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The Conditions and Manner of Executing the Contract with The Substitute Goods Are in The International Sales Convention and Subject Rights

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ABSTRACT

Considering the expansion of international relations and the need for uniform laws in the international arena in recent decades, many efforts have been made to create transnational laws. The Convention on the International Sale of Goods has been developed to harmonise the laws regarding the rights of contracts so that by joining this convention, the countries will end the problems caused by the multiplicity of laws and create a uniform procedure. In a domestic or international sales contract, the seller must deliver the goods to the buyer by the terms of the contract. If the seller violates the contract and provides a defective or non-conforming product, the performance guarantee is stipulated in the Convention on the International Sale of Goods. In this research, we examine the guarantee of the right to request a replacement product. In paragraph 2 of Article 46 of the Convention, the buyer has the right to request a replacement product in case of a fundamental violation. If there is no fundamental violation of the goods and the possibility of remedying the defects of the goods, the buyer can request the removal of the defects of the goods. The institution of submission of substitute goods does not exist in Iranian law in the sense that is mentioned in the convention. Considering the non-accession of Iran, it will be useful to review the submission of substitute goods in Iran's law.

1. Introduction

One of the seller's obligations in the sale contract is to deliver the goods by the specifications specified in the contract, and the goods must comply with the regulatory agreement in terms of quantity, type and description. In case the delivered product is not according to the contract, the Vienna Convention guarantees the performance to protect the customer's rights, such as requesting a replacement product, termination of the contract, and compensation. In this research, the guarantee of delivery of substitute goods in cases of non-conformity of the goods will be examined from the perspective of the Convention on the International Sale of Goods and its adaptation to Iranian law.

In Islamic jurisprudence, the right to ask for the removal of defects by a separate buyer has not been studied and investigated, but considering that according to the jurists, if the defect in the product disappears by itself, the rights resulting from it, the right to cancel the sale will be lost. It can be deduced from the principle of the necessity of contracts and the verse of Sharifa Ufowa in contracts that the seller is required to repair if the buyer requests to repair the goods.

The application of paragraph 3 of Article 46 of the Convention can be applied to specific and general goods, and the buyer cannot request the repair of the goods from the seller in both types of goods, if there are conditions, while sending the notice of Article 39 of the Convention. According to paragraph 2 of article 46 of the convention, if the product is not equal to the contract, the customer can request a replacement if the discrepancy of the product involves a fundamental breach of the contract, and the request for replacement of the product is made through the notification of article 39 or within a reasonable period after that. take If the seller does not provide the product according to the contract and the product is defective, the buyer can request a replacement product. The demand for replacement goods can be applied if it is a fundamental violation; The breach is fundamental if it causes a deficiency based on the contract and what the parties intended. The request of the buyer to submit the replacement product is subject to the notification in Article 39 of the Convention. The

2. Terms of product replacement

Each of the parties to the contract enters into a contract and purchases goods according to their goals and needs. Defective or non-conforming goods cannot get the buyer's consent to complete the transaction. Undoubtedly, one of the consumer's rights is to have a healthy product that conforms to the contractual characteristics. Various legislations have provided for various implementations to prevent losses to the buyer. One of the performance guarantees provided in the Convention on the International Sale of Goods is the delivery of a substitute product.

2.1. Conditions for requesting replacement goods

For the buyer to demand a replacement product from the seller, the following four conditions must be met:

A: Non-compliance of goods

The first basic condition for requesting a replacement product is the non-compliance of the product with the contract and the agreement of the parties. If the quality, quantity, description and packaging of the goods are not equal to the contract and the agreement of the parties, the goods are not considered to be by the contract. We examined in detail the conformity of the goods from the legal and physical point of view. In this section, we examine some of the assumptions of non-conformity of goods.

First: delivery of completely different goods (aloud)

If the seller delivers a different product to the buyer than what was agreed upon by the parties, it is called aliud. For example, a painting drawn by Picasso or a device with a specific function was purchased, and the seller did not send the agreed item and sent another item that was not agreed. Another Picasso painting or a device with a different function will be sent to the buyer.

It may seem that these cases do not include the non-conformity of the goods and the delivery of a completely different product should be considered subject to paragraph 1 of Article 46, but the

prevailing opinion is that such cases are included in the non-conformity. In this assumption, the delivery of another product other than the specified item is considered a fundamental violation and the customer can request the delivery of a replacement product. (Huber & Mullis, 2007: 102)

Second: Third-party claims

Paragraphs 2 and 3 of Article 46 explicitly refer to the notification of Article 39. Article 39 of the Convention is related to Articles 38 to 37 of the Convention on Material Non-Conformity. In case of material non-conformity of the goods, the buyer must send the notice of Article 39 to the seller and inform the non-conformity of the goods. Now the question arises that if the product does not comply with the law, can the buyer request to submit a replacement product?

In this case, there is a difference of opinion among jurists, but the prevailing opinion is that in case of non-compliance, paragraph 2 of Article 46 will not be valid.

First, the convention has separated the issues of material non-compliance and legal non-compliance. Articles 35 to 37 are related to material non-compliance of goods and articles 41 to 43 are related to legal non-compliance. Secondly, in Article 46, Paragraphs 2 and 3, the sending of Article 39 notification is clearly mentioned. According to the convention, the notification of Article 39 is sent to the seller in case of material non-compliance, and in case of legal non-compliance, the buyer is obliged to notify the seller of the legal non-compliance according to Article 43. Finally, the goods that, according to Article 41, are subject to the right or If it is a third claim, it is not subject to paragraph 2 of Article 46 of the Convention. (Schlechtriem, 1984: 141; Huber & Mullis, 2007: 198)

According to the opinion of one of the lawyers, if the product is claimed by a third party, it is possible to request a replacement product, because in his opinion, the concept of violation in the convention has a general meaning and guarantees the implementation of the request for a replacement product in cases where the product is claimed by a third party. considered possible. In their opinion, the guarantee of performance foreseen for the breach of obligation is mentioned in general terms in Article 45 and includes both legal and material non-compliance, but they did not consider the possibility of repairing the goods according to paragraph 3 of Article 46, in case of legal non-compliance. (Shaarian and Rahimi, 2013: 568)

Third: Delivery of incomplete goods

One of the seller's obligations is to deliver the goods to the same amount as specified in the contract, and delivery less than the agreed amount is considered a breach of contract. It was explained that according to Article 35 of the Convention, incomplete delivery of goods is considered an example of material non-compliance. Initially, Article 51 of the Convention states: "If the seller delivers only a part of the goods or if only a part of the delivered goods does not conform to the contract, Articles 46 to 50 shall be applied to the part that was not delivered or the part that is not conforming." According to the ruling stipulated in Article 51, the guarantee of implementation of Articles 46 to 51 will be applied only to the unsubmitted part. This question is raised, which of the guarantees of Article 46 will be applied in case of incomplete delivery of goods?

According to the opinion of some jurists, if the seller delivers a part of the goods to the buyer, the buyer can demand the execution of the contract for the unexecuted part by referring to paragraph 1 of Article 46. Therefore, deducting the amount will not be an example of requesting a replacement product. For example, if the seller has submitted 80 units out of 100 units of goods, the seller is responsible for the 20 units that have not been submitted and will not be responsible for the 80 units that have been submitted according to the contract. (Huber & Mullis, 2007: 198) Thus, the buyer can oblige the seller to deliver the goods.

According to one of the lawyers, while maintaining the above conclusion under the title of a general rule, we can make an exception for the buyer to demand a replacement product in case of incomplete delivery of the contract. According to this opinion, incomplete delivery of goods according to Article 35 is one of the cases of non-conformity of goods.

If the specific conditions and circumstances of the contract cause the incomplete delivery of the goods to lead to a fundamental breach of the contract, the buyer can be allowed to demand a replacement product, for example, if the buyer is a food wholesaler and the buyer buys 10 tons

of food with a one-month use-by date and the seller delivers only one ton of the goods on the due date, due to the special circumstances of the buyer, resorting to paragraph 1 of article 46 will not be useful. (Shaarian and Rahimi, 2013: 469-570)

B: Fundamentality of breach of contract

According to Article 35 of the Convention, the seller must deliver the goods according to the contract. If the delivered product is not in accordance with the agreement, the contract is considered violated. Paragraph 2 of Article 46 entitles the buyer to request a replacement product if the non-conformity of the product causes a fundamental breach of the contract. Due to the fact that the request for a replacement product from the buyer requires an exorbitant cost for the seller and will incur considerable losses.

The concept of fundamental breach in Article 25 of the Convention is defined as follows: "The breach of the contract by either party is fundamental if it leads to such damage to the party that substantially deprives him of what he had the right to expect under the contract. is to deprive unless the violator did not foresee such a result and a reasonable person of his class in the same circumstances could not have foreseen it.

According to the necessity of the essential nature of the violation to request a replacement product, the question is raised that if the buyer notices the non-conformity of the product after the seller has sent the product and before handing over the product, can the buyer, despite the non-essential nature of the product violation, Want to return and request the execution of the same obligation?

According to the opinion of some jurists, if the buyer is informed of the non-compliance before the delivery of the goods, he should request the obligation of the seller to deliver the goods by the contract by referring to paragraph 1 of article 46. According to this opinion, returning the goods before delivery and requesting the goods by the contract is outside the scope of paragraph 2 of article 46, and whether the violation is fundamental or not will not be effective in the seller's obligation. According to the opinion of some jurists, applying the above opinion in cases where the violation of the goods is non-essential will cause loss to the seller and is against the principle of good faith. (Shaarian and Rahimi, 2013: 565)

A: Send a warning

It was stated that the buyer can request a replacement product if the breach of the contract is fundamental. There is another limitation for the buyer to claim replacement goods. According to paragraph 2 of article 46 of the convention, the buyer must inform the seller of the type and nature of the non-conformity according to the notification of article 39. be sent

In the interpretation of the "reasonable period" mentioned in Article 39, there have been many opinions and there is no single procedure in this case. The reasonable notice period begins when the buyer discovers or should discover the non-conformity. If the defect or non-conformity of the goods is obvious, the reasonable period starts from the time of receipt and inspection, but in the case of hidden non-conformance goods, the starting time of the reasonable period is different and varies according to the circumstances. (Enderlein & Maskow, 1992: 160) Therefore, the beginning of the deadline may be determined from the time the product is used. For example, in a contract for the sale of tiles between a Dutch buyer and an Italian seller, the buyer proceeded to resell the goods without inspecting the goods, and after seven months from the submission date, he received objections from the customers, and one month after receiving the objections, he proceeded to inspect the goods, and three A month after the inspection, he sent a notice of non-compliance. The court declared that the buyer should have sent the notice of non-conformity to the seller within a reasonable period of time after the discovery in a reasonable time according to paragraph 1 of article 39, but the buyer had refused to send the notice in a reasonable time despite the objections of the customers. Therefore, it is not possible to determine a specific and fixed time and a reasonable period is determined by considering all the circumstances of the case. (Ferrari, 2001: 234)

The buyer can notify the seller of the non-conformity of his chosen performance guarantee while sending the notice of non-conformity to the seller, or after sending the non-conformity notice within a reasonable period, he can inform the seller of his chosen performance guarantee.

Therefore, if the buyer does not request the repair or replacement of the goods while sending the notice of Article 39, he must do so within a reasonable period after sending the notice of Article 39. (Shewingo, 2005-2006: 347)

According to the second paragraph of Article 39, the buyer must send a notice of non-conformity within 2 years from the date the goods were delivered to him. If the notice of non-conformity is sent after 2 years, the buyer will not have the right to request a replacement product. According to the explicit text of the article, if a certain period is specified in the contract to guarantee the goods, the two-year deadline will not be applied.

According to Article 40 of the Convention, in cases where the seller was aware of the non-conformity of the goods or could not have been unaware of them and did not inform the buyer, the buyer can, despite not sending the notice of Article 39, ask the seller to resolve the non-conformity of the goods. refer to According to Article 27 of the Convention, if the buyer sends the said notice with appropriate means and under special circumstances, the delay or mistake in sending and non-receipt of the notice is the responsibility of the seller. (Huber & Mullis, 2007: 197-198,200)

2.2. The cost and place of delivery of the replacement product

It appears that the seller should bear the cost of shipping the replacement item. This issue is not explicitly mentioned in the convention. But according to paragraph 1 of article 48, the seller can compensate for any non-fulfillment of his obligations at his own expense, even after the submission deadline. (Huber & Mullis, 2007: 202)

There is a difference of opinion regarding the place of delivery of the replacement item. According to one view, the replacement product should be delivered to the place where the non-conforming product was first delivered. (Huber & Mullis, 2007: 203) According to another point of view, the place of delivery of the substitute product should be determined based on Article 31. Therefore, the place of submission is determined based on the agreement of the parties at the beginning. In the case that the contract includes transportation of the goods, according to paragraph 1 of Article 31, the seller must deliver the goods to the first transport operator to be sent to the buyer, and if the contract does not include transportation, the goods must be delivered to the place where they are manufactured or produced or To be delivered at the place where it is taken from the specified warehouse (the parties must know about the existence of the goods or the manufacturing or production of the goods at that specified place when concluding the contract).

In other cases, the goods are delivered to the buyer at the seller's place of business, that is, the place where the seller's place of business was at the time of the contract. (Schlechtriem, 1984: 6-9) It should be noted that the buyer can file a claim based on articles 45 and 74 to receive damages and the cost of sending a replacement product to the destination.

Defective substitute goods will have other effects. First, the non-conformity of the goods causes a breach of the contract again, in such a situation, the buyer can benefit from the guarantee of more performance mentioned in Article 45, and if the replacement product is defective, the buyer must send the notice of Article 39. Second, the failure to send the replacement product and the defect of the replacement product indicates a fundamental breach of the contract, and the buyer can cancel the contract based on paragraph 1 of article 49 due to the fundamental breach of the contract. (Huber & Mullis, 2007: 203)

3.3. Conditions for guaranteeing product conformity

The customer receiving the performance guarantee due to the non-conformity of the goods depends on the conditions. These conditions are divided into two categories: the first category is substantive conditions and the second category is formal conditions.

3.3.1 Material conditions for guaranteeing product conformity

The essential conditions for having product conformity guarantees are:

1. Lack of compliance
2. Lack of customer awareness
3.Being attributed to the seller

A: Lack of conformity

The delivered goods must be by the contract, and to verify non-compliance in the first stage, the contract must be referred to. Any type of restriction in the contract regarding the quality or the quantity sold must be observed and its violation is considered a violation of the contract, and the non-conformity guarantee is followed.

Usually, the parties to the contract do not precisely define the goods in the contract due to speeding up transactions, or lack of attention; Therefore, the convention has determined the elements based on which the conformity or non-conformity of the goods with the contract is evaluated, which are: quality (description or type), quantity, packaging and container (paragraph 1 of article 35k).

B: Lack of awareness of the customer about the non-compliance of the goods

The second condition for the buyer to have guarantees related to the conformity of the goods is that he is not aware of the non-conformity of the goods. If the buyer was aware or could not have been unaware of the non-compliance of the goods with the contract during the transaction, the seller will not be responsible for the non-compliance ((35k)).
About the knowledge and lack of knowledge of the parties to the contract, several different definitions have been used in the convention, which are somewhat similar to each other, while there is a difference between them in terms of effects. (Safa'i, 1392: 111) The assumption of the existence of awareness is not foreseen (like the cases listed in Articles (243, (1) 49) and (a)
(1) 64k) (Safa'i, 1392: 174).
A: Being attributed to the seller
The third condition for the buyer to have guarantees regarding the non-conformity of the goods is that the non-conformity is attributable to the seller. It means that there is a defect at the moment of transfer of exchange guarantee. (Article (1)) 36k) Therefore, if the goods are sent according to the contract and are damaged during the transportation, the seller is not a guarantor. But if the damaged product is delivered to the customer and it turns out that it did not conform to the contract from the beginning, the seller is responsible. In fact, there is a conflict between the non-conformity of the product (the seller is the guarantor) and the transfer of the warranty for the exchange of the product, which the customer is responsible for.

3.3.2Guarantee of non-conformity of goods
Although in the description of articles 45 onwards, the performance guarantee resulting from breach of contract has been discussed in detail in terms of non-conformity of the goods, but it can be briefly said that if the seller violates his obligation to deliver the conforming goods, according to article 35 onwards, The buyer can resort to the "general system of compensation methods" stipulated in articles 45 and later of the convention. However, special rules for compensation only refer to breach of contract in terms of delivery of non-conforming goods. One of the cases is compliance with the conditions related to warning and inspection as stipulated in Articles 38, 41 and 44 of the Convention. Also, special compensation methods are provided, such as requesting the delivery of a replacement product (paragraph 2 of article 46) repairing the product that does not conform to the contract (paragraph 3 of article 46) or reducing the price (paragraph 51). For example, the:
1. The Belgian seller and the Dutch buyer concluded a contract for "printing brochures". Immediately after the delivery, the buyer informed the seller of his refusal to accept the goods invoice, claiming that the goods did not conform to the sample that he had prepared for the seller before printing. The seller replied that the method used in printing was of good quality and the buyer's refusal to bill for the brochures was not justified, but the seller offered to reduce the price to the buyer, which was accompanied by his refusal. Therefore, the seller filed a lawsuit against the buyer demanding full payment of the price, and the buyer also claimed damages.
Because the seller had prepared a sample for the buyer and it was agreed to print the brochure according to the said sample, the court applied clause c paragraph 2 of article 35 of the convention in entering into the nature of the lawsuit. In the opinion of the court, non-compliance should be evaluated reasonably, in the present case, a partial difference in color and some small lines in the brochure cannot be considered a fundamental breach of the contract, as a result, the court reasoned that in the present case, despite the buyer's entitlement For the damages caused by the violation, he must pay the reduced price. In another example:
2.The Italian seller and the German buyer concluded a contract to supply shoes. The goods should be produced by the seller. The buyer ordered the goods according to the sample provided by the seller. The buyer refused to pay the full price by claiming that part of the goods did not conform. Therefore, the surety filed a lawsuit demanding payment of the price and interest. The first court ruled in favor of the buyer and the appellate court upheld it.
The appellate court ruled that the buyer has the right to declare part of the contract terminated according to Article 49, Clause 1, and Article 51, Clause 1, because non-conformity of a part of the goods is a fundamental breach of the contract by the seller. According to the opinion of the

court, the conditions stipulated in Article 35 Clause A, Clause 2, mean that the goods are appropriate for normal consumption when it is realized that the goods are of average quality and the mere ability to trade is not enough. The conformity of the goods with the sample becomes relevant when there is an explicit agreement by the parties regarding it in the contract, which in the present case there was no such agreement.

The purpose of announcing the defect (non-conformity of the goods) to the seller is to allow him to prepare the necessary measures for the customer's claim and prepare the necessary documents; For example, refer to the previous seller or the manufacturer to provide proof. Also, he should be allowed to, if possible, correct the defect in the product by delivering the rest (in case of quantity defect), or by delivering a replacement product (in case of quality defect), repair or in any other way to reduce the loss. take action on the customer. (Schlechtriem, 1986: 301)

Just that the buyer informs the seller about the non-conformity of the goods at the right time. It is not enough to be able to rely on non-compliance, but according to paragraph 1 of Article 39, such a warning must be sufficiently clear. The purpose of this limitation is that the seller can respond to the buyer's claim necessarily and can make an appropriate decision regarding the inspection of the goods by himself or the repair and delivery of the replacement goods. Of course, one should not exaggerate the contents of the warning, however, it should be noted that sending a warning with general terms will not be enough for the purpose, such as the buyer declaring that the goods will cause problems for him.

In this regard, it has been stated in the opinions issued by the courts and arbitration tribunals that Article 8 of the Convention, which governs the interpretation of the words and actions of the parties, can play an important role in determining whether the buyer's warning is clear enough or not. But in any case, it should be noted that as far as the provisions of the warning are concerned, a heavy burden should not be imposed on the shoulders of the buyer. Where the non-conformity is obvious, it is necessary to mention its details, and not mentioning them will mean that the notice of non-conformity is not clear, but when the delivered goods do not work and the signs are not clear, it is enough that the buyer signs and Send the signs of product defects without having to provide details about their cause.

Article 39 is silent about the form of notice, but according to the general principle stipulated in Article 11 of the Convention, which does not consider the observance of a special form necessary for concluding a sale, it can be said that a special form is not necessary for a notice of non-compliance. As a result, the warning can be in writing or verbally, but according to Professor Shalakhtrim, if the warning is given orally or by phone, the audience must listen to it, and in case of a dispute, the burden of proof is on the announcer. However, it should be noted that in any case, the parties can agree to observe a specific form of warning. (Shaarian, 2013: 497)

The customer must accurately inform the seller of the type and nature of the "non-conformity" so that the seller can have an accurate idea of it and can take measures. The parties can agree on the content of the warning during the contract, but in any case, the customer is expected to specify whether the discrepancy is about quality or quantity; And in the first case, mention the extent of the defect or defect; Is it so much that the goods are considered to be of another type? In the second case, declare the limits of the defect in the quantity.

If the customer does not comply with his obligation to give a warning to the seller, the rights arising from the non-conformity of the goods provided by the convention, including the request for a replacement product (Article 46 K.), termination of the contract (Article 49 K.) and price reduction (Article (2) 45) loses.

According to the 1974 convention on the passage of time in international sales, lawsuits arising from the non-conformity of goods are subject to a 4-year statute of limitations, which starts from the actual delivery of the goods to the customer. (Article 7K), but this does not conflict with the customer's obligation to give notice within the prescribed period.

.3.4The position of material non-compliance in Iranian law

To understand the meaning of conformity, the authors defined and investigated the concept of non-conformity and from that they reached the concept of conformity. The lack of conformity mentioned in the convention is a general concept and includes any defect in the quality or quantity

of goods. Unlike some internal systems that still differentiate between types of defect and defect and violation of the adjective condition, according to the case, a general concept of non-conformity is accepted in the convention, which includes defect (both hidden and obvious). Any kind of defect and violation of the condition of the adjective, as well as the case where goods of another type have been delivered. For example, German law distinguishes between the normal features and characteristics of the traded goods and its special characteristics. Also, a distinction has been made between the case where the goods are of the same contractual type, but their characteristics do not match the contractual characteristics, and the case where the goods are of a different type. In French law, there is also a difference between hidden defects of goods and obvious defects, because there, the guarantee of the implementation of obvious non-conformity of the goods, which is the guarantee of the implementation of non-implementation of the obligation of delivery, is different from the guarantee of the implementation of hidden defects of the goods. In English law, the guarantee of the execution of basic terms and non-basic terms of the contract is different. Violation of a non-essential condition gives the injured party the right to demand compensation, but the guarantee of the violation of the essential condition is the right to terminate the contract.

There is no such difference in the convention, and any type of product defect or violation of the terms of the contract is considered an example of non-conformity and its implementation is guaranteed. English law is different. (Safaei, 1392: 172)

Therefore, the concept of non-compliance in the convention is very broad. Of course, the performance guarantee resulting from this non-conformity is available to the buyer if he is unaware of the non-conformity of the goods during the transaction (Article 36K). From this point of view, the lack of conformity is somewhat similar to the concept of defect in Iranian law, because the guarantee of performance due to the defect of the goods can be applied if the buyer is unaware of it at the time of concluding the contract, whether the defect is hidden or obvious (Article 426 .). But in Iranian law, there is a difference between defect and violation of description, and these two are different from each other (the option of defect is mentioned in Article 422 onwards and the option of violation of description is mentioned in Article 410 onwards of the Civil Law)

A defect has a specific aspect and is not dependent on the motivation and special goals of both parties, therefore, the description of the seller's health does not need a condition. (Katouzian, 1361, Vol.5: 270) A defect means any kind of defect that reduces the value of the product or its conventional use, and it is the standard of custom. If the description has a personal aspect and is subject to the will of the parties. They can stipulate any description about the seller. In this assumption, with the absence of that description, the right of rescission is created, even though the goods without a conditional description are not defective from a customary point of view. Whereas, as mentioned earlier, in the convention, all these concepts are subject to the title of non-compliance.

4. How to implement the request for a replacement product

4.1.Damage assessment based on alternative transaction

4.1.1Convention

Damage assessment is based on the realization of an alternative transaction, known as concrete calculation, and its basis and documentation is Article 75 of the Convention. According to this article, "when the contract has been terminated and the customer, after announcing the termination in a conventional manner and within a conventional period, has bought another product instead of the seller, or the seller has sold the seller to someone else, the party claiming damages can pay the price difference mentioned in the contract with the price obtained from the alternative transaction... (Article 74 of the Convention)

The reason why this method is called the concrete calculation method is that the damage is identified and evaluated based on the alternative transaction that has been realized.

Therefore, what is important and the evaluation criterion is the realization of the substitute transaction in a reasonable manner and within a reasonable time after the announcement of the

termination of the contract (Avoidance). In other words, the realization of the alternative transaction is a necessary condition for applying the rules mentioned in Article 75. The mere possibility of an alternative transaction and its non-fulfilment is not enough to apply this article.
The purpose and meaning of Article 75 of the Convention is to ensure the primary and certain benefit of the obligee from the execution of the contract, or what is identified and introduced under the title of expected benefit (expectation loss). (Treitel, 1998: 564)
This method intends to put the obligee or the victim of breach of contract financially and economically in a situation that would have been in that situation if the contract had been fully implemented without any defects.
In case of non-fulfilment of the contract by the obligee, if the obligee takes action to secure his contractual interests, the rules of compensation also provide him with conventional protection. Accordingly, in the case of termination of the initial contract and an alternative transaction by the obligee, in the conventional manner, he can expect to be evaluated and compensated for the damages caused to him based on the alternative transaction he made.
This assumption is true for both the buyer and the seller. If the buyer is the victim of a violation of the contract, he is entitled to receive the difference between the initial purchase price and the replacement transaction, if the price is higher than the original contract price, as damages. On the other hand, if the victim is a breach of the seller's contract, he also has the right to claim the difference between the price of the original contract and the alternative transaction, if the price of the alternative transaction is lower than the initial transaction, as damages.
The objective or real evaluation based on Article 75 of the Convention is superior to the subjective evaluation (Abstract calculation) based on Article 76, i.e. based on the market price, and assuming the realization of an alternative transaction with the conditions stated in Article 75, the possibility of citing and adhering to Article 76 It is rejected, even if the implementation of Article 76 is more beneficial and useful for the obligee.
Basically, applying the procedure stipulated in Article 75 and conducting a replacement transaction involves less costs and expenses than the procedure mentioned in Article 76, and it will also be more useful and beneficial to the obligee (Schlechtriem, 1998: 553) because the obligee is more than anyone else. The other respects his jealousy and expediency.
However, if the obligee does not comply with the restrictions and conditions stated in Article 75 of the Convention in carrying out a substitute transaction, he can no longer use the quality mentioned in Article 75 to assess his damages. Explaining that the obligor has a legal duty to deal with the issue of damage (Mitigation of damage) as described in Article 77 of the Convention, and if he does not fulfill this duty, the guarantee of its implementation is the exclusion of recourse to Article 75. will be. (Honnold, 1991: 508)
According to Article 75 of the Convention, it is first necessary to announce the termination of the primary contract that has been violated by the obligee, and then to realize the replacement purchase or sale. In other words, the replacement transaction takes place following the termination of the original contract. The definition of replacement is used when the existence of the original contract is excluded. According to al-Qaeda, it is the termination of the contract that shows its non-implementation.
Termination of the contract causes the contractual rights and obligations of the parties to disappear, especially regarding the ownership of goods, and gives them the freedom to sell or buy a replacement. As long as the contract is not terminated, it must be followed; Even a fundamental breach of the contract by one party does not give the other the right to free himself from the original obligations by making a substitute transaction; Unless the injured party has

The Ipso facto convention does not recognize the contract. Therefore, the necessity of notice of termination is inevitable. This necessity has an important exception, and that is where the obligee definitively and irrevocably violates his contract; So that at the time of performing the alternative transaction, it is certain and certain that the obligor will not fulfill his obligation, therefore, he will not have the right to demand the performance of the contract from the obligor. (Allan, 2002) In this case, there is no need to notify of termination, but the performance of a replacement transaction by the contractor will be implicitly considered as the reason for the termination of the original replaced contract.

When the obligee explicitly and irrevocably declares the breach of the contract on his part or performs actions that imply a breach of the contract, the obligee also has the right to terminate the contract based on the words or actions of the obligee. The obligor who terminates the contract no longer has the right to request the performance of the obligation and can only claim damages based on the performance of the transaction.

4.1.2 Iran's rights

In the Civil Code of Iran, contrary to the Convention, an article that explicitly refers to the performance of an alternative transaction (buying or selling) by the obligee (damaged by breach of contract) is not considered, But you can use the general rules of transactions in this regard. As it was observed (in number 1, paragraph b) of article 222 B.C. Regarding the obligation to do something by the obligee, it is specified that he has the right to perform the act of the obligation instead of the obligee and to demand the costs and expenses of doing it from him. Also, in Article 238 BC, the possibility of making a commitment or a conditional act by the obligee in place of the obligee and at his expense is established. Also, Article 47 of the Law on the Execution of Civil Sentences, in addition to the above powers, allows the convicted person to demand the necessary fees from the convicted party even without performing the act.

In all the above cases, the court will determine the amount of expenses and costs of performing the subject of the obligation by the obligor or a third party to replace the violator with the necessary research and, if necessary, by seeking the opinion of an expert.

Article 214 of the Islamic Republic of Iran stipulates that it is a financial or practical matter that each of the transactors submits or fulfills an obligation. By adopting the unity of the criterion from the above-mentioned articles, it is possible to extend and generalize the ruling on the permissibility of performing an act and the status of the obligation to replace the obligee with the performance of a substitute transaction and delivery of property. Therefore, in the assumption that Roshandeh does not comply with his obligation to deliver the sold property or the buyer refuses to pay for it and the obligation of the obligee to fulfill the obligation also remains ineffective and unfulfilled, the other party has the right to conduct an alternative transaction and the cost and demand its expenses from the offender.

The costs and expenses of fulfilling the obligation by the obligee or someone else may be more than the amounts agreed with the obligee (violator) in the initial contract. In this case, the obligor has the right to receive these additional costs and expenses as damages from the violator. For example, a contractor must build a building, but due to the violation of the contract and fulfilling his obligations, the obligee is forced to fulfil the obligation after some time has passed. With time, the price of materials and construction costs have increased, and the undertaker will inevitably spend more money and costs to fulfil the commitment. Therefore, he has the right to demand these amounts from the offender.

According to Article 221 BC: "If a party makes a commitment to take action or undertakes to refrain from doing something, in case of violation, the other party is responsible for damages...". Also, according to Article 515 of the Civil Procedure Law approved in 1979, the petitioner has the right to claim damages from the defendant for the delay in fulfilling the obligation or non-fulfilment of the obligation. These losses must be certain and directly caused by the obligee's breach of his obligation (Article 520 of the Civil Code). Therefore, the difference in the price of performing the obligation or the alternative transaction, as well as its costs and expenses, will be claimed as damages caused by the obligee's breach of the contract. The court will also determine the amount of loss and the method and quality of its compensation according to the circumstances of the case and, if necessary, by consulting an expert.

5. The effects of alternative transactions

5.1.Convention

(1The first and most important effect of the replacement transaction according to Article 75 of the Convention is the entitlement of the injured party to the difference between its price and the original transaction price. The obligee foresees or it is predictable for him that the violation of the initial contract by him will make the obligee obliged to perform a replacement transaction.

A question comes to mind, and that is, is it necessary to replace the actual transaction price or is it sufficient to predict its limits?

In no article or text, the need to accurately predict the price is not explicitly mentioned. However, according to the analysis of the will and the common will of the parties and the implicit obligation, the parties must assume the responsibility for the price difference at the moment of concluding the contract and have committed or committed to it. Conventional changes are predictable; Especially considering market conditions, supply and demand of goods and seasonal changes.

If the price difference happens suddenly exceptionally and unconventionally, will the obligor be responsible or not?

This matter is mentioned in Article 74 of the Convention and leaves no doubt.

According to this article, the injured party is responsible for the amount and amount of damages caused by the breach of the contract up to the amount that he or should have foreseen at the moment of concluding the contract and in the light of the circumstances and facts; Otherwise, it is not responsible for any damages. Unless it is specified in the contract or the exceptional harmful effects of breaching the contract have been brought to his notice. Also, exceptional and unforeseeable changes can be attributed to the authority of Cairo, which is also beyond the scope of the responsibility of the obligor.

(2In addition to the price difference between the initial and alternative transactions, the obligor can demand all necessary and conventional costs and expenses from the obligor to perform the alternative transaction. Such as the costs and expenses related to the resupply of goods for the sale or purchase of goods, the costs of maintaining and maintaining goods and warehousing, transportation, insurance, royalties and any other type of costs that are normal according to the circumstances of the matter. to be recognized.

It cannot be expected that all the aforementioned losses or costs, including loss of profit, as well as litigation costs and compensations that the injured party pays to its customers, will be compensated through the application of Article 75 of the Convention. What is the nature and philosophy of the existence of this article is merely to evaluate the difference in contract prices? But you should not worry about not compensating for such damages, because any expenses and losses that are not compensated by the application of Article 75, can be claimed and compensated under the inclusion and rule of Article 74 of the Confederation, which is the general rule regarding the assessment and compensation of damages. is acceptable.

5.2.Iran's rights

According to the principles and goals of contractual responsibility, in Iranian law, the same effects and results are imposed on the fulfilment of obligations or alternative transactions in the conventional way. Under Articles 222, 238 BC and Article 47 of the Law on Enforcement of

Civil Judgments, the offender must pay all the expenses and costs of fulfilling the obligation by the obligor or someone else. Regarding the replacement transaction, buying or selling the same product, the offender will be sentenced to pay the price difference. In addition, all necessary and conventional costs and expenses for conducting an alternative transaction, such as re-offering the goods for sale, costs related to storage, transportation, etc., will be the responsibility of the offender. The obligee has the right to demand such costs from the violator as damages caused to him due to the breach of contract, non-fulfilment of the obligation or delay in the fulfilment of the obligation (Article 515 of the Civil Code); Provided that these expenses are the direct and immediate result of the obligee's violation. In other words, there must be a customary relationship between the non-fulfillment of the obligation and the damage caused (Article 520 of A.D.M.). (Safaei, 1382: 214), rather, there must be a relationship of customary causation between the non-fulfillment of the obligation and the loss incurred; In such a way that the customs attribute the damages to the breach of contract or the obligee's breach.

Regarding the necessity of predictability of damage, civil law does not have a clear ruling. However, most of legal writers have considered the ability to predict damages as a necessary condition for fulfilling the contractual responsibility. (Katouzian, 2010, Vol. 3: 811; Shahidi, 2013: 57; Safaei, 2012: 215-214) and attribute its validity to the common will of the parties and contractual obligations at the moment of concluding the contract. In other words, if the loss is not foreseeable, it does not enter the territory of the contract and its compensation cannot be attributed to the agreement of the parties; Also, the relation of customary causation between breach of contract and unforeseeable damages is uncertain and doubtful (Katouzian, 2010, Vol. 3: 220), besides, according to Article 221 of BC, which stipulates that damages must either be explicitly mentioned in the contract or Conventionally, it is used as a stipulation in the contract, or if the law dictates it, that unconventional damages, which are also unforeseeable, cannot be claimed. (Safaei, 1382: 215)

It is sufficient to recognize the realization of foreseeability, its custom ability and that the damage was usually foreseeable by the parties.

Should the exact amount and size of damage be predictable? Article 618 of the Civil Code of Iran states: "If the deposited property is entrusted to the trustee in a closed box or sealed envelope, he does not have the right to open it, and he is the guarantor".

As long as the trustee predicts that opening the box or envelope will lead to loss, it is sufficient, even if he cannot predict the exact amount and size. Therefore, it is sufficient that the cause and type of damage can be predicted, and it is not necessary to identify its amount and importance. (Katouzian 1380, Vol. 3: 813). If the amount of damages is exceptional and much more than expected, it can no longer be attributed to the fault of the offender or breach of contract. At the same time, proving the power of Cairo also exempts the obligee from paying damages. (Articles 227 and 229 BC).

Conclusion

One of the goals of the Convention on the International Sale of Goods is to maintain the contract and continue the life of the contract. In this direction, the convention provides a performance guarantee that prevents the termination of the contract in case of non-conformity of the goods. In the case of delivery of defective goods by the seller, the guarantee of fulfilment of the demand for replacement goods by the buyer is stated in paragraph 2 of article 46. The request for a replacement product is subject to the fundamental nature of the breach of contract. Therefore, if the non-compliance is insignificant, the buyer can't request a replacement product. The buyer must notify the seller of the request for replacement goods through Article 39 of the Convention or within a reasonable period of time thereafter. It is possible to request a replacement product in the general sale, and the buyer cannot demand a replacement product unless the seller has submitted a completely different product to the buyer, in which case the buyer can submit the replacement product, which is one of the types of performance of the same obligation. to request In Iranian law, although there is delivery of substitute goods in the case of generality of the seller in line with the contractual obligation, there is no institution as substitute goods in the sense stated

in the convention. In the Consumer Rights Protection Law, the legislator, in accordance with the Civil Law, has provided the buyer with the right to terminate the contract or to demand compensation. does not have But in the Law on the Protection of the Rights of Car Consumers, the right to demand a replacement product is provided for the consumer under certain conditions. According to paragraph 3 of article 46 of the convention, if the product is defective, the buyer can demand the repair of the product. In both specific and general types of goods, it is possible to request the repair of the goods, but the demand for the repair of the goods must be reasonable according to the circumstances. As mentioned, the request for product repair should be made through the notice of Article 39 or within a reasonable period after that.

In Iran's law, there is no such thing as a demand for goods to be repaired by the buyer, but by examining articles of 478, 481, 527 BC and Article 12 of the Law on Landlord and Tenant Relations, we deduced that the right to rescind is lost when the defect is fixed. It is possible because there is no cause for termination or arash by removing the damage. Therefore, with the unity of the criterion of placing the above materials and the principle of the necessity of contracts, it is possible to request the repair of goods by the buyer. It should be said that the defect must be able to be repaired and the repair of the defect should not cause damage to the buyer.

Consumer rights protection law does not provide the buyer with the right to demand the repair of goods, but in an innovative measure, the investigating authorities can compel the supplier, manufacturer or seller to collect the goods for repair and repair or to comply with the suitability of the type of goods and custom. , something that is not foreseen in the law on protecting the rights of car consumers. In Note 5 of Article 5 of the Law on Protection of the Rights of Car Consumers, repairing the car or replacing its parts is explicitly emphasized. During the warranty period, the supplier is obliged to fix any kind of defect or defect that contradicts the specifications announced to the consumer or prevents the desired use.

Therefore, in Iranian law, we are facing a legal gap regarding the guarantee of performances under the title of repair and replacement of goods; In this way, in the discussion of the sale of executive guarantee under the title of repair and replacement, it is not foreseen. The will of the parties to conclude a contract is its full implementation, therefore, the provision of the guarantee of the right to claim replacement goods in the civil law can play an effective role in maintaining the life of contracts. Despite the approval of the Consumer Rights Protection Law in 2008, none of the aforementioned performance guarantees have been established and no effective protection has been provided to the consumer. The investigations carried out indicate the necessity of changing the civil law of Iran so that the law changes in sync with the customs and needs of the society. Granting the right to claim replacement goods is not in conflict with Iran's legal principles, but is in line with the principle of the necessity of contracts, so Iran's joining the Convention on the International Sale of Goods does not face any problem.

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