

**UNIVERSITY OF EXETER
DEPARTMENT OF LAW**

TITLE:

**A COMPARATIVE ACCOUNT ON THE CORRELATION BETWEEN
DELIVERY AND PAYMENT IN THE UNITED NATIONS CONVENTION
ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 1980
(THE VIENNA CONVENTION),
IRANIAN LAW, AND ENGLISH LAW**

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August 1996

(Revised June 1997)

ABSTRACT

It is the given intention of the parties to a contract of sale that they should fulfill their obligations concurrently. A concurrent performance finds its special form in international sales which involve particular methods of delivery and payment. When the principle of concurrence is in hazard, because of either party's failure to fulfill its obligations concurrently with the other, then the other party is entitled to preserve the concurrence by resorting to remedies, such as withholding performance of his obligations, tracing the goods (when the goods are already delivered), and rescission of the contract.

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INTRODUCTION

Exchange of the object of sale with a money consideration is the essence and main purpose of the parties to a contract of sale. Given the transfer of property as the effect of a contract of sale, the mere transfer of property when not accompanied by a transfer of control over the goods or the price cannot completely ensure the parties that they will obtain what they expect to gain by the contract. In other words, the correlation between delivery and payment which originates from the parties' intention and is crystallized by the terms of the contract at the stage of its conclusion should be exposed at the stage of performance of the contract. Concurrence between delivery and payment is a certain principle which is implicitly or explicitly expressed in different legal systems. Accordingly, in the absence of any contrary agreement, payment becomes due when the seller delivers or is ready to deliver and the seller finds a duty to deliver when the buyer pays or is ready and willing to pay the price. Moreover, some trace of this correlation can be found in the provisions concerning remedies for the breach of the contract. Non-performance by either of the parties entitles the other party not to perform or to suspend the performance. Termination of the contract, either as an *ipso facto* effect of impossibility of the fulfillment of one of the parties' obligation¹, or as an avoidance of the contract by the aggrieved party in some circumstances, can be interpreted as the result of a correlation between delivery and payment. In this paper, in addition to a comparison between regulations concerning and reflecting this correlation in Iranian law, the Sale of Goods Act 1979 of England and the Vienna Convention, special attention will be paid to the implication of these provisions in an international sale of goods in which the methods of delivery and payment differ

¹ Section 7 of the Sale of Goods Act 1979, and Article 387 of the Iranian Civil Code

noticeably from a domestic sale. This comparison can assist us to assess the degree of protection which an unpaid seller or an undelivered buyer may receive under either of the above-mentioned legal systems. This assessment may be used to propose some amendments in these regulations or at least to be utilized by merchants when choosing the law of their contracts.

1. The Effects of Statement of Concurrence Between Delivery and Payment in the Legislation

As already mentioned, it is the given intention of the parties in a contract of sale, as a buyer, to pay only when the seller has delivered or is ready to deliver, and as a seller, to deliver when the buyer has paid or is ready to pay, unless otherwise agreed. Moreover, a contract of sale is a legal framework for the parties' intentions and expectations to obtain possession of goods/price, one as a consideration of the other. So the concurrence between delivery and payment is inferred from the contract of sale itself. Whether the necessity of concurrence is mentioned by law or not, fulfillment of the obligation of either parties cannot be a condition precedent to the performance of the contract by the other party without the parties agreement. When any arrangement for delivery or payment contrary to the concurrent fulfillment of the parties' obligations has to be set up by their agreement, then the concurrent performance is of the essence of the contract. The provisions such as Article 58(1) of the Vienna Convention and Section 28 of the Sale of Goods Act 1979 will play no role but to clarify what is the implicit term of a contract of sale. The lack of a clear statement by Iranian law about concurrence between delivery and payment does not affect the right of the parties to request a simultaneous performance.

2. Concurrence in International Sales

Since the method of delivery and payment in international sales usually differs from domestic sales, simultaneous performance of the parties' obligations in an international contract of sale is not as simple as it is in a domestic sale. The

statement "a seller should be ready and willing to deliver when the buyer is ready and willing to pay" cannot be applied to a contract which involves carriage of goods, and the payment is made by a bill of exchange or a letter of credit. Applying these methods to the contract undermines the importance of the question of "who has to perform first?". The conflict between the seller's right to withhold delivery until he receives the price, and the buyer's right to abstain from payment until the seller delivers no longer exists when payment is made by a documentary bill or a letter of credit.

Regarding mode of delivery, the main character of an international contract is that the contract involves carriage of goods, therefore the goods have to be handed over to a carrier and, while the goods are in transit, some documents such as shipping documents, represent the goods. In these contracts usually the tender of documents, as the means of control of the goods, replaces delivery of the goods. Now the question is whether the payment has to be made simultaneously with the hand over of the goods to the carrier or tender of documents to the seller. On the other hand, the common methods of payment in an international sale are payments by letters of credit or bills of exchange as a documentary bill or under a collection arrangement. The above-said question will be addressed here with respect to these two methods of payment.

2.1 Concurrence when Payment Is Made by Bills of Exchange

A bill of exchange as a means of payment may be used in international sales either as a documentary bill or under a collection arrangement. When the seller has drawn a bill of exchange on the buyer for the purchase price and then attaches to the bill of exchange the bill of lading which symbolize the goods, such a bill of exchange is called a documentary bill. In payments by documentary bill there is no need for interference by a bank. According to the agreement of the parties, the buyer has to accept or pay the bill of exchange before becoming entitled to receive the bill of

loading as a document relating to disposition of the goods.² It is worth mentioning here that regarding characteristics of a bill of exchange as a negotiable instrument, an accepted bill can be used by a holder in due course in various ways, such as negotiation by the mere delivery of the bill, or delivery and endorsement, and discount of the bill if the bill contains a credit element. So using a documentary bill for payment assures the seller that control of the goods will be transferred to the buyer only when the buyer has paid the price or undertaken to pay by accepting a negotiable instrument which has almost the equivalent value as a cash payment.

The above-mentioned process in an international sale goes more smoothly when the seller's bank under the seller's instructions (through its branch or correspondent bank in the buyer's country) interferes to present the bill of exchange which is drawn by the seller on the buyer at the buyer's place of business and to tender the shipment documents to him when he accepts or pays the bill of exchange. In this way the bank plays a medial role for the collection of the purchase price. The "collection" is defined by the "Uniform Rule for Collections" (1978 Revision, sponsored by the International Chamber of Commerce), as follows:

- (i)"Collection" means the handling by banks, on instructions received, of documents ... in order to-
 - (a) obtain acceptance and/or, as the case may be, payment, or
 - (b) deliver the commercial documents against acceptance and/or, as the case may be, against payment, or
 - (c) deliver documents on other terms and conditions

Since instructions given by the seller determine the line which the bank has to follow, the seller may instruct the bank in the collection order, whether the shipping documents shall be delivered to the buyer on the acceptance of the bill or on actual payment or any other special instruction, as stated in the collection order. Hence, payment by a bill of exchange under a collection arrangement also fully complies with the principle of concurrence. These methods of payment are compatible with

²Schmitthoff Clive M., *Schmitthoff's Export Trade*, Ninth edition, London, Stevens & Sons, 1990, p.389

the principle of concurrence as set out in all three legal systems with which we are dealing in this paper (i.e., Iranian Law, English law, and the Vienna Convention). Tender of documents may constitute an effective delivery in all legal systems. Moreover, the agreement of the parties may replace direct payment by the acceptance of a bill of exchange. Therefore two distinguishable elements of payment by bills of exchange are largely satisfactory in Iranian law, English law, and the Vienna Convention. The language of the Vienna Convention is more explicit on this matter as Article 58 reads as follows:

(2) If the contract involves carriage of the goods, the seller may dispatch the goods on terms whereby the goods, or documents controlling their disposition, will not be handed over to the buyer except against payment of the price.

The nature and functions of bills of exchange are almost identical in Iranian and English law. A bill which is used for payment in an international transaction, however, may fall within the category of "foreign bills" in English law. A foreign bill, according to the Bills of Exchange Act 1882, is a bill when :

- (a) either is drawn by a person who is not resident in the British Island,
- (b) or is drawn by a person resident in the British Island on a person resident abroad and is payable abroad.

All other bills are inland bills (Section 4).³ The differences between provisions concerning inland and foreign bills (e.g., necessity of protest only for foreign bills) and the question of applicable law to the obligation of a person who signed the bill, do not affect the function of bills as a means of payment under the English law. Section 72 of the Act sets up detail of the rules on the conflict of the law concerning bills of exchange.

³ For the purpose of this Act "British Islands" mean any part of the United Kingdom of Great Britain and Ireland, the island of Man, Guernsey, Jersey, Alderney, and Sark, and the islands adjacent to any of them being part of the dominion of Her Majesty. (Section 4, the Bills of Exchange Act 1882)

There is no definition of foreign bills in Iranian law. But the Iranian Commercial Code briefly says when a bill is not subject to Iranian law then the bill is a foreign bill. According to the Iranian Commercial Code, a bill of exchange is subject to the law of the country where it is drawn. Moreover, the obligation of the person who signed the bill (either as the drawer, or endorser) is subject to the law of the country where the obligation originates. (Articles 305, and 306 of the Iranian Commercial Code)

2.2 Concurrence when Payment Is Made by a Letter of Credit

The most common method of payment in an international sale is payment by a letter of credit. In this process, according to the agreement of the parties, the buyer arranges for the payment of the price, through his bank (issuing bank), by a bank at the seller's place of business (advising bank), against documents, including the documents concerning the disposition of the goods i.e., the transport documents. When the required documents are presented by the seller to the advising bank and having regard also that the other terms and conditions of the credit have been met, the bank will pay the purchase price according to the terms of the credit.⁴ Using a letter of credit for payment in an international trade enables the sellers to obtain payment against the shipping document when the goods are in transit. Usually, therefore, according to the terms of credit payment by the advising bank is concurrent with the tender of the documents representing the goods. But, as already mentioned, both parties initially have the duty of making such a process possible. It means that the buyer, in advance, has to instruct a bank in his place of business to open a letter of credit for the seller; and the seller, in order to be able to tender the shipping documents, has to ship the goods at the time and the place required by the contract. It is convenient if these primary stages take place concurrently. So the question is what is the appropriate time for opening the letter of credit with regard to the time of shipment.

⁴Schmitthoff, *Op.Cit.*, pp.400, and 403

2.2.1 Time of Opening a Letter of Credit

As a result of concurrence between delivery and payment, the seller is entitled to ask for the purchase price immediately after the shipment (at the agreed time or within the agreed period) on presentation of the documents (as required by the credit) to the advising bank. Therefore, the credit should be available to the seller from the first day of the shipment period until the end. This point is reflected in the judgment of Somervell L.J. in *Pavia & Co. S.P.A. v. Thurmann-Nielsen*, as he said:

When a seller is given a right to ship over a period and there is machinery for payment, that machinery must be available over the whole of that period.⁵

Whether "the letter of credit must be opened at the latest by the beginning of the shipment period"⁶ or "the buyer must provide the letter of credit within a reasonable time before the first date for shipment"⁷ is not decisive in English law. However, if the payment by credit must be available from the very first day of the shipment period, then it has to be opened in a reasonable time (most probably, before the commencement of the shipment period) as it is necessary for the credit to be available from that time. *Plasticmoda S.P.A. v. Davidson (Manchester) Ltd*⁸, which provides that where there is a fixed date for shipment the buyer is obliged to open the credit at a reasonable time before the date of shipment, endorses the above statement.

The Vienna Convention has not gone into the detail regarding concurrence between delivery and payment in international sales, but Article 54 expands the buyer's duty of payment to "taking such steps and complying with such formalities as may be

⁵[1952] 2 Q.B., pp.84, 88

⁶*Pavia & Co. S.P.A. v. Thurmann-Nielsen*, [1952] 2 Q.B., p.84

⁷*Sinason-Teicher Inter-American Grain Corporation v. Olicakes and Oilseeds Trading Co. Ltd.*, [1954] 1 W.L.R., p.1349 (*per* Lord Denning)

⁸[1952] 1 Lloyd's Rep., p.527

required under the contract or any laws and regulation to enable the payment to be made". A fundamental breach of this duty may entitle the other party to avoid the contract. Here again, with respect to payment by a letter of credit, the credit must be available to the seller when he presents the documents to the bank, which could be the first day of the shipment period. So the credit must be opened as the price can be obtained on the first day of the shipment period. The language of the above-mentioned article in the Vienna Convention is sufficiently strong to put such a burden on the buyer for due payment.

Iranian law does not contain any expressed or implied rules regarding obligation of the seller to open a letter of credit at any specific time. But with regard to two leading principles in Iranian law a very reasonable and practical solution can be achieved. One of them is the principle of autonomy of wills in private contracts, which allows the parties to agree upon payment by a letter of credit as well as setting up the terms and conditions of the credit.⁹ The second one is the major role played by custom, common practices and usage in the contracts as the implied intention of the parties. According to Article 220 of the Iranian Civil Code the parties to a contract are not only obliged to fulfill what they agreed upon explicitly in their contract but they are also bound to whatever law or custom is put on them, as a result of their contract. Therefore, as a customary consequence of the contract of sale in which payment by a letter of credit is stipulated, the buyer is then duty-bound to open a letter of credit at a proper time such as to enable the seller to obtain the purchase price as soon as the goods are shipped. However, lack of an express statement about time of opening a letter of credit in the Vienna Convention and in Iranian law, as it exists in English case law, does not deprive the seller of the expectation of a prompt payment against documents.

⁹ According to Article 10 of the Iranian Civil Code all private contracts are valid, unless they are inconsistent with the specific language of the law. As regards freedom of stipulation, stipulations which do not fall within one of the following categories are valid, i.e. the parties are bound to them. First, stipulations which are impossible to fulfil, or are useless and unprofitable, or are not legal, are of no effect, though they do not nullify the contract itself (Article 232 of the Iranian Civil Code). Second, stipulations which are unknown and of which lack of knowledge leads to ignorance of the object of the contract or the consideration, are void and invalidate the contract (Article 233 of the Iranian Civil Code).

3. Remedies for Breach of Concurrence

The concurrent performance of the parties' obligations is guaranteed by the remedies which are made available to the disappointed party when the other party will not or cannot fulfill his obligations. These remedies reflect the principle of correlation between delivery and payment. For instance, an unpaid seller's rights of lien or stoppage of goods in transit are the consequences of the correlation between delivery and payment. When the buyer has not paid for the goods the seller is entitled to refrain from delivery or, on some occasions, resume possession of them if he has already dispatched the goods to the buyer. In some legal systems, when there are some evidence that one party will not or cannot fulfill his obligations at all the disappointed party has been given a right to terminate the contract in order to rid himself of that bad bargain. For example insolvency of the buyer is considered by Iranian law as an occasion in which the unpaid seller can terminate the contract.

Surprisingly, in some national laws more attention has been paid to the unpaid seller than a buyer who has not received the goods, even though he is ready to pay. For example the right of lien and stoppage in transit are exclusively designated to the unpaid seller in English law and, the "option of delay in payment"¹⁰ and the "option of insolvency"¹¹ in Iranian law both provide only the unpaid seller with an option to terminate the contract when the buyer has not paid within a specific period or becomes insolvent. The buyer to whom the goods have not been delivered at the agreed time, or can foresee that the seller will not be able to deliver at the agreed time, has been given no special protection, and the only way forward him is for him to claim damages caused by non-delivery. The status of this buyer appears worse under English law than Iranian law, because in the latter, at least both seller and buyer are furnished with the right of lien, whereas in English law only the unpaid seller has such a right. Moreover, remedy of the specific performance which may benefit the buyer on such an occasion is treated as an exceptional remedy in common law, by contrast to Iranian law where the first available remedy for an

¹⁰ Article 402 of the Iranian Civil Code

¹¹ Article 380 of the Iranian Civil Code

aggrieved party is to ask for the specific performance (which is, in this case, delivery of the goods as described by the contract), whenever it is possible (Articles 222, and 275 of the Iranian Civil Code). Probably, legislators of national laws assume that the buyer in the case of non-delivery by the seller needs less protection because he has not yet parted with his money, and eventually he may terminate the contract and approach another seller.¹² A buyer in an international sale, however, has to receive the same protections as the seller, because he may not be able, for many reasons, to approach another seller. For instance, swapping from one seller to another is not possible or easy for the buyer when the letter of credit has already opened in the name of the seller and the buyer has paid a portion of the purchase price to the issuing bank, or when the seller is the exclusive producer of the goods. On the other hand, giving both parties the right to withhold from delivery or payment until the other party delivers or pays may cause practical difficulties when both parties intend to practice their right of lien. The Vienna Convention in its regulations concerning the correlation between the parties' obligations and the available remedies for breach has dealt equally with both the seller and the buyer, in a way which does not cause any practical difficulty. For example, in Articles 71, and 72 the right to suspend or avoid the contract when it becomes apparent that one of the parties will not perform a substantial part of his obligations (Art. 71) or will commit a fundamental breach (Art. 72) has not been designated only to the seller or to the buyer, but are available equally to both parties.

The available remedies to an aggrieved party for breach of a concurrent performance of a contract of sale, regardless of the question of property, can be classified as follows: (a) the right to withhold from delivery/payment; (b) the seller's right to trace the goods when he has been parted from possession of them; (c) the right to terminate the contract. The availability and the conditions which give rise to any of these remedies in Iranian law, English law, and in the Vienna Convention will be compared here.

¹² Termination in English law can be the result of the acceptance of the seller's repudiation by the buyer.

3.1 The Right to Withhold from Delivery (or Payment)

The right of lien is recognized for an aggrieved party in both English and Iranian law when the other party is not ready to fulfill his obligation. The correlation between delivery and payment requires that the seller be given the right not to deliver when the buyer has not paid and *vice versa*. But, as already mentioned, in English law this right is designed only for an unpaid seller, whereas in Iranian law both the seller and the buyer may refrain from delivery, or payment, until the other party delivers, or pays (Article 377 of the Iranian Civil Code). English law differs from Iranian law in giving the unpaid seller the right to refrain from delivery until payment or tender of the price, whereas in Iranian law the right of lien terminates when the other party is prepared to deliver his part. Under both laws sales by credit are excluded. When the time of credit has expired and the payment becomes due, then the right of lien will be available for the unpaid seller. This right can be exercised when the seller has possession of the goods. The right of lien in Iranian and English law may be identically waived by the aggrieved party, explicitly or implicitly e.g., by a part delivery which can be regarded as an agreement to waive. Insolvency of the buyer before delivery entitles the unpaid seller not to deliver in both Iranian and English law.

The seller may exercise his right of lien as long as he is physically in possession of the goods. The Sale of Goods Act 1979 considers the seller to be in possession when he has actual and physical possession of them, even though "he is in possession of the goods as agent or bailee or custodian for the buyer" (Section 41(2)). The similar rule can be derived from Article 378 of the Iranian Civil Code which provides that only a deliberate delivery may deprive the seller from his right to withhold from delivery before he receives the price. So that if the goods come into the buyer's possession by any cause other than delivery by the seller, the seller will not lose his right of lien. Subsection 43(1)(a) implies that when the seller is no longer in possession of the goods but reserves the right of disposal of them for himself, he may still exercise his right of lien. The right of the seller to resume possession of the goods when he has already parted with them (by delivery to a

carrier or other bailee or custodian for the purpose of transmission to the buyer) cannot be called the right of lien, which means to refrain from delivery. There is more similarity between the provisions of this subsection and the stoppage in transit which is regulated in Sections 44-46 of the Sale of Goods Act 1979.

The Vienna Convention guarantees concurrence between delivery and payment by giving the aggrieved party, either the seller or the buyer, a right to suspend the performance of his obligation when "it becomes apparent that the other party will not perform a substantial part of his obligation" (Article 71(1)). The Vienna Convention differs from the above-mentioned national laws in two ways: firstly, the right to lien or refraining from performance is replaced by the right to suspend the contract; secondly, failure to perform any substantial part of the contract, not necessarily non-delivery or non-payment, may cause the right of suspension by the aggrieved party. Suspension of the contract, when the seller is in possession of the goods, not only releases him from delivery but also the duty to take any further step with regard to the performance of the contract, such as producing or manufacturing the goods. Moreover, under the Convention the seller or the buyer should not wait until the breach by the other party occurs and then suspend the contract, but when it becomes apparent that a breach with respect to a substantial part of the contract will occur he may suspend the contract. The Convention (Article 71(1)) reduces the possibility of abuse of this right by determining the grounds which may give rise to the right of suspension, which are as follows:

- (a) a serious deficiency in his ability to perform or in his creditworthiness; or
- (b) his conduct in preparing to perform or in performing the contract.

Insolvency of the buyer is a clear example of a serious deficiency in his creditworthiness and entitles the unpaid seller to suspend the contract. The right of suspension of the contract before delivery, though identical to the right of lien in both English and Iranian law, is wider than that right with regard to the grounds which give rise to this right and the obligations of the aggrieved party which could

be wiped up by virtue of exercising the right. The third paragraph of Article 71 requires notice to be given by the party suspending the contract to the other party, but existence and exercise of the right of suspension is not subject to giving such a notice. The notice is required to provide the other party with a chance to provide adequate assurance of his performance; the assurance obliges the suspending party to continue with performance.

Bearing in mind that an international sale requires primary stages which have to be taken before delivery and payment, the Vienna Convention provides a much better balance between the obligations of the parties, which is the main purpose of the principle of concurrence and remedies set up for its breach. For instance, a deficiency in the creditworthiness of the buyer entitles the seller to suspend the process of manufacturing, or shipping, or obtaining an export licence or any other action which is necessary for delivery. Equally, when it becomes apparent that the seller, for example because of an export ban in his country, will not deliver the buyer will be free from the primary stages of payment, such as opening a letter of credit. The conflict between the seller's right of lien and the right of lien for the buyer, which may happen in any legal system in which the right is provided for the both parties, is less likely to happen under the Convention. According to the Convention either of the parties may suspend the contract when it becomes apparent that the other party will not perform his obligations. But the necessity of giving an immediate notice of suspension to the other party and the duty of the suspending party to resume the contract when he receives an adequate assurance from the other party eliminate the possibility of the occasions on which both parties can suspend the contract due to failure of the other party in fulfilling his obligations. Hence, practically, the actual performance of either of the parties is not a condition as to the other party's duty to perform. The assurance of performance given by either of the parties adequately binds the other party to continue with the performance of the contract. What is an adequate assurance of performance is a matter of fact, which differs from one circumstance to another. However, conflict

between both parties' lien is unavoidable when the only adequate assurance of performance by both parties is a real and complete performance.

3.2 Right to Trace the Goods

The unpaid seller's right to trace the goods when he is no longer in possession of them is recognized by all three legal systems with which we are dealing, *viz.* Iranian law, English law and the Vienna Convention. But the grounds causing this right may differ. The other controversial issue concerning this right is the limit to which the seller can trace the goods *i.e.*, whether an unpaid seller is entitled to resume possession of the goods when they are already placed in the possession of the buyer, or whether this right may be exercised only as long as the goods are in transit.

The right of stopping goods in transit is expressly recognized for an unpaid seller in English law and the Vienna Convention. According to Section 44 of the Sale of Goods Act 1979, only in the case of insolvency of the buyer can an unpaid seller stop goods in transit, resume and retain possession of them until payment or tender of price. As mentioned before, if the seller has reserved the right of disposal of the goods, when he delivers the goods to the carrier for the purpose of transmission to the buyer, he may resume possession of the goods as a result of this reservation. Therefore, insolvency of the buyer is the only ground for an *ipso facto* stoppage in transit right of an unpaid seller.

Under the Vienna Convention parting from possession of the goods does not affect the seller's right to prevent the handover of the goods to the buyer when it becomes apparent that the buyer will not perform a substantial part of his obligations. So the grounds which give rise to the right of suspension of the contract by the seller when he has possession of the goods, similarly entitles him to prevent the handover of the goods to the buyer once they have been dispatched. The second paragraph of Article 71 of the Convention, concerning this situation, reads as follows:

(2) If the seller has already dispatched the goods before the grounds described in the preceding paragraph become evident, he may

prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them. The present paragraph relates only to the rights in the goods as between the buyer and the seller.

Under the Vienna Convention, as in English law, the seller may prevent the handing over of the goods to the buyer as long as the goods are not physically placed under the buyer's or his agent's control. Therefore, holding documents of title to the goods by the buyer does not prevent the seller stopping the goods in transit. In other words, only an actual and physical delivery to the seller, or his agent, may cease the disappointed seller's right to trace the goods. However, for the purpose of this paragraph a carrier, under any circumstances, should not be deemed as the seller's agent; unless the nature of possession of the carrier is changed by giving an acknowledgment to the buyer that he holds the goods on his behalf, after the arrival of the goods at their destination. Despite the similarities between English law and the Convention in the concept of the course of transit, the Sale of Goods Act contains more details about duration of transit than the Convention. What can be said is that the right of stoppage in transit is ended, in both the Convention and English law, when the buyer or his agent takes delivery of the goods. Subsection 45(5) of the Sale of goods Act, raises the question of whether possession of a master of the ship when the ship chartered by the buyer is on the buyer's behalf or is as a carrier. This subsection can be criticized as it undermines the purpose of the stoppage in transit, as was mentioned earlier.

The very existence of the right of stoppage in transit, although not mentioned expressly by Iranian law, is compatible with the general principles approved by this legal system. As has been mentioned before, a contract of carriage, though recognized by the Iranian Commercial Code as a specific contract, in its nature is an agency contract and follows the same principles unless otherwise provided by the law (Article 378 of the Iranian Commercial Code). Therefore the carrier is the agent of the person who arranged the contract of carriage (dispatcher). So, when the seller is the one who arranged for the carriage and entered into the contract with the

carrier the carrier is deemed to be his agent and the carrier, as an agent, has to follow the instructions of the seller as a principal.¹³ In this way, the seller has possession of the goods through his agent and, as a result of the continuation of his right of lien, may resume possession of the goods, or instruct the carrier not to hand them over to the buyer until payment has been made. On the same grounds, there will be no room for the seller's right to trace the goods after they are delivered to the carrier when the carrier is the buyer's agent simply because the buyer arranged for and entered into the contract of carriage. In these circumstances, delivery to the carrier is deemed as delivery to the buyer and cuts off any relationship between the seller and the goods. But an outcome similar to stoppage in transit in English law is still available for the disappointed party under Iranian law. The right of stoppage in transit comes into existence in English law when the buyer becomes insolvent. In the case of insolvency of the buyer, Iranian law also entitles the unpaid seller to reclaim the goods, even though they have been delivered to the buyer, as long as the buyer has retained in his possession the actual object of sale (Article 380 of the Iranian Civil Code). The insolvency of the buyer in Iranian law entitles the unpaid seller not only to interfere in the process of transmission of the goods to the buyer while they are in transit, but also allows the seller to reclaim the goods even after they are handed over to the buyer. The latter part of the unpaid seller's right raises the question of similarity between the unpaid seller's right in the case of insolvency of the buyer in Iranian law and a retention of title clause in English law.¹⁴

According to Article 383 of the Iranian Commercial Code, the right of the seller, as the person who arranged for and entered into the contract of carriage, to reclaim the goods in transit will terminate on the following occasions: (1) when the bill of lading is handed over to the buyer; (2) when the carrier has given a receipt of the

¹³According to Article 382 of the Iranian Commercial Code: "The dispatcher, as long as the goods are in possession of the carrier, is entitled to resume possession of them; but he has to pay all the expenses and losses incurred by the carrier."

¹⁴Notwithstanding the similarities between the option of insolvency and retention of title clause in their purpose, the retention of title clause in English law differs from the option of insolvency in Iranian law in its effects. A comparison between these two concept has been done in my Ph.D. thesis.

goods to the seller and the seller cannot return it to the carrier; (3) when the carrier acknowledges to the buyer that the goods have arrived at their destination and he has to take delivery of them; (4) when after arrival of the goods at their destination the buyer requests delivery of them. One should keep in mind that the right to reclaim the goods in this article is not a remedy for an unpaid seller, but this right is recognized for the seller whether he is paid or not. However, the handing over of the bill of lading to an insolvent buyer cannot prevent the unpaid seller resuming possession of the goods under the circumstances already mentioned. The fact that the goods are in constructive possession of the buyer may not deprive the unpaid seller to reclaim the goods, because insolvency of the buyer entitles the unpaid seller to reclaim the goods even though they are in the actual and physical possession of the buyer.

For the following reasons the Vienna Convention provides the most comprehensive and concise regulation concerning an unpaid seller's right. Firstly, the right of stoppage under the Convention is not only for an *unpaid seller* but it also protects the seller when it becomes apparent that the buyer will not perform a substantial part of his obligations, a right which covers a much wider area than non-payment. Moreover, stoppage in transit under the Convention is not available only in the case of insolvency of the buyer, which is the only certain ground for this right, in both Iranian and English law. Secondly, the language of the relevant article of the Convention, though concise is comprehensive and clearly elaborates the possibility of exercising this right when the buyer has documents of title to them. An over-estimate of the role and importance of documents of title may misleadingly suggest that holding the documents of title, such as a bill of lading, by the buyer entitles him to claim the goods from the carrier. In this situation the seller should not be entitled to prevent the handing over of the goods to the buyer who holds the documents. But the Convention clearly distinguishes between the role of these documents between the seller and the buyer and their role as regards third parties, by saying that: "The present paragraph relates only to the rights in the goods as between the buyer and the seller."

3.3 Termination of the Contract

Termination of the contract can support the principle of concurrence between delivery and payment by putting an end to the contract when one of the parties refuses to perform his obligations, or performance of his obligations becomes impossible. On some occasions and under some legal systems, the law itself puts an end to the contract, and on other occasions the aggrieved party is furnished with a right to terminate the contract.

3.3.1 Rescission of the Contract by Law (*Ipsa facto* Rescission)

In English law as well as Iranian law the contract for the sale of specific goods will be rescinded when the object of sale without any fault from either parties perishes before the passing of risk.¹⁵ Rescission of contract when delivery becomes impossible is a perfect example of correlation between delivery and payment. The *ipso facto* rescission will not occur after the passing of risk; however, Iranian law differs from English law concerning time of transfer of risk. In Iranian law, the risk passes on delivery¹⁶; whereas the passing of risk in English law is tied to the transfer of property and is subject to the agreement of the parties. In the absence of the parties' agreement, the presumption of transfer of property as set out by the Sale of Goods Act 1979 (Section 18)¹⁷ will lead to a similar result as in Iranian law;

¹⁵Section 7 of the Sale of Goods Act 1979; and Article 387 of the Iranian Civil Code

¹⁶ The transfer of risk on delivery is an accepted rule in Islamic law which derives from a saying of the Prophet Mohammed and is reflected in Article 387 of the Iranian Civil Code as follows:

“If the object of sale without fault or neglect of the seller is destroyed before delivery, the contract of sale is terminated and the consideration must be returned to the buyer,”

It has to be mentioned that the transfer of risk by delivery is a supplementary law which comes into play when the parties fail to decide upon the time of the transfer of risk. (See: Katozian, Naser. *Huquq-i Madani (Bay', Mu'awida, Ijara, Qard)*, (Farsi), Tehran (Iran): Intishar, 1371 A.H., pp.188, and 189)

¹⁷ It has to be mentioned here that English law has recently welcomed a major changes with regard to the sale of goods forming part of an identified bulk. According to the Sale of Goods (Amendment) Act 1995, a buyer who has paid for some or all of goods forming part of an identified bulk becomes an owner in common of the bulk. However, the amendment has not addressed the question of allocation of risk between seller and buyer where the goods deteriorated before the buyer takes delivery of his share of the goods. Moreover, the co-ownership concept may not be considered as an identical to the property, which cannot pass until the goods have been ascertained (Section 16 of the Sale of Goods Act). Therefore the amendment has not any effect on the question of transfer of risk in such contracts.

because, setting aside minor differences, in both laws risk passes when the goods are placed at the buyer's control, or a major step towards this stage has been taken.¹⁸

The Vienna Convention in this regard differs from both the national laws as *ipso facto* avoidance has not been recognized by the Convention. However, inferred from Article 60 of the Convention, the loss of goods before the passing of risk discharges the buyer from the duty of payment. The result endorses concurrence between obligations of the parties to a sale contract.

3.3.2 Avoidance of the Contract by the Aggrieved Party

The right of avoidance is recognized for the aggrieved party when the possibility of a concurrent performance of the parties' obligation is seriously jeopardized. Termination of a contract as a remedy for breach of terms and conditions of the contract in the course of performance¹⁹ also offers a high degree of protection to the aggrieved party who has not received what he is entitled to receive. But termination of a contract as a guarantee for a concurrent performance should enable the aggrieved party to release himself from the contractual obligations by putting an end to the contract, not after a breach but in advance, when it is clear that a breach will occur. Different legal systems offer this right on different grounds and occasions. The questions, such as whether the aggrieved party should wait until the time of performance, or whether he may terminate the contract the other party's obligations become due, and what may give rise to this right, determine the sphere of application of this right in different legal systems.

Before setting up the main argument it seems necessary to mention that there is confusion concerning the proper terminology for the termination of the contract by

¹⁸ However, regardless of the governing law of the contract, by the parties' agreement, very often Incoterms may apply as to the question of transfer of risk in international sale contracts.

¹⁹ For instance, avoidance of the contract as a result of a fundamental breach in the course of performance under the Vienna Convention, and the right of cancellation of the contract by the buyer when the delivered goods are defective in Iranian law, and breach of a condition in English law.

the aggrieved party due to breach by the other party, which causes returning property in the goods to the seller if it has already passed to the buyer and putting an end to the parties' duty to continue performance of the contract. This right is called by the Vienna Convention "the right of avoidance". Iranian law adopts the Arabic term of *faskh* from Islamic law for this concept, but in English texts different translations such as "termination", "cancellation" and "rescission" are used to express this concept. In English law the House of Lords in *Johnson v Agnew*²⁰ distinguished between rescission of a contract *ab initio* on grounds of contractual invalidity such as fraud or duress, and termination of the contract for breach. Only the former is strictly rescission which has retrospective effect. However, confusion in English law still exists; for instance, according to the above distinction failure of the buyer to pay the price which entitles the seller to resell must involve termination of the contract, whereas, on this occasion, the term of rescission is used by the Sale of Goods Act 1979 (subsection 48(4)).

The right of cancellation is recognized by Iranian law for the disappointed party on various occasions. Amongst them the right of an unpaid seller to cancel the contract due to delay in payment, or insolvency of the buyer, remarkably reflects the principle of concurrence between delivery and payment. In the sale of specific goods, or part of a specific bulk, when there is no agreement concerning time of delivery or payment, the seller who has not yet delivered the goods will be entitled to cancel the contract if the buyer has not paid or tendered the price within three days from conclusion of the contract. The period of three days might be shorter if the goods will have perished before the expiration of three days.²¹ The restricted sphere of application of this right, such as being the object of sale specific goods as well as the short period of three days for payment, make the provisions unfit and inapplicable to international contracts.

²⁰[1980] AC, P: 367

²¹Articles 402, and 409 of the Iranian Civil Code

The insolvency of the buyer before or after delivery, as long as the actual goods are in the buyer's possession, entitles the unpaid seller to cancel the contract and consequently not to deliver or reclaim the goods. The insolvency of the buyer before the time of payment, as well as in a contract of sale by credit, enables the unpaid seller to cancel the contract because, according to the Iranian Commercial Code (Art. 421), once the verdict of insolvency has been issued all the time obligations of the insolvent become due. The language of Article 380 of the Iranian Civil Code expressly suggests that only the insolvency of the buyer may give rise to such rights for an unpaid seller. It has been said that, by analogy, the insolvency of the seller may equally enable the buyer to cancel the contract and not to pay, if he has not already done so, or reclaim the amount already paid so long as the seller has retained in his possession the actual consideration (paid price).²² Accordingly, in the case of the insolvency of the seller, the buyer who has neither received the goods nor paid the price is entitled to cancel the contract and release himself from his contractual obligations. However, application of this provision to the common form of sales, which involves monetary consideration when the price has already been tendered and the seller becomes insolvent, seems complicated. It is difficult, impossible and useless to trace the "actual purchase price" in the seller's possession after it has been tendered to the seller. In international sales, very commonly, payment is made by documentary bills or letters of credit without using notes or an exchange of currencies. Hence it is nonsensical to ask whether the actual tendered price is in the possession of the seller or not. Therefore, the Iranian Commercial Code in Article 534 provides that only an unpaid seller can refrain from delivery, or reclaim the goods, if the buyer becomes insolvent before payment. With regard to all legal arguments and economic expediency, one cannot agree more than stating that the insolvency of the seller before delivery entitles the buyer, who has not yet

²²Imami, Hassan. *Huquq-i Madani*, vol.1 (Farsi), Tehran: Iran, Islamiya, 1364 (A.H.) p.528;

Bear in mind that in Iranian law a contract of sale does not necessarily involve a monetary consideration; exchange of two commodities, as well as exchange of a commodity with money, are considered as a contract of sale.

paid the price, to cancel the contract; an unpaid seller can do so when the buyer becomes insolvent before delivery and payment.

In English law rescission of a contract is the result of an anticipatory breach of the contract by one of the parties when it has been accepted by the other party. In *Aforos Shipping Co. v Pagnan & F.lli (The Aforos)*, an anticipatory breach is closely linked to the concept of fundamental breach, as Lord Diplock said:

If one party to a contract states expressly or by implication to the other party in advance that he will not be able to perform a particular primary obligations on his part under the contract when the time for performance arrives, the question whether the other party may elect the statement as a repudiation depends upon whether the threatened non-performance would have the effect of depriving that other party of substantially the whole benefit which it was the intention of the parties that he should obtain from the primary obligations of the parties under the contract remaining unperformed. ... The non-performance threatened must itself satisfy the criteria of a fundamental breach. ²³

Moreover, failure of one of the parties to perform his obligation is a repudiation when the result of non-performance amounts to a fundamental breach.²⁴ Therefore, a contract of sale is regarded as repudiated if either of the parties makes it plain to the other party that he is unable or unwilling to perform his obligation or he has, by his own act or default, completely disabled himself from performing his obligation.²⁵ According to the afore-said judgment of the House of Lords, such a statement or conduct will amount to a fundamental breach when a possible non-performance deprives the other party of the whole benefit of the contract, i.e. when it becomes clear that the seller will not deliver and the buyer will not pay for, or accept, the

²³.[1983] 1 W.L.R., p.195, on p.203

²⁴.*Ibid.*

²⁵.See *Benjamin's Sale of Goods*, A.G. Guest (general editor), 4th edition, London, Sweet & Maxwell, 1992, 8-006, and 9-044

goods.²⁶ In this way, the seller has been given authority to terminate the contract if, before the time of delivery becomes evident, the buyer will not pay; and the buyer may terminate the contract when the seller, before the time of performance is due, indicates that he will not deliver. Since in English law stipulations as to the time of payment is not of the essence of the contract, failure in payment or deficiency in the buyer's creditworthiness, which may cause a late payment, does not automatically amount to the right of termination of the contract for the seller. However, if the time of payment by stipulation becomes of the essence or a fundamental term of the contract, or the circumstances show that the buyer's failure to pay is a breach which goes to the root of the contract, then the seller may treat the contract as repudiated and bring the contract to an end by accepting the buyer's repudiation. The mere insolvency of the buyer or the announcement of his insolvency does not necessarily amount to a repudiation of the contract.²⁷ If the aggrieved party decides to accept repudiation of the contract, then he can immediately claim for damages. But if the repudiation has not been accepted, the contract is kept alive, and both parties should carry on performance of the contract.

Subsections 48(3) and 48(4) of the Sale of Goods Act 1979 designate the right of re-sale as a remedy for an unpaid seller. The right of re-sale is associated with rescission (or termination) of the contract. As the Court of Appeal in *R. V. Ward Ltd v Bignall*²⁸ explained, re-sale necessarily amounts to a rescission of the contract under both subsections 48(3) and 48(4). An unpaid seller may be entitled to re-sell the goods when he expressly reserves the right of re-sale in the case of default by the buyer, and where the goods are of a perishable nature, or where the unpaid seller gives notice of his intention to re-sell and the buyer does not, within a reasonable time, pay or tender the price. In other words, the unpaid seller firstly rescinds the sale and then re-sells the goods, hence the original buyer will not be

²⁶. See Section 27 of the Sale of Goods Act 1979

²⁷. *Phoenix Bessemer Steel Co Ltd, In re* (1879), 4 Ch D, p.108

²⁸. [1967] 1 QB, p.534

entitled to the price of re-sale. When the seller expressly reserves the right to resell in case the buyer should make a default, he makes time the essence of the contract. So also, by giving notice to the buyer that he intends to resell, the seller indicates that the time factor is a crucial element, and failure to pay in a reasonable time goes to the root of the contract.

The Vienna Convention authorizes the aggrieved party to avoid the contract when the other party commits a fundamental breach. Article 72 of the Convention strongly guarantees the principle of concurrence by authorizing either party to avoid the contract when it is clear that the other party will commit a fundamental breach.²⁹ In this way, the contract will be terminated before a breach occurs. Either the seller or the buyer can put an end to the contract and release himself from any contractual obligations when it is clear that he will not receive what he is entitled to expect from the contract.³⁰ The right of avoidance in Article 72 is similar to the right of an aggrieved party in English law to terminate the contract by accepting the anticipatory breach of the other party, and the concept of fundamental breach plays a key role in both of them. But Article 72 of the Convention can apply to a wider range of occasions, because fundamental breach in the Convention has a wider meaning than English law. In English law, failure of either party to perform his obligations amounts to a fundamental breach when the breach, or the result of the breach, substantially deprives the other party of the *whole benefit that he was entitled to receive from the contract*.³¹ In the Vienna Convention, "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*

²⁹.Article 72 of the Vienna Convention reads as follows:

- (1) If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided.
- (2) If time allows, the party intending to declare the contract avoided must give reasonable notice to the other party in order to permit him to provide adequate assurance of his performance.
- (3) The requirements of the preceding paragraph do not apply if the other party has declared that he will not perform his obligations.

³⁰.See Article 25 of the Vienna Convention

³¹.*Aforos Shipping Co. v Pagnan & F.lli*, [1983] 1 W.L.R., p.195

expect under the contract" (Article 25). Deprivation of the "whole benefit of a contract of sale" is caused by absolute non-performance, i.e. non-delivery by the seller, or non-payment and non-taking delivery by the buyer, whereas deprivation of contractual expectations may be caused by non-performance as well as an imperfect performance. For instance, when by examination of the goods which the seller intends to dispatch to the buyer, it becomes clear that the quality of the goods is not in conformity with the contract, the result of non-conformity may meet the criteria of a fundamental breach under the Vienna Convention, but not under English law. Moreover, since the stipulations as to time of payment are not of the essence of a contract of sale in English law ³², the buyer's failure to pay does not necessarily amount to a fundamental breach and therefore can be treated as an anticipatory breach.

It is clear in English case law that the party who accepts the repudiation of the contract and brings the contract to the end can immediately claim for damages, and should not wait until the time of performance. The same principle should be followed under the Vienna Convention, because according to Article 81 avoidance releases both parties from their obligations subject to any damages which may be due. So, after avoidance of the contract under Article 72 or 73, the party in breach cannot and will not carry on performance of the contract. Therefore, it would be unreasonable and unfair to say the aggrieved party should wait for actual breach when the contract no longer exists.

The Vienna Convention, if time allows, requires that the party who intends to avoid the contract should give notice to the other party in order to give him a chance to provide adequate assurance of his performance. So the contract may not be avoided unless a reasonable time has elapsed within which the party in breach can provide assurance of his performance. English law does not require such a notice and an anticipatory breach can be accepted as soon as it has occurred.

³².Section 10 of the Sale of Goods Act 1979

Putting an end to a contract by one of the parties, as a precaution, due to the breach that will happen by the other party is a very strong remedy. When one of the parties, prior to the time of performance as shown by his conduct and behavior, or by his statement, indicates that he will not or cannot perform his obligations and his failure will seriously jeopardize the balance between the parties' rights and entitlements under the contract, then there is no reason for the aggrieved party to keep his promise, carry on with his obligations and wait until the time of performance. On the other hand, if the grounds which give rise to this right are not clearly defined by law, the right will be misused and the existence of contracts will be in hazard by unreal claims. Moreover, it is far better if one can make sure before avoidance that the guilty party will not or cannot fulfill his obligations. The provisions of Article 72 of the Vienna Convention fulfills the above-mentioned requirements. However, the concept of fundamental breach as used by the Convention is not a familiar term for the lawyer. Therefore it might be difficult to determine whether or not the breach that is clear will occur amounts to a fundamental breach and consequently gives rise to the right of avoidance. Bearing in mind the definition of fundamental breach in the Convention, the above question should be paraphrased as follows: whether or not the result of the breach, that is clear will happen, can substantially deprive the other party from what he is entitled to expect under the contract.

CONCLUSION

Since the purpose of a contract for sale of goods is exchange of goods for money consideration, payment is the counterpart of delivery in all legal systems. A concurrent performance is required to assure either of the parties that he will receive what he is entitled when he performs his obligations. A party to a contract is entitled to refrain from performance, or to suspend the contract, or to bring the contract to an end when the other party has not performed his obligations concurrently or indicates that he will not or cannot perform. Termination of a contract as a result of a fundamental breach which will occur in the future has been widely accepted by both English law and the Vienna Convention, but can hardly be welcomed by Iranian law. Only the insolvency of the buyer may give rise to the right of cancellation of the contract for an unpaid seller in advance of the time of payment. In the Iranian law of contract, there are some certain imperative rules which determine when and how a contract may be terminated. According to Article 219 of the Iranian Civil Code, contracts which are concluded according to law are binding for the parties, unless they have been canceled by mutual agreement or due to the law. However, if an anticipatory breach by one of the parties can be regarded as consent and intention to the cancellation of the contract, then the other party will be able to bring the contract to an end by indicating his consent to the cancellation of the contract. Article 284 of the Iranian Civil Code, in this regard, provides: "Cancellation can be made by any word or any act which indicates mutual agreement of the parties on cancellation of the contract." This institution is not designed as a remedy for breach of the contract by one of the parties but it can be used to eliminate the conflict between Article 72 of the Vienna Convention and the imperative part of Iranian law of contract which is originated from Islamic law, and in this way ease ratification of the Vienna Convention by the Iranian government.³³

³³According to the Constitution of the Islamic Republic of Iran all international conventions should be ratified by the Iranian parliament (*Majlis*), and the parliament cannot establish laws which are in contrast with the principles of Islam and the Constitution. (See Articles 4, 72, 77, and 96 of the Constitution of the Islamic Republic of Iran)