2528-9705

Örgütsel Davranış Araştırmaları Dergisi
Journal Of Organizational Behavior Research
Cilt / Vol.: 3, Sayı / Is.: S2, Yıl/Year: 2018, Kod/ID: 81S2337

A STUDY OF THE PLACE OF LIEN IN UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

Saeid YEKTAEI[1]*, Nahid JAVANMORADI[2]

[1] MA Student, Tehran University, Kish International Campus,
[2] Ph.D. Assistant Professor, Faculty of Law and Political Sciences, Allameh Tabataba'i University, Tehran.

*Corresponding Author

ABSTRACT

The study of lien in United Nations Convention on Contracts for the International Sale of Goods as well as assaying Iranian law on commerce and the principle of speed in commercial transactions are of importance. One can add to them the unification of the laws related to sale in various countries which is pursued by the legislators. United Nations Convention on Contracts for the International Sale of Goods seeks to establish an international economic order to tackle the legal impediments of international transactions. Given the development of the subject many countries have joined this convention until now. In commerce principle of speed in commercial transactions is of paramount significance. Unification of laws related to sale in various countries is one of the key concerns of the legislators. United Nations Convention on Contracts for the International Sale of Goods is an effort for preparing the ground for a better future for the international sales of the signatories. According to this convention, delivery of good and paying the price, provided an agreement has been reached between the parties of the time of payment of the price and/or the delivery of the good, are mutually required and the good and documents should be delivered to the buyer and the seller can make the performance of obligations conditional upon the payment of the price by the buyer.

Keywords: *Lien, Sale Convention, International Sale, Sale Contract, Reciprocal*

INTRODUCTION

The concept of lien in international commercial transactions like private contracts implies that the seller is the owner of the price and the buyer is the owner of the good as soon as the contract is sealed and thus the parties to the contract are obliged to deliver what belong to the other party. This is exactly the most substantial obligation undertaken by the parties to a sale contract. Then the parties accomplish their reciprocal obligations in order to prepare the ground for the fulfillment of the final goal of the ratification of the contract. Their whole efforts are taken by the latter goal and if this legal expectation is not met or any interruption occurs amid its fulfillment each one of the parties due to their concerns of the danger of possible damages will have the right to take required measures and actions as stipulated in the contract in order to ensure his/her own interests. The party that encounters such a condition has the right to reveal his own concern and at least in a temporary fashion suspend his obligations and take mutual actions so that the conditions of the contract are met. The right to avoidance of accomplishing one's obligations is what we term as lien.

The article 58 of the UN Convention reads as follows "The buyer is not bound to pay the price until he has had an opportunity to examine the goods, unless the procedures for delivery or payment agreed upon by the parties are inconsistent with his having such an opportunity".

Geliş tarihi/Recieved: 10.12.2017 – Kabul tarihi/Accepted: 09.02.2018 – Yayın tarihi/Published: 21.08.2018

In the article 86 of the convention it has been noted that if the sold item when it is delivered is not according to the conditions discussed the sale could be annulled. The buyer could take possession of the good until the whole price paid for the good is refunded. In our law, since the lien is exercised as regards the major obligations those cases that are recognized in the UN Convention as regards the ancillary expenses and obligations cannot be exercised in Iranian law.

Then given the studies that have been conducted concerning the articles of the convention related to the lien and the extensions of causes that give rise to it as well as the suspension of the contract new horizons are opened before our eyes that can assist the internal legislator to take advantage of these solutions in order to legislate proper codes.

Since the United Nations Convention on Contracts for the International Sale of Goods seeks, on the one hand, to establish a relationship between the new international economic order, and on the other hand, it struggles to tackle the existing legal obstacles in the path of international transactions, the analysis of the articles of this convention seems to be effective in understanding the concept of "lien" both in international and internal contexts.

As we mentioned earlier, sale is a reciprocal contract and as soon as it is concluded by the parties there shall be certain rights and obligations that should be observed and undertaken by those who are involved. In other words, if one of the parties does not act according to his obligations the other party has the lien insofar as he can refuse to undertake his own obligations until the time when the other party does not meet his obligations.

Insofar as one can state that in United Nations Convention on Contracts for the International Sale of Goods the articles 58, 85 and 86 have endorsed the "lien" although the articles 71 and 72 are not so irrelevant to the issue of "lien".

As a result, in short, each one of the parties to the sale contract enjoy a number of rights and obligations as soon as the contract is sealed and if one of them refuses to undertake his obligations the other party has the right to refuse to accomplish his own obligations either until when the first party fulfils the obligations. This right is called "lien". To state the matter otherwise, this right confirms the correlation of the delivery of the good and payment of the price. In other words, each party to the contract accepts to perform the contract when the other party accomplishes his obligations.

In Iranian law, lien is taken to be part of every transaction in which the parties exchange goods for a determinate price and when nothing has been mentioned of the order of obligations as regards the exchange it is expected naturally that the goods and price are exchanged at the same time in a simultaneous fashion. This implicit agreement has its origin in the common sense meaning of "exchange". The renowned example of this is normally sought for in the sale itself where the ownership for the parties occurs in the same time and this is why the exchange of the price and good takes place in the simultaneous fashion. The two parties are so dependent on this equality that if they are forced to accomplish their obligations without seeing their rights met they will certainly feel oppressed because their rights are trespassed while they are expected to fulfill the obligations. The important conclusion that is drawn from this identity and unity is that each one of the parties of the exchange can make the delivery of his exchange item (whether it is the good or the price) conditional upon the accomplishment of the obligations of the other party. This right that allows the parties to suspend the performance of the contract without the total cancellation of it is called lien.

This term has not been used in Iranian Civil Code but in the article 377 it has been stipulated that each one of the seller and the buyer has the right to refuse from delivering the sold item and the price until the other party accepts to deliver. In this judgment refusal of delivery is known as a means for forcing the other party to the contract to undertake his obligations. However, lien is not an exclusive property of sale contract and it is applied in all contracts that are concerned with exchange and the sale has also been categorized as an extension of lien for its being a variation of exchange.

It is worth noting that Shia jurists believe that lien is required by every exchange and based on tradition they refer to this basic right in their discussions of sale, marriage and permission.

First Section: Introduction to Lien

General Remarks:

What is the lien?

In another definition in exchange contracts including sale if one of the parties of the exchange refuses to undertake his obligations the other party has the right to do the same and refuse to accomplish his specific obligations and in Shia jurisprudence this is called the "right of refusal".[1]

This is why the article 377 of Civil Code reads: "if each one of the parties refuses to deliver the exchanged item (be it the price or the sold item) the other party has the right to refuse to meet his obligation until the former does the same".

But what is of importance is that there is nothing special in sale contract that would make the lien an exclusive property of it rather the nature of exchange as a whole requires such an action and for this reason one can state that this judgment should be exercised in all exchange contracts.

Among the exchange contracts one can refer to marriage contract in which the dowry is an item that is supposed to be exchanged in return of docility. Lien principle is applied n this context and the best guarantee for the exercise of dowry is lien and refusing from docility before receiving the dowry that has been decided by the Sacred Religion and using this right the woman can refuse to be obedient and at the same time she will have the right to alimony; because this disobedience is permitted by the religion.[2]

Thus, the legislator states in the article 1085 of Civil Code: "So long as the marriage portion is not delivered to her, the wife can refuse to fulfill the duties which she has to her husband provided, however, that the marriage portion is payable at once. This refusal does not debar her from right of maintenance expenses."

Admittedly, duties in this context cover not all duties of woman such as good manner, living in the husband's house, obeying the husband and so on and so forth, rather it refers just to obedience in sexual relations.

The general theory of Shia jurists and the content of the article 1085 of Civil Code denote that if the dowry (marriage portion) is agreed to b paid when the woman asks it she has the right of lien regardless of whether the husband is able to pay the dowry or not (Emami, 1993).

Conditions of Lien

[1] Najafi Kashif al-Qita, Mahdi, Morid al-Anam fi Sharhi Sharyah al-Islam, vol. 4, p. 200; also cf. Shahrudi, Mahmoud, Mosuah al-Fiqh al-Islami, vol. 9, p. 415.

[2] Taheri, Habibullah, Civil Law, vol. 3, p. 174.

The conditions that allow the parties to have the right of lien in transactions are brought about as a result of the voluntary link of the exchanged items. Then in the exchange contracts the parties have such a right. In the free contract there is not lien even if an exchange occurs in the contract; because the exchange conditions does not change the nature of an irrelevant contract to an exchange one. In this state, we will be encountered with two non-exchange contracts. Likewise, there is no lien in the loan agreement; because in the loan no exchange takes place.

Lien has its origin in the link and correlation of two exchanged items and this link will disappear with the cancellation of the contract. Returning what has been cancelled following the conclusion of the contract depends on the two parties and it is not a contractual obligation and it should be considered a binding guarantee. As to the cancellation it should be said that the parties annul the contract in a voluntary fashion; in such a case the lien can be forced as to returning the two exchanged items; because this is part of the cancellation and the parties either in explicit or implicit forms have also reached an agreement of returning the exchanged items.

As we mentioned earlier, since lien results from the mutual agreement of the parties one needs to consider the domination of will to be one of the conditions that bring about the right of acceptance although the parties can annul this right upon a mutual agreement; e.g. one of the means of annulment of lien is "determining a fixed term". In the article 377 of Civil Code it is noted that "each one of the sold item and the price which is present should be delivered".

Lien has a subject that can include the delivery of property, including the property itself or the interest, undertaking two works in return of each other, or undertaking a work in return of the delivery of a good or refusal from undertaking the work.

It needs to be noted that lien might be concerned with the failure of performance of the obligations or their partial accomplishment. The most just way is that the lien to be exercised in proportionate to the performance of obligations. Although the public has accepted this solution our courts and authors are suspicious of partial lien and believe that this decision needs the permission of the legislator.

The expenses of maintenance of the sold item in lien period are on the buyer who is considered its owner in the same way that he owns its benefits. In other words, the one who takes advantage of lien is the legal guardian. Accordingly, his responsibility is like the responsibility of the mortgagee and based on the lien principle he is not allowed to take advantage of the objective sources; because the owner of right is the mortgagee. If one of the parties performs his obligations out of consent before other, he cannot withdraw it referring to the lien.

Now as to those cases where the lien is cancelled one can say that:

1. Whenever the obligee performs the contract terms upon his own will and undertakes the obligations he will have no right to withdraw the property that he has already delivered; in fact, in other words, he has given up his right of lien.
2. If the mutual obligation is cancelled out due to any reason the lien will turn baseless either; and also when the obligation is transferred to the other party in such a case the party is free from lien claims on behalf of the claimant party; for example, the seller issues a bill for the buyer in order to receive the price of the sold item and it is accepted.
3. In the case where the parties to the contract cancel the lien either explicitly or implicitly; for example, setting a deadline for the performance of the obligations.

One can say that any claim of the performance of obligation by either one of the parties to the contract is not tantamount to the cancellation of lien; because is it was mentioned earlier lien is a means for putting pressure on the parties to perform the mutual obligations.

In the laws of European countries, like France, Switzerland, and Germany, lien has a wider scope as compared to Iranian law. In French law, it is taken for granted that the institutions that provide water, electricity and gas has the right to cut the services of the subscribers who do not pay their bills whose balance is the condition of reusing the services.

Chapter one: concept and principles of lien

A) Lien:

Lien, as a jurisprudential and legal term, refers to a contract party's right of refusal of performance of his obligations until the other party performs his obligations. This is indeed a type of surety bond that allows the parties to force the party who refuses to undertake the obligations stipulated in the contract.[3]

Sometimes in jurisprudential and legal sources lien is expressed through various terms like right of refusal, right of avoidance and so on and so forth.[4] In Iranian law, the term termination right has been used merely in the article 371 of Commercial Code while other laws have used other terms such as the right of refusal of the delivery of the sold item or the price or refusal of the performance of the obligation.[5]

Now with the development of commerce lien is an accepted principle in the legal systems around the world and has found an international aspect. In Germany, for example, lien is considered to be a legal rule (Jafari Langeroodi, 1997). It is seen that in international treaties and conventions lien has been recognized as a right; e.g. in United Nations Convention on Contracts for the International Sale of Goods (adopted in 1980) based on the article 58 of which the seller is allowed to make the delivery of goods and documents conditional upon the reception of the price. Moreover, if a contract is conditional and requires the carriage of the good the seller is allowed to deliver the sold item with this condition. Then the good and document are delivered provided the price is paid. (International Sale Laws, 1980)

B) Scholars and Lien:

The majority of jurists prove lien as an essential part of the contracts based on various reasons including the consensus of rational men and the conventional rules of transactions.[6] But this view will also have some opponents like Moqaddas Ardabili who has not accepted lien neither in sale contract not in the marriage. This is because when the contract is sealed the ownership is transferred and the delivery of the sold item is necessary.[7]

C) Jurisprudence and Lien

As to the permissibility of lien there are not clear and explicit traditions and the oppression of one party of the contract by the refusal of delivery of the sold item does not legitimize the oppression of the other party. In jurisprudence and law there are various theories of the basis of lien. (Esfahani, 1999)

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[3] Nasir Katoozian, Civil Law: Family, vol. 4, p. 87.
[4] Ali Ibn Hossein Mohaqeq Karaki, Jame al-Maqasid fi Sharhi al-Qawaed, vol. 13, p. 355.
[5] Iranian Law, 2000; Iranian Civil Code, Articles 377, 380, 1085.
[6] Mohammad Hassan Ibn Baqer Najafi, Jawahir al-Kalam fi Sharhi Sharaye al-Islam, vol. 23, pp. 146-147.
[7] Ahmad Ibn Mohammad Moqadas Ardabili, Majma al-Faeda va al-Burhan, vol. 8, pp. 504-505.

Many jurists have declared the lien a result of the exchange that occurs through the contract and thus it is counted as part of the very essence of the contract. Each one of the two parties to the contract are obliged based on the judgment of the common sense to deliver the sold item to the buyer while the latter is also obliged to pay the price and since there is no logical order that would allow one to be preceded by the other both parties have the right to resort to lien if the other fails to meet his obligation.[8]

Some other jurists contend that lien is implicitly implied by the very fact of the exchange itself as the sold item and the price should be delivered to their new owners. There are other jurists who believe that lien is a rational principle and a requirement of the exchange. (Imam Khomeini, vol. 5, pp. 371-372)

D) Law and Lien:

In some of the legal systems lien has been interpreted based on the causal relation between the obligations of the two parties. Since the cause of obligations of one party is the other party; then, certainly it is logical that each party makes the performance of the relevant obligation conditional upon the performance of the obligation of the other party.[9] In other systems including common law system lien has been expressed through the principle that if the right claimant does not perform his obligations his claim will not be accepted. This rule is known in common law system as the rule of justice and fairness and is considered to be the basis of lien in international contracts. (Jafari Langeroodi, 1997)

E) Nature of Lien:

This is why some jurists and legal experts have considered lien to be an objective right. One of the conditions of the lien is that one of the exchanged items should be objective. (Ahmad Zarqa, 1999) On the contrary, some legal experts despite acceptance of some features of objective law as regards lien (like heritability) have not endorsed objectivity for reasons.[10]

F) Conditions of Fulfillment of Lien

The significant condition of fulfillment of lien, according to jurists, is the fact that for the delivery of the two exchanged items in a transaction no determinate time has been decided. In other words, the contract at issue does not have any deadline and the obligations of the parties are performed in a simultaneous fashion. Even in the view of some jurists if an agreement is reach on the deadline of the delivery of the traded item after the conclusion of the contract no lien will be required.

United Nations Convention on Contracts for the International Sale of Goods has noted that in those cases where the seller knows that the buyer will not be able to pay the price in its deadline despite the time that is allocated for the performance of obligations has the right to resort to lien.[11]

According to the article 380 of Iranian civil code if the buyer goes bankrupt the seller has the right to refuse to deliver the sold item; of course, provided the possibility of failure of performance of the term obligations is high. The condition of a transaction's not being of any term and its being performed at the present has not been considered to be among the

[8] Mohammad Hassan Baqer Najafi, Jawahir al-Kalam, vol. 23, pp. 145-146.
[9] Nasir Katoozian, 2003, Civil Law: Family, vol. 2, p. 342.
[10] Nasir Katoozian, 2003, Family Law, vol. 1, p. 105.
[11] Iranian Laws, 2000.

conditions required for the fulfillment of the lien. For example, in law it is noted that in a court the obligee should be given time to undertake his obligations.[12]

G) Cases of Cancellation of Lien

1) In a case where one of the two obligations is performed, based on law or the common sense, sooner than the other, there will be no lien; e.g. paying the charge in contracts that are concluded based on an agreed amount of fee; in such cases the silence of the parties is a sign of agreement according to the legislator and the common sense.[13] Upon the performance of the obligation of one party like paying the price in sale contract lien is cancelled. Of course, some experts believe that partial or full fulfillment of obligation does not result in the cancellation of lien. To put it otherwise, lien is not reducible. The other idea is that lien is cancelled in respect of the fulfilled part of the obligation and is forced only as regards the unfulfilled parts of the obligations. (Shahidi, 2004)
2) One of the other ways of cancellation of lien is that a condition is set by the parties of the lack of lien. There is merely disagreement of the cancellation of lien in the event of remitting the obligation and the acceptance of the one to whom the obligation has been remitted.[14]
3) The remission of price or the sold item as a whole is tantamount to the delivery of price and the good and as a result it will lead to the cancellation of lien and this is endorsed based on the article 724 of Civil Code. (Shahidi, 2003)

Some of the legal experts have considered the fulfillment of the surety bond to be tantamount to the delivery of price or the sold item and argued that this will lead o the cancellation of lien. (Sukuti, 1998) It is also worth mentioning that the majority of jurists suggest that lien will not be cancelled out with such actions as depositing, lending, mortgage, renting and undertaking one's obligation. (Shirvani, Hashyah, vol. 4, p. 417)

H) Domain of Lien

According to some authors, lien is not restricted to sale contract and it exists in all exchange contracts in which two obligees exist. Even some believe that lien exists in all exchange and non-exchange contracts. (Baqeri and Tabatabaei, 2005) For example, in lending contract the borrower can ask for the expenses that he have spent on the borrowed item and he has the right to refuse to return the lent until the expenses are paid. Although jurisprudential works do not clearly demarcate the scope of lien and this right has been generally discussed in the debates of sale the evidences show that the jurists believe in lien in all exchange contracts. (Khansari Najafi, 1999)

Insofar as the jurists have accepted the lien as regards all mutual obligations including non-contractual obligations like usurpation. Given the discussed points, many legal experts have clearly endorsed the existence of lien in all exchange contracts in Iranian law and of course some of them have suggested some exceptions to this principle.

I) Lien and Lease Contract

[12] Nasir Katoozian, 2003, Civil Law, vol. 4, p. 94.
[13] Ibid, pp. 95-96.
[14] Nasir Katoozian, Civil law, vol. 4, pp. 93-94.

In the lease contract, or leasing the benefits, lien has been considered for both parties. Some jurists including Hanafis and Malekis, who have regarded the ownership a gradual process in the lease do not believe in lien.[15]

Moreover, one can say that in lease due to the gradual occurrence of ownership lien is indeed suspicious. Some jurists also suggest that if the subject of lease is doing something as regards a good (like sewing a cloth) it is possible to seize the good until the fee is paid; but if the one hired for handling a job has not exercised any effect on the good no lien will exist and the seizure of the good would be tantamount usurpation.[16]

J) Lien and Violation of Parties

Whenever both parties to the contract who have access to lien fail to undertake their obligations and each one of them to make the performance of the obligations conditional upon the performance of the obligations of the other part there are various ideas in Islamic jurisprudence which have been proposed to cast light on the ambiguous state of the transaction.

Upon a closer look one sees that Shia and Sunni jurists do not allow any sense of superiority of any one of the two parties over the other. Then, the judge forces both to deliver the exchanged items including the good and the price so that they are simultaneously exchanged. (Imam Khomeini, pp. 372-373) But according to some of the Shia jurists, since the price is a function of the sold item and the seller receives the price after delivering the sold good in sale contract first the seller and then the buyer should deliver the exchanged items. There is another theory that has been outlined by Ibn Edris Helli who states that drawing is the only solution to this situation. Of course, according to Shafei Mohammad Ibn Edris, when the price is general (not specified with all details) the buyer should first deliver the price.

Generally speaking, receiving the transacted item without the satisfaction of the other party does not cancel the lien out; then, whenever one of the two parties gives the transacted item to the other party without knowledge of the lien he has the right to refund it. (Allame Helli, 1991)

The legal experts have not considered the disposition through usurpation, seizure or reluctance and mistake to be a basis for the annulment of the lien. An item for which a party has lien is the property of the other party; thus, costs of its maintenance during lien is on the owner.

Even when the owner refuses to pay the costs the one who has the property in the custody can refer to the court and force his using legal means to pay the costs and if it is necessary he should pay the costs for now and later they will be refunded through legal procedures.[17] One should say that in the United Nations Convention of International Sale of Goods it is noted that if any unconventional delay occurs in the payment of the price or the costs of the good's maintenance the maintainer has the right to inform the owner and if the necessary actions are not taken he will have the right to sell the goods. (International Sale Law, 1980)

Some jurists believe that the benefits of the property belong to the owner while some others contend that the one who confiscates the property is not in charge of securing the benefits. (Imam Khomeini)

[15] Mohammad Hassan Baqer Najafi, 1981, Jawahir al-Kalam, vol. 27, p. 238.
[16] Ibid.
[17] Nasir Katoozian, Civil Law, vol. 4, p. 106.

This is to say that the one who makes use of the right of lien is the trustee of the property of the other party and thus if the exchanged item suffers any damage while it is under his custody he will not be in chanrge.[18]

Moreover, in the discussion of lien one can say that the latter right can be transferred to the deputies of the parties like inheritors and the creditor. (Shahidi, 2003)

Second Section: Lien in Iranian Law and UN Convention of International Sale

Chapter One: Study of Lien based on the article 58 of UN Convention of International Sale 1980 Vienna and article 377 of Iranian Civil Law

The article 58 of UN Convention of International Sale reads as follows:

1. *If the buyer is not bound to pay the price at any other specific time, he must pay it when the seller places either the goods or documents controlling their disposition at the buyer's disposal in accordance with the contract and this Convention. The seller may make such payment a condition for handing over the goods or documents.*
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.*
3. *The buyer is not bound to pay the price until he has had an opportunity to examine the goods, unless the procedures for delivery or payment agreed upon by the parties are inconsistent with his having such an opportunity.*

Article 377 of Iranian Civil Code reads: "*Either the seller of the buyer can retain the goods sold or their consideration until the other party is prepared to deliver his part, unless either the object of sale or the consideration thereof is agreed to be delivered at a subsequent date in which case either the object of sale or consideration which has become mature should be surrendered.*"

Both articles refer to lien in their own specific ways and in analysis of these articles one can say:

In the first clause of the article 58 of UN Convention it is stated that the buyer is obliged to pay the price when the seller delivers the good and in the article 377 of Iranian Civil Code it is suggested that both the buyer and the seller can refrain from delivering the exchanged items until the other party performs his obligation.

The first point here is that price and the good are correlative and they should be paid and delivered simultaneously and when the sale is express and the good is sold without guarantee they are no longer correlative. Also, it is clearly stipulated that whenever no exact time is specified for the payment the buyer is obliged to pay the price when the seller delivers the good.

This is while in the article 377 of Civil Code no allusion has been made to this and only parts of the texts suggest that the other party can take advantage of various types of options in order to be benefited from the good that he has bought. Then, delivery takes place when the good is allowed to be completely at the disposal of the individual who has the ability to make use of it.

The other point is that if any delay occurs in the performance of the contract the buyer has the right to ask for damages and this delay can be a basis for changing the course of the payment

[18] Nasir Katoozian, Civil Law, vol. 4, p. 103.

of the price due to the damages. It is also noteworthy that the performance of the article 58 of the convention is where there is no agreement between the parties.

In the second clause of the article 58 it is noted that "*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.*" Here indeed the domination of the seller is partially weakened while in the article 377 of the Civil Code the subject is merely concerned with a simple and stable condition in which the parties are ready to exchange the good and the price and no word has been stated regarding the time and conditions.

In the third clause of the article 58 of the UN Convention it is noted that the buyer is not obliged to pay the price and so long as there is such an opportunity the buyer has the right to check the details of the good. It is interesting that this article of the Convention argues that a transaction can be annulled due to further inspections. However, it is also noted here that lien in this context can be used as a means to put pressure on the buyer to pay the price. Now if an objective item exists for exchange there is still another option for checking the defects but the Convention suggests that lien is extended until an intelligible and acceptable deadline is defined and the buyer has the right to check the good right to that time and then pay the price. In the Convention it is also noted that if any defect is found in the good after the test or there is any mismatches it can be corrected in other ways, i.e. non-contract ways. For example, in a special contract if an action is taken against the agreed rules the other party has the right for cancellation or he is given an intelligible time for compensation. Of course, clause 3 of the article 58 of the UN Convention seems to include two exceptions first one which is the case where the procedures and norms of delivery of the good and the payment of the price is against the right of the buyer and the second is the case where the cancellation of the right of test there will be no right of cancellation.

Finally, one can conclude that from the triple clauses of the article 58 of the UN Convention of International Sale the clauses 1 and 2 are in line with the article 377 of Iranian Civil Code and the clause 3 of the article 58 is different from Iranian law and in itself it has an alternative perspective.

Second Part: Comparative Study

Chapter One: Comparative Study of Lien in UN Convention of International Sale and Iranian Law

We know that comparison of the laws of countries allows us to revise the current legal codes and recognize their weaknesses and strengths. Besides overcoming the weaknesses one can take advantage of the strengths of the laws of other countries in order to embark upon the path of legal growth. Against some few scholars who are denying the principle of lien in all legal mutual contracts and relations and believe in the absolute unconditional delivery and suggest that we can only resort to lien in those cases where the law is breached and consider it to be an emergency case maxim, the majority of jurists not only accept lien as a fundamental principle in all exchange contracts rather they insist on its performance. In Iranian law the jurists have accepted lien in exchange based transactions. However, principles of lien in the UN Convention can be interpreted based on such factors and relations as causality and correlation between the exchanged items, justice and fairness and also judgment in the Convention.

Chapter Two: Differences and Similarities

In the Convention lien is not exercised as regards non-exchange contracts due to their insignificant state in the international scene. This is also the case with the Iranian law. The codifiers of the Convention have also applied lien as to the secondary obligations besides the major obligations. In other words, they believe that lien is not an exclusive property of the exchanged items rather it is also applicable as regards the expenses and ancillaries that are imposed to the party who fails to perform his obligations as stipulated in the contract. While we know that in Iranian law lien is just applicable to the major exchanged items and it is denied about the secondary obligations.

In the UN Convention of International Sale lien is merely confined to sale contracts because in commercial transactions that the goal is the acquisition of profit there remains no room for the exchange contracts. Nevertheless, since exchange and reciprocal correlation as well as justice and fairness are the basis of lien in Iranian law one can see that the legislator has alluded to some substantial and determinate types of contract. One can feasibly extend the domain of lien to the point where all exchange based contracts can be included.

As we mentioned earlier, mutuality and voluntary exchange are the basis of lien. But in some cases this shows itself in other form. For example, confiscation of a property (exercising lien) for having a debt balanced in the articles 58 and 71 of the Convention is based on its exchange. The bases of lien in the Convention and Iranian law have differences and similarities:

A. Among similarities of these two legal systems one can refer to the belief in the mutually binding contract signed by two parties as the very foundation of lien. Because none of the aforementioned systems have attributed any effect in the annulled contract.
B. As to the necessity of unconditionality of contract and simultaneity of the delivery of the exchanged items the systems have considered them the prerequisite of lien and for this reason deciding a deadline is seen as the basis for cancellation of the lien. On the contrary, in the Convention though the lien mentioned in the article 58 due to the simultaneity of the obligations of the signatories in the article 71 of the same Convention the scope of lien and it is even exercised where the obligations of one party is instant while the obligations of the other party have deadlines.
C. If the party who willingly seeks to exercise the lien delivers his exchanged item he will surely have no right to retain it because he has resigned his right. But some cases have been underlined in the Convention based on the internal law that allows one to have access to lien as a basic right again.

In the Convention the codifiers have spoken of the right of suspension along with lien and extending the scope and for this reason it can include both the reciprocal obligations in either instant and prolonged forms while in Iranian law deciding a deadline for each one of the parties is a sign of giving priority to him over the other party in undertaking the obligations that would divest him of the basic right of taking advantage of lien option.

The second clause of the article 71 of the Convention regarding the confiscation of the good in the course of transiting suggests that although the seller has delivered the good to the transit agent and by this action he has already divested himself of the lien right he is allowed to retain the conditions. Moreover, in Iranian law in the articles 580 of Civil Code and 532 of Commercial Law despite delivery of the exchanged items in some conditions he can have them

back. Thus, we understand that there are numerous similarities as regards the stance of both legal systems concerning the cancellation of lien and in this way in Iranian law the most significant reason of the cancellation of lien the rights of the obligee who has undertaken the obligations will lose their effectiveness as soon as these obligations regarding the payment and delivery of the good are met.

If a particular condition has been interpolated against the simultaneity of the delivery of the exchanged items as regards the prior delivery of one as compared to the other this condition would cause the lien to turn ineffective. In fact, to put it otherwise, this party has willingly divested himself of this basic right.

It is also noted that the cancellation of contract due to its termination or annulment leads to the ineffectiveness of lien in the Convention and Iranian law. Although the scope of termination due to damage in confiscation term in the Convention has differences with Iranian law, insofar as in Iranian law any damage to the sold item during confiscation and before the delivery without violation or negligence of the confiscator and due to an external force would cause termination while its domain in the Convention is changing before and after the exchange of the guarantee.

The effects of lien in both legal systems have similarities:

1. Suspension of performance of the obligations;
2. Continuation of contract despite the reference to the lien;
3. Temporariness of lien;
4. Ability to refer to lien before the third party;
5. Inability of taking advantage of the confiscated property by the owner;
6. The insistence of the owner on the payment of the expenses related to the maintenance of the confiscated property.

In the UN Convention in articles 85 and 86 maintenance of the seized property is an obligation for the one who confiscates the property until the time when the expenses are paid by the other party who owns the property. Thus, according to the UN Convention, the expenses of maintenance of the seized property are required to be paid by the owner and the other party has the right to receive all these expenses based on the lien.

But in Iranian Law when the buyer delays the payment the seller is not obliged to maintain the sold good. However, if any expense is forced to the seller during confiscation time the buyer who is considered to be the owner will be obliged to pay them. In other words, in Iranian law there is no lien as regards the expenses, then the one who seizes the good does not have any right as to lien.

In Iranian law the majority of jurists have considered the seller to be responsible for the damages done to the sold item during the lien term due to termination, according to the article 387 of Civil Code and the principle of "damaging the sold item before the delivery". Although Iranian legal experts have not regarded the damage done to the good during this time to be part of the principle and believe that since in this case the sold item had been in the custody of the buyer the damage should be covered by the latter. But in the Convention the codifiers have delved into further details as regards the probabilities regarding the custody of the sold item. To put it otherwise, if the damage occurs before the exchange takes place based on the sale contract and the contract is terminated and the one who seizes the property will stand responsible for the damage. But if the damage occurs after the exchange of the good and the

price while this damage is incurred due the excess or negligence on the behalf of the seizer he will be responsible for the damage and should pay the total price plus the compensation otherwise the contract will be cancelled out. Given the aforementioned points one can state that the UN Convention conceives a wider scope for the termination of the contract due to the damage incurred to the seized property as compared to Iranian Law. This is because the Iranian legislator believes that a contract can be terminated when a damage is done before the delivery and without any excess or negligence.

According to the article 88 of the Convention if the sold item is seized for a long time while it is subject to decomposition or degradation the Convention allows the seizer to sell the good and balance his own debt and return the rest to the owner. However, in Iranian law lien is not associated with such an effect and so long as the contract is not terminated due to a legal basis the seized good will be owned by the buyer and the seller does not have the right to resell it because this action is considered to be tantamount to the illegal owning of another man's property which not permissible. Nevertheless, if the contract is terminated due to a reason the seller who owns the good has the right to sell it as his own property. And even if the price is lesser than the agreed number in the contract the seller has the right to force the buyer to pay the rest.[19]

The question that can be raised here is that whether in Iranian law like the Convention one can increase the time of performance of the contract proportionate to the confiscation time or not? This issue (prolonging the contract term) appears when both of the obligations are instant like the case where the seller is obliged to deliver a particular good in a determinate time line and the seller recongnizes before starting the production of the good that the buyer is not committed to his obligations and as a result based on the article 71 of the convention suspends the implementation of his own obligations. In such a case the buyer should build confidence in the seller that he will perform the obligations and thus the right to suspension disappears and the seller begins to perfom his own obligations although the time line would change due to the suspension.

Chapter Three: difference of lien in the convention of international sale and Iranian civil law

In Iranian laws there is no clear mention of lien but in the article 377 in a conceptual form and in the article 392 in an implicit fashion this basic right has been stipulated. However, in the marriage contract lien is clearly mentioned though it is not applicable to the sale contract. In the articles 58-71-85-86 of the UN Convention this right is stipulated.

Upon a short review it is found that lien is of a wider scope in the Convention and besides the exchanged items it is applied to the expenses of preservation, storage, and refrigerating room and so on and so forth. In other words, if a costumer pays the price but the expenses are not balanced – for example, if the seller is obliged to dispatch a technician to install the professional good but he refuses to do so – both parties have the right to resort to lien though in this case lien is confined to the exchanged items. In the Civil Code lien is simultaneous with the delivery of the good and price but since it is not possible to deliver them at the same time there is no simultaneity in the Convention.

[19] Safaei, Seyed Hassan, 1996, Civil Law and Comparative Law, Mizan Press, Tehran, p. 459.

In the Convention lien is for both the main and secondary obligations and if the seller does not allow the buyer to test the good the buyer has the right to refuse to pay the price but in Iran test is not among the major pillars of the contract to which lien belongs.
In the Convention when the seller gives the ownership documents after receiving the price the buyer loses his right of lien even if he has not received the bought good yet but in Iran lien is restricted to the price before the sold item.
In the Convention if it is found after the conclusion of contract that one of the two parties is not able to perform his obligations the other party has the right to suspend the performance of his own obligations while in Iranian Civil Code there is no right of suspension (only in the article 383 of Commercial Law it is mentioned that the seller has the right of suspension).

Part Three: An Interpretation of the Articles of the Convention of International Sale

Chapter One: Articles of the International Convention

The article 30 of the Convention that addresses the obligations of the parties reads: "The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention". This article suggests that delivery of the good and handing over the documents as mentioned in the contract is prior to other rules of the Convention. The article 53 reads: "The buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention." In the aforementioned articles it is noted that the significance of main obligations of the parties as a result of the violation of the contract and its effects needs to be taken into account because the violation of main obligations is more probable than the secondary obligations to cause the whole cancellation of the contract. Now if no condition has been included in the contract as regards the main obligations of the contract (delivery of the good and price), certainly based on the article 58 of the Convention, the application of contract will require the simultaneity of the performance of the obligations of the parties. We see that this article expresses the lien and the right to refuse to perfom the obligations. In fact, the article 58 is an expression of the general maxim of lien and the articles 85 and 86 have widened the scope of this right.
The article 58 of UN Convention of International Sale reads as follows:

1. *If the buyer is not bound to pay the price at any other specific time, he must pay it when the seller places either the goods or documents controlling their disposition at the buyer's disposal in accordance with the contract and this Convention. The seller may make such payment a condition for handing over the goods or documents.*
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.*
3. *The buyer is not bound to pay the price until he has had an opportunity to examine the goods, unless the procedures for delivery or payment agreed upon by the parties are inconsistent with his having such an opportunity.*

The articles 85 and 86 have also referred to lien as a basic right in a sale contract. Article 85 reads: " If the buyer is in delay in taking delivery of the goods or, where payment of the price and delivery of the goods are to be made concurrently, if he fails to pay the price, and the seller is either in possession of the goods or otherwise able to control their disposition, the seller must take such steps as are reasonable in the circumstances to preserve them. He is entitled to retain

them until he has been reimbursed his reasonable expenses by the buyer." On the other hand, the article 86 reads: "If the buyer has received the goods and intends to exercise any right under the contract or this Convention to reject them, he must take such steps to preserve them as are reasonable in the circumstances. He is entitled to retain them until he has been reimbursed his reasonable expenses by the seller." Then these articles of the Convention suggest that two types of lien have been predicted one of which is concerned with the main exchanged items and the other is related to the expenses of the preservation of the good. Thus conceived, lien means nothing but the right of refusal or avoidance of the contractual obligations before the party who has violated the contract that forces him to perform his obligations.

Chapter Two: basis of lien in the international convention

In the Convention after the conclusion of the sale if all conditions related to the authenticity of the transaction are observed and the sale has taken place in correct form the seller is obliged to deliver the good and documents to the buyer. On the other hand, aricle 58 suggests that the buyer is obliged to pay the price regardless of the observation of any item on the behalf of the seller.

Article 59 reads as follows: "The buyer must pay the price on the date fixed by or determinable from the contract and this Convention without the need for any request or compliance with any formality on the part of the seller". In the article 58 that is about the time of performance of obligations of the parties an allusion has been made to the principle of simultaneity of the delivery of the good and price. According to the aforementioned article, if in the contract a special time has not been determined for the payment of the price the buyer can refuse to pay it until the seller hands over the documents and the good according to the rules stipulated in the convention. But if the seller delivers the good and the related documents the buyer is also obliged to pay the price.

For the sake of guaranteeing the payment of the price the Convention has allowed the seller to deliver the good and related documents when the price is paid. In the second clause of the article 58 of the Convention it is said: "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." Historically speaking, article 58 of the Convention contains the general ideas mentioned in the articles 71 and 72 of the Uniform Law for International Sale. However, we see that there are some essential and formal changes in it. Article 71 contains almost more general comments on the simultaneity of the delivery of the good and payment of price. Moreover, this article clarifies the ambiguous points that have not been clearly addressed in the article 72. Another significant amendment of the article 58 is that the seller cannot delay the dispatch of the good until the price is paid. This is an alternative solution that has been also stipulated in the first clause of the article 72 of the Uniform Law. On the other hand, the right of buyer for testing the good in general has also been emphasized. (A group of scholars, trans. Darabpoor)

Therefore, some believe that article 58 of the Convention speaks of a causal relationship between the bilateral obgliations in the sense that the seller accepts to perform his obligations in order to receive the price while the buyer pays the price for having the good. Then, due to the correlation of these two obligations the Convention has adopted some measures to ensure them the most important one of which is "lien". In the articles 85 and 86 of the Convention

that address the obligations of seller and buyer regarding the preservation of the good as well as the details of the expenses, the preserver is considered allowed to resort to lien in order to receive the expenses. Some scholars contend that the basis of lien for the expenses of the preservation of the sold good should not be sought for in the sale contract rather in view of the article 69 of the Convention as well as the point regarding the transfer of risk to the other party, i.e. buyer, in the article 85 and the seller in vthe article 86 according to which under a number of circumstances the seller or the buyer are obliged to undertake the preservation one should say that the basis of lien in these articles is the Convention itself otherwise due to the transfer of the risk to the other party the innocent party would not blame the party who should have taken care of the good for the possible damages.(Nuri, 2006)

For example, when the Convention assigns the responsibility of preservation of the good to the seller or the buyer if according to the general regulations and principles the good belongs to the other party and he is not legally obliged to preserve it. In this regard it is indeed reason and fairness that judges of the expenses that have been paid for the preservation and here someone should cover these expenses. Thus, the foundations of lien in the Convention can be justice and fairness as well as the judgment of the Convention depending on the causal or correlative relationship of the exchanged items.

Chapter Three: Reasons of the Existence of Lien in UN Convention

1. It is needless to say that the existence of a correct sale contract can be inferred based on the totality of the articles of the Convention concerning lien. In other words, conclusion of a correct sale contract between the two parties is the first requirement for lien because the latter is one of the legal effects of a sale contract. To state the matter differently, if a contract is not concluded correctly no effect would be expected of it.
2. The contract should be concluded in an unconditional form so that a basis provided for the lien based on the article 58 of the Convention. In other words, if the contract has passed the time of delivery of the sold item and the price in silence and the seller and the buyer have not determined any specific time in such a case the exchange of the good and the price will be simultaneous and the parties have the right to terminate the contract if the exchange does not occur accordingly. From another point of view, if the parties determine a particular time for the exchange in a way that simultaneity turns pointless this will be a basis for lien. For example, if they have concluded the sale on credit there will be no lien due to future state of the obligation of the buyer and the seller should deliver the good before receiving the price. It is noteworthy that setting a deadline can only thwart lien when it cancels the simultaneity and whenever the agreement is in a form that the deadline has been set for both parties in an equal way the lien will remain untouched. For it makes no difference if the simultaneity of delivery is a requirement of the unconditionality of the contract or due to its temporal indeterminateness or because of the agreement of the parties. Of course, simultaneity of the delivery has just been mentioned in the article 58 of the Convention as a basis for lien otherwise if according to the article 71 one of the parties suspend his obligations the mutual obligations are not required to be necessarily simultaneous.
3. Awareness of the suspension of the performance of the basic obligations on behalf of the other party, after the contract and based on the article 71 of the Convention, allows the other party to suspend his own obligations in return.

Then if it is clear before the conclusion of the contract that the other party will not be able to perform his obligations no right for resorting to lien will be for the party who has signed the contract. From the clause one of the article 71 of the Convention one can deduce that even if the time for performance of the obligations has not come and it is revealed that the other party is unable to undertake the oblgiaitons the remained party has the right to suspend the performance of the obligations whenever it is necessary. Accordingly, some scholars have suggested in their interpretations of the Convention that "inner concern of one party over the performance of the obligations of the other party is not a basis for allocation a right for him to resort to lien rather there should be substantial evidences" (A group of authors, translated by Darabpur). Accordingly, in debates that led to the adoption of the article 71 in the Vienna conference the members were worried over the conditions of the performance that in their view should have been objective instead of being internal. In fact, developing countries were more concerned of the possible powerful stance of one party that would allow him to suspend the contract and force the weaker party to provide a practical guarantee for the performance of the obligations while in the time when the contract was concluded this had not been included in the agreement. Therefore, in the article 71 besides one's awareness of the other party's disability of performance of his obligations the legislator has stipulated that this awareness should be also associated with convincing reasons. In other words, awareness alone does not provide the basis for lien rather some conditions are requird to substantiate this awareness. Some of these conditions have been already mentioned in the article 71: a serious deficiency in his ability to perform or in his credit-worthiness.

CONCLUSION:

Upon a short comparative review of Iranian law, it becomes clear that according to the accepted regulations both parties to the contract are allowed to make the performance of their obligations conditional upon the performance of the obligations of the other party without having the right of contract termination. Although lien has not been clearly stipulated in the Civil Code there are still some points in the article 377 of Civil Code that endorse it. Lien is the result of the willful correlation of two mutual exchanged items. Then, there will be no lien in free contract. What has been mentioned in the clause 2 of article 58 of the Convention addresses the case where transit of the good is included in the contract. It is clear that in such a case delivery of the good and the payment will take place in different places and it is the seller who first dispatches the good. He is obliged to deliver the good and has no right to ask for the payment in advance. But this point has not been mentioned in our law. Nevertheless, one needs to take it into account that according to accepted general principles in Iranian law lien cannot be a reason to refuse to undertake obligations without any substantial evidence. In other words, no party has the right to suspend his obligations without any feasible execuse. For this reason, one might say that the content and spirit of our legal rules are consistent with the clause 2 of the article 58 of the Convention though no clear stipulation of the issue has been made in the articles of Civil Code.

Now according to the mentioned points lien has its origin in the mutual obligations of the seller and the buyer. In general, if a guarantee has been provided by each one of the seller and the buyer there will be no basis for lien and even if the parties in such cases have not

determined a clear date and time for the performance of obligations the guarantee itself can serve as a basis for determination of time. The aforementioned point can be understood based on the clause 1 of the article 58. As already mentioned, the seller should deliver the sold good to the buyer and he has the right to make this delivery conditional upon the payment of the price. In this case the buyer is obliged to pay the price in cash. Then, there is a causal relation between the way that price is paid and the good is delivered.

According to the discussions that were made regarding the clause 2 of article 58 of the Convention the latter point can be inferred from it too. This clause gives the buyer the right to test the bought good and if the seller refuses to allow the buyer to test the good the latter has the right to resort to lien. We also recognize that in Iranian law lien is restricted to the main and mutual obligations. Thus, though the buyer's right to test the good is not among the main obligations it can turn to a main obligation under some conditions that have been agreed by the parties.

As to the article 85 of the Convention we mentioned that the buyer has two obligations: one being payment of the price and the other receiving the good. If he fails to pay the price despite the necessity of simultaneous balance of the bill and the delivery of the good he has indeed delyed himself the delivery of the good.

In such a case the seller is obliged to adopt the normal measures for preservation of the good and he has also the right to seize the good until the expenses are not paid. It should be also noted that this is accepted in our law and we can say that according to the article 85 of the Convention the seller can ask damages from the buyer due to the failure of performance of obligations. Meanwhile in Iranian law this damage has been discussed under the title of "causation" and this damage cannot be asked as "lien"; because in Iranian law as we studied and stated lien is a secondary issue and cannot be resorted as the main condition of the contract.

As to the article 86 of the Convention it is important to note that since the aforementioned article is expressed in two clauses it is indeed addressing two different cases: one is the case where the buyer has received the good but he wants to deny it based on his legal rights and the other is the case where the buyer has not received the good. In other words, in the first case the good is physically at the disposal of the buyer while in the second case the good is ready to be owned. The buyer in this latter case should inform the seller that he wants to reject the received item. There are two possibilities in this case: either the seller has failed to deliver the good as he should then the buyer has the right to ask for the damages and he can resort to lien. This type of lien that is discussed in the article 86 of the Convention is not known in Iranian law; because in Iranian law lien is not among the main issues of the contract.

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