

## Observing international commutative contracts and the damage of postpone in rendering properties in the 1980 Convention and comparing it with Iran Civil law

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### Abstract

Commutative contracts are one of the most common and important legal acts. Therefore, a main section of articles of various legal systems is about it. This diversity of systems resulted in various regulations which, in the lack of unified regulations, resulted in problems for contract parties in international commerce. In regard of this discussion about commutative contracts, the damage of postpone of rendering properties should be noted; this issue became more important in the years after the revolution in our country and various positions have been taken by jurisdiction about it. The problem which is paid attention to by commutative contracts parties from long ago is the responsibilities of property damage after making contracts and before rendering it to the customer. The problem is that until when sellers have responsibilities regarding properties and in other words when liability is transferred to customers. Answers to this issue in various legal systems are not the same. The present study observes the international commutative contracts comparing to Iran civil law and also damage of delay in rendering properties and consideration in the international commutative contracts convention (Vienn, 1980) and Iran law. Since Iran has not joined the aforementioned convention comparing them is necessary and useful.

**Keywords:** commutative contracts, damage, postpone in rendering, property, consideration

### Introduction

Commutative contracts are one of the most common and important legal acts. Therefore, a main section of articles of various legal systems is about it. This diversity of systems resulted in various regulations which, in the lack of unified regulations, resulted in problems for contract parties in international commerce.

Since long ago, this kind of contract was considered one of the most significant commercial acts, so that it could be claimed that this kind of contract is the mother commutative contract and source of most commercial transactions like marine, territorial and aviatric transportations, insurance and etc. the frequency of commutative contracts comparing with other businesses resulted in legal systems establishing specific regulations about commutative contracts. Most of these legal systems do not consider huge differences between properties and consideration in commutative contracts and consider some rules equally obligatory as main conditions for both of them.

With the increase of grounds of economical activities in international and national domains, the necessity of achieving rules and principles resulting in stability, facility and expedition of commercial exchanges were sensed more than before and this view was accepted that legal terms are changeable, though founded on the stability principle, and can change based on time and place.

In addition to changes in the state rules of countries, in recent decades, cordial understanding was considered absolutely necessary in lives and seclusion and isolation have become unbearable. The ever increasing development of international commerce and the need of countries to novel conditions because of development of legal relations propelled the international society to codify integrated regulation s promising speed, facility and bolstering of international commercial

relationships. In this regard, the Vienne international commutative contract of properties in 1980 can be pointed out which is the result of efforts of intellectuals and geniuses of the world in various legal, political, social, economical and religious for more than fifty years.

In this regard, the effort of the European commission about contract rights deserves praise. The European parliament ratified a resolution in 1989 in order to codify a principle or European code about private rights. The aforementioned commission codified the first section of European principles of contract rights in 1995 and eventually corrected and completed it in 1997, 1998 and 2000.

### Statement of the problem

The main problem in this study is understanding and exploiting whether it is necessary that the rendered property accord with the one that is sold, or not? This research is based on Iran rules and the international commutative contracts of property convention in 1980s.

In Iran legal terms no single recommendation exists in this regard, but there is unity in regulations. Using the integrated recommendation of convention, perhaps we can also make a unity among the dispersed regulations on Iran civil laws.

The convention of UN in 1980 in Vienne about the international property commutative contracts resulted in development of international commerce by removing the legal impediments in trades and had taken a significant step in coming close to countries with different beliefs and customs.

The problem which is paid attention to by commutative contracts parties from long ago, is the responsibilities of property damage after making contracts and before rendering it to the customer. The problem is that until when sellers have

responsibilities regarding properties and in other words when liability is transferred to costumers.

The answers to this issue in various legal systems are not the same. The present study observes the international commutative contracts comparing to Iran civil law and also damage of delay in rendering properties and consideration in the international commutative contracts convention (Vienn, 1980) <sup>[23]</sup> and Iran law. Since Iran has not joined the aforementioned convention comparing them is necessary and useful.

In fact, the difference between the state and international commutative contracts is not only that one of them has a foreign element and the other not. There are other differences distinguishing these two commercial activities from each other, whether technically, legally or regarding the economical policy of countries regarding these two kinds of contracts. In this study we observe the different aspects of this subject and also explain the loss of rendering about properties and prices (considerations) in the 1980 convention. Then we compare and contrast them with the articles in Iran civil law.

### **The concept of commutative contract and its difference with exchanges**

Commutative contracts are one of the objective contracts that not only their conditions are their effects are separately determined in civil law, but also they have many common regulations of contracts with themselves. In other words, the traditional place of codifying the principles governs all contractive relationships.

On the other hand, commutative contracts obey the general conditions of other types of contracts; in this type of contract, both parties must have serious and legal will; a costumer and a seller must have the legal permission of ownership and use. The legality of contracts depends on existence of an objective subject and the rule considers collusion to reach an illegitimate goal ineffective. (Article 190 civil law onwards) (Katousian, vol. 1, 1387, No. 172 onwards) <sup>[24]</sup>.

The article 338 of civil law defines commutative contracts as follows: (Commutative contract are rendering the possession of an object to a certain other party.) This large domain adds to the commutative contract are. Because, rendering the possession to any other party, whether money, property or service, is considered a commutative contract and it is not necessary that money is used in the trade. But there is a question: What is the difference between a commutative contract and an exchange and how can we understand whether a certain trade between two properties is a commutative contract or an exchange?

Distinguishing between a commutative contract and an exchange depends on the common intention of both parties. If they want to trade two properties with no privilege, this trade is considered an exchange and obeys its principles. Whenever they want that one of the properties is the object of sale and the other its price, the contract is a commutative contract. But there is still a problem T if it is not mentioned in the contract that it is a commutative contract or an exchange, how can we figure out the real intention of both parties? Does any evidence assist prosecutors in this analysis? In the rest of the study we observe this fact. (The same source)

**The features of commutative contracts**The article 338 of civil law defines commutative contracts as follows:

(Commutative contract are rendering the possession of an object to a certain other party.) This definition which is derived of faqihs states that:

- 1) Commutative contracts are possessory contracts
- 2) Commutative contracts are of reciprocal contracts
- 3) The property should be objective

"Commutative contracts are possessory" means that the transfer of property to costumers and its price to sellers occur with offering and acceptance. When sellers and costumers agree on trading two properties and their conditions, properties and their prices trade with each other automatically and there is no need for commitment and execution.

That commutative contracts are possessory is accepted in Islamic rules and came as self-evident in the civil law. This issue is novel in European laws and some countries have not accepted it yet. (Katusian, Vol.1, 1387:15) <sup>[24]</sup>.

The definition in article 338 of civil law clearly tells us that commutative contracts are reciprocal; It means that the property that is sold itself is traded with the other one (which nowadays is usually money).

This description distinguishes commutative contracts from other types. Because in these types of contracts, either some property is rendered to another one with nothing in exchange, or if the receptor has been given a commitment. Between that and the main subject, there will be no causal relationship. (Katusian, 1377:25-29) <sup>[25]</sup>.

Another description that we observe is that the object of sale must be objective. Objectivity means a property having materialistic and palpable existence and that is independently traded not as a gradual fruit of another property. Usually when it is stated that the substance of some property was transferred, it means its substance and its interest. However sometimes it is possible that the financial interest is transferred to another by contracts. In that case the substance is called unprofitable.

Therefore, in spite of what some professors have written, not being sensible is not a situation that can distinguish substance from interests because not only sometimes interests are tangible, but also some of the types of substance cannot be found in outer world. Just like that a kharvar of wheat (generally) can only be imagined and based on it parties trade. (Katusian, 1377: 25-29) <sup>[25]</sup>.

### **The differences between state and international commutative contract**

In fact, the difference between the state and international commutative contracts is not only that one of them has a foreign element and the other not. There are other differences distinguishing these two commercial activities from each other, whether technically, legally or regarding the economical policy of countries regarding these two kinds of contracts. (Akhlaghi and Emami 1385) <sup>[26]</sup> (Stoufflet, 1957, 2) <sup>[26]</sup>.

#### **A: technical differences**

Technically, the physical distance between seller and costumers is still the main problem, though communicative instruments have greatly advanced.

Most of the commercial trades are between countries that have large geographical distance between them. The reason is that the neighboring countries have considerably similar economical resources and that countries have to refer to far areas to get products that they do not have and cannot find in

their neighboring countries. This long distance has certain results.

If we ignore the distance between sellers and costumers, the international commutative contracts and state ones are different in another aspect. In the first type of commutative contracts it is almost obligatory to use international or foreign currency (Dollar, Euro, Franc, etc.) as the trade price. In the state commutative contract there is no need to use any currency other than the one of the country of sellers and costumers.

### **B- Difference regarding legal and economical policies of countries**

The most important difference between state commutative contracts and international ones must be sought in legal and economical considerations. In fact, almost in all ages, the international transactions were not in accordance with the governing of countries. Nevertheless, for centuries various governments, did not block the freedom of international transactions seriously and were just satisfied with the custom rules for transactions. Their goals were both getting some income for themselves and also support their citizens' activities.

Nowadays, regarding the epidemic economical crisis, most countries have to interfere more in the issues regarding the international transactions lest the liberty in transactions should cause severe imbalance in their payments to foreign countries or make their government lose the control of state market.

The result of this policy is establishing a control system of transaction which is somehow severe in most countries. This system both limits the transactions of goods and transferring capitals (Hamel, 1955, 115) <sup>[20]</sup>.

This principles and regulations shaping the international transactional Jus commune either have supernational or state aspects, although they are about international transactions; the first group of these principles are observed under the title of supernational legal resources and the second group under the name of state resources of international commutative contracts.

### **The general principles of law**

In some of the countries which produce oil, the only legal system is the Islamic one. The western countries argue that this legal system is limited to a certain Muslim area and are to solve the problems among Muslims. Also, they believe that in the oil rich Muslim countries, specific regulations are not anticipated to exploit and perform oil transaction between them and foreign countries.

As a result of this thought, in most oil contracts between oil rich countries and foreign companies, in addition to mentioning the rights of the oil rich countries, as governing law on contracts, the necessity of executing the general law principles are pointed out as complementary principles so that the oil rich country is satisfied that in the case of disagreement, its state law principles govern contracts, and also the foreign company is relieved that if some problem arise in its relationship with the other party, the recognized law principles in most legal systems of the world guarantee its rights. (Stern, 1980, 3) (Lalive, 1977, 319-369)

### **Observing the delay damage of rendering regarding the property and price in Iran law**

In mere commutative contracts, rendering is the condition of validity of contracts. And also cause the nullification of lien

and cancelling right of delay in payment. However the most important resulting effect on rendering is the interchangeable liability. In the following, the effect on rendering on the mere commutative contracts and afterwards its main effect which is interchangeable liability are observed:

A: The effect of rendering on nullification of lien the optional rendering of properties, results in nullifying the lien and its reason is the practical nullification of lien by sellers. The article 378 civil law, regarding this issue states that: (If sellers optionally render his property before getting the price, he cannot restitute it unless by cancelling rights.)

### **B: The effect of rendering on nullification of delay in price payment**

According to the article 402 of civil law: (Whenever property substance is external or like that, and there is no determined deadline for paying the price or rendering properties between trade parties, if three days passes of the date of commutative contracts and neither the seller renders the property to the costumer nor the costumer does not pay the whole price to the seller, the seller can cancel the transaction.) So, whenever during three days since the commutative contracts date, a seller renders the whole property to costumers (or costumers pay the price to sellers), sellers do not have cancellation right anymore, even if by some methods property returns to the seller and payment is returned to costumers (Article 404 civil law). The rendering of property during three days after commutative contracts date by sellers means practical signing the commutative contracts and so the cancelling right is nullified, unless it could be proved, otherwise. (Sani the martyr 1410:336) <sup>[27]</sup>.

### **Transferring the interchangeable liability, the most salient effect of rendering**

By rendering, the liability is transferred from seller to costumers. Before observing this transfer, we must see what is meant by interchangeable liability.

The interchangeable liability means that each contract parties while signing the contract is obliged to give the counterpart of what they receive from the other party to the other party. Just like sellers who, when they receive payments, give properties to costumers and costumers pay the price of the property they receive. Now that we considered transfer of liability from the seller on the condition of rendering properties, we must state that there is another rule branched out from it which is that if a property is destroyed before rendering, a seller must guarantee its loss.

Although by commutative contracts per se, the ownership of property and payment are transferred (paragraph 1 article 364 civil law), whenever properties are destroyed by an external event, before rendering, the property of seller is destroyed and its price as mentioned before is the one transferring from sellers to costumers via rendering the interchangeable liability and before rendering it the contract is not complete. Its reason is that from analytic point of view commutative contracts is possession of counterparts and commitment to rendering them.

Therefore, until rendering does not occur, the contract is not complete (Paragraph 3, 4 of article 362 civil law).

The article 387 states about this issue that: (If a property is destroyed before rendering and the seller has no fault in it, the

commutative contract is cancelled and payment must be returned to the customer.)

The important point here is that sometimes the interchangeable liability continues after rendering the property. That is when cancelling right is specified to the customer or is shared between him and another foreign person. It means that if at the time of cancelling right specified to the customer. The property is destroyed or damaged; the seller is responsible for it. That is what the article 453 states in this issue: (Regarding the cancelling rights of assembly, animals and conditions, if a property is damaged or destroyed after rendering or at the time of seller's cancelling right or the one of contract parties, customers are responsible and if the cancelling right is specified to customers, seller is responsible for destruction or damage) (Ibid, 336-340)

### **The recoverable damages of commutative contracts**

A: the expenses of forming commutative contracts:

A customer usually pays various expenses to buy their desired property which have no limitation and can occur in numerous cases. For example, these expenses could be pointed out: the expense of customer's coming to meetings until the contract is made and property is transferred, the intermediary salary and expense of legal counseling to reassure customers, the expenses of engrossing an official document. The expense of making the contract payment and keeping it, the expenses of evaluating properties.

Such damages and losses must be compensated by seller and there is no ambiguity in it since sellers caused them for customers.

### **B: Consideration of property interests**

According to the article 261 of civil law (If an unauthorized property is given to customers, whenever the customer does not get permission from the owner, customers are responsible for property substance and its interest during the time that it belonged to him, although they have not used its interests.)

According to the aforementioned principle, refusing the unauthorized transaction, the owner can take the interests of state accountants and non-state accountants from customers and from this viewpoint, the customer's liability, though ignorant to another person's merit, is the same as the one of the usurper. The reason is that in fiqh, the receptor of an illegal contract is considered a usurper.

Regarding this issue, faqihs do not agree on a verdict: After paying the counterpart of the mentioned interest to the owner of the property, can buyers refer to sellers and demand it back? Some of faqihs, e.g. the author of Meftah Al Kerameh, argue that customers can refer to the unauthorized seller only for taking back the interests of non-state accountants and not in the case of state accountants. This is because in the second case, they have used the property before and cannot demand it back from the seller, too. (Allameh Helli, 1413:348) <sup>[28]</sup> But contrary to them many faqihs consider the returning of customers to demand back the counterpart of state and non state accountants without problem and do not limit the customer right to acquisition of the recent mentioned issue. (Najafi, 1367, vol 22:300) <sup>[29]</sup>.

### **Demanding the loss of delay in payment**

As it is mentioned in legal resources, the concept of loss of delay in payment is not like usury and compensation of decrease in money value. Supposing that the property belongs

to another, the unauthorized seller had guarantee liability since the beginning of having the right to use the payments, because of the nullification of commutative contracts and they were obliged to return the payment to customers. The willful rendering of payment by customers to sellers does not mean satisfaction or consent since customers imagined that the commutative contract was valid and the commutative contract being nullified, the consent is nullified too. So the unauthorized seller must pay for the losses suffered from delay in payment as an obligator.

In addition to it, if customers demand the payment knowing that the property belongs to another, based on the article 522 of new code of civil procedure there is no doubt in customers having the right to receive the loss payments of delay in payments since the date of demanding based on this article.

If the demandant, give the petition of restitution of payment and loss of delay in payment to a court because of the property belonging to another, can the court sentence the defendant to paying the price and loss of delay in payment based on the current price?

In cases which demandants demand the payment and loss of delay in payment because of the property belonging to another, the court must issue a sentence based on the article 522 of code of civil procedure interpreting the article 391 of civil law.

It was mentioned that the concept of loss of delay in payment is not like usury and compensation of decrease in money value. The unauthorized seller had guarantee liability since the beginning of having the right to use the payments and they were obliged to return the payment to customers. The willful rendering of payment by customers to sellers does not mean satisfaction or consent since customers imagined that the commutative contract was valid and the commutative contract being nullified, the consent is nullified, too. So the unauthorized seller must pay for the losses suffered from delay in payment as an obligator.

Obviously, the loss of delay in payment, which has the nature of loss and is because of instigation and complacency, is more than the price that the unauthorized seller pays as refusing the payment itself as compensation of decrease in money value.

### **Observing the loss of delay in payment of property and price in 1980 convention**

In the international convention of commutative contracts of goods there is no definition of loss. But the legislator used damage and loss in the article 74 of the convention and stated that the recoverable losses include material ones and loss of profit. He considered the anticipatability the necessary condition for demanding losses.

The definition in the convention is generally stated and from this view it is congruous with the legal systems of countries and Iran. This article implied the principle of full compensation of losses. (Schlechtriem, 1998, 533) <sup>[22]</sup>.

Based on this principle, obligees have the right to demand the full compensation of disadvantages because of cancelling contracts by committed people. Evaluating these losses are done based on comparing the situation of obligee when the contract is fully executed and when it is cancelled. This method provides the expectation interest of the obligee which is achieved by execution of the contract. The principle of complete compensation of includes both material losses or emergens Damnu and loss of profit or Lucrum Cessans. (Enderlain & Maskow, 1992, 22)

However there is an exception in the principle of complete compensation of losses in the convention which refers to article 5 of the convention. According to this article, convention does not include the responsibility of the seller regarding death or physical harms resulting from goods. Therefore, this kind of compensation also obeys the state regulations of countries of contract parties.

Therefore, summarily, it must be said that the article 74 of the convention expresses the principle of compensation for loss and its conditions. But the nature and types of commitments that are breached and their variety and numbers are counted and determined based on article 45 and 61 of the convention. So this article of convention must be interpreted in relation with articles 45 and 61 and also the principles 75 to 80. (Enderline, 1992, 1992, 297) (Delay in delivery)

### **Maintaining the possession in Iran law**

In Iran law one of the effects of a legal commutative contract is transferring the possession. It means that when the commutative contract occurs, a customer possesses the property and a seller possesses its price. (Paragraph 1 article 362 Civil law). of course this is the case in a commutative contract whose property is a determined object and if a commutative contract is aggregate or an aggregate in something specified, transferring the ownership is only possible after determining the property.

Contrary to most legal systems of the world, in Iran law transferring the liability does not accompany the one of ownership. The article 378 of Civil law states that: If a property is wasted before rendering and its seller is not blameful in it, the commutative contract is cancelled and the payment must be returned to the customer. So, principally, transferring the liability occurs with rendering the goods. (The exception of article 453 of civil law must also be considered here).

In Iran law, the cancelling right weakened the effect of the condition of maintaining the possession. This is because even if such a condition does not exist, when customers become insolvent and the counterpart of the property is with him. The seller can restate it ... (Article 380 civil law).

Therefore, the effect of mentioning the condition of keeping the possession in Iran will be like the extended condition of maintaining the possession in England and its effect board is even more than the one of England law, since demanding the profit of selling for customers does not depend on proving the trust relationship between them.

The 1980 Vienne international commutative contract of goods is one of the obvious examples of this movement and it can be considered the product of theoretical and practical attempt of wise and intellectual men of various nations to reach the maximum agreement, unity and integrity in the international commercial right.

### **Conclusion**

In a commutative contract a property is traded with another and each party tries to achieve a property which is worthier than the other. Therefore in it, the amount and features of both properties of trade must be clear. Also there are two possessions in it and the shared will of both parties connect them and create the concept of transaction.

The article 338 of the civil law defined the commutative contract as follows: (Commutative contract are rendering the possession of an object to a certain other party.) It is

understood by this definition that a commutative contract is a possessory contract and one of the reciprocal types. Also, the property must be objective.

That commutative contracts are possessory, which is accepted in Islamic rules and came as self-evident in the civil law, is novel in European laws and some countries have not accepted it yet.

Some of jurists believe that there is not much difference between state and international commutative contracts. It seems that the only considerable difference between them is that the second type needs a supernatural elements which is non-existent in the first type, and also this supernatural element creates only one problem in the stage of dealing with problems and conflicts resulting from international commutative contracts. The judge, in order to solve the problem between sellers and customers must refer to the system of conflict of rules. But as soon as a national law governing in the contract is found, its regulations will be enough for solving the problems.

This viewpoint is clearly different with what actually exists. In fact, the difference between state and international commutative contracts is not only that one of them has a foreign element and the other not. There are other differences distinguishing these two commercial activities from each other, whether technically, legally or regarding the economical policy of countries.

Regarding sellers and liabilities, it must be added that in Iran law, the liability transferred only by rendering the good to the customer and not to the person responsible for its transportation. The reason is that the seller's commitment is rendering the property to customers.

In 1379, in Iran law, legislators of code of civil procedure of public and revolution courts made the demand of loss of delay generally possible on four conditions.

Faqih generally considered the loss of delay in rendering the money usury and illegitimate in any case; But some of them, supposing the huge decrease of money value and guarantee of debtor in paying the debt on time, considered demanding the loss of delay in rendering acceptable.

At the end, I recommend that the article 522 of code of civil procedure of public and revolution courts in civil issues be eliminated from this law which is related to shape issues and be inserted in the civil law that is related to substantive regulations. Also the accepted solution recommended by the Guardian council be specified by legislators with stating that it is specified to its publication for non-bank and for companies and people.

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