

Claim for Damages upon Termination of Contract under the United Nations Convention on Contracts for the International Sale of Goods, with a Comparative Glance at Iranian Law

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Abstract

One of the most important and prevalent legal relationships through which a substantial portion of human needs is satisfied is the contract of sale, whether domestic or international. The United Nations Convention on Contracts for the International Sale of Goods (1980) is regarded as one of the most successful international instruments in harmonizing the law governing international sales contracts and provides various remedies in cases of breach of contract. Among the most significant of these remedies are the right to terminate the contract and the right to claim damages. When parties enter into a contract, they intend for it to be duly performed; however, this outcome does not always materialize, and for various reasons, one or both parties may acquire the right to terminate the contract. Moreover, the occurrence of loss is an inevitable aspect of commercial transactions, and such loss may arise either from a breach of contract or from the dissolution of the contract through termination. In the present article, by relying on the provisions of the Convention and with reference to Iranian law, the remedies of contract termination and damages, as well as the possibility of their concurrent application, are examined. Furthermore, the study analyzes the conditions and rules governing the claim and calculation of damages following the termination of a contract.

Keywords: claim for damages, contract termination, remedies, Convention on Contracts for the International Sale of Goods, Iranian law

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1. Introduction

The existence of diverse legal systems has always constituted an obstacle to the development and expansion of international trade. For this reason, over past decades, efforts have been made to harmonize and unify the law, particularly contract law, at the national, continental, and global levels. Various reasons justify the necessity of harmonizing and unifying contract law.

One of these reasons is that trade, especially at the international level, is regarded as a complex matter whose success depends to a considerable extent on the predictability of the legal consequences arising from commercial transactions. The parties to an international contract find it necessary to know in advance the legal results, rights, and obligations arising from their future transactions so that they may properly manage their commercial affairs. Given the differences among the rules established in various legal systems, this is extremely difficult, because precise knowledge of the rules and judicial practice of another legal system is highly complex and costly. Moreover, some concepts recognized in one legal system may not be recognized in another, which in turn gives rise to numerous problems in the legal relations between the contracting parties.

Another reason for the necessity of uniform law is that competition in the commercial world requires measures to be taken as quickly as possible and decisions to be made within the shortest possible time. This becomes even more difficult where different legal systems may potentially apply to the same matter, because the resolution of disputes then requires recourse to private international law and conflict-of-laws rules, and, due to their particular complexities, dispute settlement in practice takes a long time. For this reason, the existence of uniform and harmonized rules in contract law can significantly reduce the need to resort to private international law rules.

The 1980 Vienna United Nations Convention on Contracts for the International Sale of Goods, or the CISG, is regarded as one of the most successful international uniform instruments in the harmonization of contract law, because, to date, 98 countries accounting for a substantial volume of world trade have acceded to it, and the instrument is widely applied by national courts and arbitral tribunals as the most comprehensive governing law for international sales contracts. To date, Iran has not acceded to the Convention.

Although, in most cases, the parties to a contract regard their interest as lying in compliance with and adherence to the contract, in some cases one of the parties may, for various reasons, fail to perform its obligations and thereby commit a breach of contract, or the agreement may be mutually rescinded, or, for certain reasons, avoided by one of the parties. One of the most important remedies that the Convention provides for breach of contract is avoidance of the contract. Under the CISG, avoidance is an exceptional remedy, and stricter conditions have been prescribed for it than for other remedies; as a matter of principle, preservation of the contract is preferred. Unlike national legal systems, the Convention limits the cases of avoidance to Articles 49 and 64, and in both of those provisions, the occurrence of a fundamental breach of contract is regarded as a principal ground for avoidance. Other grounds for avoidance include the expiration of an additional period of time and the seller's failure to deliver the goods, as well as the buyer's failure to perform its contractual obligations concerning payment of the price or taking delivery of the goods despite the expiration of an additional period.

Another of the most important remedies that the Convention provides for breach of contract is the recovery of damages, because in the sphere of commercial transactions the occurrence of loss is unavoidable. When the loss suffered results from breach of contract, it is necessary to prevent illegitimate loss and to seek its compensation; it is also necessary to protect the legitimate benefits that the aggrieved party could have enjoyed had the obligations been properly performed. Such loss may also be imposed on one party by the other as a result of avoidance of the contract, or one party may exercise avoidance of the contract and claim damages simultaneously.

Article 74 of the Convention addresses the concept of damages and the conditions for their recovery, while Articles 75 and 76, concerning damages arising from substitute transactions and the calculation of damages by the current price method, set out the rules and conditions governing the recovery of damages following avoidance of the contract.

The present study seeks, by drawing upon the provisions of the CISG, first to examine the general conditions for the recovery of damages and avoidance of the contract, as two important remedies for breach of contract, as well as the possibility of their simultaneous application, and then to analyze the rules governing the recovery of damages after avoidance of the contract under the Convention. Since Iran has not yet acceded to this important international instrument, an effort is also made to refer comparatively to the rules and provisions of Iranian law on this matter and to identify the points of similarity and difference between them. One benefit of such comparison is to examine the possibility of Iran's accession to the CISG through identifying

their convergences and divergences. In addition, the Convention's provisions may be used to remedy shortcomings in domestic legislation and to reform and update it in the field of contract law.

2. Concept of Damages

Damages mean the loss suffered by a person and, in a general sense, refer to the harm arising from non-performance of contractual obligations. The purpose of contractual damages is to restore the injured party to its former position.

In Iranian legal terminology, damages have two meanings. In the first meaning, damages refer to the loss or harm suffered, namely the difference between the injured party's present assets and the assets that party would have had if the wrongful act had not occurred. In the second meaning, damages are equivalent to compensation and refer to the property or sum that must be paid by the wrongdoer to the injured party in order to compensate the loss suffered (Jafari Langroudi, 2017). The reason for this duality in the meaning of the term "damages" in Iranian legal culture is its customary usage, under which the word is sometimes used in the first sense and sometimes in the second. When the legislator speaks of compensating the loss that has arisen, it employs the first meaning, whereas when it refers to the payment of damages in Articles 227 and 229 and the claim for damages in Article 226, it has in mind the second meaning of damages, namely compensation or indemnity (Bahmani, 2018).

In Part II of Chapter V of the 1980 Vienna Convention on Contracts for the International Sale of Goods, Article 74 provides the following definition of damages: "Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach." This portion of the article sets out the general principle of compensation, under which any loss arising from breach of contract is recoverable. It follows from the first part of this article that recoverable damages fall into two categories: losses actually suffered and loss of profit. The first category generally refers to a reduction in the obligee's existing assets, property, or financial position, while the second refers to something that the obligee never possessed but would have obtained had the contract been properly performed (Shoarian & Rahimi, 2021).

3. Characteristics of Recoverable Damages under the CISG

Under Articles 1 through 5 of the CISG, the Convention applies only to certain types of international sales. Therefore, unlike domestic legal systems, including Iranian law, it is not capable of protecting all types of loss suffered by persons, whether pecuniary, non-pecuniary, bodily, contractual, or tortious. This is especially so because some of these losses fall within mandatory rules and matters of public policy and are governed only by domestic law. Accordingly, recoverable damages under the Convention have five characteristics: they must be pecuniary rather than bodily; material rather than moral; suffered by a contracting party rather than a third party; caused by breach of contract rather than by the ordinary risk of commercial activity; and, finally, they must reflect positive rather than negative interest. By positive interest is meant that the award of damages should place the injured party in the position it would have occupied had the obligor properly performed, so that it could have obtained the benefits expected from performance of the contract. By contrast, in the case of negative interest, the aim is to place the obligee or injured party in the position existing before conclusion of the contract, without profit or loss. It should be noted that negative interest is more commonly used as the basis for calculating damages where the contract has been declared void.

4. Conditions for the Recovery of Damages

In order for the injured party to claim compensation for the loss suffered, certain conditions must exist. These conditions, which are almost identical under the Convention and Iranian law, are as follows.

4.1. Occurrence of Breach of Contract

The most important condition for claiming damages is the existence of a contract and its breach. Therefore, the necessary condition for recovery of damages is the occurrence of breach of contract. The concept of breach under the Convention is a uniform concept that encompasses all forms of breach, such as non-performance, defective performance, delay in performance,

non-conforming performance, and premature performance. It also makes no difference whether the breach is fundamental or non-fundamental, whether the obligation is principal or ancillary, or whether the source of the breached obligation is the contract, usage, or the supplementary provisions of the Convention (Changwei, 2003).

4.2. Occurrence of Loss

Mere breach of contract is not sufficient for the recovery of damages; rather, that breach must cause loss or harm to the other party. The liability imposed upon the obligor as a result of non-performance exists in order to compensate the loss caused to the other party by the breach; otherwise, no one may use non-performance as a means of taking advantage of the obligor's property (Katouzian, 2007).

Article 74 of the Convention is silent on the necessity of this condition for the recovery of damages, and the reason for this silence is probably that the matter is self-evident (Shoarian & Rahimi, 2021). Nevertheless, some writers consider that Article 74 expressly refers to this requirement by using the phrase "a sum equal to the loss" (Farsani, 2022).

4.3. Directness of Loss

The third condition for the recovery of damages is that there must be a direct causal link between the breach of contract and the loss suffered, meaning that the loss must have arisen directly and without intervention from the non-performance of the obligation. Article 74 of the Convention does not expressly state the necessity of a causal relationship between breach and loss, but the opening words of the provision, which refer to "damages for breach of contract... suffered by the other party as a consequence of the breach," implicitly indicate that the Convention takes this requirement into account.

As for the requirement of directness under Iranian law, Article 520 of the Code of Civil Procedure provides that, in claiming damages, the claimant must prove that the loss suffered arose directly from non-performance, delay in performance, or failure to deliver the claimed subject matter; otherwise, the court will dismiss the claim for damages.

4.4. Maturity of the Time for Performance

The Convention leaves the requirement that the time for performance must have arrived unexpressed and does not regard it as an independent condition for the recovery of damages. According to some jurists, prior to the expiration of the time for performance, breach has not yet occurred and damages cannot be claimed; consequently, the arrival of the time for performance is not an independent condition but falls within the scope of the requirement of breach (Shoarian & Rahimi, 2021). It may also be said that, since the contract cannot be breached before the time for performance has expired, damages cannot be claimed before that time has arrived (Farsani, 2022). The exception in this respect is anticipatory breach under Articles 71 and 72 of the Convention (Schlechtriem & Schwenger, 2010). Unlike actual breach, which occurs through non-performance at the agreed time, anticipatory or prospective breach exists where it becomes clear before the due date that a substantial part of the contract will not be performed when due. In that case, the obligee may, as appropriate, suspend the contract and seek assurance, avoid the contract, or claim damages before the time for performance arrives.

Under Iranian law, Article 226 of the Civil Code provides that, in the event of non-performance by one of the contracting parties, the obligee may not claim damages unless a definite time for performance has been fixed and has expired; and if no such time has been fixed, the obligee may claim damages only where the time of performance depended on its demand and it proves that performance was requested.

4.5. Illegitimacy of the Loss Suffered

The illegitimacy of the loss means that the loss must not have resulted from the lawful exercise of a right by the person causing it. Therefore, if one party, pursuant to Articles 71 and 72 of the Convention, anticipates breach by the other party and suspends performance, the other party cannot claim damages from it, because, although that person has caused loss to the other party, it has in fact exercised its lawful right to prevent its own harm. Although this condition is not expressly stated in either

the Convention or Iranian law, it is self-evident that it must be taken into account in order to claim damages, because the exercise of a right cannot coexist with liability and responsibility (Ghasemi, 2005).

4.6. *Foreseeability of the Loss*

One of the most important conditions for the recovery of damages is the foreseeability of the loss. Under Article 74 of the Convention, only those losses are compensable that were foreseeable by the defendant. In other words, the party causing the loss is liable only for those losses that, at the time of the conclusion of the contract, were foreseeable as possible consequences of breach (Audit, 1990). Loss is foreseeable when, at the time of the conclusion of the contract, the defendant, in light of the facts of which it knew or ought to have known, foresaw or ought to have foreseen it as a possible consequence of breach. As previously noted, under Article 74 of the Convention it is not necessary that the loss be the direct effect of the breach; indirect losses may also be compensable. However, foreseeability as an additional condition moderates this rule to some extent, because remote and indirect losses are generally not foreseeable.

4.7. *Observance of the Principle of Mitigation*

Under Article 77 of the Convention, a party relying on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss resulting from the breach, including loss of profit. If that party fails to do so, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated. Therefore, the injured party may not refrain from taking any action to mitigate the loss and merely watch the loss increase in the hope of recovering greater damages for breach of contract; rather, even if it had no role in causing the breach, it must take such measures as are necessary and customary in the circumstances to reduce the loss or prevent its increase.

5. **Avoidance of the Contract**

Avoidance of the contract, as one of the remedies for breach of contract, is exceptional in nature, and the drafters of the Convention sought, as far as possible, to preserve the contract between the parties and to prevent its avoidance. Although this principle is not expressly stated in the Convention, it may be inferred from the provisions concerning the seller's right to cure in the event of non-conformity of the goods and from the fact that cases of avoidance are, in the first instance, limited to fundamental breach of contract (Safaei, 2020).

Under Iranian law as well, pursuant to Article 237 of the Civil Code with respect to contractual stipulations and Article 476 of the Civil Code concerning lease contracts, in the case of principal obligations, where one of the parties breaches its obligation, specific performance of the contract must first be demanded, and only where performance of the contractual obligations is impossible is avoidance regarded as the last resort for redressing the harm suffered. Except in certain exceptional cases, such as the option for delay in payment of the price, the other party does not acquire the right of avoidance immediately upon breach. Thus, under Iranian law too, as under the Convention, the right of avoidance is exceptional in nature. However, the concept of fundamental breach does not exist in Iranian law, and where the law grants one party a right of avoidance, no distinction is drawn between fundamental and non-fundamental breach. It should also be noted that, both under Iranian law and under the Convention, avoidance of the contract does not require a court judgment and takes effect through the declaration of will by the entitled party.

6. **Cases of Avoidance of the Contract**

6.1. *Cases in Which the Buyer Acquires the Right of Avoidance*

Under Article 49 of the Convention, the buyer acquires the right to avoid the contract in the following cases: first, where the seller's failure to perform constitutes a fundamental breach of contract; second, where, in the case of non-delivery, the buyer has fixed an additional period of time for the seller and the seller fails to deliver the goods within that period or declares that it will not do so.

6.1.1. *Fundamental Breach of Contract*

Under Article 25 of the Convention, a breach of contract is fundamental when two conditions are met. First, it causes substantial detriment to the other party so as substantially to deprive that party of what it was entitled to expect under the contract. Second, such detriment was foreseeable by the party in breach. Where the parties have expressly agreed that the breach of a certain obligation shall be regarded as fundamental, foreseeability of the loss is not required (Schlechtriem & Thomas, 1998). Some examples of fundamental breach are as follows.

Failure to deliver the goods, or delay in delivery. It should be noted that failure to deliver the goods is, in itself, regarded as a fundamental breach, whereas delay in delivery is considered fundamental and gives rise to the buyer's right of avoidance only where the time of delivery is of the essence for the buyer and delivery after that date no longer serves any purpose for it (Schlechtriem & Thomas, 1998).

Refusal to perform the obligation to deliver. Under Article 49(1)(b) of the Convention, where the seller delays delivery and it is implicitly evident that it has no intention of performing its obligation, such delay is treated as a fundamental breach.

Impossibility of delivery. Where delivery of the goods becomes impossible, the buyer has the right to avoid the contract. Since automatic termination is not provided for in the Convention, in such a case the contract does not terminate automatically and requires a declaration of avoidance by the buyer (Schlechtriem & Thomas, 1998).

Delivery of non-conforming goods. Under Article 49(1)(a) of the Convention, if the goods delivered are materially non-conforming with the contract and such non-conformity amounts to a fundamental breach, the buyer has the right to avoid the contract, provided, first, that it has given notice of the non-conformity to the seller and, second, that return of the goods to the seller is possible. Where the goods are legally non-conforming, for example because they are subject to a third party's claim or right, failure by the seller to remedy the non-conformity within a reasonable time amounts to a fundamental breach and gives the buyer the right of avoidance. Where the seller is bound to deliver documents to the buyer, the same rules apply as in the case of delivery of the goods (Schlechtriem & Thomas, 1998).

6.1.2. *Non-Delivery of the Goods within the Additional Period Fixed by the Buyer*

Under Article 49(1)(b) of the Convention, the second case in which the buyer has the right to avoid the sales contract is where the seller fails to deliver the goods within the additional period fixed by the buyer for delivery or declares that it does not intend to do so. Under that provision, where the obligation to deliver is not performed, the buyer may, after granting an additional period, avoid the contract upon expiration of that period.

6.2. *Cases in Which the Seller Acquires the Right of Avoidance*

Under Article 64 of the Convention, the seller may avoid the contract in two cases: first, where the buyer's breach amounts to a fundamental breach; second, where the seller grants the buyer a reasonable additional period for performance and the buyer fails to perform within that period. In the latter case, the seller has the right to avoid the contract even if the breach is not fundamental. This latter case applies only to the buyer's obligations to pay the price and take delivery of the goods, not to all of the buyer's obligations.

It should be noted that avoidance of the contract does not require a court judgment and is effected by the seller's declaration (Audit, 1990); nor does it matter whether the goods have been delivered to the buyer.

7. **Avoidance of the Contract on the Basis of Anticipatory Breach**

As a rule, it is not possible to avoid the contract before the time for performance has arrived and before the obligor has failed to perform. However, prior to performance, the obligee may conclude, on the basis of the obligor's statements, conduct, or the surrounding circumstances, that the obligor is unwilling or unable to perform on time. In such a case, anticipatory breach or the anticipation of breach arises. Article 72 of the Convention provides that if, prior to the date for performance, it is clear that one of the parties will commit a fundamental breach of contract, the other party may avoid the contract. A party intending not

to avoid must, if time permits, give reasonable notice to the other party in order to allow it to provide adequate assurance of performance. If the other party declares that it will not perform its obligations, these requirements no longer apply.

The concept of anticipatory breach is unfamiliar to Iranian law, but an examination of statutory law reveals effects and signs of this doctrine, which is justified on the basis of the obligation to avert probable harm. On this basis, the effects of anticipatory breach may be inferred from such institutions as transactions intended to evade debt, the option of insolvency, reduction in the obligor's financial creditworthiness under Articles 237 and 238 of the Commercial Code, and the rule contained in Article 377 of the Civil Code and Article 533 of the Commercial Code. On the basis of an implied condition, the effects of this doctrine may thus be accepted in Iranian law (Kazemi & Rabiei, 2012).

As noted, another instance in which the right of avoidance may be exercised in Iranian law on the basis of anticipated breach appears in Article 533 of the Commercial Code. Under that provision, if the buyer becomes bankrupt after receiving the goods and the goods are still in its possession, the seller may, on the basis of the anticipation that the buyer will be unable to perform its obligation to pay the price, seek restitution of the goods. However, if the goods are no longer in the buyer's possession and have been transferred in some way to a third party, the seller will not have such a right. This right of restitution of the goods may be justified as a form of avoidance of the contract.

8. Possibility of Simultaneous Application of the Remedies of Avoidance and Damages

Under Article 45 of the Convention, in the event of breach of contract by the seller, the remedies available to the buyer are as follows: specific performance of the contract, which includes actual performance, delivery of substitute goods, and repair of the goods; avoidance of the contract; reduction of the price under Article 50 of the Convention; and damages. Article 61 of the Convention, in turn, sets out the seller's remedies in the event of breach by the buyer, namely specific performance, avoidance of the contract, and damages. In addition to those remedies, the seller may, under Article 78 of the Convention, claim interest on the price and may also, under Article 88, resell the goods and recover its loss in that manner.

Under Article 45(2) of the Convention, which sets out the remedies available to the buyer in the event of breach by the seller, unlike certain incompatible remedies such as specific performance and avoidance, which cannot be claimed together, the right to damages is a remedy that is always available to the buyer in the event of breach, provided that loss has been suffered, and it may be invoked alongside other remedies in order to compensate for losses that remain despite the use of those other remedies (Honnold, 1991). Similarly, with respect to the remedies available to the seller, Article 61(2) of the Convention provides that the seller is not deprived, by resorting to other remedies, of any right it may have to claim damages. It must, however, be borne in mind that the amount of damages awarded depends on the other remedies invoked simultaneously.

Accordingly, under the Convention, both seller and buyer may claim damages and avoid the contract at the same time. Iranian law does not expressly state that the remedies provided to the buyer and seller may be cumulated, but apparently those remedies are available to the injured party to the extent that they are compatible, and that party may use several remedies simultaneously. Naturally, remedies such as specific performance and avoidance are not compatible, but damages may be combined with any of the remedies provided (Shoarian & Rahimi, 2021).

9. Recovery and Calculation of Damages in the Event of Avoidance of the Contract

The general rules governing damages for breach of contract are set out in Article 74 of the Convention. However, in Articles 75 and 76, in order to complement Article 74 and in situations where the contract has been avoided because of the other party's breach, the Convention provides special methods for calculating recoverable damages. The most important advantage for the injured party in calculating damages under Articles 75 and 76 is that, as a general rule, the condition of foreseeability of loss set out in the second part of Article 74 does not apply (Huber & Mullis, 2007). Other losses, however, remain recoverable only within the scope of foreseeable damages under the general rule of Article 74.

The first method provided by the Convention, where the contract has been avoided because of the other party's breach, for recovering and calculating the injured party's loss is the conclusion of a substitute transaction and recovery of the price difference under Article 75. The second method is recovery of the difference between the contract price and the current value of the goods under Article 76. It should be noted that the rules contained in Articles 75 and 76 do not replace Article 74, but

rather complement it. It should also be emphasized that Articles 75 and 76 are not mandatory in nature, and the injured party may rely on Article 74 of the Convention to calculate and recover its damages (Shoarian & Rahimi, 2021).

With this introduction, the methods referred to in Articles 75 and 76 of the Convention will now be explained in order.

9.1. Damages Arising from a Substitute Transaction

Under Article 75 of the Convention, if the contract is avoided and the buyer has bought goods in replacement in a reasonable manner and within a reasonable time after avoidance, or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction, together with any other damages recoverable under Article 74. The method provided for in Article 75 is known as the “concrete method” of calculating damages, because it takes into account the actual conduct and position of the party claiming damages (Shoarian & Rahimi, 2021). From a practical perspective, the rule for calculating damages by the concrete method is also justified, because in practice the seller or buyer, after avoidance of the contract, will usually resell the goods or purchase substitute goods. Moreover, this rule is closely linked to the duty to mitigate, because entering into a substitute transaction is usually regarded as the ordinary means of reducing the loss suffered (Changwei, 2003).

If, after avoidance of the contract, the seller is able to dispose of only part of the goods by means of a substitute transaction, the concrete and abstract methods of calculating damages under Articles 75 and 76 of the Convention will apply simultaneously. One decision has held that if the seller is able to resell only part of the goods covered by the avoided contract, Article 75 applies to the part for which a substitute transaction has been concluded, while Article 76 applies to the part for which no substitute transaction has been concluded (Shoarian & Rahimi, 2021).

If the substitute transaction is not concluded in accordance with the conditions laid down in Article 75 of the Convention, for example if the buyer is unable to conclude it within a reasonable time, the amount of damages will be calculated according to the abstract method under Article 76 of the Convention. If the conditions for the application of Article 76 are also absent, for example because there is no current price, the amount of damages payable will be determined under Article 74 of the Convention (Gotanda, 2004).

9.1.1. Conditions for Calculating Damages by the Concrete Method

The use of the concrete method is subject to certain conditions that, as expressly stated in Article 75 of the Convention, are as follows: first, the injured party must have avoided the contract; second, the purchase of substitute goods or resale of the goods must have been made in a reasonable manner; and third, the injured party must have concluded the substitute transaction within a reasonable time after avoidance of the contract.

A. Avoidance of the Contract

Avoidance of the contract usually establishes that the contract will not be performed and extinguishes the parties' rights and obligations, thereby giving them the right to abandon performance and enter into a substitute transaction. For Article 75 of the Convention to apply, one of the parties must have acquired the right to avoid the contract under one of the Convention's relevant provisions, such as Article 49, which concerns avoidance by the buyer, or Article 72, which concerns avoidance before the date for performance, and, as a general rule, must have sent notice of avoidance to the other party. Accordingly, the substitute transaction should be concluded after the dispatch of the notice of avoidance. Nevertheless, where the party in breach expressly refuses to perform the contract, notice of avoidance is not necessary in order to conclude the substitute transaction, because in that case the breaching party is not deserving of protection, and insisting that the injured party must send notice of avoidance before entering into a substitute transaction would not be consistent with the principle of good faith (Shoarian & Rahimi, 2021). Some jurists further argue that, in such a case, the conclusion of the substitute transaction itself amounts to an implied declaration of avoidance, although notice of avoidance remains necessary for the other effects of avoidance to arise (Huber & Mullis, 2007).

B. Conclusion of the Substitute Transaction in a Reasonable and Ordinary Manner

To recover damages under Article 75 of the Convention, it is not sufficient that the injured party conclude a substitute transaction after avoiding the contract; that transaction must also have been concluded in a reasonable manner. The Convention does not specify which conditions must be met for a substitute transaction to be regarded as reasonable. Jurists have generally stated, however, that in concluding the substitute transaction the injured party must act like a cautious, diligent, and reasonable merchant and must observe the principles of good faith and mitigation (Saidov, 2008). For example, where the injured party is the buyer, it should attempt to purchase substitute goods at the lowest possible price, and where the injured party is the seller, it should attempt to sell the goods at the highest possible price. The consequence of failing to conclude the substitute transaction in a reasonable manner is that the injured party loses the possibility of relying on the concrete method of calculation, and its damages will then be calculated, as the case may be, under Articles 76 and 74 of the Convention (Farsani, 2022).

The transaction concluded after avoidance must genuinely have been intended to replace the original transaction. To satisfy this requirement, the substitute transaction must, in general, be connected to the original transaction and be capable of protecting the injured party's interest in the performance of the original contract. Protection of that interest is also dependent on the substitute transaction having been concluded with a third party; otherwise, the injured party's interests will not be adequately protected (Huber & Mullis, 2007).

The connection between the original contract and the substitute transaction may encompass all elements relating to time, place, price, and other contractual terms. Determining the existence of such a connection is particularly difficult where the injured party is continuously engaged in trading goods of the kind covered by the breached contract. In other words, it may be extremely difficult, and sometimes impossible, to determine whether the injured party concluded the transaction as a substitute for the avoided contract or merely sold or purchased goods in the ordinary course of business. Some jurists suggest, as a solution, that since avoidance of the contract requires notice, the injured party can prevent disputes over which transaction constitutes the substitute transaction by adding, in the notice of avoidance, a statement of its intention to conclude such a substitute transaction. In the absence of such a statement, and in order to satisfy the requirement in Article 75 of the Convention that the substitute transaction be concluded within a reasonable time, the first substitute purchase or resale may be regarded as the substitute transaction (Honnold, 1991).

As for the degree of connection required between the substitute transaction and the original contract, the more similar the conditions of the substitute transaction are to those of the original contract with respect to time and place of performance and price, the easier it will be to treat it as a substitute transaction. It should be noted that where the price and characteristics of the substitute goods differ significantly from those of the original goods, the injured party may not recover the difference between the price of the substitute transaction and the original contract price (Changwei, 2003).

C. The Substitute Transaction Must Be Concluded within a Reasonable Time

The substitute transaction must be concluded within a reasonable time after avoidance of the contract. This requirement has been included in order to prevent the injured party from speculating on the market to the detriment of the party in breach (Shoarian & Rahimi, 2021). Whether the time taken to conclude the substitute transaction is reasonable depends on the circumstances of each case. Criteria such as the nature and characteristics of the goods, the purpose behind the conclusion of the original contract, and the existence or absence of a market for the substitute transaction may be relevant in assessing whether the timing was reasonable and ordinary (Saidov, 2008).

9.1.2. Method of Calculating Damages by the Concrete Method

In calculating and assessing the amount of damages payable to the injured party, two important principles must be taken into account. First, under the principle of full compensation, the damages awarded must compensate all the losses suffered by the injured party. Second, the injured party must not be placed in a better position than the one it would have occupied had the contract been performed. Under the second part of Article 75 of the Convention, damages calculated by the concrete method equal the difference between the price of the substitute transaction and the price of the original contract. This loss constitutes the minimum loss covering the injured party's expected interest. However, the injured party may also have suffered additional losses that are not fully covered by the price difference between the substitute and original transactions. For this reason, the final part of Article 75 provides that other losses recoverable under Article 74 may also be recovered. Such losses usually

include incidental and consequential losses incurred by the injured party in locating substitute goods, advertising the resale of the goods, and transporting and storing the goods (Shoarian & Rahimi, 2021).

As regards the possibility of claiming loss of profit as part of the “other damages” recoverable under the final part of Article 75 of the Convention, where the substitute transaction places the injured party in an equivalent opportunity to earn profit or in a position equivalent to that which the avoided contract would have afforded, loss of profit cannot be claimed as additional damages. However, in situations such as reduced sales volume, most jurists consider loss of profit to be recoverable as additional damages under Article 74 of the Convention (Huber & Mullis, 2007).

With respect to the difference between the price of the substitute transaction and the price of the original contract, merely calculating the difference between those two prices will not always accurately reflect the loss suffered by the injured party, because the terms of the substitute transaction may differ from those of the original contract. Necessary adjustments must therefore be made so that the two prices are comparable. A clear example is where the substitute transaction is concluded on commercial terms different from those in the original contract. In one case, for example, the original contract had been concluded on CFR terms, whereas the buyer concluded the substitute transaction on FOB terms. Since FOB does not include carriage costs, the arbitral tribunal added transportation costs to the price of the substitute transaction and only then calculated the difference between the original contract price and the substitute price, so that the injured party would be placed in a position equivalent to that resulting from performance of the original contract and the expenses incurred in concluding the substitute transaction would be taken into account in the calculation of damages (Saidov, 2008).

9.1.3. *Damages Arising from a Substitute Transaction under Iranian Law*

Under Iranian law, avoidance of the contract does not bar a claim for damages, and, once customary causation is established, results similar to those under the Convention may be reached. The Iranian Civil Code contains no express rule concerning damages arising from a substitute transaction, but such damages may be accepted under Iranian law on the basis of certain provisions and legal rules. Article 222 of the Civil Code states the general rule in this regard. Under that article, in the event of non-performance, the judge may authorize the person in whose favor the obligation was undertaken to perform the act itself and order the defaulting party to pay the cost. Under Article 222, the act may be performed not only by the obligee but also by a third party, subject to the condition that the court grants authorization in favor of the obligee, because the third party has no involvement in the dispute. A similar inference may also be drawn from Articles 238 and 534 of the Civil Code. Under Article 238, where the performance of an act is stipulated in the contract and compelling the obligor to perform it is impossible, but performance by another person is possible, the judge may arrange for performance at the obligor’s expense. Under Article 534, if the agricultural agent abandons the work at the outset or during performance and there is no one who can perform the work in its place, the judge, at the cultivator’s request, compels the agent to perform the work or continues the work at the agent’s expense; if that is impossible, the cultivator has the right to avoid the contract.

Another example of recognition of a similar rule in Iranian law appears in Article 47 of the Law on the Enforcement of Civil Judgments. Under that article, where the judgment requires the performance of a specific act and the judgment debtor refuses to perform it, and performance by another person is possible, the judgment creditor may, under the supervision of the enforcement officer, have the act performed by another person and recover the costs, or may claim the costs from the judgment debtor through the enforcement office without carrying out the act itself. In each of these cases, the court, after the necessary inquiries and, where necessary, with the assistance of an expert, determines the amount of the costs.

Article 34 of the 2008 Regulation on the Enforcement of the Contents of Official Instruments likewise provides that where an enforcement order has been issued for the performance of an obligation such as repairing a building, a qanat, completing a building, constructing a new building, planting trees, and the like, and the obligor, after service of the enforcement order, fails to perform it, the registration office compels the obligor to perform the obligation or to pay the necessary expenses for its performance. If the obligor fails to act, the obligee may, with the knowledge of the registration office, perform the obligation at its own expense, and if the manner of performance or the determination of its cost requires expert opinion, the registration office shall appoint an official expert to determine the manner of performance or the cost thereof. The expert’s fee, in an appropriate amount, is collected as part of the other costs from the obligee by the registration enforcement office, and the obligee has the right to recover all such costs from the obligor through that office.

In all of the foregoing provisions, where the obligor refuses to perform and performance is entrusted to a third party, any additional cost is borne by the obligor. Although, in those examples, the original contract remains in force and performance is carried out by a third party, the same rule may also be applied where the contract is avoided because of breach and the obligee is consequently compelled to secure performance through a substitute transaction. In such a case, the obligor may be required to compensate the loss resulting from the difference between the price of the original contract and the price of the substitute contract (Shoarian & Torabi, 2010).

In addition to the foregoing, Article 3 of the Civil Liability Act provides that the court shall determine the amount of the loss and the method and manner of its compensation in light of the circumstances of the case. On the basis of the discretion granted by the legislature, the judge may, in view of the circumstances of the case, award damages. The rule in Article 3 of the Civil Liability Act is not confined to tortious liability and is regarded as a common rule of compensation. Therefore, in contractual liability as well, the judge has the authority to rely on it and award compensation for loss arising from a substitute transaction.

Custom is also one of the sources for identifying instances of compensable harm. It is an established customary rule that where, due to breach of contract and the avoidance thereof, the obligee concludes a substitute contract at a higher amount, the additional loss and expense imposed upon it arise from breach of the original contract, and the obligor is bound to compensate them. The existence of a customary causal link between the breach and the loss arising from the substitute transaction is therefore clear. In addition to custom, a similar result may also be reached on the basis of the no-harm principle; if the loss arising from the substitute transaction is attributable to the obligor, the necessity of compensating it may be inferred from that principle as well. It should be noted that, in concluding the second contract, its terms and amount must be ordinary and reasonable, and if the obligee acts negligently in concluding the substitute transaction and contracts on terms contrary to normal commercial practice, it will not be entitled to recover the additional cost (Shoarian & Rahimi, 2021).

Obligations may be divided, with respect to the time of performance, into obligations in which timely performance is of the essence and obligations in which it is not. Loss arising from a substitute transaction is not conceivable in the former category, because where breach takes the form of non-performance at the specified time, performance of the original contract is no longer of any use to the obligee, and naturally a substitute transaction would also be pointless (Shoarian & Rahimi, 2021).

9.2. Calculation of Damages by the Current Price Method

Under Article 76(1) of the Convention, if the contract is avoided and there is a current price for the goods, the party claiming damages may, if it has not concluded a substitute transaction under Article 75, recover the difference between the price fixed by the contract and the current price at the time of avoidance, together with any other damages recoverable under Article 74. Furthermore, where the declaration of avoidance is made after the goods have been taken over, the current price at the time of taking over is controlling. Article 76(2) also lays down rules for determining the place at which the current price is to be determined, which will be discussed below.

The method provided in Article 76 of the Convention is known as the “abstract method” of calculating damages, because, unlike the concrete method, which is based on the actual conclusion of a substitute transaction, the injured party under the abstract method has not in fact concluded such a transaction. Rather, the method proceeds on the assumption that the injured party could have concluded a substitute transaction at the current price. It should be noted that, like the concrete method, the abstract method is not subject to the condition of foreseeability of loss (Shoarian & Rahimi, 2021).

According to case law and the view of most scholars, the abstract method applies not only where no substitute transaction has been concluded, but also where the substitute transaction does not satisfy the conditions of Article 75 or where it is impossible to determine which of the transactions concluded by the injured party constitutes the substitute transaction (Huber & Mullis, 2007).

Where the conditions for the application of both Articles 75 and 76 are met, the concrete method takes precedence over the abstract method (Shoarian & Rahimi, 2021). It should also be noted that, unlike Article 75, the application of Article 76 is subject to the requirement that the contract price, whether expressly or impliedly, be determinable; if the contract provides for

an open price, Article 76 cannot apply. Therefore, where the conditions for the application of Article 76 are absent, damages are calculated under Article 74 of the Convention (Shoarian & Rahimi, 2021).

9.2.1. *Conditions for Calculating Damages by the Abstract Method*

The possibility of calculating damages by the abstract method depends on the fulfillment of certain conditions. In the absence of any of the following conditions, damages cannot be recovered by the abstract method, and the amount payable must instead be determined under the general rules laid down in Article 74 of the Convention (Saidov, 2008). As with the concrete method, the first condition is that the injured party must have declared avoidance of the contract. The second condition is that the injured party must not have concluded a substitute transaction, or that any such transaction must not have been concluded in accordance with the conditions prescribed in Article 75. The third condition is the existence of a current price for the goods that were the subject matter of the avoided contract. The fourth condition is that the price in the original contract must have been expressly or impliedly fixed. As noted above, where the contract contains an open price term, the abstract method cannot be applied (Shoarian & Rahimi, 2021).

As previously stated, if the injured party avoids the contract before taking over the goods, the current price at the time of the declaration of avoidance is controlling, whereas if avoidance is declared after taking over the goods, the current price at the time of taking over is controlling. The place for assessing damages under the abstract method is, in principle, the place where the goods should have been delivered to the buyer; if there is no current price at that place, the price at another place, adjusted for differences in transportation costs, may serve as a reasonable substitute for determining the current price (Saidov, 2008).

9.2.2. *Concept and Rules Governing Current Price in the Abstract Method of Calculating Damages*

Under the first part of Article 76(2) of the Convention, the current price is the price prevailing at the place where delivery of the goods should have taken place. If there is no current price at that place, the price at another place, taking into account differences in transport costs, may serve as the current price if that place is a reasonable substitute.

In capitalist economic systems, the current price is usually regarded as equivalent to the market price, namely the price at which the goods can be sold or purchased on the relevant market (Shoarian & Rahimi, 2021). There is no precise definition of the concept of a market, but some of its general characteristics may be mentioned. First, although it is impossible to identify all potential buyers and sellers in the market, the number of buyers and sellers must be sufficient for the existence of a market to be conceivable. Second, the market must provide the means for interaction between buyers and sellers. Third, there must be a certain degree of activity and regularity in the conclusion of transactions. Fourth, the market must involve similar or identical goods. Fifth, the existence of a market does not require the existence of a physical location. Finally, a market can generally be said to exist only if it is capable of absorbing the entire supply and satisfying the entire demand. The absence of one of these conditions probably, and the absence of two of them certainly, leads to the conclusion that no market for the goods in question can be said to exist (Saidov, 2008).

As to the time for determining the current price, Article 76 of the Convention provides two different temporal points of reference. Under the first part of Article 76(1), the determinative time is, as a rule, the moment when the injured party avoids the contract. However, because that rule might permit abuse by buyers who have already taken over the goods, the remainder of Article 76(1) adds that, if the party claiming damages avoids the contract after taking over the goods, the current price at the time of taking over shall apply instead of the current price at the time of avoidance. The determination of the time for assessing the current price is important because the injured party might otherwise, through unjustified delay and speculation on market price movements, increase the breaching party's liability.

With respect to the place for assessing the current price, the first part of Article 76(2) of the Convention provides that the relevant place is the place where the goods should have been delivered. The place of delivery is determined under Article 31 of the Convention. If there is no current price at the place of delivery, or if the buyer cannot prove the current price there, the current price at another place shall be used if, after adjustment for transportation costs, that place constitutes a reasonable substitute for the place of delivery. Such a place is usually the one geographically closest to the place of performance of the original obligation (Shoarian & Rahimi, 2021).

9.2.3. *Method of Calculating Damages by the Abstract Method*

As previously noted, under Article 76(1) of the Convention, calculation of damages by the abstract method enables the injured party to recover, as damages, the difference between the price fixed by the contract and the current price at the time of avoidance, or in some circumstances the current price at the time of taking over. Payment of the difference between the contract price and the current price represents the minimum amount of damages that the injured party may claim (Changwei, 2003). For that reason, Article 76(1) goes on to provide that other losses are also recoverable under Article 74 of the Convention. As already mentioned, such losses may include losses that the injured party has suffered or will suffer as a consequence of the breach, for example where, because of the seller's breach, the buyer becomes liable to its own customers for damages caused by delay in delivery. Other recoverable losses may also include loss of profit resulting from reduced sales volume.

It should be noted that damages awarded must not place the injured party in a better position than the one it would have occupied had the contract been performed. It should also be emphasized that recovery of additional damages under Article 76 of the Convention remains subject to the conditions set out in Article 74, such as the rule of foreseeability.

9.2.4. *Calculation of Damages by the Current Price Method under Iranian Law*

The Iranian Civil Code contains no rule similar to Article 76 of the Convention. However, a similar rule may be found in Article 29 of the 2008 Regulation on the Enforcement of the Contents of Official Instruments. Under that provision, where the subject matter of the enforcement order is a specified movable item and access to it is not possible, or where the obligation concerns fungible goods owed generally and the obligor refuses performance, or where no equivalent can be found externally, the obligee may demand the value of the obligation as of the day of performance. In that case, the head of the local registration office determines that value through an official expert and recovers it from the obligor, unless the instrument provides otherwise between the parties. As can be seen, this rule resembles the situation discussed above in relation to the abstract method or current price method of calculating damages and may be regarded as a general rule for contractual obligations in Iranian law, to the effect that where it is impossible for the obligee to conclude a substitute transaction, it is entitled to the current value of the subject matter of the obligation.

10. Conclusion

In light of the issues examined in the present study, it may be concluded that the objective of the drafters of the CISG was to preserve the contract as far as possible and prevent its avoidance, and for that reason they sought to limit the instances of avoidance, to a considerable extent, in comparison with national legal systems.

Under the Convention, the occurrence of a fundamental breach of contract is regarded as a principal ground for avoidance. Other grounds include the expiration of an additional period and the seller's failure to deliver the goods, as well as the buyer's failure to perform its contractual obligation to pay the price or take delivery despite the expiration of the additional period. Important examples of fundamental breach include failure to deliver the goods or delay in their delivery, refusal to perform the obligation to deliver, impossibility of delivery, and delivery of goods that are materially or legally non-conforming.

Under Iranian law as well, where one of the parties breaches its obligation, specific performance must in principle first be demanded, and only where performance of the contractual obligations is impossible is avoidance regarded as the last means of redressing the harm suffered. Thus, as under the Convention, the right of avoidance is exceptional in Iranian law, although the concept of fundamental breach does not exist in that system.

As a rule, it is not possible to avoid the contract before the time for performance has arrived and the obligor has failed to perform. However, before performance, the obligee may conclude, on the basis of the obligor's statements, conduct, or surrounding circumstances, that the obligor is unwilling or unable to perform on time; in that case anticipatory breach arises. Article 72 of the Convention accepts avoidance on the basis of anticipated breach. The concept of anticipatory breach is unknown to Iranian law, but an examination of statutory law reveals signs and effects of this doctrine, justified by the obligation to avert probable harm.

Another important remedy provided by the Convention for breach of contract is damages. The Convention adopts the principle of full compensation and treats all loss arising from breach of contract as recoverable. Unlike domestic legal systems,

which cover all kinds of loss suffered by persons, whether pecuniary, moral, bodily, contractual, or tortious, recoverable damages under the Convention have five characteristics: they must be pecuniary rather than bodily, material rather than moral, suffered by the contracting party rather than a third person, caused by breach of contract rather than the ordinary risk of commercial activity, and, finally, they must protect the positive interest rather than the negative interest.

Moreover, in order for the injured party to claim compensation for the loss suffered, certain conditions must exist, and these are almost identical under the Convention and Iranian law. These conditions are the occurrence of breach of contract, the occurrence of loss, the directness of the loss, the arrival of the time for performance, the illegitimacy of the loss suffered, the foreseeability of the loss by the party causing it, and observance by the injured party of the principle of mitigation.

Under both the Convention and Iranian law, the remedies of damages and avoidance of the contract are compatible, and the exercise of the right of avoidance is not inconsistent with the right to claim damages under Articles 74 through 78 of the Convention.

Under the concrete method of calculating damages, where the contract is avoided and the buyer purchases substitute goods in a reasonable manner and within a reasonable time after avoidance, or the seller resells the goods, the party claiming damages may recover the difference between the contract price and the substitute transaction price together with any other damages recoverable under Article 74.

Under the abstract method, where the contract is avoided and there is a current price for the goods, the party claiming damages may, if it has not concluded a substitute transaction under Article 75 of the Convention, recover the difference between the contract price and the current price at the time of avoidance, together with any other damages recoverable under Article 74. If the substitute transaction has not been concluded in accordance with the conditions of Article 75, or if it is impossible to determine which of the transactions concluded by the injured party constitutes the substitute transaction, damages will be calculated according to the abstract method.

Where the conditions for the application of both Articles 75 and 76 of the Convention are satisfied, the concrete method takes precedence over the abstract method. If, after avoidance of the contract, the seller is able to dispose of only part of the goods through a substitute transaction, the concrete and abstract methods provided in Articles 75 and 76 will apply simultaneously.

The Iranian Civil Code contains no express rule concerning damages arising from a substitute transaction under Article 75 of the Convention. However, such damages may be accepted in Iranian law on the basis of certain provisions and legal rules, including Articles 222, 238, and 534 of the Civil Code, Article 47 of the Law on the Enforcement of Civil Judgments, and Article 34 of the 2008 Regulation on the Enforcement of the Contents of Official Instruments. Likewise, with respect to Article 76 of the Convention concerning calculation of damages by the current price method, there is no corresponding rule in the Iranian Civil Code, but a similar rule may be found in Article 29 of the 2008 Regulation on the Enforcement of the Contents of Official Instruments.

Ethical Considerations

All procedures performed in this study were under the ethical standards.

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Conflict of Interest

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