as it is "fixed in the contract", because the ownership of the specific object of sale transfers to the buyer as soon as the contract is concluded. Beside the effect of any change in the subject matter of sale on the matter of ownership, in order for a contract of sale to be legally concluded under Iranian Civil Law, the obligation of delivering goods compatible with "fixed" term remains to be fulfilled by the sellers.

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[٢٧٤]. The Vienna Convention Act ١٩٨٠ Art ٣٥(١).

[٢٧٥]. The Iranian Civil Code Art ٣٤٢.

٧.٣.٢ UNDER THE VIENNA CONVENTION

The Vienna Convention requires that the seller must deliver goods that conform to the contract and follow the criteria of conformity. In addition, the goods must conform to the contract in terms of quantity, quality, and description. Article ٣٥ of the Vienna Convention concerns the conformity of the goods provided as follows:

"(١) the seller must deliver goods which are of the quantity, quality, and description required by the contract and which are contained or packaged in the manner required by the contract. (٢) Except where the parties have agreed otherwise, the goods do not conform to the contract unless they: (a) Are fit for the purposes for which goods of the same description would ordinarily be used; (b) Are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely upon, or that it was unreasonable for him to rely upon, on the seller's skill and judgment; (c) Possess the qualities of goods which the seller has held out to the buyer as a sample or model; (d) Are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods".

This provision states that the seller must deliver goods that conform to the contract and present the criteria of conformity. In addition, this provision requires that the goods must conform to the contract in terms of quantity, quality, and description.

According to this article, any type of lack of conformity is regarded as an uncompleted performance of the obligation to deliver. The extent to which the delivery obligation is left unperformed is insignificant as even a trivial inconformity may be considered as a breach of contract.

Therefore, the seller is obliged to supply and deliver goods that conform to the contract in quality, quantity, and description.

If the goods are defective or if there is a lack of standard quality, then the contract does not perform entirely. That is to say that when the seller delivers a defective object to the sale he does not perform his duty fully. In the sale of goods specified in the contract, it is commonly accepted that a lack of conformity of the goods with the regular standard is a breach of contract unless the buyer knew or could not have been unaware of such a lack of conformity. The Vienna Convention provides for the general concept of lack of conformity which includes defective goods and the delivery of goods that are different from the specified goods.[٢٧٦]

As mentioned in the previous chapter, the concept of delivery in the Vienna Convention is not included in the conformity of goods with the contract; therefore the delivery of defective goods is regarded as constructive delivery. Article ٣٦(١) suggests that the Convention obliges the sellers to deliver goods conforming with the terms of the contract of sale at the passing of risk from the sellers to buyers.

In general, Article ٣٥ shows that the delivery of goods must take place appropriately. This article also makes reference to a compromise by the parties. After that, in the case of a lack of compromise, they must then apply other provisions.[٢٧٧] It is clear that the parties here must not veer from the Convention, but they must specify the scope of seller obligations in accordance with the Convention.[٢٧٨] In terms of the obligation as to not deviate from the contract of sale and its obligations, it is argued that" In developing the Convention there was no significant support for extending avoidance to include insubstantial deviations from the contract".[٢٧٩]

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[٢٧٦]. Peter Schlechtriem, Goods *Commentary on the UN Convention on the International Sale of* (CISG) (٣rd edn, Edited by Ingeborg Schwenzer OUP ٢٠١٠) ٢٧٥.

[٢٧٧]. Safai, S. H., *The Law of International Sale of Goods A Comparative Study* (٢nd edn, Tehran, University of Tehran Press, ٢٠١٣) ١٢٤.

[٢٧٨]. John O. Honnold and Harry M. Fletcher, *Uniform Law for International Sales under the ١٩٨٠ United Nations Convention*, (٤th revised edn, Kluwer Law International ٢٠٠٩) ٩٥.

[٢٧٩]. *Ibid*.٩٧.

The provisions of the Convention simply play a supplemental role in respect of the parties making a compromise. Therefore, the content of Article ٣٥ is only applicable when there is no express or implied contractual agreement. Furthermore, the scope of the seller's obligations might be specified by the contract.

According to Article ٣٥ (١) of the Vienna Convention, the seller must deliver goods that are of the quantity, quality, and description mentioned in the contract. It could be said that it is normal for the parties to specify their obligations in this respect. Article ٣٥(٢) (b) provides that it suffices that conformity fits to the "purpose of expressly or impliedly made known to the seller". Consequently, the sellers are not under obligation to specify the description of goods expressly as the Convention allows "implied" conformity. In case the description of goods is expressed in the contract of sale, the goods are to be in conformity with the agreed the description as the nearest term to the parties' intention and observing implied conformity would be inappropriate. Otherwise i.e. in the absence of express description, the implied description of goods shall be observed by the court or arbitral tribunal as the case may be.

One of the ways of observing description in the latter situation is where the seller refers to the advertisement or the notice in his offer, even impliedly; in this case the offer would be treated as a description. A description of the goods might be mentioned in the buyer's demands. In this case, if the seller does not protest, then the goods must be delivered in accordance with the buyer's description.[٢٨٠]

The delivery of defective goods paves the path for the avoidance of the contract even where defective goods are immaterial. However, the delivered goods must contain a minimum of the description mentioned in the contract. If they do not determine the specific goods, the seller is obliged to deliver goods that conform to the sample goods, otherwise delivery does not perform as per the terms of the contract of sale.

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٢٨٠. Bianca, in Bianca-Bonell, *Commentary on the International Sales Law* (Giuffrè, Milan ١٩٨٧) ٢٦٨-٢٨٣.

However, some commentators on the Convention point out some problems relating to this Article as follows: Article ٣٥ does not contain an express provision imposing on the seller a duty to deliver goods of average quality. The Convention should have specified that the goods are reasonably fit for the purposes for which goods of the same description would ordinarily be used if:

"(a) they are of such quality and in such condition as it is reasonable to expect, having regard to any description applied to them, the price, and all other relevant circumstances; and (b) if the goods, in the case of fungible goods, are of fair average quality within the description and are of an even kind, quality and quantity within each unit and among all units involved".[٢٨١]

Later, this amendment was withdrawn leaving open the question if the seller, even without an opposite contract clause, is bound to deliver goods of average quality.

"Some domestic legislation has resolved the problem and expressly mentioned that the seller of unascertained goods has to provide for goods of fair quality. The Civil Code of the Federal Republic of Germany, for instance, prescribes that the obligations of delivering unascertained goods are to be performed through goods of average type and quality. Similarly, the United States Uniform Commercial Code requires that the goods be merchantable; i.e., the goods must be of a fair average quality".[٢٨٢]

٧.٤ DELIVERY LESS THAN SPECIFIED QUANTITY

On the subject of the non-conformity of delivered goods with the subject matter of the contract, there two point of views: sometimes delivered goods are less than the fixed amount, and sometimes they are more than that settled amount. In either cases, the seller's obligation to remedy, in one hand, and the buyers' right to claim damages, on the other hand, falls within the ambit of Article ٣٧ which reads:

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[٢٨١]. *Ibid*.

[٢٨٢]. *Ibid*.

"If the seller has delivered goods before the date for delivery, he may, up to that date, deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of any non-conforming goods delivered or remedy any lack of conformity in the goods delivered, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention".

٧.٤.١ UNDER IRANIAN LAW

According to Iranian law, if after making a contract or during the delivery of specific goods, it is found that the quantity of the goods delivered does not conform to the specified amount stipulated in the contract, two situations may be adopted: sometimes the goods have been sold as a specific amount and sometimes the object of sale is sold with a condition that the goods must be of a specific amount. Each attitude has different effects.

According to Article ٣٨٤ of the Iranian Civil Code, if the seller having sold the subject matter realizes that he has delivered goods that do not conform to the contract ones in terms of quantity the buyer reserves the right to terminate the contract or approve the contract as it is and claim damages for defection or return excessive parts of the goods if delivery is made excessively.

In respect of delivery and its compliance with contractual terms, in some cases it is made partially contractually. Article ٤٤١ entitles the buyers to reject those parts that are inconsistent with contract and accept others. If the buyers opt to reject the subject matter of sale partially, the contract would be avoided for the relevant part as a result of which the payment and subject matter return to the sellers and buyers respectively.[٢٨٣]

Article ٤٤٢ of the Civil Code[٢٨٤] specifies the manner in which the value for the available part and the unavailable part of the object of sale can be determined. It seems

[٢٨٣].The Iranian Civil Code Art ٤٤١.

[٢٨٤]. "When the Option of Sales Unfulfilled in Part comes into force, the portion of the consideration which must be returned to the purchaser is calculated as follows that part of the object of sale which becomes the

that the right of revocation for the seller, which is mentioned in Article ٣٨٤ of the Iranian Civil Code, is dedicated to the "Option of Incorrect Description",[٢٨٥] where the parties do not have any conditions in their contract which will allow them to circumvent it. Furthermore, under the Option of Incorrect Description, the price is not reduced, because the condition is not part of the price, while article ٣٨٤ stipulates the payment by installment of the price. Some jurists[٢٨٦] believe that this condition is not part of the price and state that the buyer cannot receive money for the unavailable part of the object of sale. In other words, the condition is not in return for the price. After that, the buyer can accept or revoke the transaction since the price can be reduced when the object of sale is divisible and each part of the object of sale may be seen as in return for each part of the price. Otherwise, a reduction in the price is impossible. For instance, if we buy a car for £٥,٠٠٠ we cannot say that each part of the car has its own separate price and that the total price is given in return for the whole car as an object of sale. In addition, the object of sale is a specific object and the seller is obliged to deliver that specific amount so, when it is not delivered in full, then such a situation gives an option to the buyer either to accept the goods or to repudiate the contract.

However, the ability to obtain a reduction in the price depends on the object of sale, because sometimes the object of sale is divisible, such as ١٠ tons of rice, and sometimes it is not divisible, such as a car. Therefore, it might be said that the buyer can accept defective goods and take the money for the unavailable part of the object of sale when the object of sale is divisible. However, if the object of sale is not divisible, like a car, he has an option either to accept the transaction or to repudiate the contract.

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property of the purchaser will be valued alone; the seller will keep that portion of the consideration which bears to the whole consideration of the purchase the same ratio as the value of the portion mentioned above bears to the value of the whole thing sold in its entirety, and the seller must return the rest to the purchaser".

[٢٨٥]. Article ٤١٠ & ٤١١ of the Civil Code describes the option of an incorrect description as; If a person should buy a thing from its description only without having seen it, and should then find on inspection that it does not possess the description which had been made, he has the option of either canceling the sale or of accepting the object as it is. Article ٤١١ - If the seller has not seen the thing, whereas the purchaser has seen it, and the thing sold possesses qualities which are other than those described, the seller only shall have the right of cancellation.

[٢٨٦]. Al-Karaki, Ali bin Al-Hussein, *Jame' Al-Maqased fi Sharh Al-Qava'ed* (٧th edn: Vol.٤ Aal-Beit Institute, Beirut, ٢٠١٢) ٤٣٠.

٧.٤.٢ UNDER THE VIENNA CONVENTION

According to the Vienna Convention,[٢٨٧] delivery of less than the agreed quantity of goods is regarded both as a breach of contract and as a lack of conformity with the contract, thus the performance guarantee for a lack of conformity will apply.[٢٨٨] However, the performance guarantees for fundamental breaches and non-fundamental breaches are different.

Trade usages generally ignore the deficiencies of delivered goods that have arisen during the transportation of the goods or in some similar circumstance, because this kind of deficiency is regarded as a non-fundamental breach. It is for this reason that this form of deficiency is not addressed by trade customs. The extent of the negligence depends both on the type and the nature of the goods. Thus, when there is no justification, there will be no negligence.[٢٨٩]

When the amount of the object of sale has not been specified by the parties - for example, if the object of sale has been bought approximately - trade usage rules take into account both the extent of the goods and the extent of the negligence.[٢٩٠]

Since the parties have agreed on the quantity of the goods, the seller is responsible for that quantity. When the seller delivers less than the agreed quantity, a breach of contract will result and the performance guarantee will be applied.[٢٩١] However, if the lack of conformity in the quantity of goods is minor, the trade custom will usually disregard it.[٢٩٢] Moreover, the extent of the negligence depends on the type and the nature of the delivered goods, so that if there is a rational justification for the deficiency it will be disregarded by

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[٢٨٧]. The Vienna Convention Act ١٩٨٠ Art ٣٥(١).

[٢٨٨]. Safai, S. H., *The Law of International Sale of Goods A Comparative Study* (٢nd edn, Tehran, University of Tehran Press, ٢٠١٣) ١٨٢.

[٢٨٩]. Jamal M Abdel Aziz, *The Conformity Obligation in Contracts for the International Sale of Goods* [- in Arabic], Doctoral thesis (Cairo: ١٩٩٦/١٩٩٧) ٤١.

[٢٩٠]. Safai, S. H., *The Law of International Sale of Goods A Comparative Study* (٢nd edn, Tehran, University of Tehran Press, ٢٠١٣) ١٨٧.

[٢٩١]. *Ibid*, ٩٧.

[٢٩٢]. Jamal M Abdel Aziz, *The Conformity Obligation in Contracts for the International Sale of Goods* [- in Arabic], Doctoral thesis (Cairo, ١٩٩٦/١٩٩٧) ٣١.

the trade custom.[٢٩٣] For example, sometimes the deficiency is caused on the course of transportation.

٧.٥ UNASCERTAINED GOODS

When the object of sale is a part of a bulk, such as ٥ tons of wheat or ٥٠ tons of barley grain, which is available in the warehouse, the seller is obliged to divide that specific amount from the bulk and convey them to the buyer.

If the delivered goods are less than the fixed amount, if there is an amount of the goods, which has equal parts, the buyer cannot cancel the sale; however, he can oblige the seller to pay compensation. In the case of impossibility of delivery, or when delayed delivery gives rise to a loss to the buyer, then the buyer has the 'Option of the Division of the Contract'.

Also, when part of the object of sale, which is in equal parts, was available at the commencement of the contract and then some part of the good perished by chance or by an Act of God, then the contract for the perished part will be revoked and, accordingly, the buyer has the option to accept the available part of the goods and request financial compensation for the unavailable part.[٢٩٤]

Finally, when a portion of the equal goods was available at the time, the contract was made, and the seller transfers a part to a third party, then the entire contract will be Void.[٢٩٥] According to Article ٣٢٣ of the Iranian Civil Code,[٢٩٦] if the seller had not authorized the sale or the contract was not satisfied, the buyer could request the sold goods or an

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[٢٩٣]. Safai, S. H., *The Law of International Sale of Goods A Comparative Study* (٢nd edn, Tehran, University of Tehran Press, ٢٠١٣) ١٨٧.

[٢٩٤]. This is in accordance with the 'Option of the Division of Contract'.

[٢٩٥]. That is a contract that has been put in place without the owner's permission.

[٢٩٦]. If a person buys a property from an unlawful occupier, the buyer is also liable, and the rightful owner of the property is able to refer to either the seller or the buyer to demand that the property be returned. If the property has been damaged or destroyed he is able to demand either an identical property or the payment of its price. Also, in any case, he is able to request the benefit.

exemplar of them. Also, if the specific object has perished, the buyer can request a refund of the price when access to the exemplar of the sold goods is impossible.

٧.٦ GOODS SOLD BY SPECIFIC OR UNASCERTAINED GOODS

When the objects of sale are goods sold by specific the seller is obliged to deliver the goods in accordance with the contract. He/she will then be discharged from his duty. Under the Iranian Civil Code goods are said to be in bulk when they are applicable to many. Also, the object of sale is termed unascertained goods when it has no external existence and when its credit belongs to the seller. Under Article ٢٢٢ of the Iranian Civil Code, the buyer has the right to oblige the seller to deliver the shortage and if the seller does not do this, the buyer can refer the matter to the court. The court can then give permission to the buyer to source the goods from a third party and the seller may be obliged to pay all expenses.

There is a question of whether or not the buyer is able to revoke the transaction before requesting the seller to perform his obligation. According to Articles ٢١٩, ٣٧٦, and ٤٥٧, it can be generally deduced that Iranian Civil Code restrict the parties' right to contract out. In fact, throughout the Civil Code both contractual parties are encouraged to retain the contract alive by fulfilling their obligation, therefore, repudiation, cancellation or avoidance of the contract is the last solution to settle arising disputes.

When the nature of the subject matter of goods is unusual in the sense that it contains a particularity such as perishability of goods or its usage or sale is limited to particular season or area a delay in the delivery of such goods will be detrimental. Therefore, with these types of goods, the buyer will have the right to terminate the contract if the goods is no longer usable for its particular purpose. Having said that, whether the nature of goods have to be mentioned as part of the description or it is meant to be understood by both parties is left to be interpreted by the terms and intention of parties.

٧.٧ DELIVERY OF AN ADDITIONAL QUANTITY

Sometimes the lack of conformity is concerned with the quantity of delivered goods exceeding the quantity agreed in the contract. In such a situation, there is a question of whether or not the seller or the buyer has the right to revoke the contract.

٧.٧.١ UNDER IRANIAN LAW

Lack of conformity in the quantity of delivered goods exceeding the quantity agreed has been discussed in the Iranian legal system. Under Iranian law[٢٩٧] if the object of sale is more than the specified quantity, then the surplus belongs to the seller. Perhaps the reason is that a surplus was not offered by the seller and was not part of the contract. In such a situation, there is a question of whether or not the seller or the buyer has the right to revoke the contract. It seems that we should distinguish between an object of sale which is divisible without detriment, such as cereal, and an object of sale which is not divisible without detriment, such as a house. Therefore, in the first case – where it is divisible without detriment- the parties should not be able to revoke the sale and the surplus should belong to the seller. However, in the second one - not divisible without detriment- the right of revocation should belong to the disadvantaged party.

However, the parties can reach decisions regarding excessive goods during delivery.[٢٩٨] For instance, if the object of sale is ١٠ tons of rice, they can make a provision in the contract for a delivery that exceeds ١٠ tons of rice. In such cases, the buyer may be asked to pay for the surplus on a prorated basis.

٧.٧.٢ UNDER THE VIENNA CONVENTION

Article ٥٢(٢) provides "… (٢) If the seller delivers a quantity of goods greater than that provided for in the contract, the buyer may take delivery or refuse to take delivery of the excess quantity. If the buyer takes delivery of all or part of the excess quantity, he must pay for it at the contract rate.

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[٢٩٧]. The Iranian Civil Code Art ٣٨٤.

[٢٩٨]. Mortaza Ansari, *Al-Makasib*, (٢٠th edn, Beirut, Al-Noman ٢٠١٣) ٢٨٥.

In the case where the amount of goods delivered is "greater" than what is contracted, the buyer has the option to take delivery and accept excess quantity or reject the goods. The acceptance of excess quantity obligates the buyers to "pay for it at the contract rate".

Nevertheless, delivery of excess quantity is not regarded as a breach of contract. Therefore, the buyer cannot repudiate or seek rescission of the contract, because he has the option to accept or refuse this surplus and if he accepts it he must pay for it in accordance with Article ٥٢ (٢) of the Vienna Convention.

To use the Performance Guarantee for lack of conformity, the buyer must give notice to the seller in a reasonable time after he has recovered it.[٢٩٩] If he does not give due notice to the seller, he will lose the right to rely on the lack of conformity of the goods.[٣٠٠] In this case, if the seller informs the buyer about this surplus and the buyer does not give notice to the seller after he has been informed, then he will lose the right to refuse the goods.[٣٠١] Article ٤٠ of the Vienna Convention provides that:

"The seller is not entitled to rely on the provisions of articles ٣٨ *and* ٣٩ *if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer".*

If the seller had not informed the buyer regarding the surplus, the buyer must give notice to the seller.[٣٠٢] Hence, if the surplus is small, the buyer might be obliged to accept it in accordance with the normal custom and usage between parties.[٣٠٣] However, if the buyer did not take the surplus, "he must take such steps to preserve them as are reasonable in the circumstances. He is entitled to retain them until he has been reimbursed his reasonable

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[٢٩٩]. The Vienna Convention Act ١٩٨٠ Art ٣٩(١).

[٣٠٠]. *Ibid.*

[٣٠١]. Schlechtriem & Schwenzer, *Commentary on the UN Convention on the International Sale of Goods* (CISG) (٣rd edn: Edited by Ingeborg Schwenzer OUP ٢٠١٠) ٤٥١.

[٣٠٢]. The Vienna Convention Act ١٩٨٠ Art ٤٠.

[٣٠٣]. John O. Honnold and Harry M. Fletchner, *Uniform Law for International Sales under the ١٩٨٠ United Nations Convention* (٤th revised edn, Kluwer Law International ٢٠٠٩) ٤٠٤.

expenses by the seller".[٣٠٤] Whenever the seller delivers only one part of the object of sale or if only one part of the delivered goods conform to the contract, then, in accordance with Articles ٤٦ to ٥٠,[٣٠٥] the buyer cannot revoke the entire contract unless this is regarded as a fundamental breach,[٣٠٦] as the buyer has the right to revoke only the part which does not conform to the contract.

Sometimes, an inquiry about the surplus is not possible for the buyer, or sometimes because a bill of lading has been issued for all of the goods he is not able to refuse the surplus, or because of the quality of the packaging, the buyer cannot inform them about the amount. The buyer in this situation has no choice but to refuse the goods and cancel the contract if the surplus is such that it amounts to a fundamental breach. Also, he can take the surplus and apply for remedy.[٣٠٧] If the seller delivers a surplus without realizing what he has done, he has the right to a refund, because the surplus does not belong to the buyer. If the seller delivers the surplus and he is fully aware of what he has done, it can only mean that he had intended to make a new contract or amend his contract with the delivery of this quantity, so the buyer has the option to take or refuse it. In the case of an acceptance by the buyer, the primary contract will be amended and then the seller cannot apply for a refund for this surplus and the buyer cannot refuse it.[٣٠٨] It is clear in this case that the buyer is not bound to accept the surplus, so he may refuse it.[٣٠٩]

As a result, according to Iranian Law, the surplus of delivered goods is for the seller.[٣١٠] If the delivered goods are divisible, none of the contractual parties can revoke the contract, but when the goods are not divisible, the right to repudiate lies with the party who will lose from the division of the goods. If delivery of excess quantity had been a

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٣٠٤. The Vienna Convention Act ١٩٨٠Art ٨٦.

٣٠٥. The Vienna Convention Act ١٩٨٠Art ٥١(١).

٣٠٦. The Vienna Convention Act ١٩٨٠ Art ٥٢(٢).

٣٠٧. Jamal M Abdel Aziz, *The Conformity Obligation in Contracts for the International Sale of Goods* [- in Arabic], Doctoral thesis (Cairo: ١٩٩٦/١٩٩٧) ٣٨.

٣٠٨. The Vienna Convention Act ١٩٨٠, Art, ٥٢(٢).

٣٠٩. Safai, S. H., *The Law of International Sale of Goods A Comparative Study* (٢nd edn, Tehran, University of Tehran Press, ٢٠١٣) ١٨٤.

٣١٠. The Iranian Civil Code Art ٣٨٤.

fundamental breach of contract, the contract would have been avoided (ab initio) whereas Article ٥٢(٢) confers on the buyers two options acceptance or rejection.

The criterion of the Vienna Convention, which gives the right of repudiation for a fundamental breach to the seller, is preferable to Iranian Law because the sale would be stable and reduce uncertainty in the contract. Moreover, giving the right to repudiate to the party sustaining a loss in Iranian law seems more just.

٧.٨ DELIVERY OF NORMAL QUANTITY OF GOODS

The object of sale must conform with the contractual agreement relating to quantity, quality, and description required by the customer. The quality and quantity of the object of sale should be known at the time the contract is made. The quality and quantity of the object of sale are determined by inspection of specific goods or by description, or by inspection and description.

٧.٨.١ UNDER IRANIAN LAW

If the object of the sale is a specific good, the seller must deliver goods that are of the description given at the time of the conclusion of the contract. Article ٢٧٨ of the Iranian Civil Code states that:

"If a particular property constitutes the object of the obligation then the delivery thereof to its owner in its actual state at the time of delivery shall discharge the obligor from his responsibility, even if the property is deficient or defective, so long as the deficiency or defect is not due to the excessive use or negligence of the obligor, except in the cases stipulated in the law".

The meaning of "Defective" in this article is a reduction in the price and the quantity of the goods. In addition, the meaning of deficiency refers to the missing quantity and a description of the object of sale.

The source of a lack of conformity is different. Sometimes a lack of conformity is derived from the description, which has been explained by the seller. Sometimes the object of sale does not conform to the sample, or the customer has not seen the goods and bought them according to the description given by the seller. In such cases, if after seeing the goods he finds that they do not match the description, then the buyer has the option to revoke and cancel the contract, or otherwise, he may accept them. This option is known as the option of a breach of description.[٣١١]

If the source of the lack of conformity is the changing of some of the descriptions, then the buyer has the option to inspect with a view to revoking the contract. In this case, if one of the parties revokes the sale and the other signs and accepts the sale, the contract will be voided and revoked. When one of the parties accepts the sale and signs for it, he will lose his right of revocation, but if the other party repudiates the contract, the contract will be voided. When the lack of conformity derives from a lack of quality in the goods leading to a loss in its value, the sale will be voided because the object of the sale must be valuable,[٣١٢] so, the value of the object of sale is the essence of the contract.

If non-conformity of the goods comes from a lack of quality or something missing which is usually found in the object of sale, the buyer has the Option of Defect,[٣١٣] to nullify the contract or to apply for a margin[٣١٤] (*Arsh*).[٣١٥]

A. Unascertained goods (Goods from a specific bulk)

When the object of sale comes from a specific bulk – a bulk in identified goods - the seller is obliged to deliver the goods, which are specified in bulk. For instance, if the seller sold ١,٠٠٠ tons of rice from ١٠,٠٠٠ tons of rice held in a specific warehouse, he must deliver

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[٣١١]. The Iranian Civil Code Art ٤١٠.

[٣١٢]. The Iranian Civil Code, Art, ٢١٥: "the object of sale must be valued and there must be a rational profit".

[٣١٣]. *Khiyar e Aibe*.

[٣١٤]. In commercial transactions the difference between the purchase price paid by an intermediary or retailer and the selling price, or difference between price received by manufacturer for its goods and costs to produce. Also called gross profit margin.

[٣١٥]. The Iranian Civil Code Arts ٤٢٢ & ٤٢٧.

that ١٠٠٠ tons of rice from that warehouse. In addition, the delivered goods must be of the quality which is specified in the contract. Articles ٢١٩ and ٤٥٧ of the Iranian Civil Code indicate that, if the seller delivers defective and non-defective goods together, the buyer can demand the delivery of non-defective goods. In this case, the buyer cannot apply for the Option of Defect because the seller is able to replace the non-defective goods. Therefore, there is no reason for a revocation of the contract. However, if the replacement of non-defective goods is impossible for the seller, the buyer can apply for the Option of Defect, whether repudiating the contract of sale or requesting a refund of the money. However, the buyer cannot take the non-defective goods and refuse the defective ones, because such discrimination leads to a loss for the seller.[٣١٦]

Sometimes the object of sale is unascertained goods that are in bulk and not identified. For example, where one has ١٠ tons of wheat that are not available and not specified at the time of agreeing on the contract. When the object of sale is unavailable or unascertained, the sellers are neither obliged to deliver the goods nor to deliver goods that are "conventionally defective". Article ٢٧٩ of the Iranian Civil Code provides as follows:

"If the object of obligation (goods) in bulk and not identified, the obligator is not obliged to supply the best one, but he cannot deliver goods which are conventionally defective as well".

According to the Iranian Civil Code, the seller can deliver lower quality of goods to the buyer but he cannot deliver defective goods, because the concept of sale is applicable to undamaged and non-defective goods, not to 'best' quality goods. Therefore, when the buyer receives the goods and believes that, they are non-defective, but after a while realizes that they are damaged, then the seller must replace the goods or refund the price, otherwise he has the right to repudiate.[٣١٧]

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[٣١٦]. The Iranian Civil Code Arts ٤٣١ & ٤٣٢.

[٣١٧]. The Iranian Civil Code Art ٤٢٤.

٧.٨.٢ UNDER THE VIENNA CONVENTION

According to Article ٣٥ (١) of the Vienna Convention, the goods must conform to the conditions of the contract; otherwise, there will be a breach of contract. In terms of non-conformity, there is no difference whether the delivered goods are of high quality or low quality.[٣١٨]

It seems that by Article ٣٥, the necessity to conform to the contract is an independent obligation because the concept of delivery in the Convention excludes conformity of goods to the contract. Therefore, the delivery of defective goods or non-conforming with the contract discharges the seller from his obligation of delivery, and conformity of goods is an independent obligation. Therefore, in this case, the provision concerning the Option of Defect and taking a margin (*Arsh*)[٣١٩] will be applied. However, the conformity of unascertained goods with the contract is necessary, because if the object of sale is unascertained goods, then the delivery of defective goods or not conforming to the contract is regarded as non-delivery. Therefore, the buyer can request goods that conform to the contract. The failure to provide the agreed quality of goods leads to the breach and the revocation of the contract.[٣٢٠]

٧.٩ FITNESS FOR ORDINARY USE UNDER THE CONVENTION

The seller must deliver goods that are suitable for trade purposes and must be of the same descriptions which would ordinarily be used so that the buyer can sell them. Under the Vienna Convention, delivered goods must be:

"fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer

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[٣١٨]. Schlechtriem & Schwenzer, *Commentary on the UN Convention on the International Sale of Goods* (CISG) (٣rd edn, Edited by Ingeborg Schwenzer OUP ٢٠١٠) ٢٧٧.

[٣١٩]. *Arsh* is a part of the price which is calculated by comparing the value of sound goods with the value of defective goods.

[٣٢٠]. Safai, S. H., *The Law of International Sale of Goods A Comparative Study* (٢nd edn, Tehran, University of Tehran Press, ٢٠١٣) ١٧٣.

did not rely upon, or that it was unreasonable for him to rely upon, on the seller's skill and judgment".[٣٢١]

According to this paragraph, the seller must deliver goods that are fit for the purpose of the buyer. Therefore, the delivery of goods those are not adequate for trade purposes and are not of the same descriptions which would ordinarily be used, are regarded as lacking in conformity. In fact, the seller must deliver goods that are suitable for trade purposes and must be of the same descriptions which would ordinarily be used, so that the buyer can sell them on.[٣٢٢] The fitness of the goods for ordinary use is considered in accordance with the seller's trading location, not the buyer's.[٣٢٣]

"The CISG imposes these obligations because in a usual sale, and in the absence of contrary intent, today's international buyer is entitled to expect the goods to possess certain basic qualities even if the contract does not expressly state. Among the implied obligations as to the quality, this subparagraph is of great practical importance: it is an international version of an implied warranty of fitness for ordinary use, familiar in many European domestic laws".[٣٢٤]

The Vienna Convention does not specify any quality standard for goods for the purpose of any purchaser because it is clear that the purposes of each buyer are different and that the quality standard for each trader in different countries is also different. Therefore, in each case, the goods may be more or less fit for purpose, but the seller must on the whole deliver goods of average quality. The quality of goods for ordinary use must be ascertained, according to the standards of the seller's place of business. Indeed, the seller is not expected to know of the specific requirements or limitations in force in other countries.

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[٣٢١]. The Vienna Convention Act ١٩٨٠ Art ٣٥ (٢).

[٣٢٢]. Safai S. H., *The Law of International Sale of Goods A Comparative Study* (٢nd edn, Tehran, University of Tehran Press, ٢٠١٣) ١٧٥.

[٣٢٣]. Bianca, in Bianca-Bonell, *Commentary on the International Sales Law* (Giuffrè, Milan ١٩٨٧) ٩٨.

[٣٢٤]. Teija Poikela, 'Conformity of Goods in the ١٩٨٠ United Nations Convention of Contracts for the International Sale of Goods' [٢٠٠٣] ١ Nordic Journal of Commercial Law. <http://www.njcl.utu.fi/١-٢٠٠٣/Article٥.pdf>, Accessed, ١٧ January ٢٠١٩.

Only in some specific cases would it be reasonable to expect a seller to have knowledge of a buyer's local standards.

Another point holds that 'ordinary use' should be definite by the standards of the country or region in which the buyer intends to use the goods. For this reason, the quality may be better or less good, but it should at least not be significantly below the standard that can reasonably be expected in accordance with the price and other circumstances. Since the requirement of 'ordinary use' of the goods can be met in quite varying quality, one may safely suppose that the purchaser can only insist on a certain minimum. The Vienna Convention does not specify any particular quality standards; e.g. cars can be traded for resale but also for scrap metal. A specific problem relates to the period of durability or fitness, which plays a role in the foodstuffs and the pharmaceutical industries. Since no general standards have emerged yet in this respect, a relevant agreement in the contract should be recommended.[٣٢٥] Since Iranian law is domestic law and has not been written for the purpose of international sale there is no article relating to the particular purpose of sale.

٧.١٠ FITNESS FOR A PARTICULAR PURPOSE

٧.١٠.١ UNDER THE VIENNA CONVENTION

The seller is bound to deliver goods that are fit for the purpose of the buyer providing that the buyer's purpose is expressly or impliedly made known to the seller at the time of the conclusion of the contract. The same point is made equally in ١٩٧٩ UK Sale of Goods Act except that the latter acknowledges the compliance with the purpose intended by the buyers expressed or implied within the contract.[٣٢٦] For example, where a seller has committed to delivering ١٠٠ Jeep A٢ to an oil company, which has engines that are fit for working in the desert, but instead he delivers ١٠٠ Jeep A١ which are generally used for driving in the city and are not suitable for the desert. In this case, the seller has not performed his obligation in relation to the conformity of goods. In circumstances that show

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[٣٢٥]. *Ibid.*

[٣٢٦]. Sale of Goods Act, Art, ٣٥ (b), & U.K. Sale of Goods Act, S ١٤ (٣).

that the buyer did not rely on the seller's skill, or that it was unreasonable for him to rely on the seller's skill, the seller is not held responsible[٣٢٧]. In the above example, if it appears that the car company had no experience in making that type of car, and the buyer was aware of it, the seller is not responsible too.

Some commentators believe that mere awareness of the seller of the particular purpose of the buyer is sufficient. It could be expressly or impliedly or sometimes could be understood from the circumstances of the negotiation during the making of the contract.[٣٢٨]

If the buyer does not rely on the seller's skill and chooses the goods himself without any advice or without consulting the seller, and the seller knows that those particular goods are not fit for the buyer's purpose, the principle of good faith requires that the seller must inform the buyer accordingly.[٣٢٩]

٧.١١ THE CONFORMITY OF GOODS WITH THE SAMPLE

٧.١١.١ UNDER THE VIENNA CONVENTION

By Article ٣٥ (٢) of the Vienna Convention, the seller must deliver goods that conform to the model or sample that he has been "held out to the buyers". Therefore, if the seller presents a sample to the buyer, he must deliver goods that conform to the quality of the sample. The sample or model held out by the sellers and agreed by the buyers is considered as an exception to the general matrix proposed by Article ٣٥(١) i.e. the obligation to conform to the contractual terms. The terms of the contract are in principle what is to be performed accordingly, yet if a model or sample is intended by parties it will prevail over the general rule.[٣٣٠] Otherwise, failing to provide goods conforming to the sample or model he would not be discharged from his liability.it is also possible that a seller

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[٣٢٧]. The Vienna Convention Act ١٩٨٠ Art ٣٥(b).

[٣٢٨]. John O. Honnold and Harry M. Fletchner, *Uniform Law for International Sales under the ١٩٨٠ United Nations Convention*, (٤th revised edn, Kluwer Law International ٢٠٠٩) ٣٠٦.

[٣٢٩]. Schlechtriem & Schwenzer, *Commentary on the UN Convention on the International Sale of Goods* (CISG), (٣rd edn, Edited by Ingeborg Schwenzer OUP ٢٠١٠) ٢٨٢.

[٣٣٠]. Safai, S. H., *The Law of International Sale of Goods A Comparative Study* (٢nd edn, Tehran, University of Tehran Press, ٢٠١٣) ١٨١.

might present a sample or a model only in order to give an approximate description of the goods offered to the buyer. The approximate sample or model nevertheless binds the seller to deliver goods possessing the same qualities as the sample or the model, although slight differences may be ignored.[٣٣١]

٧.١١.٢ UNDER IRANIAN LAW

Under Iranian law, the quality and quantity of the object of sale should be known at the time the contract is made. The quality and quantity of the object of sale are determined by inspection of specific goods or by description, or by inspection and description. The quality of goods is sometimes determined by presenting a sample of the goods. Therefore, the seller has a duty to deliver goods that conform to the parties' agreement. Article ٣٥٤ of the Iranian Civil Code states that;

"When a sale is arranged by means of a sample, all the goods sold must conform to the sample; otherwise the purchaser has the right to cancel the contract".

In addition, the goods should comply with the criteria which are imposed by the law as implied terms of the contract. The only implied term concerning quality in Iranian law is that the object of sale should be free from defects. The delivery of defective goods is regarded as a breach of contract which entitles the buyer to a remedy.[٣٣٢] The word "defect" has not been defined by the Iranian Civil Code. But Article ٤٢٦ of the Civil Code states that;

"The determination of a defect shall take place in accordance with common usage and custom, and therefore may vary with time and place".

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[٣٣١]. Imre Nagy, 'Conformity of goods under the Vienna Convention on Contracts for the International Sale of Goods' (٢٠٠٧) Balázs & Holló Law Firm, Budapest <http://www.consulegis.com/fileadmin/downloads/Dr_T_M_Award-Dr_Imre_Nagy.pdf> Accessed ٩ July ٢٠١٤.

[٣٣٢]. The Iranian Civil Code Art ٤٣٦.

With regard to the above article, the word "defect" becomes a wide concept that may include various meanings with regard to different goods and times, and places. It has added that reliance on the implied term, such as freedom of the object of sale from defects, cannot assure the buyer that he will receive the goods in conformity with his needs. Thus, the parties should negotiate and describe the quality of the goods at the time the contract is made and clearly write them into their contract. The remedies for breach of the implied or expressed terms as to quality in the sale of specific goods are different from the sale of unascertained goods. The remedy for price reduction is only available to the buyer when the contract is for the sale of specific goods and the delivered goods are defective. However, when dealing with unascertained goods, the delivery of defective goods or the delivery of non-conforming goods entitles the buyer to request specific performance of the contract and if it is impossible, the buyer can then repudiate the contract.

Iranian Law is not able to deal adequately with the difficulty of remedies for breach of contract for the sale of unascertained goods. This is the biggest problem in Iranian law which limits the competence of Iranian law as the law applicable to international contracts because international sales mostly concern unascertained goods.

٧.١٢ PROPER PACKING

The packaging of the goods is very significant in international sales because goods might be conveyed by means of several different methods of transportation before they reach their destination. In addition, goods may encounter different climates. Therefore, it is important for the goods to be contained and packaged by the seller in a manner that is usual for such goods and for the packaging to be adequate for the duration of the carriage, taking into consideration the route, and the country of destination. Unfortunately, "several cases were found in which improperly packaged goods failed to conform to the contract; a Mexican court[٣٣٣] found that a seller of canned fruit violated Article ٣٥ where the containers

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٣٣٣. *Conservas La Costeña, S.A. v. Lanin San Luis* S.A., Agruindustrial Santa Adela, S.A., D.O., (١٦ de julio de ١٩٩٦ (Mex.), translated in ١٧ J.L. & Com. ٤٢٧, ١٩٩٨).

were not adequate to prevent the contents from deteriorating after shipment".[٣٣٤]According to the Vienna Convention, the seller must deliver goods "which are contained or packaged in the manner required by the contract".[٣٣٥] "This provision states that the delivery obligation includes the seller's parallel duty to do what is ordinarily required in order to allow the buyer to receive the goods in a satisfactory condition. The Vienna Convention clearly also implies that the goods have to be properly packaged so as to allow the buyer to load and carry them away, even if the goods are to be handed over at the seller's place of business".[٣٣٦]The goods must be packaged in accordance with international trade usage; if there is no such usage in this respect, then the goods must be packaged and contained in a manner that is adequate to preserve and protect the goods until they reach their destination.

٧.١٢.١ UNDER THE VIENNA CONVENTION

The Vienna Convention regards the packaging of goods as an element of conformity, and it also obliges the seller to properly package the goods even in relation to goods that the seller plans to deliver to the buyer which is still in the factory.[٣٣٧]

The seller is exempt from the lack of any conformity under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.[٣٣٨] Consequently, the seller is not responsible, when the buyer knows of the defect of non-conformity or where he could not have been unaware of the lack of conformity at the time of the conclusion of the contract. In addition, the seller is not liable

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٣٣٤. Imre Nagy, 'Conformity of goods under the Vienna Convention on Contracts for the International Sale of Goods [٢٠٠٧] Balázs & HollóLawFirm, Budapest <http://www.consulegis.com/fileadmin/downloads/Dr_T_M_Award-Dr_Imre_Nagy.pdf> Accessed ٩ July ٢٠١٢.

٣٣٥. The Vienna Convention Act ١٩٨٠ Art ٣٥(١).

٣٣٦. Imre Nagy, 'Conformity of goods under the Vienna Convention on Contracts for the International Sale of Goods [٢٠٠٧] Balázs & Holló Law Firm. Budapest <http://www.consulegis.com/fileadmin/downloads/Dr_T_M_Award-Dr_Imre_Nagy.pdf> Accessed ٩ July ٢٠١٢.

٣٣٧. Schlechtriem & Schwenzer, *Commentary on the UN Convention on the International Sale of Goods* (CISG), (٣rd edn, Edited by Ingeborg Schwenzer OUP ٢٠١٠) ٦٠.

٣٣٨. The Vienna Convention Act ١٩٨٠ Art ٣٥(٣).

for a defect of goods that is part of the description of the goods. In addition, he is not responsible for a defect that is reasonably expected by the customer, for instance, when the seller has delivered goods of low quality to the buyer in the past without receiving any objection from the buyer.

"It does not matter whether the packaging is part of the goods, but the obligation to package the goods depends on what is customary. The seller has an obligation to package the goods not only when the goods are dispatched, but also under the Convention Article ٣١, subparagraphs (b) and (c) if the seller only has to place the goods at the disposal of the buyer. Also, in these cases, the goods have to be packaged so as to allow the buyer to load and transport them. If the buyer himself is to provide the packaging, a clear relevant clause has to be agreed upon in the contract. This may relate in particular to new goods, but also to such goods that have to be manufactured in an especial way".[٣٣٩]

٧.١٢.٢ UNDER IRANIAN LAW

There is no express article in Iranian Law concerning the packaging of goods. However, it may be inferred from the general content[٣٤٠] of the Iranian Civil Code relating to the description that the seller is liable to deliver the goods which conform to the contract in all aspects.[٣٤١] It may also be inferred from Article ٢٢٥ of the Iranian Civil Code[٣٤٢] in which it is stated that;

"If certain points that are customarily understood in a contract by customary law or practice are not specified therein, they are nevertheless, to be considered as mentioned in the contract".

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[٣٣٩]. Fritz Enderlein and Dietrich Maskow, 'International Sale Law United Nations Convention on Contracts for the International Sale of Goods' [٢٠١٣] Peace Law, <http://www.cisg.law.pace.edu/cisg/biblio/enderlein.html> Accessed ٩ July ٢٠١٤.

[٣٤٠]. The Iranian Civil Code Arts ٢٣٤,٣٥١, ٣٥٤ & ٣٥٥.

[٣٤١]. Alireza Nazimi, '*Obligations of the vendor at the Convention on the International Sale of Goods and Rights in Iran*' [٢٠١٢] A Comparative Study Journal <http://www.notary.ir/node/٢٩١> Accessed ٩ July ٢٠١٤.

[٣٤٢]. Also, it could be inferred from the Iranian Civil Code, Arts ٢٢٥ and ٣٥٦.

The customary law regarding some goods, like furniture, is that the seller is obliged to package them. The above-mentioned does not make it irrelevant for an express legal term that obliges the seller to package the goods, particularly new goods for which there is no clear and obvious relevant custom relating to who packages them. However, according to the trade custom, the seller must package them, but a lack of an express legal term about who packages the goods in Iranian Law can be problematic.[٣٤٣]

As a result, under Iranian Law, if there is a term in the contract which obliges the seller to package the goods, he must accordingly package them, otherwise, the law relating to the delivery of goods requires them to be packaged. According to Article ٢٢٥ and trade customs, the seller must package the goods.

It could be said that the Convention regarding packaging is an element of conformity but Iranian Law does not mention expressly how to package the goods and instead leaves it to customary law. This can be problematic in international trade. As mentioned in the first chapter, the regulations of the Iranian Civil Code concerning sales were not drafted to deal with international sales, thus in most cases that deal with international sales reference should be made to the relevant custom and usage or alternatively, the contract could be made with Incoterms.

٧.١٣ FUNDAMENTAL BREACH OF CONTRACT AND LACK OF MATERIAL CONFORMITY

٧.١٣.١ UNDER THE VIENNA CONVENTION

It is clear from the provisions of the Vienna Convention[٣٤٤] is subject to consider the breach in question as a fundamental breach. In other words, it may be suggested that Vienna Convention is pro-enforcement bias. It appears that the writers of the Convention

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[٣٤٣]. Hamidreza Partow, 'Obligation of the Seller with regard to the Packaging of Goods' [٢٠١١] ٣ <http://sapient.blogfa.com/post-١٩.aspx> Accessed ٩ July ٢٠٢٠.

[٣٤٤]. The Vienna Convention Act ١٩٨٠ Arts ٢٥, ٣٤,٣٦,٣٧,٤٨,٤٩,٦٤,٥١ and ٧٣.

intentionally and purposefully have restricted the claim of repudiation merely to fundamental breaches. That is to say, principally the Convention remains perfectly applicable to the contract of sale if it is intended by contractual parties unless the condition of fundamental breach are met. Article ٤٩ (١) of the Convention provides that;

"The buyer may declare the contract avoided: (a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract".

Article ٥١ (٢) also provides that; "the buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract".

Concerning cases relating to the right of revocation right, the Convention states that:

"the seller may declare the contract avoided: (a) if the failure by the buyer to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract".[٣٤٥]

The Vienna Convention does not provide guidelines for a distinction to be made between fundamental and non-fundamental breach; it simply states that:

"*a breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as to substantially deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee, and a reasonable person of the same kind in the same circumstances would have not foreseen such a result*".[٣٤٦]

"This provision has been criticized because it does not give a clear definition of fundamental breach.[٣٤٧] The Convention does not even provide an example of what may

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[٣٤٥]. The Vienna Convention Act ١٩٨ Art ٦٤ (١).

[٣٤٦]. The Vienna Convention Act ١٩٨٠ Art ٢٥.

[٣٤٧]. Graffi Leonardo, 'Case Law on the Concept of Fundamental Breach in the Vienna Sales Convention' [٢٠١٣] Peace Law <http://www.cisg.law.pace.edu/cisg/biblio/graffi.html> Accessed ١٠ August ٢٠٢٠.

constitute a fundamental breach for the purpose of its application. It simply provides general interpretive guidelines".[٣٤٨] Therefore, it might be concluded that the distinction of fundamental breach is a subjective matter that has to be assessed in case a dispute arises.

According to the content of the Vienna Convention,[٣٤٩] for a fundamental breach of the contract from one contract party, three elements are necessary: ١. One of the parties has caused a fundamental breach; ٢. This fundamental breach leads to substantial damage to other parties; ٣. This loss or detriment was foreseeable.

Some lawmakers believe that substantial deprivation of one of the parties from a foreseeable benefit in a contract is one of the conditions for fundamental breach.[٣٥٠] However, it is clear that the substantial deprivation of one party from his foreseeable benefit is not an independent condition but is in fact a condition that allows one to obtain the rate of suffered damage. It seems that the nature and essence of the breach's obligation are not important, but the effects of the non-performance of the contract from the promisor are more important. Therefore, the loss suffered by the other party will be fundamental, when this damage leads to substantial damage to his profit in the contract. For example, when the parties have agreed to deliver the goods on a particular date for a special event, but the seller fails to deliver them on that agreed date. The parties can cite any non-performance of an obligation of the contract as a fundamental breach or agree that any fundamental breach is a non – fundamental breach in order to avoid revocation.[٣٥١]

One case of a fundamental breach is where there is the delivery of non-material conformity of goods with the contract so that if the delivered goods do not conform to the contract this may be regarded as a fundamental breach and accordingly the buyer has a right to repudiate the contract in accordance with Article ٤٩ (١) (a). The cancellation of the contract in such a case is subject to two conditions: first that the buyer has to give notice to the seller in a case of a lack of conformity as indicated in Article ٣٩, and secondly, the goods have to be returned to the seller, if it possible in accordance with Article ٨٢ (١).

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[٣٤٨]. *Ibid.*

[٣٤٩]. The Vienna Convention Act ١٩٨٠ Art ٢٥.

[٣٥٠]. Albert H Kritzer, *Guide to Practical Applications of the United Nations, Convention on Contracts for the International Sale of Goods* (Boston: Kluwer Law and Taxation ١٩٨٩) ٢٠٥.

[٣٥١]. The Vienna Convention Act ١٩٨٠Art ٦.

When the seller delivers non-conforming goods before the fixed time for delivery, the buyer can cancel the contract if the lack of conformity was substantial and with reference to the essence of the goods and where making up deficiency of the goods is impossible. The exercise of this condition retains the right of the buyer to repair the goods in accordance with the contract.[٣٥٢]However, if the goods are delivered in due time or after the delivery date, the buyer has the right to cancellation without the foregoing conditions.

When nonconforming cannot be avoided, but the goods are repairable, the buyer cannot repudiate the contract unless the time for repair has passed and the seller has not repaired them, or if he has done so, it was unsuccessful.[٣٥٣]If the non-conformity is insubstantial, the buyer cannot terminate the contract unless the goods have not yet been delivered by the seller.[٣٥٤]

If a major part of the delivered goods is nonconforming with the agreed descriptions in the contract then this will be regarded as a fundamental breach because the buyer will be deprived of the expected profits and he can thus cancel the contract in accordance with Articles ٥١ (٤) and ٤٩ (١) of the Convention.[٣٥٥]

If the delivered goods are of a different color than those specified in the contract it will not be regarded as a fundamental breach because the goods may yet conform to the buyer's requirement. This will be the case unless the goods' color is important for the purposes of the buyer's transaction. Hence, in this event, the buyer can only claim damages. It has to be added, however, that the mere delivery of low-quality goods is not regarded as a fundamental breach but the delivery of a smaller amount than the agreed amount in the contract is a fundamental breach.

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[٣٥٢]. The Vienna Convention Act ١٩٨٠ Arts ٣٧, ٤٨.

[٣٥٣]. Schlechtriem & Schwenzer, *Commentary on the UN Convention on the International Sale of Goods* (CISG) (٣rd edn, Edited by Ingeborg Schwenzer OUP ٢٠١٠) ٤٧١ & Safai, S. H., *The Law of International Sale of Goods A Comparative Study* (٢nd edn, Tehran, University of Tehran Press, ٢٠١٣) ٢٥٥.

[٣٥٤]. Safai, S. H., *The Law of International Sale of Goods A Comparative Study* (٢nd edn, Tehran, University of Tehran Press, ٢٠١٣) ٢٥٥.

[٣٥٥]. The Vienna Convention Act ١٩٨٠ Arts ٤٩, ٥١.

٧.١٤ QUALITY CONFORMITY OF DELIVERED GOODS & ITS PERFORMANCE GUARANTEE

The quality of the subject matter of a contract must conform to the contract. The meaning of quality here is its essence and is the essential material of the goods. This issue is important because in most transactions the quality of the goods is the main purpose of the contract. Consequently, the seller cannot oblige the buyer to take delivery of goods where their quality does not conform to the agreement.

٧.١٤.١ UNDER IRANIAN LAW

Under Iranian law, a seller cannot oblige the buyer to accept goods that are not of the same quality as that described in the contract, even though the delivered goods may be more expensive than the goods specified in the agreement.[٣٥٦] Thus, if the subject matter of the contract is unascertained goods, the parties may agree to have delivered goods of a different commodity, for instance, they may agree to the delivery of wheat instead of rice. This kind of agreement essentially is an uncertain contract and by virtue of this contract, the buyer takes delivery of the goods, because the seller did not perform his primary obligation.

A. Specific Goods

If the subject matter of the contract is specific goods, the seller must deliver the goods themselves and nothing else. Therefore, if the seller delivers goods but after a while realizes that the materials of the delivered goods are different from that specified, the contract will be cancelled.[٣٥٧] If after making a contract for a specific time of delivery if the material of the goods suffers a loss in their nature due to a change in quality, the contract will be cancelled.[٣٥٨]

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[٣٥٦]. The Iranian Civil Code Art ٢٧٥.

[٣٥٧]. The Iranian Civil Code Art ٣٥٣.

[٣٥٨]. Abdullah Kiyaie, *Obligations of Seller and Buyer Before and after the Delivery of Goods,* (٣rd edn, Tehran, Iran, ٢٠٠٥) ١٢٢.

B. Unascertained Goods

If the goods are unidentified unascertained goods and all or part of the delivered goods is made up of different materials, the seller must deliver the same quality of goods as those specified in the contract. In this case, if the lack of conformity relates to the time when the contract is made, the contract will be cancelled, and if the change in the quality of the goods takes place after the conclusion of the contract and before taking delivery, the seller must remedy any lack of conformity. Otherwise, the buyer has the option of accepting the contract regarding the conformity of goods and cancelling the other part of the contract or repudiating the contract entirely.[٣٥٩]

٧.١٥ LEGAL CONFORMITY (THIRD PARTY CLAIM)

The seller is obliged under the Vienna Convention[٣٦٠] to deliver goods that are free from any right or claim of a third party. Article ٤١ of the Vienna Convention provides:

"The seller must deliver goods which are free from any right or claim of a third party unless the buyer agreed to take the goods subject to that right or claim. However, if such right or claim is based on industrial property or other intellectual property, the seller's obligation is governed by Article ٤٢".

In this part, legal conformity under two sections will be considered. Firstly, rights and third-party claims on the object of sale will be examined. Secondly, rights and third-party claims concerning intellectual property will be reviewed.

٧.١٥.١ UNDER THE VIENNA CONVENTION

The Vienna Convention is not concerned with the effect that a contract may have on the property or the goods sold.[٣٦١] Therefore, in discussions about rights and third-party

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[٣٥٩]. The Iranian Civil Code Arts ٤٤١ and ٤٤٢.

[٣٦٠]. The Vienna Convention Act ١٩٨٠ Arts ٤١ and ٤٢.

[٣٦١]. The Vienna Convention Act ١٩٨٠ Art ٤.

claims, the property and the refund of goods are determined by domestic law.[٣٦٢] However, the relationship between the seller and the buyer must be considered in accordance with the Vienna Convention.

According to Article ٤١, the seller is responsible (as bailee) for any right or third-party claim. This Article makes reference to a "right or claim of a third party". "Right" includes any type of real rights such as ownership and accessory rights such as a lien.[٣٦٣]

With regard to third-party claims, it is not necessary for the pursuit of a claim for it to be an existing right. If he did not permit the buyer's operation, his action is enough for it to be regarded as a claim.[٣٦٤] Also, it is not necessary to make a third-party claim in court in order to for an action to be brought against the seller. A mere discussion with the customer is enough for his claim to go forward.[٣٦٥] Therefore, the goods must be free from any charge and the buyer must be free to enjoy ownership of the goods without any disturbance. However, there is a question of whether any limitations which are imposed on the sale and purchase of some goods in public law, such as limitations concerning the import, export, taxes, or environmental protection and consumer protection can be considered as a lack of legal conformity or material conformity.

There is no express ruling on this issue in the Vienna Convention and there is nothing of importance to be derived from its historical record. Some commentators believe that a distinction should be made between different cases.[٣٦٦] For example, limitations concerning the import or export of goods are regarded as a lack of legal conformity, but limitations

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[٣٦٢]. Schlechtriem & Schwenzer, *Commentary on the UN Convention on the International Sale of Goods* (CISG) (٣rd edn, Edited by Ingeborg Schwenzer OUP ٢٠١٠) ٢٢٥.

[٣٦٣]. Safai, S. H., *The Law of International Sale of Goods A Comparative Study* (٢nd edn, Tehran, University of Tehran Press, ٢٠١٣) ٢٠٣.

[٣٦٤]. *Ibid.*

[٣٦٥]. Schlechtriem & Schwenzer, *Commentary on the UN Convention on the International Sale of Goods* (CISG) (٣rd edn, Edited by Ingeborg Schwenzer OUP ٢٠١٠) ٣٢٩.

[٣٦٦]. *Ibid.*

concerning the essence and nature of goods that are due to environmental protection and consumer protection are regarded as material conformity.[٣٦٧]

٧.١٥.٢ UNDER IRANIAN LAW

Under Iranian law, the seller is required to sell goods of which he is the owner, or where he has permission to sell them from the owner. If a seller sells another person's goods without the permission of that person and the real owner does not accept this transaction, the seller is responsible for refunding the price.[٣٦٨] Also, when a third party has a right other than an ownership right, so, the buyer has the right to repudiate the contract if he is not aware.[٣٦٩] However, it seems that the buyer will benefit from this right, only when the third party claim is demonstrated in court, thus, a mere claim without assertion is not enough for the operation of this right. Therefore, Iranian law and the Vienna Convention differ on this point, because according to the Vienna Convention a mere third party claim gives the buyer the right to refer to the seller and benefit from a foreseen performance guarantee.[٣٧٠] The fact that a reference has to be made to a court for any claim before referring the matter back to the seller is not reasonable, because the seller himself is mainly responsible for any claim and he may be able to resolve any problems or misunderstandings by negotiation. In addition, there is no obligation under Iranian Law to give notice in cases where a claim is made by a third party while under the Vienna Convention the buyer must give notice to the seller. In addition, according to English law[٣٧١] as well as Iranian Law, the object of sale must be free from any claim and third party right and the buyer is not obliged to give notice to the seller.

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[٣٦٧]. *Ibid.*

[٣٦٨]. The Iranian Civil Code Art ٣٩١.

[٣٦٩]. The Iranian Civil Code Art ٥٣.

[٣٧٠]. Safai, S. H., *The Law of International Sale of Goods A Comparative Study* (٢nd edn, Tehran, University of Tehran Press, ٢٠١٣) ٢٠٧.

[٣٧١]. The UK. Sale of Goods Act ١٩٧٩ S ١٢ (٢).

٧.١٦ EXCEPTION TO A SELLER'S LIABILITY FOR THIRD-PARTY CLAIMS ON GOODS

٧.١٦.١ UNDER THE VIENNA CONVENTION

The seller has no liability towards the buyer in three cases and his guarantee will be lost in those cases that include:

A. Buyer’s satisfaction toward non-conformity

According to Article ٤١ of the Vienna Convention, if the buyer agrees and accepts the goods which are subject to claim or right, he will lose his right to refer to the seller. If the buyer knows of the third party claim during the sale, it might be regarded as his implied satisfaction[٣٧٢] but principally, the buyer's agreement is different from a mere announcement, and only giving notice to the seller must not be regarded as satisfaction by him.

B. Non-liability condition

According to the previous case, which was the satisfaction of the buyer with the acceptance of the goods together with a third-party claim, it could be inferred that the validity of the seller's non-liability condition towards the third-party claim is thus satisfied. In addition, it could be seen to be in conformity with Article ٦ of the Vienna Convention.[٣٧٣]

C. lack of commitment to giving the customer notice

If the buyer does not give notice to the seller after he has been informed of a third-party claim or after the time in which he could not have been unaware of such a claim, he will lose his right to rely on the provisions of Article ٤١ or Article ٤٢.[٣٧٤] However, in two cases the buyer has the right to rely on non-conformity if he does not give notice in a reasonable time;

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[٣٧٢]. Schlechtriem & Schwenzer, “Commentary *on the UN Convention on the International Sale of Goods* (CISG) (٣rd edn. Edited by Ingeborg Schwenzer OUP ٢٠١٠) ٣٣١.

[٣٧٣]. Safai, S. H., *The Law of International Sale of Goods A Comparative Study* (٢nd edn, Tehran, University of Tehran Press, ٢٠١٣) ٢٠٤.

[٣٧٤]. The Vienna Convention Act ١٩٨٠ Art ٤٣ (١).

A. When the buyer has a reasonable excuse for his failure to give notice.[٣٧٥] In this case, the buyer is entitled to apply only to reduce the price or claim damage, except for a loss of profit.[٣٧٦]

B. When the seller knows of a right or a third party claim and he has not informed the buyer.[٣٧٧]

٧.١٦.٢ UNDER IRANIAN LAW

The third-party claim may be rooted in Article ٣٩١ of Iranian Civil Law where the property of the subject matter of sale is owned by a third party prior to the conclusion of the contract. In this case, a third party has a potential claim on the subject matter as a bona fide party. If the goods belonged to a non-contractual party, the buyer can claim to have his costs refunded by the 'impostor' seller. However, he cannot claim damages or other losses which he has suffered in this transaction, because he knew and acted against himself.[٣٧٨] However, regarding other rights or claims except for ownership claims, such as a lien or an easement, the buyer has no right to repudiate the contract or refer the matter back to the seller if he was fully aware of all the facts during the sale.[٣٧٩]

There is no particular article or express text in Iranian Law concerned with the reduction, increase or non-responsibility of the seller under the contract. However, regardless of the existence of doubt about the validity of such contracts, some lawmakers have accepted their validity as a principle.[٣٨٠] However, if the sellers knew of the right or third party claim and hide it, this condition of the seller's non-responsibility could be considered invalid because of its conflict with public order.[٣٨١] Therefore, in this respect both

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٣٧٥. The Vienna Convention Act ١٩٨٠ Art ٤٤.

٣٧٦. *Ibid.*

٣٧٧. The Vienna Convention Act ١٩٨٠ Art ٤٣ (٢).

٣٧٨. The Iranian Civil Code Art ٢٦٣.

٣٧٩. The Iranian Civil Code Art ٥٣.

٣٨٠. Safai, S. H., *The Law of International Sale of Goods A Comparative Study* (٢nd edn, Tehran University of Tehran Press, ٢٠١٣) ٢١١.

٣٨١. Naser Katozian, *Ughud -e- Moayan* (٧th edn, V. ١, Tehran, Ganj Danesh ٢٠١٠) ١٦٦.

Iranian law and the Vienna Convention share identical viewpoints on the matter of third party right over the subject matter of the contract of sale.

٧.١٧ RIGHT AND THIRD-PARTY CLAIM DUE TO INTELLECTUAL PROPERTY

٧.١٧.١ UNDER THE VIENNA CONVENTION

A right or a third party claim in relation to an object of sale may be made for industrial property or other types of intellectual property concerning the production, mark, name, designs, and models which are supported by International Conventions. Therefore, a buyer may be prohibited from reselling the goods because of a third-party patent.[٣٨٢] In light of this possibility, the Vienna Convention expressly obliges the seller to deliver goods that are free from any right or third party claim that is based on industrial property or other intellectual property.[٣٨٣]

Since the first instance of sold goods may be different from the instance of using the goods, Article ٤٢ of the Vienna Convention limits the obligation of the seller into two parts;

A. The right or claim of a third party must be based on the law of the State i.e. the State of resale or the State where the goods are used.[٣٨٤]

B. The buyer cannot refer to the claim of a third party unless the seller knew or could not have been unaware of the right or claim.[٣٨٥]

Therefore it may be said that Vienna Convention's endorsement of the buyer in relation to a third party claim concerning intellectual property in Article ٤٢ is subject to two conditions;

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[٣٨٢]. *Haq e Enhesari*.

[٣٨٣]. The Vienna Convention Act ١٩٨٠ Art ٤٢.

[٣٨٤]. Safai, S. H., *The Law of International Sale of Goods A Comparative Study* (٢nd edn, Tehran, University of Tehran Press, ٢٠١٣) ٢١٢.

[٣٨٥]. *Ibid*.

The seller must have known of the third-party claim at the time the contract was made or alternatively he could not have been unaware of the right or claim. The right or claim must be based on the law of the State for which the goods were for resale or other use.[٣٨٦] By Article ٤٢(٢) the buyer, in two cases, cannot refer to the seller for a guarantee relating to a third party claim based on intellectual property.

A. "*At the time of the conclusion of the contract the buyer knew or could not have been unaware of the right or claim*." This rule is similar to the rule that has been discussed in Article ٤٢ viz. concerning the material right of the third party. However, in that Article there was no case in which the buyer "could not have been unaware of the right or claim" but there is a condition here, regarding intellectual property, because, on the one hand, the buyer could not have been unaware of the legal statute of intellectual property in his country. On the other hand, his lack of information regarding the law of the country into which goods are being transferred is not acceptable.[٣٨٧]

B. *"The right or claim results from the seller's compliance with technical drawings, designs, formulae or other such specifications furnished by the buyer".*[٣٨٨]

٧.١٧.٢ UNDER IRANIAN LAW

The Vienna Convention has referred the criterion of assessment of goods to the national law of the countries due to the immunity arising from industrial and intellectual property. In order to consider this Article and its compliance with Iranian law, it is necessary to look at the status of industrial and intellectual property law in the Iranian legal system.

Before the Islamic revolution in Iran, there were a number of regulations that were designed to protect foreigners' rights. However, after the revolution and more importantly recently, under the title of contracts of investment, this protection has increased to its

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[٣٨٦]. John O. Honnold and Harry M. Fletchner, *Uniform Law for International Sales under the ١٩٨٠ United Nations Convention* (٤th revised edn, Kluwer Law International ٢٠٠٩) ٢١٣.

[٣٨٧]. Safai, S. H., *The Law of International Sale of Goods A Comparative Study* (٢nd edn, Tehran, University of Tehran Press, ٢٠١٣) ٢١٣.

[٣٨٨]. The Vienna Convention Act ١٩٨٠ Art ٤٢ (٢).

highest level. However, Iran has not adopted any conventions or treaties in the area of intellectual property. Nonetheless, regarding industrial property, Iran adopted the Paris Convention in the area of protection of industrial property in ١٩٥٧. In addition, after the revolution, it signed the Madrid Agreement in ٢٠٠٤.

As intellectual property law has not been recognized in Iranian law, it may be said that Article ٤٢ of the Vienna Convention which concerns the delivery of goods that are free from any intellectual property rights is of no legal significance in the eyes of Iranian law. In contrast, regarding industrial property due to recent changes, it can be said that the seller is obliged to deliver goods free from any industrial property rights unless the buyer is able to reject the goods. However, if the buyer was aware of the contrary or should have been aware, the seller has no duty.[٣٨٩]

Ultimately, one of the points that deserves to be mentioned is that if the governing law of the contract is Vienna Convention and the Iranian courts have jurisdiction as per the contract the possible difference in respect of subject such as intellectual property may cause issues, yet they are not insoluble as the court may solve it referring to the comp=only accepted principles of conflict of laws.

٧.١٨ SOME DIFFERENCES BETWEEN IRANIAN LAW AND THE VIENNA CONVENTION

Under Iranian law, there is no difference between material conformity and the legal conformity of goods, and there is also no separation between claims based on intellectual property and other claims. However, Iranian lawmakers have not totally disregarded this subject and have occasionally legislated specific laws in this area. The Articles in this chapter can be found in the Iranian Civil Code.

[٣٨٩]. Alireza Nazem, 'Obligations of the Vendor, Convention on International Sale of Goods and Rights in Iran' [٢٠١١] Kanoon e Sardaftaran <http://www.notary.ir/node/٢٩١> Accessed ٠٨ June ٢٠٢٠.

Under Iranian Law a mere third-party claim does not give rise to a right including the right to repudiate a contract nor does it provide a remedy for the buyer unless such a claim will not allow the customer to retain his constructive possession of the goods. However, under the Vienna Convention, a mere third-party claim could be caused to a right of remedy for the buyer.

Additionally, under the Vienna Convention, the buyer enjoys a performance guarantee for a lack of conformity, provided notice is given to the seller, while under Iranian law, only non-conformity of goods with the contract will allow the customer to use his rights of repudiation or his rights to damages and he need not previously notify the seller.

There is no Article strictly concerning claims based on intellectual property and exclusive ownership[۳۹۰] in Iranian law; therefore it would seem that the need for such Articles is clear. In more advanced law attention is paid to the necessity of conformity of goods with the contract. Among these is the Vienna Convention on the Sale of Goods ۱۹۸۰ and the UK Sale of Goods Act ۱۹۷۹ which provide some provisions in this respect. However in Iranian law, no special chapter is devoted to this subject, and accordingly, a legal requirement for text, in this case, is strongly felt. Nevertheless, it could be said that the provisions relating to the necessity of conformity of goods with the contract and its performance guarantees are inferable from certain Articles of the Iranian Civil Code, Trade Law, and the Act of Enrolling.

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۳۹۰. Monopoly.

٧.١٩ CONCLUSION

In addition, under Iranian law, the buyer is able to cancel the contract in cases of impossibility of performance of the contract or an adjustment of the contract i.e. requests for a price reduction, both options of which need the intervention of the court.

The seller is also bound to deliver the goods consistent with the descriptions mentioned in the contract concerning the quality of the goods. Under Iranian Law, delivered goods have to be free from any defect in relation to the implied term concerning quality between the parties. Hence, the law itself may exempt the parties from the description of the goods in their contract. The delivery of defective quality goods gives an option to the buyer to cancel the contract or reduce the price in the sale of specific goods. However, in the case of a lack of conformity in the quality of delivered goods occurring in unascertained goods the buyer can request the specific performance of the contract. If specific performance is impossible for the seller, the buyer becomes entitled to repudiate the contract.

Iranian Civil Law's stipulation and freedom of contracts empower the parties in international sales to design the contract in accordance with their intentions. The stipulation of special trade terms such as C.I.F and F.O.B terms, with reference to their definition by the International Chamber of Commerce, can very much assist the parties in easily modifying the contract. However, these terms do not cover some areas such as the transfer of property, the quality of the goods, and the remedies for breach of contract. In addition, Iranian law, despite its positive aspects, is not capable of applying to international sales. Changes to those rules concerning sale in the Iranian Civil Code which largely deal with national sales is probably not the best solution for diverse reasons. The solution is to codify international sales according to their requirements and distinguish national sales from international contracts, and in such circumstances, the best solution is to accept a uniform law on the law of international contracts.

CHAPTER EIGHT

٨. THE EFFECTS OF DELIVERY

٨.١ INTRODUCTION

The delivery of goods and its legal consequences are extremely important matters in the law relating to the international sale of goods. When goods are sold they are 'at risk' until they reach the buyer's destination. Examples of such risks include the sinking of the ship carrying the goods in question, cargo theft, defects or destruction. These risks are of particular importance in international trade when the seller and the buyer are located in two different countries. The question is often posed: who must bear these risks the seller or the buyer? To answer this question one must consider the legal consequences of the delivery of goods as they are transferred from the seller to the buyer. Issues concern the transfer of property and the passing of risk. Issues concerning the disruption and lien and some other effects of delivery will be discussed in this chapter. As in the earlier chapters, this will be a comparative study relating to the Civil Code of the Islamic Republic of Iran, and the United Nations Convention on Contracts for the International Sale of Goods.

٨.٢ EFFECTS OF DELIVERY ON THE PASSING OF PROPERTY

The effect of the delivery of goods on the passing of property is one of the most significant subjects in sale of goods contracts. Lawmakers and legal systems have presented different solutions on this important matter. Some legal systems see the act of delivery as the time of the transfer of property whilst others say that as soon as the contract is concluded the ownership of the good is transferred from the seller to the buyer.

٨.٢.١ UNDER IRANIAN LAW

There are two views regarding the transfer of property in Iranian law.[٣٩١] According to the first, property in the sale of specific goods and the goods forming part of a bulk passes when the contract is concluded, but property in the sale of unascertained goods passes with delivery. Based on the second view, property passes at the time of the contract of sale when the object of sale is capable of being transferred.[٣٩٢] Therefore, when the goods are capable of transfer immediately, their ownership will transfer to the buyer as soon as the goods have been placed in a position where the transfer of property is possible.

The method of the transfer of property from the seller to the buyer depends on the type and the nature of the goods. When the object of sale is specific goods the property passes to the buyer as soon as the contract is made. According to Islamic Law[٣٩٣] when a contract is made the object of the sale passes to the buyer immediately.٣٩٤The Iranian Civil Code has described a sale in the following terms: *"A sale consists of the giving of possession of specified goods in return for a known consideration*".[٣٩٥] Also Article ٣٦٢ of the Iranian Civil Code states that:

"The consequences of a regularly conducted sale are as follows: ١- *The buyer becomes the owner of the object sold and the seller of its price as soon as a sale is affected".*

It may thus be inferred from the above articles, particularly Article ٣٦٢, that the contract of sale itself leads directly to the transfer of the property from the seller to the buyer.[٣٩٦] Article ٣٦٤ of the Iranian Civil Code exceptionally mentions that, the time of taking delivery is the time of the transfer of property. The Article provides that:

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٣٩١. M. B. Asghari, and others, *The Consequences of the Passing of Risk in Contracts of Sale Involving the Carriage of Goods: A comparative study between Iranian law and CISG, International Proceedings of Economics Development and Research* (١st edn, Singapore vol. ٣٦, ٢٠١٢) ١٠١-١٠٤.

٣٩٢. *Ibid.*

٣٩٣. Mortaza Ansari, *Al-Makasib* (٢٠th edn, Beirut, Al-Noman ٢٠١٣) ٣٤.

٣٩٤According to Muslim jurisprudence, the contract of sale itself serves to transfer the property in the goods to the buyer.

٣٩٥. The Iranian Civil Code Art ٣٣٨.

٣٩٦. M.H. Najafi, Jawaher *al kalam*, (Vth edn, Dar al-Ehya-al-Turath-al Arabi, Lebanon ١٩٨١) ٣٧.

"…In the case of a sale in which delivery is a condition, such as a sale of coins against other coins, the ownership passes from the date of delivery and not from that of the contract".

It appears that the exception of the subject matter of Article ٣٦٢(١) includes all types of sale in which the taking of delivery is the condition for its validity.[٣٩٧] This is the case even though this is not expressly mentioned in the legal materials. [٣٩٨]

The ability and robustness to deliver goods is considered as a condition that may nullify the contract. To illustrate, Articles ٣٦٧ to ٣٨٩ treats non-delivery in some cases as a breach that may affect the spirit of the contract. While entering into the contract of sale the seller shall have the ability to deliver goods as per the contract. Going through the above mentioned Articles it may be suggested that the importance of delivery according to Iranian Civil Law is such an extent that in some conditions passing of property as a result of the contract of sale would be subject to the determination of delivery. In supporting this argument, Article ٣٧٢ explicitly states that if the seller is able to deliver goods partially, the contract is effective and valid solely in respect of the deliverable part. Attention must be given to the "ability" to deliver goods which is far more different from actual delivery. That is to say, if the circumstances show that the seller knew that the goods were not deliverable when he enters into the contract and he was knowingly aware of his inability, this suffices for invalidating the contract *ab initio*. Thus, in analyzing the legal effects following the contract of sale under Iranian Civil Law i.e. "The buyer becomes the owner of the object sold and the seller of its price as soon as a sale is affected" is achievable on condition that not only delivery is conducted but also its ability existed at the time the parties entered into the contract. As a result, the ability to deliver goods by the seller and the ability to deliver the price or simply the consideration would affect the passing of property. If the ability to deliver one of the said items did not existed the contract of sale would not be formed, consequently, property has not exchanged. In consequence, as soon as the contract of sale

[٣٩٧]. There is a type of sale where the buyer must pay the price in advance. For example, a buyer may contract to buy ١٠٠ cars from a factory and pay the price in advance. The factory will then deliver them at a later time in accordance with the contract. This type of sale known in Islamic law as "Ba'y e Sa'la'm".

[٣٩٨]. Jalil Ghanvati, *Comparative Study concerning the Time of the Transfer of Property* (٢nd edn, Andishe Hay Huquqi, Tehran, ٢٠١٢) ٥٧.

is concluded it is not "affected" it effectiveness is subject to both the ability to deliver and delivery.

٨.٢.٢ UNDER THE VIENNA CONVENTION

According to the Vienna Convention, the passing of the property to the buyer is one of the obligations of the seller.[٣٩٩] Article ٣٠ of the Vienna Convention clearly states that:

"The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention".

With regard to the last part of the above Article, the seller has a duty to ensure that the property passes. However, the Vienna Convention does not clearly state how the seller may transfer the property and what must be done in order to pass ownership in the goods. The reason may be that since there are different provisions and rules regarding the transfer of property amongst the signatory nations the unification of those rules makes it difficult. Thus, the Convention is silent on this point.[٤٠٠]

In the light of this problem, Article ٤ of the Vienna Convention provides that:

"This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:

(a) the validity of the contract or of any of its provisions or of any usage;

(b) the effect which the contract may have on the property in the goods sold".

Therefore, the Vienna Convention does not provide any solutions, which might aid a court in case of dispute. Who has the entitlement to observe passing of property and on which basis? One of the suggestions put forward is that the law pursuant to the private international law of the forum also known as "lex situs" would be the criterion of passing of property.

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[٣٩٩]. The Vienna Convention Art ٣٠.

[٤٠٠]. John O. Honnold and Harry M. Fletchner, *Uniform Law for International Sales under the ١٩٨٠ United Nations Convention* (٤th revised edn, Kluwer Law International ٢٠٠٩) ٨٧٢.

Furthermore, the inaction of the Convention towards passing of property may arise questions on the retention of property in that passing of property directly affects its retention by beneficial party. Assuming that the seller retains property unilaterally and the law of *lex situs* confirms that retention does it contradict with the Convention. Alternatively, on the contrary, can it be practiced in line with the Convention? It is arguable that a "simple" retention in exchange of payment of the price would not be problematic. The same is applicable in relation to passing of contractual documents. Whether a retention that goes beyond a "simple" retention on behalf of either party may be viewed as a fundamental breach in the sense of Article ٢٥ falls upon the court[٤٠١]. Article ٢٥ reads:

"A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result".

Moreover, one of the assumption put forward in respect of passing of property in international sales would be that since the goods in the majority of international sales are not specific goods it could be said that the passing of property in international sale at the time of the nomination and the specification and the marking of goods for delivery will be occurred. But we are faced with a problem. If the nomination of goods is the criteria for the passing of property, the seller can be denied his rights when there is no document or witness. It is clear that the nomination depends on the seller's intention. Moreover, in many cases, the buyer cannot prove his claim that the nomination of the goods will occur before delivery takes place. But delivery is a material action and both parties are involved. It is possible however, to prove that the contract can be concluded and that, in most cases, the nomination of goods will take place with delivery. In other words, delivery is the most common way of proving the nomination of the goods.

Under C.I.F contract, Property could pass upon the transfer of documents to the buyer and payment of the price by the buyer to the seller.

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٤٠١. Ingeborg Schwenzer, Schlechtriem & Schwenzer, *Commentary on the UN Convention on the International Sale of Goods* (٥th Edition Oxford Legal Research Library ٢٠٢٣) ٣٣٥.

The documents play an important role in CIF contract, the bill of lading represents the title in the goods, and hence the transfer of the bill of lading should mean the transfer of property in the goods. Therefore, the general presumption in CIF contract is that the property passes upon the transfer of the documents in exchange for payment of the price.

In a CIF contract, the intention of the parties will be that passing of property is conditional. If the buyer rejects them upon examination, property in the goods reverts to the seller.[٤٠٢]

Clearly, the Convention undoubtedly recognizes passing of property expressly and passing of title impliedly as a contractual obligation of the seller under Article ٣٠. Therefore, the seller should have previewed how the property of the goods are going to be transferred and shall take all necessary measures to satisfy his contractual undertaking. What if the sellers do not possess the contractual goods? Under Article ٤١ "The seller must deliver goods which are free from any right or claim of a third party, unless the buyer agreed to take the goods subject to that right or claim….".

For passing of property to be conducted, the seller shall have the property of the goods prior to entering into the contract otherwise he has no entitlement for such transfer and the transfer of unprocessed goods will be unlawful and non-contractual[٤٠٣]. Finally, property needs to be given weight in that the elimination of property will alter the nature of the contract as a whole. If both parties intentionally exclude the obligation of passing of property from the contract, the contract is not titled a contract of sale anymore since one of the most undertaking and significant part for forming a contract of sale has been removed. Although the contract will be correct and efficient, yet it will not have the consequences and be treated as a sale contract. Lacking transfer of property will affect the contractual relation between both parties to the extent that the rights, obligations and liabilities deriving from the contract will not be a simple relation between seller and buyer and will change significantly.

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[٤٠٢]. *Kwei Tek* Chao v British Traders & Shippers Ltd. [١٩٥٤]. https://heinonline.org/HOL/LandingPage?handle=hein.journals/soaf٧٣&div=٣٩&id=&page=> Accessed ١st September,٢٠٢٣.

[٤٠٣]. *Ibid.*

The formation of the contract of sale closely depends on passing of property which illustrates the double importance of this concept in international transactions.

٨.٣ THE EFFECT OF DELIVERY ON THE TRANSFER OF RISK

The carriage of goods which is the subject of an international transaction and which is bound by the rules concerning the possession of the goods presents certain difficulties. During delivery and during the period of the physical carriage of the goods there may be exposure to a variety of events such as drowning, fire, theft or other damage. The loss or damage caused to the goods and other accompanying issues give rise to different circumstances and prevent one or both of the parties from achieving their aim of a sale. Therefore, the liability of parties with respect to loss, damage or the destruction of goods during the transfer is very important and poses a number of questions. For example, who is the responsible party for the resultant loss or damage of goods after the contract has been made? What are the opportunities for satisfactory redress?

٨.٤ THE MEANING OF RISK

The meaning of risk in international trade can arise in a number of situations where there has been the destruction, loss and damage of sold goods. The common feature in all these cases is that the loss or damage must have been an accidental and an unforeseeable event. Therefore, the word "risk" includes situations like theft, sea accidents; high and low temperatures which may damage the quality of goods, causing them to perish; mixing goods with others, the deterioration of the goods, evaporation, improper storage and the careless control of the goods by the carrier.[٤٠٤] In other words, the meaning of risk is loss and defects cause by accident event which cannot be attributed to the seller or the buyer. Also the concept of risk may include insurance risk, political risk and commercial risk.[٤٠٥]

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[٤٠٤]. Douglas E.Goodfriend, '*After the Damage is Done; Risk of Loss Under the United Nations Convention on International Sale of Goods* ' [١٩٨٤] C J T.٢٢

[٤٠٥]. D Michael Day, *The Law of International Trade* (٣rd edn, Butterworths LexisNexis ٢٠٠٣) ١٠٤.

٨.٥ THE TIME TO TRANSFER OF RISK

The goods may suffer destruction through loss or damage at different points from contract formation until the delivery to the buyer. Sometimes, the delivery of the goods takes place at the same time as when a contract is made. However, sometimes a long period elapses between the making of the contract and the delivery of goods. In the latter instance there is always the possibility that the goods will suffer accidental and unexpected damage, for example, the goods may be being packed in the seller's warehouse or damage may occur during the transfer to the port in preparation for export or loss, theft or damage may occur at the destination port or whilst at sea. The important question in all these cases is when does the risk of loss or damage of goods transfer to the buyer? The answer to this question depends on the legal system mechanism upon which the exchange of goods is based on.

٨.٥.١ UNDER IRANIAN LAW

According to the general principles of Islamic law, an owner who takes the benefit from the goods is responsible for any loss or damage to the goods before delivery.[٤٠٦] However, if the property in the sold goods is transferred to the buyer after the conclusion of the contract i.e. before delivery, the buyer is responsible for any loss or damage caused to the goods.[٤٠٧] This rule is not followed in contracts of sale when the risk passes with delivery. Accordingly, passing of risk has been linked to passing of property in the sense that one shall prove its property over the goods in question prior to passing the risk of those goods to the other party. On the other hand, passing of risk is also connected to the time of delivery i.e. prior to delivery, concurrent with delivery or subsequent to delivery. The three latter stages are to be considered under Iranian law principles.

The rule of "the transfer of risk" in Iranian law is taken from the tradition of Muslim's holy prophet which expressed in the following way: "the destruction of any goods before delivery is borne by the seller".[٤٠٨] Some Muslim jurists believe that the transfer of risk by delivery is a deviation from Islamic principles. Hence, in attempting to justify this rule it is

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[٤٠٦]. Naser Katozian, *Ughud -e- Moayan* (Vth edn, V.١, Tehran, Ganje danesh, ٢٠١٠) ١٨٧.
[٤٠٧]. The Iranian Civil Code, Art, ٣٨٧.
[٤٠٨]. Noori Tabarsi H, *Mustadrak al Wasael* (١st edn, Alolbeit , Qum, ١٩٩٢) ٤٧٣.

said that it is impossible to impose the risk on the seller after the delivery of goods unless the property has been returned to him. Therefore this rule is based on the premise is that the contract has been cancelled at the time of the destruction of the goods and that possession of the goods is restored to the seller before their destruction. As a result, the seller becomes responsible for any loss or damage of goods, that is to say the risk of destruction is imposed on the seller as the owner of the object of sale.[٤٠٩] This justification is not acceptable and is complicated because there is no reason to accept that the contract has been cancelled before the destruction of the goods. The causes of the transfer of ownership and the cancellation of the contract are expressly mentioned by law. Under these rules the damage or the destruction of goods before delivery takes place cannot lead to the transfer of ownership or the termination of the contract.

It seems that the transfer of risk via the delivery of goods and the termination of the contract when the goods destroyed before delivery is not an exception and does not require any justification. The termination of the contract in such circumstances-which goods are exchanged is based on the intent of the parties. The main target of the party's agreement in such contracts as the sale of goods is to reach the buyer to bring about the ownership of the goods whilst the seller wishes to obtain the consideration or the price i.e. the exchange of goods and the transfer of ownership is the main aim of the contractual parties.[٤١٠] Thus, when the goods or the object of sale has been destroyed or lost one of the parties wouldn't be able to achieve his aim. Therefore, the contract will be cancelled.

According to this view, the termination of the contract is a consequence of the parties' implied intentions. Moreover, the transfer of risk by delivery is more reasonable than the transfer of risk by ownership. Because, as mentioned in the first chapter, the meaning of "delivery" is the control of goods not only the delivery for the physical goods, so that a person who has the control of goods logically is the person responsible for the risk, because he is able to safeguard the goods and prevent their loss or destruction and also he can insure the goods, for example. It could be said that the transfer of risk can be linked to the transfer of ownership, when ownership of the goods transfers to the buyer via the delivery

٤٠٩. Hasan Imami, *Huquq e Madani* (٣rd edn, Vol ١, Tehran, Islamiyeh, ٢٠٢٠) ٤٦٨.
٤١٠. Nasir Katouzian, *Ughud -e- Moayan* (Vth edn: V.١, Ganje danesh Tehran, ٢٠٠٠) ٨٢.

of the control of the goods. In this case, the transfer of risk by delivery is not an exception from the principle rather it is a rule that conforms to the principle.

The question of whether the transfer of risk sets up a principle or an exception, may give rise to a different result. If the transfer of risk by delivery is considered to be an exception, its usage will be restricted to some definite issues. For instance, it may apply to a sale contract also it may apply solely to the destruction of goods at no reduction in price or consideration. The most important consequence of the transfer of risk via delivery as an exception is that the parties in a contract sale cannot stipulate any terms in their contract. It follows that they cannot change the law regarding the transfer of risk. The exceptions to the rules which have been made by the lawmaker point to the mandatory nature of the law legislated by these exceptions. The transfer of risk by delivery is not an exception, it is a rule and thus it is not at odds to the general principles of law. It could therefore be applied to all contracts based on the exchange of two properties. The destruction of the consideration or the price is also covered by this rule. As a result, since this law applies to the implied intention and the agreement of the parties, so they are able to set their agreement regarding the transfer of risk. The transfer of risk by the delivery of goods is a supplementary rule which applies when the parties cannot or fail to decide when the risk should be transferred.[٤١١]

٨.٥.٢ EXPLANATION OF ARTICLE ٣٨٧ OF THE IRANIAN CIVIL CODE

This article is taken from Islamic law. Its origin in Islamic law is a Hadith, that is a saying or an act or tacit approval or disapproval ascribed to the Prophet Muhammad. This article says that the risk will be borne by the seller where goods are destroyed before taking delivery.[٤١٢]

The rule concerning the transfer of risk and the termination of the contract by the destruction of goods is clearly mentioned in Article ٣٨٧ of the Iranian Civil Code as follows:

[٤١١]. Hasan Imami, *Huquq e Madani* (٣rd edn, Vol ١, Tehran, Islamiyeh, ٢٠٢٠) ٤٦٧.
[٤١٢]. Mortaza Ansari, *Al-Makasib* (٢٠th edn, Al-Noman, Beirut, ٢٠١٣) ٧٠.

"If the object sold perishes before delivery, even without the fault or neglect of the seller, the sale will be avoided and the consideration restored unless the seller has already applied to a magistrate or his substitute for the enforcement of the delivery, in which case the loss will be borne by the buyer only".

According to the above Article, if the goods are destroyed without the fault or the negligence of the seller the contract will be terminated and he will bear the risk. However, the type of remedy available to the buyer is different. Also, the seller will bear the risk and the price must be refunded when the destruction of the good is not caused by his fault. In cases where the destruction of the goods was caused by the seller's fault or negligence, the buyer may claim for substitute goods or the price which he has been paid. Also he can repudiate the sale where delivery is impossible.[٤١٣]

There are two points of view held by Muslim jurists with regard to the avoidance of a contract when the goods have been destroyed by a third party. Some believe that the contract will be revoked when the loss of the goods has been caused by a natural event. Therefore, there is no reason for avoidance of a contract when its destruction has been caused by a third party.[٤١٤] Others believe that this article should apply when the goods have been destroyed by factors which are outside the seller's control and thus the destruction and the loss of goods by a third party leads to a revocation of the contract. Comparing the wording of the Article in issue with the relevant ones in CISG highlights the correlation between delivery and risk with an emphasis in lack of negligence. As long as delivery has not been conducted, the risk of destruction will lead to avoidance of the contract. This Article will be the equivalent of Section V of CISG and more particularly Article ٨١, which states:

"Avoidance of the contract releases both parties from their obligations under it, subject to any damages which may be due…"

In other words, the risk of destruction will be borne by both parties if it is avoided as the contract will be revoked to its initial point where no agreement was yet achieved. On the definition of avoidance in general contract law is consistent with the Iranian Civil law. The

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[٤١٣]. Hasan Imami, *Huquq e Madani* (٣rd edn, Vol ١, Tehran, Islamiyeh, ٢٠٢٠) ٤٦٨.

[٤١٤]. Makki al-Amili, *Al-lum'at al-Dimishqiya* (٨th edn, Vol. ٢, Ganje Erfan, Qum, ٢٠٠١) ٩٥.

common ground in both jurisdictions regards the contract avoided where it is terminated by a reason outside the control of both parties. In this case, the fact that the subject matter of the contract is destroyed prior to delivery cited in Article ۳۸۷ has made the performance of the contract impossible renders the contract avoided will generate the same consequences as general contract law. Both attempt to keep the contract and the agreement reached by parties alive and the cancellation, termination or avoidance of contract has been stated in the narrowest way. Similar to Iranian Civil Law, it is strongly argued that the Vienna Convention the avoidance of the contract is restrictively permitted under Article ۲۵ referring to "fundamental breach". The only exceptional case where avoidance may take place no matter a fundamental breach has taken place or not is non-delivery.[٤١٥] The position taken by the Iranian domestic law also builds a relation between non-delivery and the avoidance of the contract because of impossibility of performance. The requirement that the seller should deliver goods is part of a contract's concept and thus where there is a loss of goods he cannot fulfill his obligations and therefore the contract will be avoided. As a result, the loss or destruction of the goods by a third party as well as the loss of goods by a natural event which is beyond the capacity of the seller to affect its outcome may lead to a revocation of the sale.

The consequences of these viewpoints are different. According to the first view, the contract has not been cancelled but the buyer is able to cancel it and he can claim the price. But, if the sale is regarded as terminated, the buyer may only claim for the price which has been paid and if he does not take any action against the third party the seller can take action against the third party and claim a remedy.[٤١٦]

Article ۳۸۷ allows for two exceptions in Iranian law. Firstly, the seller is responsible for all losses and all the damage to the goods after delivery. When the seller is able to cancel the contract based on (a) an option of meeting or (b) an option of animal or (c) an option of condition. This exception is based on a narration where it has been said that when one of the parties is able to cancel the contract, the risk should be borne by other party who has no right to cancel the contract.

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[٤١٥]. Peter Huber, Alastair Mullis, *The CISG a new textbook for students and practitioners* (Sellier European law publishers, ۲۰۰۷) ۲۰۹-۲۱۲.

[٤١٦]. Ansari Mortaza, *Al-Makasib* (۲۰th edn, Al-Noman, Beirut, ۲۰۱۳) ۲۲.

It is argued that when the buyer has the right to revoke a contract then as far as the buyer is concerned the contract is in an unstable condition. Therefore, it is better to let the risk remain the seller's responsibility.[٤١٧] This, it is argued, is not enough to make the risk the responsibility of the seller after delivery. Because, logically the risk must be borne by the party who has control of the goods and who has custody of the goods. Thus when the delivery of goods takes place under the buyer control and handed over to him he is responsible to keep them properly from losses, damage, defect and destruction. It seems that putting the risk on the seller responsibility, comes from the view which link transfer of risk to transfer of property, but as mentioned before, according to Islamic law and Iranian law risk will pass by delivery not by transfer of property. Finally, since this Article derive from Islamic law, cannot easily modify it so, the Iranian legal system faces a difficulty in finding its way forward.

Second, when the goods have been destroyed by the buyer, the seller is not responsible for destruction of the goods before delivery. This exception is consistent with principle of Iranian law. Because article ٣٨٧ comes into effect when the possessions of the goods has transferred to the buyer. Thus, the seller is not responsible for loss, damage, defect or destruction of the goods which caused by his action.

٨.٦ DEFECT IN THE GOODS BEFORE DELIVERY

٨.٦.١ UNDER IRANIAN LAW

When the object of sale has not been destroyed but has become unusable because of an accident or where the delivery may be temporarily excused, the seller will be bound. Article ٣٨٨ of the Civil Code addresses this matter and provides that: *"If before delivery the object of sale deteriorates the buyer can cancel the sale".*

According to this article in such cases, the buyer has the option to either rescind the contract or claim for an indemnity of defect. Here, the seller is not able to deliver the goods

[٤١٧]. *Ibid*.٣٠.

because the object of sale although not destroyed but it has unusable. This rule also specified in article ٤٢٥ of the Code.[٤١٨]

Therefore, the consequences of the seller's failure to deliver the goods are different. Therefore, the consequences of the seller's failure to deliver the goods are different. Either the consequences of damage or the destruction of the goods leads to the cancellation of the contract and result in the inability of the seller to deliver the goods or the goods are defect before delivery, which gives the buyer the right to revocation.[٤١٩]

٨.٦.٢ UNDER THE VIENNA CONVENTION

The Vienna Convention also contains provisions relating to the passing of risk. Under the Vienna Convention, risk transfers with the delivery of sold goods from seller to buyer. Articles ٦٦ to ٦٨ are dedicated to the conditions and the effects of the transfer of risk. It is clear that the provisions of the Vienna Convention concerning the passing of risk are seen as more important than contractual provisions, custom, usage, and common practice between parties which in comparison are seen as secondary rules. The rules relating to the transfer of risk are of important intellectual concern for the contracting parties, and usually they predict or establish the provisions in the contract or in the general conditions particularly with reference to provisions of Incoterms. Therefore, the provisions of the Vienna Convention regarding the passing of risk apply when the contracting parties have not set down any rule.[٤٢٠] In other words, it is likely that most contracts will contain terms stating when the risk is to pass, or the use of trade terms will also determine the passing of risk. In their absence, the Vienna Convention's rules relating to passing of risk will be applied.[٤٢١]

The Vienna Convention uses the word "risk" when loss or damage "is due to an act or omission of the seller"[٤٢٢] in view of that, the transfer of risk to the buyer at a specific time

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[٤١٨]. "A defect which occurs in the thing sold after the sale but before delivery is to be regarded in the same way as a previous defect".

[٤١٩]. Mirza Hussein Naini, *Al-Makasib* (٢٠th edn, Al-Noman, Beirut, ٢٠٠٣) ١٨٨.

[٤٢٠]. Iraj Seddiqi, *New Uniform International sale Law* (Law Magazin, Iran, No ١٥) ٣٥١. & John O. Honnold and Harry M. Fletchner, *Uniform Law for International Sales under the ١٩٨٠ United Nations Convention,* (٤th revised edn, Kluwer Law International ٢٠٠٩) ٨٣١.

[٤٢١]. I. Carr, and Stone, P., *International trade law* (٦th edn, published, Routledge, Oxon, ٢٠١٨) ٨١.

[٤٢٢]. The Vienna Convention Act ١٩٨٠ Art ٦٦.

means that the buyer is responsible for potential losses including the destruction or damage to goods[٤٢٣].The Vienna Convention provides that:

"Loss of or damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price, unless the loss or damage is due to an act or omission of the seller".[٤٢٤]

Although, on the face of it, Article ٦٠ implies the notion of risk, yet in dealing with this notion the Convention does not go further than domestic jurisdictions and is restricted to loss and damages occurred to contractual goods and it possible legal effects on the relation between seller and buyer. Does Article ٦٠ propose a legal solution for any kinds of loss or damage e.g. theft, delivery by mistake; loss of weight, vandalism, accidents or any other risks or it is conferred on the domestic court of *lex situs*? "The CISG's rules on passing of risk generally do not encompass economic risks".[٤٢٥]

After the transfer of risk if the loss or the destruction of goods is not due to the act or omission of the seller he will be responsible for the risk. For example, when the loss or damage is due to a lack of proper packaging which was one of his obligations, the risk is borne by the seller[٤٢٦] in fact; the seller is responsible for the damage or the losses in the goods at the time of the passing of the risk.[٤٢٧]

Article ٦٦ conditions that the loss or damage attributable to the seller is not covered as they must be "coincidental". Similarly, the same conclusion may be drawn from the provision of Article ٣٦(١) associating the time of passing of risk with non-conformity of goods.[٤٢٨]

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[٤٢٣]. C.M. Bianca, M.J. Bonnell, *Commentary on the International Sales Law* – The ١٩٨٠ Vienna Sales Convention, (Giuffrè, Milan ١٩٨٧) ٤٨٢.

[٤٢٤]. The Vienna Convention, Art, ٦٦.

[٤٢٥] Ingeborg Schwenzer, Schlechtriem & Schwenzer: *Commentary on the UN Convention on the International Sale of Goods* (٥th Edition) Oxford Legal Research Library ٢٠٢٣) ٣٤٠.

[٤٢٦]. C.M. Bianca, M.J. Bonnell, *Commentary on the International Sales Law* – The ١٩٨٠ Vienna Sales Convention(Giuffrè, Milan ١٩٨٧) ٢٨٤.

[٤٢٧]. *Ibid.*٣٨٤.

[٤٢٨]. The seller is liable in accordance with the contract and this Convention for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent

A. The Direct Delivery of Goods

In the majority of international sales, the goods are delivered to the buyer by a third party who carries the goods, such as common carriers. In fact, the goods are handed over to the customer by indirect delivery. Article ٦٧ of the Vienna Convention addresses this type of delivery. In some other transactions the goods are delivered to the buyer personally or his agent directly. Article ٦٩ of the Convention addresses direct delivery.

Direct delivery of the goods can be by transportation. For instance, the goods are delivered to the buyer or his agent after unloading them from a vessel. In this case, the passing of the risk from the seller to the buyer is from the time of taking delivery by the buyer, but if the goods are not taken over by the buyer or his agent, the time of transfer is the time at which the buyer was to take them in accordance with the contract.

Article ٦٩ of the Convention, distinguishes between the time which it is provided that the goods must be delivered in a seller's place of production and when the goods must be delivered to other places. The article provides as follows:

"(١) In cases not within articles ٦٧ and ٦٨, the risk passes to the buyer when he takes over the goods or, if he does not do so in due time, from the time when the goods are placed at his disposal and he commits a breach of contract by failing to take delivery.

(٢) However, if the buyer is bound to take over the goods at a place other than a place of business of the seller, the risk passes when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal at that place.

(٣) If the contract relates to goods not then identified, the goods are considered not to be placed at the disposal of the buyer until they are clearly identified to the contract".

only after that time", Ingeborg Schwenzer, Schlechtriem & Schwenzer: *Commentary on the UN Convention on the International Sale of Goods* (٥th Edition) Oxford Legal Research Library ٢٠٢٣) ٣٥.

In this article two conditions are expressed for the passing of risk. These are the placing of the goods at the disposal of the buyer and that the goods must be identified by the seller.[٤٢٩]

In cases where the seller must take over the goods from his place of business or another place or places, as mentioned in Article ٣١ of the Vienna Convention, this would be subject to Article ٦٩ of the Vienna Convention. When the seller is acting according to the contract and hands over the goods at his place of business, the buyer is obliged to take them at that place and the risk passes to the buyer at that place. But if he fails to take delivery, risk passes from the time at which the goods have been placed at his disposal provided that his failure to take delivery is not regarded as a fundamental breach.[٤٣٠] For example, if the buyer is bound to take ٢٠٠ computers in June and the seller has provided these computers in May. If the seller fails to take them at the specified time he will be responsible for any loss or damage which may occur after that time.

B. Indirect Delivery

Indirect delivery is subject to Article ٦٧ of the Vienna Convention. When the delivery of goods accrue indirectly, two different options are possible. First, the seller is not required to deliver the goods in specified place to the carrier according to the contract. Second, he bound to deliver them at the specified place. The first paragraph of the Article ٦٧ provides as follows:

"(١) If the contract of sale involves carriage of the goods and the seller is not bound to hand them over at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract of sale. If the seller is bound to hand the goods over to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place…".

The fact that the rules relate to the transfer of risk with the delivery of goods and in turn depend on whether the contract involves the carriage of goods or not is different. The

[٤٢٩]. Safai, S. H., *The Law of International Sale of Goods A Comparative Study* (٢nd edn, Tehran, University of Tehran Press, ٢٠١٣)١٤٨.
[٤٣٠]. The Vienna Convention Act ١٩٨٠ Art ٦٩(١).

contract of sale in most international transactions involves the carriage of goods, which requires that the goods are to be transported by a third party. Therefore, the goods are delivered indirectly to the buyer. In such cases, two conditions are necessary. The transfer of goods to the carrier and the specification of goods i.e. the goods must be specified.

٨.٧ THE TRANSFER OF RISK IN GOODS IN TRANSIT

Many international trade transactions take place while goods are in transit. According to the Vienna Convention, for goods in transit the risk passes at the time of conclusion of the contract. In this case the transfer of risk at the time of delivery is not possible. Article ٦٨ of the Convention provides that:

"The risk in respect of goods sold in transit passes to the buyer from the time of the conclusion of the contract. However, if the circumstances so indicate, the risk is assumed by the buyer from the time the goods were handed over to the carrier who issued the documents embodying the contract of carriage. Nevertheless, if at the time of the conclusion of the contract of sale the seller knew or ought to have known that the goods had been lost or damaged and did not disclose this to the buyer, the loss or damage is at the risk of the seller".

According to this Article, the risk passes to the buyer from the time at which the contract is concluded. If an accident is caused by the damage to the goods that would be recognizable, for example when damage is caused by an accident or a storm, there is no wrong or problem in the subject matter of the article. But, in many cases, it is impossible to determine the cause of the damage or the destruction. On the other hand, if a part of damage is caused by an accident before the conclusion of the contract and another part of the damage is the result of an accident which occurs after the making of the contract, then both the seller and the buyer will have a claim against the insurer for the damage which is caused by the accidents.[٤٣١]

[٤٣١]. Safai, S. H., *The Law of International Sale of Goods A Comparative Study*, (٢nd edn, Tehran, University of Tehran Press, ٢٠١٣) ١٥٠.

It has been mentioned that an exception in Article ٦٨ of the Vienna Convention is that, (if the circumstances so indicate) risk pass to carrier which issued the contract documents at the time of delivery. For instance, when after the conclusion of the contract insurance and document of title indorse and transfer to the buyer; circumstances indicate that the parties impliedly agreed that the risk passed to the buyer from the time which goods are delivered to the carrier.[٤٣٢] The reason is that the document of title is in the name of the buyer and thus he only has the right to claim. The buyer also is also able to have recourse to the insurer.

As has been stated, there is an exception. In Article ٦٨ of the Vienna Convention the risk in goods in transit passes to the buyer at the time of the conclusion of the contract. However, in the third paragraph of that Article it is stated that:

"if at the time of the conclusion of the contract of sale the seller knew or ought to have known that the goods had been lost or damaged and[he] did not disclose this to the buyer, the loss or damage is at the risk of the seller".

There are three points of view regarding whether the seller is responsible for the damage, loss or destruction of the goods – before and after conclusion of the contract- or if he is only responsible for the damage, loss or destruction which takes place after the conclusion of the contract. According to first view, the seller's responsibility is limited to the damage which he knew of or ought to have known of at the time of making contract. This theory is confirmed by the last statement in Article ٦٨.[٤٣٣] However, it could be said that, this rule causes a separation of the risk for goods in transit and its performance also seems problematic. The second view holds that, in this case, the seller is responsible for damage which takes place after conclusion of the contract.[٤٣٤] The third view is that, in the case of the seller, where there are known defects or damage of goods in transit which was not disclosed to the buyer, the seller is responsible for the damage, losses and the destruction

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٤٣٢. *Ibid.*

٤٣٣. Schlechtriem & Schwenzer, *Commentary on the UN Convention on the International Sale of Goods* (CISG) (٣rd edn, Edited by Ingeborg Schwenzer OUP ٢٠١٠) ٣٤.

٤٣٤. Safai, S. H., *The Law of International Sale of Goods A Comparative Study*, (٢nd edn, Tehran, University of Tehran Press, ٢٠١٣) ١٥٣.

of the goods which occurred both before and after the conclusion of the contract.[٤٣٥] This latter theory is clearly different from the first, because according to this view the responsibility of seller is not limited to the losses and the damage of goods which took place before the conclusion of the contract. On the other hand, by this theory the seller is not responsible for any loss and damages which has occurred after the conclusion of the contract but it contains all the loss and the damage which becomes apparent after the contract has been made and which comes from the initial damage i.e. the damage which occurred before the conclusion of the contract.

٨.٨ THE TRANSFER OF RISK IN INCOTERMS

There is no rule concerning the time and method of the transfer of risk in Incoterms. One of the terms in this international instrument concerns the transfer of risk and its conditions and preliminaries. We will consider how and when risk passes from the seller to the buyer and who makes the contract under C.I.F. or F.O.B. terms.

A. The transfer of risk under FOB & CIF contracts

According to the provisions of Incoterms, if a contract is concluded under FOB & CIF the risk of destruction, loss or damage to the goods passes to the buyer as soon as the goods have passed over the ship's rail.[٤٣٦] in FOB terms -which is one of the most popular of the trade terms used in international sale contracts, the seller is obliged to hand over the goods to the carrier in the port of shipment on board ship.[٤٣٧] Under FOB terms, the seller is not obliged to arrange for the transportation and the insurance of the goods. Therefore, the time of passing of risk to the buyer is the time at which the goods have been placed on board of the nominated ship by the seller, for the period of the fixed time in the contract.[٤٣٨] In other words, in FOB sales, the risk passes when the goods pass the ship's rail.[٤٣٩]The seller is also bound to provide the conformity certification of the goods and hand them over in the port

[٤٣٥]. Schlechtriem & Schwenzer, *Commentary on the UN Convention on the International Sale of Goods* (CISG) (٣rd Edn, Edited by Ingeborg Schwenzer OUP ٢٠١٠) ٣٤-٣٥.

[٤٣٦]. John Atiyah, N. Adams, Hector Macqueen, *Atiyah's Sale of Goods* (١٣th edn, Pearson Education Limited, ٢٠١٦) ٤٢٣.

[٤٣٧]. I. Carr, and Stone, P. *International trade law (*٦th edn, published, Routledge, Oxon, ٢٠١٨) ٣٧.

[٤٣٨]. Jan Ramberg. E.J.L.R. ٢٠١١, ١٣(٣/٤) ٣٨٠-٣٨٧.

[٤٣٩]. I. Carr, and Stone, P. *International trade law* (٦th edn, published, Routledge, Oxon, ٢٠١٨) ٣٨.

of shipment within the fixed time period. He also must give sufficient notice to the buyer to unload the goods from the vessel.[٤٤٠] If the seller fails to give notice to the buyer, the risk is still borne by him and it will not be passed to the buyer.

If the buyer, has not informed the seller about the name, place or period of time of the shipment or the vessel did not arrive at the agreed time, or cannot load the cargo or shipment happened earlier, the seller has to bear all of the risk of losses or damage**.**

Regarding transfer of risk under CIF contract: Under a CIF contract the risk passes on shipment and property/title (ownership) is transferred at the time when the documents including; bill of lading, insurance policy and commercial invoice, are tendered to the buyer and the price of the goods are paid. The rationale for highlighting the passing of risk is that general liabilities of sellers are transferred to buyers from the time risk passes. The time of passing of risk deprives buyers of having any claim or defense in respect of loss or damage of the goods. In other words, buyers concede that they must receive the contractual goods regardless of their condition once the risk is passed to them. On the other hand, CIF sellers are entitled to be paid on condition that the contract of sale is enforceable. That is to say the prima facie assumption that in CIF contracts risk passes on shipment is rebutted if the contract is unenforceable. In Couturier v Hastie[٤٤١] the contract was unenforceable in the light of frustration. Consequently, the risk is not passed to the buyers as a result of which the sellers cannot claim for the price and forfeited the right to recourse to the buyers.

In terms of contracts based on FOB terms, the general principle suggesting that risk passes on shipment i.e. delivery of the goods to the ship, irrespective of passing of property, is applicable doubtlessly. Nonetheless, the case of CIF contracts the time in question may differ under certain circumstances. In principle, there is no doubt that CIF buyers can only claim against the insurance policy or to the carrier in case the goods are missing delivered, damaged or lost at the port of discharge. In other words, it is implicit that by accepting the passing of risk on shipment CIF buyers redress in case loss or damage occurs later.

In short, there are three views regarding passing of risk in domestic law:

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٤٤٠. Paragraph ٢ of the Incoterms provisions.

٤٤١. Couturier v Hastie (١٨٥٦) ٥ HLC ٦٧٣; ١٠ ER ١٠٦٥.

A. The risk passes at the time of the conclusion of the contract which is accepted by Swiss Law.[٤٤٢] In this case the time of the delivery of goods cannot play a role in the passing of risk.

B. The risk passes to the buyer when the ownership of the goods passes to the buyer. This idea is derived from English and French Law.[٤٤٣]

C. The risk passes at the time the goods are delivered to the buyer. This view is accepted by the Vienna Convention[٤٤٤] and Iranian Law.[٤٤٥]

The Vienna Convention has not accepted the theoretical basis in English and French law, because the Vienna Convention only governs the formation of the contract and it is not concerned with the effect the contract may have on the property of the goods sold.[٤٤٦]

The authors of the Vienna Convention have accepted the time of delivery as the main principle for the transfer of risk[٤٤٧] and they have accepted the time of the conclusion of the contract for the transfer of risk to the buyer as the secondary rule in some cases.[٤٤٨] Thus under the Vienna Convention the time of passing of risk depends on the case. In direct delivery, the risk passes when the buyer take over the goods.[٤٤٩] If delivery takes place indirectly i.e. "the contract of sale involves the carriage of the goods and the seller is not bound to hand them over at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract of sale".[٤٥٠] Also the risk in goods in transit passes at the time of the conclusion of the contract.[٤٥١]

The authors of the Vienna Convention in justifying its solution argue that since the delivery of the goods is an essential event, it is not difficult for the parties to adjust the delivery time

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٤٤٢. Swiss Civil Code Act ٢٠١٠ Art ١٨٥.
٤٤٣. The U.K. Sale of Goods Act ١٩٧٩ S ٢٩ (١) & The Civil Code of the French Act ١٨٠٤, Art ١١٣٨.
٤٤٤. The Vienna Convention Act ١٩٨٠ Art ٦٧.
٤٤٥. The Iranian Civil Code Art ٣٨٧.
٤٤٦. The Vienna Convention Act ١٩٨٠ Art ٤.
٤٤٧. The Vienna Convention Act ١٩٨٠ Art ٦٧.
٤٤٨. The Vienna Convention Act ١٩٨٠ Art ٦٨.
٤٤٩. The Vienna Convention Act ١٩٨٠ Art ٦٩.
٤٥٠. The Vienna Convention Act ١٩٨٠ Art, ٦٧ (١).
٤٥١. The Vienna Convention Act ١٩٨٠ Art ٦٨.

to the contract. In addition, it is fair that the bearer of the risk is the one who controls the goods, because he can keep them in a suitable place and is able to prepare to prevent or ensure the loss or damage of the goods.[٤٥٢] Also as currently mentioned, Incoterms specify the time of passing of risk in each term, thus it is better to encourage contractual parties and better to train businesspersons to make their contracts under Incoterms.

٨.٩ THE TRANSFER OF RISK WHEN THE CONTRACT INVOLVES THE CARRIAGE OF GOODS

٨.٩.١ UNDER IRANIAN LAW

There is no particular provision in Iranian law concerning transfer of risk and passing of property when the contract involves carriage of goods. The main question is whether delivery of goods with a carrier is an effective delivery or not? The answer to the question will not affect the passing of property if it is accepted that the property in the goods passes at the time of the conclusion of the contract when the goods are capable of being transferred. Based on this view, the property in the sale of unascertained goods and the goods which are part of a specified bulk passes from the seller to the buyer when there is capacity in the goods and they are appropriated for this transfer. Thus, according to this view delivery has no role in the passing of property. However, when there is no indication of appropriation before delivery, delivery can be regarded as a sign or indication of the appropriation of goods. The fact that there has been the delivery of goods to the carrier, where the carrier is assumed as the agent of the seller, cannot be considered as appropriation unless the seller hands over all the documents relating to the goods which prove that the buyer is entitled to the possession of the goods.

Under the second view, which holds that the property in unascertained goods passes with delivery, the delivery of goods to the carrier cannot be regarded as effective delivery. This is because delivery is the transfer of the control of goods from the seller to the buyer and is not only the physical transfer of the goods. Therefore, where there has been the delivery of

[٤٥٢]. John O. Honnold and Harry M. Fletchner, *Uniform Law for International Sales under the ١٩٨٠ United Nations Convention* (٤th revised edn, Kluwer Law International ٢٠٠٩) ٤٥٥.

the goods to the carrier, the goods still are under the control of the seller and the carrier must follow the seller's instructions. Actually, there has been a transfer of goods to the buyer when the documents relating to the goods, such as the bill of lading and shipment receipt are handed over to the buyer. Then the carrier should follow the buyer's instructions, as the owner of the goods so the seller cannot ask the carrier to return the goods. Therefore, the mere delivery of the goods to the carrier without documents of title cannot be regarded as effective delivery one which leads to the passing of property from the seller to the buyer.

When one considers the transfer of risk the question is, in the case of contracts which involves the carriage of goods, when does the risk transfer from the seller to the buyer? Under Iranian Law, the risk passes with the delivery of the goods. However, it is not possible to say that risk passes from the seller to the buyer by delivery of the goods to the carrier. This is because the carrier is usually the agent of the seller and follows the seller's instructions. Under Article ٣٨٦ and ٣٨٨ of the Iranian Civil Code, the carrier bears the risk of the goods in transit as an agent of the seller in this respect. Thus, as the agent of the seller the carrier is responsible for any defect, destruction and damage of the goods during transportation. The carrier must hand over the goods to the buyer and deliver the goods to the buyer the same state as he received them from the seller. Consequently, when the documents relating to the control and possession of the goods are handed over to the buyer, he will be able to determine the remedy where the goods are defective or where they have been destroyed in the course of transit. Article ٣٨٤ of the Iranian Civil Code emphasizes that the risk in the goods does not transfer unless the goods are delivered to the buyer at their destination.

٨.٩.٢ UNDER THE VIENNA CONVENTION

The majority of international sales involve the carriage of goods by a third party carrier. Thus, the goods are generally delivered by the seller to the buyer indirectly. According to the Vienna Convention[٤٥٣] when the contract of sale involves the carriage of goods with a carrier, the risk is transferred from the seller to the buyer with two conditions. First, on the

[٤٥٣].The Vienna Convention Act ١٩٨٠ Art ٦٧.

handing over of the goods to the carrier the goods must be “clearly identified with the contract”.

٨.٩.٣ HANDING OVER THE GOODS TO THE CARRIER

Article ٦٧ of the Vienna Convention also distinguishes between the time when the seller is or is not bound to deliver the goods in a particular place. In the first case, if the contract of sale involves the carriage of goods the seller will be discharged from his duty to deliver the goods when he passes the goods over to the first carrier for transmission to the buyer.[٤٥٤] When the delivery or the handing over of the goods takes place the risk in the goods passes to the buyer. Article ٦٧ (١) of the Vienna Convention clearly states that:

“If the contract of sale involves carriage of the goods and the seller is not bound to hand them over at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract of sale”.

As mentioned, the first carrier is not the seller or his agent thus, the loading of goods on to the seller’s vehicle, does not cause the transfer of risk to the buyer. The goods should be handed over to the carrier with intention of delivering them to the buyer.[٤٥٥]

In the second case, the seller is bound to hand over the goods to a carrier in a particular place. In this case the risk passes to the buyer whenever the seller has handed the goods over to the carrier at the particular place. If before handing over the goods at the particular place the seller is bound to handing them over to another carrier, then the risk does not pass because delivery didn’t takes place at the particular place[٤٥٦] the above mentioned Article provided that;

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[٤٥٤]. The Vienna Convention Act ١٩٨٠ Art ٣١(a).

[٤٥٥]. *Ibid.*

[٤٥٦]. John O. Honnold and Harry M. Fletchner, *Uniform Law for International Sales under the ١٩٨٠ United Nations Convention* (٤th revised edn, Kluwer Law International ٢٠٠٩) ٣٧٥.

"If the seller is bound to hand the goods over to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place".[٤٥٧]

For instance, when the buyer is obliged to deliver the goods to the ship in a particular seaport but he hand them over to a carrier's lorry for carriage to a particular port for loading on to the ship, then the delivery to the lorry or train cannot pass the risk to the buyer.

٨.١٠ THE GOODS MUST BE CLEARLY IDENTIFIED TO THE CONTRACT

The delivery of the goods to the buyer is not the cause of the transfer of risk, but there must be a further action that is to say the goods must be identified for the contract. Paragraph ٢ of the Article ٦٧ provides that:

"Nevertheless, the risk does not pass to the buyer until the goods are clearly identified to the contract, whether by markings on the goods, by shipping documents, by notice given to the buyer or otherwise".

In many cases goods are delivered to buyers in bulk. In such cases the risk is borne by the seller until the goods have been identified, that is as long as each individual good is specified for example "by shipping documents, by notice given to the buyer or otherwise". It is clear that the specification of goods is to avoid fraud by the seller in cases where part of the delivered goods is destroyed or damaged. Because the seller may claim that 'the destroyed part' belonged to the buyer.[٤٥٨]

[٤٥٧]. The Vienna Convention Act ١٩٨٠, Art ٦٧(١).

[٤٥٨]. Schlechtriem & Schwenzer, *Commentary on the UN Convention* on the International Sale of Goods (CISG) (٣rd edn, Edited by Ingeborg Schwenzer OUP ٢٠١٠) ٢٧.

٨.١١ DOSE THE RATIFICATION OF DOCUMENTS RELATING TO THE GOODS AFFECT THE PASSING OF THE RISK?

The final part of paragraph ١ of Article ٦٧ of the Vienna Convention provides that: "The fact that the seller is authorized to retain documents controlling the disposition of the goods does not affect the passage of the risk." The transfer of risk depends on the physical transfer of the goods to the seller. The purpose of the codification of this rule is to avoid changes to the rules which concern the transfer of risk because the seller sometimes retains documents concerned with the control of goods as an assurance of payment. The Vienna Convention has expressly mentioned that the retention of the goods' shipping documents by the seller is not a barrier to transfer of risk to the buyer. [٤٥٩]

٨.١٢ EFFECT OF DELIVERY ON LIEN

٨.١٢.١ UNDER IRANIAN LAW

According to the Iranian Civil Code, a lien is a right, which enables a party to perform his obligation subject to certain actions of the other party. It means that the seller is able to retain the goods until the buyer pays the price. In addition, the buyer can use this right to keep the sum to be paid for the price until the seller delivers the goods or until the seller prepares to deliver his part. Article ٣٧٧ of the Iranian Civil Code provides that:

"Either the seller of the buyer can retain the goods sold or their consideration until the other party is prepared to deliver his part, unless either the object of sale or the consideration thereof is agreed to be delivered at a subsequent date in which case either the object of sale or consideration which has become mature should be surrendered".

[٤٥٩]. John O. Honnold and Harry M. Fletchner, *Uniform Law for International Sales under the ١٩٨٠ United Nations Convention* (٤th revised edn, Kluwer Law International ٢٠٠٩) ٤٨٤.

The Iranian legislator does not accept any avoidance or holding of the goods by one of the parties with respect to the delivery of goods, even a delay in delivery is regarded as an avoidance of the party to deliver.[٤٦٠]

Moreover, it is inferred from Articles ٣٧٧and ٣٨٠ of the Iranian Civil Code that the parties in respect of delivery are equal and there is no priority in delivery for any of the parties.

The basis for the Iranian legislator for the acceptance of the parties' lien is that there will be two mutual obligations, which relate to the contract of sale and they must be performed concurrently.[٤٦١]

When the good is already in the buyer's possession before the conclusion of the contract a further 'delivery' after the contract is made is unnecessary. The same applies to the consideration of the sale.[٤٦٢] The question remains whether the taking of a delivery before a contract is made will give rise to a dropping of the lien or not. There is no express article in Iranian Civil Code on this point.

In these cases it could be said that, if the seller knew that the goods were under the control of the buyer and then made the contract, this is circumstantial evidence for his consent. Therefore, his lien is lost and the buyer must pay the consideration immediately.

٨.١٢.٢ UNDER THE VIENNA CONVENTION

Under the Vienna Convention each of the parties can postpone his contractual obligation until the other party performs his obligation. Article ٥٨ of the Convention clearly states that;

"(١) If the buyer is not bound to pay the price at any other specific time, he must pay it when the seller places either the goods or documents controlling their disposition at the buyer's disposal in accordance with the contract and this Convention. The seller may make such payment a condition for handing over the goods or documents".

[٤٦٠] The Iranian Civil Code Arts ٣٦٢ and ٣٧٦.

[٤٦١] Abdullah Kiyaie, *Obligations of Seller and Buyer Before and after the Delivery of Goods* (١st edn, Tehran ١٩٩٨) ٣٣٢.

[٤٦٢] The Iranian Civil Code Art ٣٧٣.

Also in Article ٥٧ (١) it is provided that:

"(١) If the buyer is not bound to pay the price at any other particular place, he must pay it to the seller:

(a) at the seller's place of business; or

(b) if the payment is to be made against the handing over of the goods or of documents, at the place where the handing over takes place".

In part (b) of this Article, it is provided that the buyer can postpone the payment until he receives the goods. Therefore, according to the Vienna Convention the parties are able to retain the goods or the documents or the payment until the payment or the handing over takes place.[٤٦٣] The delivery of the goods and the payment must take place at same time even where the goods have been delivered to a carrier.[٤٦٤] Article ٨٥ of the Vienna Convention states that:

"If the buyer is in delay in taking delivery of the goods or, where payment of the price and delivery of the goods are to be made concurrently, if he fails to pay the price, and the seller is either in possession of the goods or otherwise able to control their disposition, the seller must take such steps as are reasonable in the circumstances to preserve them. He is entitled to retain them until he has been reimbursed his reasonable expenses by the buyer".

According to this Article, if the parties have agreed in the contract the concurrency of the payment with the handing over of the goods when the goods are ready for delivery and payer was not ready to pay, this will be regarded as non-performance of the buyer's obligation. Therefore, the obligation of the seller for the delivery of the goods will be suspended. However, in this period he must safeguard the goods.[٤٦٥]

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[٤٦٣]. John O. Honnold and Harry M. Fletchner, *Uniform Law for International Sales under the ١٩٨٠ United Nations Convention* (٤th revised edn, Kluwer Law International, ٢٠٠٩) ٤٢٠.

[٤٦٤]. Sale of Goods Act, Art ٧١ explains other aspects of the lien, for example, the defect of goods and the suspension of contract.

[٤٦٥]. Schlechtriem & Schwenzer, *Commentary on the UN Convention on the International Sale of Goods* (CISG) (٣rd edn, Edited by Ingeborg Schwenzer OUP ٢٠١٠) ١٧٦-١٧٧.

The article does not mention the right of the seller to retain the goods due to delay of payment expressly. However, it should be understood that the obligation of the seller to hand over the goods is changed to an obligation on the seller to safeguard the goods. A closer examination of this article shows that the right of the seller to retain the goods is dedicated to the time where the seller has possession of the goods or is otherwise able to control their disposition. Therefore, when the goods are not in his possession or under his control, his right to retain the goods is reduced and he has no duty to safeguard them. In short, according to the Vienna Convention, it could be said that the seller has no right to retain the goods, when the goods are not under his control and they are in effect in the buyer's possession.

According to three legal systems which have been considered the payment of the price and the delivery of the goods are concurrent conditions. Also, the buyer can postpone the payment of the price until he has examined the goods. The seller can exercise a lien only when the goods are under his physical control and he has control over the transfer of the sold goods.[٤٦٦] The seller's lien is lost too. Also, if the seller delivers the goods to the buyer, the buyer has no right to keep the sum owed for the price.[٤٦٧] However, the buyer can, in some cases, postpone the payment "until he has had an opportunity to examine the goods."[٤٦٨] Excluding that, there is no provision in Iranian law regarding to right of the buyer to examine the goods before the payment of the price. Thus, since this rule is based on common usage and custom, it could be said that the buyer under the Iranian Civil Code has such a right in accordance with the common custom and usage. Therefore, the buyer, having regard to the common custom, is able to examine the goods in a reasonable time period for the purpose of ascertaining whether they are in conformity with the contract or not.[٤٦٩]

[٤٦٦] The Vienna Convention Act ١٩٨٠ Art ٨٥.
[٤٦٧] The Iranian Civil Code Arts, ٣٧٧ & The Vienna Convention Act ١٩٨٠ Arts ٣١, ٥٧, ٥٨ and ٧١.
[٤٦٨] The Vienna Convention Act ١٩٨٠ Art ٥٨ (٣).
[٤٦٩] Safai, S. H., *The Law of International Sale of Goods A Comparative Study* (٢nd edn, Tehran, University of Tehran Press, ٢٠١٣) ٣١٩.

٨.١٣ CONCLUSION

As discussed in the third chapter, the Iranian Civil Code defines delivery as the transfer of the control of the goods from the seller to the buyer. In the event of a dispute the common trade usage and custom will specify whether the control has been efficiently transferred or not.

The answer to the question of whether delivery has any effect on the transfer of property or not" has been examined in detail. The Iranian Civil Code states that the property in the goods when they are available, or become capable of being transferred, passes as soon as the contract is concluded.

However, the seller has a duty to deliver the goods, when the property has already been transferred to the buyer. The buyer can, by himself and without the assent and authorization of the seller, take possession of the object of sale. In the case of the seller, he cannot deliver the goods and the buyer is not able to take possession of the goods, the sale will thus be terminated.[٤٧٠] According to the Vienna Convention the seller has a duty to pass the property of the sold good. However, the Vienna Convention does not state how the seller should transfer the property and what must be done by him to pass ownership in the goods. The reason may be that since there are different provisions and rules regarding the transfer of property among nations that is why the unification of those rules is difficult and therefore the Vienna Convention is silent on the matter.[٤٧١]

In addition the risk in the goods passes to the buyer when delivery takes place. When the object of sale has been destroyed before delivery takes place the contract of sale will be terminated. As mentioned earlier in this chapter, according to the Iranian Civil Code the parties can fix the time of passing of risk or the transfer of property by agreement.

According to the Vienna Convention the risk in the goods passes with delivery unless otherwise agreed. The principle of party autonomy concerning the time of the passing of the

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[٤٧٠]. U.K. Sale of Goods Act ١٩٧٩ S ١٨.

[٤٧١]. John O. Honnold and Harry M. Fletcher, *Uniform Law for International Sales under the ١٩٨٠ United Nations Convention* (٤th revised edn, Kluwer Law International ٢٠٠٩) ٤٥٥.

risk is accepted by the Vienna Convention and the UK Sale of Goods Act ١٩٧٩.[٤٧٢] Therefore, the first rules relating to the time of the passing of risk in both systems are the party's agreement. Where there is a lack of agreement between the parties the risk passes with delivery or with the conclusion of the contract in accordance with the Vienna Convention.[٤٧٣] However according to the UK Sale of Goods Act ١٩٧٩ and the Iranian Civil Code, which provides that the risk passes when the contract has been concluded or when the property of the goods passes to the buyer, if they have not agreed on the time of the transfer of risk, then the risk will pass when the property in the goods passes to the buyer, that is even before the goods have been delivered.[٤٧٤] This rule is neither reasonable nor practicable. When the goods are at the disposal of the seller and he fails to deliver them to the buyer, the buyer has neither the power nor the control over the goods to safeguard them from loss or damage. Suppose that the sold goods have been stored in the place of business of a trader in Iran and the buyer lives in England. If the risk passes to the buyer after the contract of sale has been made, the buyer is not in a position to safeguard those goods from loss or destruction, while he is hundreds of kilometers away from his goods. Accordingly, the rule of the Vienna Convention which provides that the risk passes with delivery is much better and is closer to reality and is also better in practice for the parties. Moreover, the fixing of a time for delivery in the contract is not a difficult matter for the contracting parties. Besides, it is fair that the party who has the control of the goods should bear the risk, because he is able to safeguard them from loss and damage in a practical sense or alternatively he can insure them.[٤٧٥] In addition, as mentioned earlier, Incoterms specifies the time of the passing of risk in each term, thus it is better to encourage the parties to conclude their contracts under Incoterms.

In relation to the lien, the Iranian Civil Code, the Vienna Convention all state that the payment of the price and the delivery of the goods are concurrent conditions. Also the buyer can postpone the payment of the price until he has examined the goods. The seller can exercise his lien only when the goods are under his physical control and he has control

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٤٧٢. *Ibid*.

٤٧٣. The Vienna Convention Act ١٩٨٠ Art ٦٧ (١).

٤٧٤. The U.K. Sale of Goods Act ١٩٧٩ S ٢٠ & Michael Bridge, Benjamin's *Sale of Goods*, (١١th edn, Sweet & Maxwell ٢٠٢٠).

٤٧٥ John O. Honnold and Harry M. Fletchner, *Uniform Law for International Sales under the ١٩٨٠ United Nations Convention* (٤th revised edn, Kluwer Law International ٢٠٠٩) ٤٥٦.

over the transfer of the sold goods.[٤٧٦] However, if the goods are beyond his control, his right to his seller's lien falls away too. In addition, if the seller delivers the goods to the buyer, the buyer has no right to keep the price.[٤٧٧] However, the buyer in some cases can postpone the payment "until he has had an opportunity to examine the goods".[٤٧٨] Excluding that, there is no provision in the Iranian Civil Code regarding the right of the buyer to examine the goods before the payment of the price. Thus, since this rule is based on common usage and custom, it could be said that, the buyer who is bound by the Iranian Civil Code has such a right in accordance with the common custom and usage. Therefore, the buyer in accordance with the common custom, is able to examine the goods in a reasonable time for the purpose of ascertaining whether they are in conformity with the contract or not.[٤٧٩]

[٤٧٦] The Vienna Convention Act ١٩٨٠ Art ٨٥.

[٤٧٧] The Iranian Civil code Art ٣٧٧ and The UK Sale of Goods Act Arts ٣١, ٥٧, ٥٨ and ٧١.

[٤٧٨] The Vienna Convention Act ١٩٨٠ Art ٥٨(٣).

[٤٧٩] Safai, S. H., *The Law of International Sale of Goods A Comparative Study* (٢nd edn, Tehran, University of Tehran Press, ٢٠١٣) ٣١٩.

CHAPTER NINE

٩. CONCLISION

٩.١ INTRODUCTION

Currently, an increasing number of international trade transactions, contracts of sale, and particularly contracts of international sale, present unique challenges within international trade. Among this, the Iranian Civil Code and the trade laws of Iran tracing back to ١٩٣٤ were not drafted to deal with international trade. Thus, they cannot meet the needs of today's business. Also, Iran has not ratified the Vienna Convention Sale of Goods yet whilst in such a situation, it is expected to join the Vienna Convention to make transaction easy for merchants. In this thesis, the author has analyzed the reasons for non-ratification of the Vienna Convention by Iran and has compared the provisions of the Iranian Civil Code and the Vienna Convention (with reference to the UK Sale of Goods Act ١٩٧٩). In chapters ٣-٧ the concept of the delivery of goods and its impact on transactions are examined the rationale of comparing these two legal systems was to find the most probable reason(s) that have precluded Iran for non-ratification of the Convention and the segments of the Convention that may be inconsistent with Iranian law. Therefore, to what extent the Conventions' Articles are reconcilable with Iranian Laws, especially Iranian Civil Law, and vice versa is scrutinized through comparison. A further comparison that this thesis has made is the one between the two legal systems that aimed to clarify the most remarkable similarities and differences in an effort to examine their reconcilability. Having compared various aspects of Vienna Convention and Iranian Civil law, it concludes that the existing lacuna in the Civil Code practiced in Iran is the main cause of its inappropriateness of being regarded as an international instrument. Consequently, the Iranian Civil Code, on the face of

it, begs serious amendments to be able to cope with disputes arising from international transactions.

۹.۲ THE RESULTS OF THE RESEARCH

Regarding the position of the Vienna Convention in the area of delivery of goods, several issues should be considered. First of all, the current approaches adopted by Iranian legal experts indicate the existence of many gaps and conflicts between the Iranian Civil Code and the Vienna Convention. For this reason, the common point of view regarding the Vienna Convention and its ratification process is that the ratification of the Vienna Convention causes conflicts in Iran's legal system, and as a result, the need to amend the Iranian Civil Code related to the issue of delivery of goods in international transactions. As a result, the research questions are initially answered as follows:

The possibility of signing the Vienna Convention is envisaged by the Iranian government. Due to the fact that the Vienna Convention was designed and approved based on the criteria of the Common Law and Roman-German systems, it is in conflict with Iran's legal system in various areas. For example, in Article ۱۹۰ of the Iranian Civil Code, there is basically no reference to the issue of delivery in the contract process; while in the framework of the Vienna Convention, like the western legal systems, the delivery process is considered as a one of the important elements in the contract.

In addition, in Iran's legal system and Civil Code of Iran, there is no mention of the responsibility of the transport operator and his role in the transaction process; while the Vienna Convention has expressed clear and important provisions regarding the responsibilities, obligations and position of the transport operator. However, in relation to the lack of coordination between Iran's legal system and the Vienna Convention, two approaches are envisioned: the first approach is that, based on Article ۹ of the Civil Code, international conventions approved by the parliament and the approval of the Guardian Council, It is under the rule of ordinary law; As a result, in all cases where the provisions of the Convention and the Iranian Civil Code are in conflict with each other, the provisions of

the Civil Code automatically fall under the status of "implicit rejection" in cases of international transactions. The second approach is that before the approval of the Vienna Convention by the Islamic Republic of Iran, it is necessary to amend and revise the Civil Code in order to create the necessary harmony between the said law and the provisions of the Vienna Convention.

In response to second question, it should be noted that taking into account the provisions of Article ۱۹۰ of the Civil Code and the general jurisprudence rules on which the said article was designed, the delivery process has not been considered as a pillar in contracts. But in the Vienna Convention, delivery has been recognized as a basic pillar and a definite criterion for the transfer of responsibility. Accordingly, there is a clear conflict between the principles and general rules of jurisprudence and the provisions of the Vienna Convention. In line with the aforementioned conflict, it seems that due to the specificity of "international transactions", It can be analyzed that the delivery process is not considered to be a part of the pillars and basic conditions of validity of contracts in Iran's legal system, with the exception of international transactions, in which the delivery process is an important pillar in the validity and transfer of contractual responsibilities. In other words, the solution to this conflict is to resort to the "definition and identification of new exception" mechanism.

Nevertheless, in order to analyze the approaches and answers that were mentioned in the previous part, it is very important to mention a few points. The current approach to the general rules of contracts in the framework of Iran's legal system and paying special attention to the Article ۱۹۰ of the Civil Code is due to an oversight and calculation error in the framework and divisions of the general rules of contracts in Iranian jurisprudence and legal system. There is no doubt that Article ۱۹۰ of the Civil Code has stated the basic conditions for the authenticity of transactions, and the aforementioned article has adopted a position of silence in relation to the delivery process. However, analyzing Article ۱۹۰ of the Civil Code in comparison with the Vienna Convention is considered wrong from the point of view of legal logic.

In fact, Article ۱۹۰ has stated the basic conditions for the authenticity of transactions in general, including transactions and contracts for compensation and non-compensation. While in the Vienna Convention, normally the general rules of exchange transactions are stated. Therefore, within the framework of Iran's legal system as well as *Shiah* jurisprudence, we must distinguish between the general rules of contracts. The first is the general rules of contracts, which are mentioned in Article ۱۹۰ of the Civil Code. These rules are used for all types of contracts and with/ without consideration, etc. The second item is the general rules of transactions or exchange contracts. These rules are stated about the sale (as the main or mother contract, which is referred to in cases of silence in other contracts).

In the space of general rules of exchange contracts, the delivery process has been considered as a pillar. In other words, in spite of Article ۱۹۰, which is silent about the delivery process, in the general rules of exchange contracts in the framework of Iran's jurisprudence and legal system, the delivery process is considered as a pillar and basic condition of the validity of the contract. The same topic of analysis actually justifies the difference between the position of the Civil Code (the position of silence) and the Vienna Convention (the position of the pillar and criterion of presumption) in relation to the position of the delivery process. As a result, the assumption of most of the differences and conflicts that were mentioned earlier is ruled out.

Considering the lack of conflict between the Vienna Convention from the point of view of the contract elements and the fundamental principles and rules, with Iranian Civil Code, the ratification of the Vienna Convention in the framework of Iran's legal system does not create any conflict; Rather, the logical result of applying the general rules of compensation contracts of Iran's legal system in the form of international transactions will be the same as the provisions of the Vienna Convention. In other words, the provisions of the Vienna Convention in relation to international transactions are not out of two states: the first state, the provisions that are the logical result of the application of the Civil Code provisions in relation to international transactions (such as the "condition or condition of correctness" of assuming the delivery process); And the second case, the regulations that

are stated in the subjects that the Civil Code is silent on (such as the responsibility and obligations of the transport operator).

In this case, in fact, the provisions of the Vienna Convention have an interpretive and clarifying approach. Because its positions regarding the provisions of the Civil Code and even the commercial law do not have any conflict that cannot be summed up. In other words, the assumption of bringing together the provisions of the Civil Code, trade and the Vienna Convention is envisaged.

In terms of policy-making, one issue is important, and that is, the Iranian legislator in the legislative process, in accordance with the provisions of the fourth article of the constitution[٤٨٠], should not deviate from the imperative frameworks and the principles and rules of Shiah jurisprudence; By distinguishing between the general rules of contracts and the general rules of exchange contracts, not only is there practically no conflict between the Vienna Convention and the general jurisprudential rules, but the jurisprudential rules prescribe the provisions of the Vienna Convention regarding international transactions.

As mentioned earlier, Iranian judges basically settle disputes based on the hierarchy of sources of legal norms. If the Vienna Convention is approved, this Convention will be considered as a normal law. As a result, there is no challenge in applying the provisions of the Convention as long as it is clear. In the assumption of silence, conflict, overlap or summary of the provisions of the Convention and the judge resorting to interpretative tools and general rules, there will be no problem for the judge; Because basically, by distinguishing between the general rules of contracts and the general rules of exchange contracts, there will be no conflict in the space of basic and jurisprudential rules. In other words, there will be no challenge in the court proceedings.

[٤٨٠]. All civil, penal financial, economic, administrative, cultural, military, political, and other laws and regulations must be based on Islamic criteria. This principle applies absolutely and generally to all articles of the Constitution as well as to all other laws and regulations, and the wise persons of the Guardian Council are judges in this matter.

۹.۳ THE GAPS WHICH NEEDS TO BE RESOLVED

There are many gaps and unaddressed issues in Iranian Civil Code relating to international transaction. The absence of a clear law in Iran discourages merchants from accepting Iranian law as the governing law of their contracts. However, in practice, these gaps and unaddressed issues are solved by reference to trade custom and usage. They could also be solved by making contracts under Incoterms® ۲۰۱۰ which has been ratified by the Iranian Chamber of Commerce. Some problems which needs to improve are as follows:

A- The regulations of the Iranian Civil Code concerning sale were not drafted to deal with international sales and this may be the source of some of the differences with other legal systems and with the Vienna Convention.

B- Iranian law has only paid attention to the primary form of transfer of control. That is the transfer of control from the seller to the buyer. Therefore, issues, such as the delivery to the carrier - where the delivery of the control of the goods does not directly transfer to the buyer-, have not been addressed by Iranian Law.

C- The tender of documents of title is regarded as an effective method of delivery. It could be said that all methods which transfer the control of the goods from the seller to the buyer are acceptable and will be considered as constructive delivery by Iranian law. The key aspect of delivery in the eyes of Iranian law is the passage of control of the goods to the buyer “in a way that is accepted as valid according to common usage”. Therefore, the method of delivery itself is not important under Iranian law.

D- Reference to some methods of delivery, such as delivery to the carrier, and the tender of documents in the Civil Code is necessary. The Iranian legal system has not addressed models of delivery. It has simply accepted the methods followed by custom and usage.

E- With regard to this research, it could be concluded that the provisions of the Vienna Convention in the area of delivery may be adopted by Iranian law. Therefore, the ratification of the Vienna Convention by Iran is recommended. The principles of the Vienna Convention are compatible with the principles of Islamic law and Iranian

law. Parties to the Convention are able to exclude those rules which are inconsistent with Iranian law.[٤٨١]

However, the ratification of the Vienna Convention does not mean that Iranian law does not need amendment. The Convention applies only to international sales. Domestic sales will still follow Iranian law. According to Article ١٢ of the Convention, parties may derogate from or vary the effect of any provision of the Convention.

Moreover, four reserves are considered in the Convention. First, according to Article ٩٥ of the Convention, the Convention will only be applied for countries which have ratified this instrument or will be applied "between parties whose places of business are in a different States when the rules of private international law lead to the application of the law of a Contracting State".[٤٨٢] The second is put forward by Article ٩٢ (١):

"A Contracting State may declare at the time of signature, ratification, acceptance, and approval *or accession that it will not be bound by Part II of this Convention (Formation of the Contract) or that it will not be bound by Part III (Sale of Goods) of this Convention".*

Third, according to Article ٩٤ any countries "may at any time declare that the Convention is not to apply to contracts of sale or to their formation where the parties have their places of business in those States".

The last reserve provides that a Contracting State at any time is able to declare that:

"in accordance with Article ١٢ that any provision of Article ١١, Article ٢٩ or Part II of this Convention, that allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form other than in writing, does not apply where any party has his place of business in that State".[٤٨٣]

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٤٨١. The Vienna Convention Act ١٩٨٠ Art ٦.
٤٨٢. The Vienna Convention Act ١٩٨٠ Art ١.
٤٨٣. The Vienna Convention Act ١٩٨٠ Art ٩٦.

Furthermore, ratification of this significant international instrument by Iran will undoubtedly lead to increased development of international trade, which will in turn stimulate economic growth. It will bring greater confidence for potential contracting parties to conduct business with Iran.

٩.٤ WHAT ARE THE LEGAL CONSTRAINTS AND BARRIERS IN ORDER FOR IRAN TO BE ABLE TO RATIFY THE VIENNA CONVENTION?

Within the last few decades, globalization, which may be defined as a process of international integration and the reaction to this process of globalization- have been some of the most extensively, studied scientific subjects[٤٨٤]. In recent world, there are different organizations, such as the United Nations, to discuss the international political, economic and social problems in order to make several agreements and conventions for the ease of communication and uniformity among the countries which have been adopted by the member countries. This include several organizations such as the: United Nations Organisation (UNO), World Health Organization (WHO), World Economic Forum, World Bank, Worldwide Human Rights Organization, World Organization for Labor, World Women Forum, United Nations International Children's Emergency Fund (UNICEF) and lastly, the International Court of Justice (ICJ). The international community invited and welcomed such global organizations and happily made many international contracts and conventions for this purpose the aim of which is to participate actively in the process of international integration.[٤٨٥] However, legally speaking, the principle issue that international integration as explained may face is the disharmony and inconsistency between domestic jurisdictions and international Conventions. There is no doubt that the legal jurisdiction practiced in a State derives from hybrid elements such as the culture, history and values. For this reason, domestic jurisdictions may resist to incorporate international conventions since these

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٤٨٤. Masoumeh Zirak, 'An Analysis of the consequences and business outcomes of globalization, regionalism and Iran's ratification to the WTO' [٢٠٠٨] E P ٨٣, ٩٧.

٤٨٥. Davood Mir Muhammadi, '*Globalization dimensions and perspectives*' [٢٠٠٢] National studies ١١. <https://ensani.ir/fa/article/١٥٤٥٤٧/%D٨٪AC%D٩٪٨٧٪D٨٪A٧٪D٩٪٨٦٪DB٪٨C-%D٨٪B٤٪D٨٪AF%D٩٪٨٦-%D٨٪A٧٪D٨٪A٨٪D٨٪B٩٪D٨٪A٧٪D٨٪AF-%D٩٪٨٨-%D٨٪B١٪D٩٪٨٨٪DB٪٨C%DA%A٩٪D٨٪B١٪D٨٪AF%D٩٪٨٧٪D٨٪A٧> Accessed October ٢٠٢٣.

international documents are strongly believed to be beneficial to global powers. Therefore, some developing states are skeptical about the incorporation and ratification of the Convention as they ultimately preserve the interest of few states and are not plausibly supporting the economy of all states. An additional reason for rejecting international conventions stems from the belief suggesting that through globalization the cultural values and original backgrounds of a state will be integrated. This integration would, arguably, shape a new form of imperialism in the name of globalization.[٤٨٦]

In addition to this, global powers, particularly western powers, also continue to impose their views and values, they seem to show no flexibility in respect of underprivileged states in the international organizations also, they have established laws which can guard their rights and increase their political and social powers.[٤٨٧]

Strictly speaking, underprivileged countries view international organizations and global conventions as a one-sided tool to increase the political and economic influence of the west, they do not view these international forums and conventions as a means for their development.

Moreover, membership in international forums depends on overall conditions relating to energy, economy, political, religious and cultural values. For example if Iran wants to be a member of the World Trade Organization, it depends on providing full platform and infrastructure of the country in their hands otherwise it will not become a member.[٤٨٨] If Iran has expressed its readiness to be part of all above mentioned organizations, yet the irony is with its present economy mostly dependent on oil it will be a complete loss for the nation because according to the resolution of World Trade

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[٤٨٦]. Masoumeh Zirak, 'An Analysis of the consequences and business outcomes of globalization, regionalism and Iran's ratification to the WTO' [٢٠٠٨] E P ٨٣, ٩٧..

[٤٨٧]. *Ibid*.

[٤٨٨]. Abbas Hamzah Khani, Positive and negative consequences of the ratification of Iran to the WTO [٢٠١٢] Donyae Eqtisad (٢٦٢٤) ٢٩ <http://www.magiran.com/npview.asp?ID=٢٤٨٧١٠٧&ref=Author> Accessed December ٢٠١٤.

Organizations, countries have to compromise in their tariffs but oil products of other countries from Iran does not cover for compromising in any tariffs.[٤٨٩]

Additionally, tariffs that are introduced for export products of Iran will cause Iranian products not to compete with the products of other countries, another possible reason for why Iran and many other countries did not become a member of Conventions and forums is the views upon women, most constitutions are written based on western values which are incompatibles with Islamic rules and as well as culture of Muslim Nations.[٤٩٠]

Implementation of such constitution will result in putting aside religious beliefs from politics and society as a whole the practical authority of making laws will come in the hands of the International organizations and its establishments. Ironically, states like Israel, India and Pakistan have not joined numerous Conventions while, unlike other states, are not threatened by international sanctions.[٤٩١] The selective view towards states classified as westerners and others avert the international community from being integrated genuinely. This regard towards the failure of the functionality of international conventions is experienced previously and resulted in unsatisfactory outputs.

For example ratification of the Non-Proliferation Treaty or N.P.T. by Iran is viewed as the reason why Iran is deprived of accessing nuclear technology and the primary difference between Iran and some states. Had the acceptance of N.P.T been a grateful experience for Iran's public opinion, taking part in other international conventions would have been regarded optimistically. With that in mind, ratification of other Conventions e.g. World Trade Organization may not be an exemption. With all that has been outlined above; now we will explore the factors which affects Iran's ratification to the international conventions.

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٤٨٩. *Ibid.*

٤٩٠. Muhamad Javad Zarif & Sajjadpour, *Multilateral diplomacy, theory and practice of regional and international organizations* (١st edn, Tehran Vezarat e Kharejeh, ٢٠٠٦)١٤٢.

٤٩١. *Ibid*.

٩.٤.١ POLITICAL

Victory of Islamic Revolution of Iran in ١٩٧٩ has brought an unprecedented and unparalleled constitution in power. Neither of the two main blocks supported the new emergent power in Iran founded by Islamic principles and anti-imperialism. In order to eliminate or at least to weaken the governance of the revolutionary power in Iran, it was attacked by Iraq. It defended its territorial integrity and political independence in an international conflict against an undisputable aggression which took eight years.[٤٩٢]

The reaction of western world and international organizations to this aggression has darkened the image of west in the minds of Iranians as they did not purposefully participate for years in the meetings and conferences held by United Nations. The failure and inactiveness of western states to tackle this aggression and to take practical measures to prevent Iraq, contrary to the case of its subsequent aggression towards Kuwait, have serious repercussions on political relations of Iran vis-à-vis the west that has been extended to ratification of international convention.[٤٩٣]

٩.٤.٢ CULTURAL

Formation of a constitution of a country is always based on political, cultural, economic, social and religious belief and also based on countries past history and social value system. These specifications are taken in consideration while making a draft of international constitution or agreement. International instruments if they are to be approved internationally they should encompass diverse cultures and religions or at least leave rooms for adaptation.

As mentioned before, Convention on the Elimination of All Forms of Discrimination against Women is written only based on society's particularly western countries. They have

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[٤٩٢]. The war between Iran and Iraq started in ١٩٧٨ and ended in ١٩٨٦.

[٤٩٣]. The Iranian Constitution Art ١ Chapter ٣.

not even considered values of traditional, cultural and religious countries. That is why these constitutions have not been welcomed by many countries including Islamic countries.[٤٩٤]

٩.٤.٣ ECONOMICAL

Economy Status of the countries differs from country to country. Joining of poor countries with some agreements and conventions or being member of some organizations may create threatens the country's economy. As mentioned, taking membership in World Trade Organizations is harmful for economy of poor countries since decreasing tariffs of imported products and by permitting all types of import of products will break the backbone of local factories and industries. Based on the evidence economic circumstances of states is an additional reason for ratification or not ratification of international convention.[٤٩٥]

٩.٤.٤ LEGALLY

Under the auspices of Iran's Constitutional Law merely God has the right of making law for human beings. Based on that, any constitution that is not based on Quranic revelations has been considered null and void.[٤٩٦] It may be questioned ideologically whether international conventions can be aligned with the laws posed by God within the Quranic revelation? Replying this question is surely beyond the scope this thesis. Briefly, it is subject to the fact that how legislations is interpreted. If legislating laws means obstructing laws from the original Islamic sources that is not meant by the Constitution and by law. But if legislation means not going against the basic principles of Islam then in that case we need to review the Constitution that written is down in the Vienna Convention and look at that thoroughly. International conventions are to be studied on the basis of Islamic principles and shall not prevent the latter from being exercised.

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[٤٩٤]. Muhamad Javad Zarif & Sajjadpour, *Multilateral diplomacy, theory and practice of regional and international organizations* (١st edn, Tehran Vezarat e Kharejeh, ٢٠١٤) ١٤٢.

[٤٩٥]. Masoumeh Zirak, *'An Analysis of the consequences and business outcomes of globalization, regionalism and Iran's ratification to the WTO' [٢٠٠٨]* E P ٨٣, ٩٧.

[٤٩٦]. The Iranian Constitution Chapter ٢ Article ١.

In some cases applications and obligations are being introduced by the international organization that it practiced in that country for instance the Convention on the Elimination of All Forms of Discrimination against Women and International Criminal Court.

Another reason for refuting the argument proponent to ratification is that most of judges from various countries are even not aware of the interpretation of those constitutions.[٤٩٧] With regards to Iran another obstacle is International system of jurisprudence and judgment is based on religious values where for a judge and laws of legislation and special conditions that is based on Shia' school of thought which requires a judge to be a Muslim, just appointed by the leader and having qualifications of Judgment.[٤٩٨] This issue has been mentioned in the Constitution of Islamic Republic of Iran and it says: "qualifications of Judge will be according to criteria mentioned in the jurisprudence and translated by the constitution".[٤٩٩]

In consequent Iran is in the phase of making a change in traditional official system to the modern system. For example The Iranian Civil Code was written in ١٩٣٤ just as Iranian Trade law established in ١٩٣٨ have never changed since then. Lately, some efforts have been made to revise them and make a change. Due to traditional way of legislation of trade, Iranian traders and Iranian trade union are not familiar of modern trade laws and international convention. Reason for them not having knowledge of those modern laws is that until now, traders and business community have not taken any request for ratification of the Vienna Convention.

٩.٥ REASONS FOR NON-RATIFICATION OF THE CONVENTION BY IRANIAN AUTHORITIES

The Vienna Convention is an important international instrument that is corollary of sustained period of comparative legal study. Lawmakers prepared the Vienna Convention

[٤٩٧]. Mahdi Abdie, 'Religious and legal obstacles in the ratification to the Statute of the International Criminal Court' [٢٠١٤] Haghgostar <www.haghgostar.ir> Accessed ٢٨ December ٢٠٢١.

[٤٩٨]. *Ibid*.

[٤٩٩]. *Ibid.*

after a careful review of a number of legal systems. As a result, many states accepted, adopted, and acceded to the Convention. Because of importance of the Convention, it is significant to identify the reasons why the government of Iran refused to give legal effect to it so far.

Some reasons as the result of research have been achieved as follows;

١. According to the Iranian Constitution, provisions of any convention must not contradict with the principles of Islamic law.[٥٠٠] Since Iranian law is based on Islamic law, particularly Shia law, the main concern is the existence of conflict between the concept of the Vienna Convention and Islamic law. Therefore, the Iranian government has not signed the Vienna Convention partly because the government has not come to the conclusion that the Convention complies with Islamic requirements.

٢. Some law scholars believe that the Iranian Authorities are waiting for the result of World Trade Organisation membership. Therefore, the output has direct impact on other international Conventions inter alia CISG[٥٠١]

٣. Lack of consensus decision-makers and the multiplicity of institutions of decision-making. There are different institutes in charge of trade and legislation in Iran. The Cabinet, Ministry of trade, Iran Chamber of Commerce and the Parliament are responsible to ratify such a convention. Thus multiplicity of decision-making authorities and institutions has led to lack of consensus.

٤. Lack of unit management in the decision making process and ratification. It means that the Parliament refers the issue to the government and they in turn refer it to be considered by the Ministry of Trade also, the Ministry transfers the question to the Iran Chamber of Commerce. Hence, it is difficult find the right person accountable for ratification process. During the research I discussed with some members of the Parliament in person, unfortunately they did not know anything about this significant convention and referred me to contact and meet the Iran Chamber of Commerce officials. My efforts to

[٥٠٠]. The Iranian Constitution Principles ٤ & ٧٢.

[٥٠١]. Mahdi Abdie, 'Religious and legal obstacles in the ratification to the Statute of the International Criminal Court' [٢٠١٤] Haghgostar <www.haghgostar.ir> Accessed ٢٨ December ٢٠٢١.

contact with officials of the Chamber of Commerce also remained unanswered. Unfortunately, all of the authorities referred to another chamber, all of them stating, that they are not aware of this Convention.

٥. Political problems exist between Iran and the international world. Since the Iranian nuclear issue has created a great challenge between Iran and the European states. This political problem has affected the international activities of Iranian authorities and international issues such as ratification of such a Convention is a secondary issue.

٦. Culture and wrong views on international conventions which has been explained.

٧. Iran's people and especially the Iranian authorities as mentioned have not good memory of ratifying International Convention.[٥٠٢] There is a lack of comprehensive and long-term economic policy in Iran. The Iranian law system is not modern. The Iranian Civil Code which is the main source of trade law has been written in ١٩٣٤ so the law system and the Iranian merchants are to be updated in order to embrace changes.

٨. The importance and advantages of ratification of the Convention is neglected .The government does not see the ratification of the Vienna Convention as a legislative priority.[٥٠٣] Also the business community does not pay attention to the ratification of the Vienna Convention. In addition to governmental authorities, the business community is absolutely indifferent on the question of ratification of international conventions.

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[٥٠٢]. Iranian does not have a good memory and experience for ratification to some international agreements and conventions. For example, on March ٢٠, ١٨٩٠, *Nasir al-Din Shah* granted a concession to Major G. F. Talbot for a full monopoly over the production, sale, and export of tobacco for fifty years. This agreement brought people in the street and they protested against the Shah to cancel the agreement. Another example is ratification to the Non-Proliferation Treaty or NPT by Iran which is the cause to Iran's deprivation to access to the nuclear technology and it is the source of current problems between Iran and powerful countries.

[٥٠٣]. The best evidence for lack of attention to this important Convention is that from ١٩٨٦ until now there is not any record about the Vienna Convention in the Iranian Parliament and the government.

۹.٦ LEGAL PROCESS OF RATIFICATION OF THE INTERNATIONAL CONVENTION INTO IRANIAN LAW

According to principle ۷۷ of the Constitution "International treaties, protocols, contracts, and agreements must be approved by the Islamic Consultative Assembly" therefore ratification of the Vienna Convention needs to be approved by the Parliament. The legal process of approving will be enforced by receiving the bill from the Government or by offering the draft from one of the Parliament's Committees. The Government or the Parliament's Committee should hand it over to the Parliament Board to make an appointment for consideration in formal Parliament Assembly. After hearing the plan or the bill in a general assembly, a Representative of Government will explain the draft in detail; usually by describing its advantages and its disadvantages also he should define the draft. Then some M.Ps will speak against or support the suggested draft. After that voting for the new legislation is made. In case of approval by the general Assembly of the Parliament the legislation will be passed to the Guardian Council for the final decision and to know that whether this legislation is against the Islamic law and the principles of the Constitution or not. According to the principles of the Constitution:

"The determination of compatibility of the legislation passed by the Islamic Consultative Assembly with the laws of Islam rests with the majority vote of the fuqaha' on the Guardian Council; and the determination of its compatibility with the Constitution rests with the majority of all the members of the Guardian Council".

The President or his legal representative has the authority to sign the legislation which is approved by the Assembly after approving by the Guardian Council" After signing the president "must forward it to the responsible authorities for implementation".

۹.۷ WHY IRAN SHOULD RATIFY THE VIENNA CONVENTION?

As mentioned in Chapter one the Iranian Civil Code was not drafted to deal with international sales. Also, an extensive analysis indicates that current Iranian law suffers from gaps and uncertainty. Ratification of this significant international instrument by Iran will

most probably lead to increased development of international trade, which will in turn stimulate economic growth. This will bring greater confidence for potential international sale contract parties to conduct businesses with Iran. However, ratification of the Vienna Convention does not mean that Iranian law does not need amendment. The Convention applies only to international sales, whereas domestic sales will still follow Iranian law.

The ratification of the Vienna Convention would aid coordination between business laws and would be highly advantageous in some aspects. Research on the delivery of goods and its effects under the Vienna Convention might illustrate the essential unity and similarities of the law related to delivery in different legal systems. A useful uniformity may be the possibility of a uniform application in a range of states of the agreement uniform text. The research shows that there is no conflict between national law and uniform law meaning that there should be no encumbrance or impediment preventing the ratification of a uniform law. However, Iranian courts are unwilling to apply uniform laws if they are not in harmony with national laws. In the case of the Vienna Convention, the situation is more serious because the Convention has no fixed jurisdiction (e.g., an international court or an arbitration tribunal) to deal with cases governed by the Vienna Convention. Thus, these cases are often decided by national courts.

In addition to the above mentioned, the unification of the law of international trade is highly desirable; unification eases trade, and removes difficulties of conflict and choice of law in international transactions. However, ratification of a uniform law requires a certain degree of tolerance and compromise from the countries which intend to adopt the law. This compromise allows the contracting country to take advantage of applying a uniform law, although on some occasions its national law might be superior to the uniform law. Ratification of the Vienna Convention by Iran not only enables Iran to benefit from the advantages of uniformity, but is also a clear and proper response to the need for a law which addresses adequately and properly the problems of international sale, in circumstances where the existing law is not a clear and capable law in this regard.[٥٠٤]

[٥٠٤]. Muhamad Hosein Hasani, 'The Vienna Convention sale of Goods; Advantage & Disadvantage of ratification' [٢٠١٣] <http://hasany٣٣.blogfa.com/post/٨ > Accessed December ٢٠٢١.

Iranian law, as far as sale is concerned, derives from Islamic law, which is a scholar-made law. Islamic law, is based on some divine principles which cannot be compromised, and consequently, reduce the flexibility of the law. The Iranian Civil Code, as the main source of the Iranian sale of goods law, has been adopted from the text books on Islamic law which were mainly written at least three centuries ago;[٥٠٥] hence, the language of the Code,[٥٠٦] its terms and its examples[٥٠٧] are not appropriate to international sales. However, commentators on the code have tried to interpret the Code in such a way to fill the gaps and provide answers to newly raised questions. In fact, the need for a law which can properly deal with the problems of international sale in Iran is urgent.

The area of Iranian sale of goods law remains one which adheres strictly to medieval Islamic law. In Iranian law, other areas of trade have been brought more up to date. The reason is that Islamic law contains full and detailed regulations concerning sale, whereas some other areas such as transport or negotiable instruments have not been discussed or regulated by Muslim jurists. Therefore, as regards issues unaddressed by Islamic law, when codification was proposed, the law of western countries was adopted and, sometimes, Iran welcomed the relevant international convention, such as the "Convention for the Unification of Rules Relating to International Carriage by Air, Warsaw, ١٩٢٩" in its legislation. However, according to the Iranian Constitution, the law concerning sale cannot be changed, and neither can the Vienna Convention be ratified, unless it becomes clear that there is no conflict between the proposed law, or the Convention, and the principles of Islamic law.[٥٠٨]

The Vienna Convention is the latest and most successful effort of the international organizations, which are concerned with the uniformity and harmonization of the law of international trade, in general, and international sale in particular.[٥٠٩] The Vienna Convention

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٥٠٥. Hamid Bahrami, 'Tarikhche Tadvine Qanoone Madani' (The Development History of Iranian Civil Code) [٢٠١٣] Imam Sadiq University Journal (٢٤) <http://www.isu.ac.ir/publication/research-quarterly/research-quarterly_٢٤/Research-Quarterly_٢٤٠٢.htm> Accessed July ٢٠٢٣.

٥٠٦. The language of the Civil Code is Old Persian language, which is full of Arabic terms.

٥٠٧. Since the Civil Code has been written for domestic law so, the examples are not related to the international sale and sometime the examples are very old subjects.

٥٠٨ The Iranian Constitution Art ٧٢.

٥٠٩ Richard Schaffer, *International Business Law and Its Environment*, (١٠th edn, South-Western Cengage Learning ٢٠١٧) ١٩١.

cannot be ignored, even by non-contracting states, as its provisions are considered as "generally accepted trade usage" by the International Court of Arbitration of the International Chamber of Commerce.[٥١٠]

Setting aside the question of ratification of the Convention by the Iranian government, this study can benefit commercial lawyers and merchants in drafting a contract when Iranian law has been chosen as the applicable law to the contract, or when Iranian courts may have jurisdiction over the disputes which might arise from the contract.

Iranian courts do not give effect to the terms of the private contracts, or to the foreign law which is chosen by the parties as the law applicable to the contract, when the agreed term or law contradicts the public policy or public morality of Iranian society.

A comparison between Iranian law and the Vienna Convention, with an indication of the similar rules in English law, will reveal whether English law or the Convention can be applied as the law of contract by Iranian courts or not, and also whether or not a term or a clause which is valid under English law and the Vienna Convention is enforceable under Iranian law as well.

This study will be of practical importance for European, as well as Iranian, lawyers and businessmen, as the Iranian private and public sectors both have very close business links with European countries, including the United Kingdom.

٩.٨ RECOMMENDATIONS AND SUGGESTIONS TO REFORM THE IRANIAN LAW

It is clear that Iranian law is ill-suited for the governance of international contracts. However, freedom of contract gives parties in international sales wide discretion. The stipulation of special trade terms such as C.I.F. and F.O.B. can allow the parties to greatly

[٥١٠] ICC Arbitration Case No. ٥٧١٣ of [١٩٨٩] <http://www.cisg.law.pace.edu/cases/٨٩٥٧١٣i١.html> Accessed December ٢٠٢١.

modify their contracts without the expenditure of time or money. However, these terms do not cover some areas such as the transfer of property, the quality of goods and remedies for breach of contract. In addition, Iranian law, despite its positive aspects, is not capable of applying to international sales.

Changes to those rules concerning sale in the Iranian law which largely deals with national sales would not be appropriate for a number of different reasons. The solution is to codify international laws according to their requirements and distinguish national sale from international sale. In these circumstances the easiest solution is to accept a uniform law as the law of international contracts.

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