

## ANALYSIS OF THE BILATERAL GUARANTY IN THE DOMESTIC LAW AND COMMODITY TRADE CONVENTION

Mohammad Mahdi AHMADI<sup>1</sup>, Hassan ABEDIAN KALKHORAN<sup>2</sup>, Alireza ASGARI<sup>2</sup>, Bahareh  
RAJABI\*

<sup>1</sup> Assistant Professor, Head of Department, Islamic Jurisprudence and Legal Principles, Islamic Azad University of Qom,  
<sup>2</sup> Assistant Professor, Islamic Jurisprudence and Legal Principles, Islamic Azad University of Qom,  
<sup>3</sup> Doctoral Student of Islamic Jurisprudence and Legal Principles, Islamic Azad University of Qom.

\*Corresponding Author

### ABSTRACT

*The subject of the bilateral guaranty, its transference manner, and its time, has long been manifested in the Shiite jurisprudential texts in terms of transactions, and has been completely explained from the beginning. The domestic laws of Iran are also influenced and are in accordance with its rules. What is important of note in the current study is that it deals with the position of bilateral guaranty in 1980's Vienna Trade Convention, which knows itself as the pioneer and inventor of a new solution to solve the problems caused by the breach that may occur during a transaction. In this regard, it is bound to investigate the concept and bases of the guaranty, and explain the differences and similarities between the domestic law and the convention, which finally leads to clarification of the conformity of the rules of the convention with the rules of domestic law of Iran, which is also directly derived from Shi'i jurisprudence.*

**Keywords:** *Guaranty, Bilateral Guaranty, Risk Transfer, Delivery*

## INTRODUCTION

### **Problem statement:**

Upon the conclusion of a contract, which is in accordance with requirement and agreement of the parties, and includes the intention to transfer the ownership from the seller, and payment of the price by the customer, as a result of which the price and the object of sale is withdrawn from the ownership of one party, and transferred to the other one, based on the general rules of transactions and regarding the fact that every owner has any rights to treat his property as he wishes, in case a loss or damage is happened, the compensation is upon himself. Therefore, according to a jurisprudential rule with the theme “every loss to the object of the sale before its delivery is upon the seller”, any damage to the object of sale before its delivery is upon the seller and even if the customer has paid the price, he can claim it back.

Regarding what have been mentioned, the uncertainty arises that, this rule is inconsistent with the possessory spirit of contract of sale since the prerequisite of possession is the bilateral guaranty of the object of sale to the owner and irresponsibility of the seller. Now, how is it possible to integrate the possessory feature of contract of sale with the bilateral guaranty rule? Justifying this rule, most jurists have asserted that the contract of sale is annulled a moment before the loss and the ownership of the goods or the object of sale is retransferred to the seller. However, it should be noted this theory is applicable when the exchanges of the transaction are

still present and they are not damaged, and the parties can transfer them. But when one of the exchanges is lost and with stronger reason, its delivery is also not viable, the contract of sale will be annulled and the legal obligation is also eliminated, and the exchanges are returned to the initial owners and as a result, the loss to the goods or the object of sale is happened in possession of the owner and there will be no guaranty upon the customer. Based on the opinions of some lawyers, in the bilateral contracts, the obligation is mutual and each of the parties takes its legal life and influence from the other one. Therefore, with the loss to one, the obligation for payment of the other is also obviated (Katouzian, 1992, p.167).

Finally, the contract leads to possession and consequently, the transference of the bilateral guaranty, however in the bilateral contracts, the mere transference of the property is not the main goal, but achievement to it, is the final goal of transaction since by elimination of the subject of the contract, it can be said that the contract itself is also annulled (Civil Law, Article 190).

In the current study, we have aimed at investigating the bilateral guaranty rule (the loss of the object of sale before delivery), its effects, and conditions in the domestic laws (Civil Law, Article 387) of jurisprudential texts and 1980's Vienna Trade Convention.

### *First Discussion: Evaluation of the Bilateral Guaranty in Domestic Law*

#### *First Clause: Investigation of the Article 387 of Civil Law*

In Iranian law, the contract of sale is among the possessory contracts. Most lawyers have said in definition of possessory contracts that it is a contract which leads to transference of ownership from one party to the other. However, on the contrary, some lawyers believe that this definition is not complete, and have tried to establish a new definition as follows: bilateral contract is a contract that leads to creation of transference of an actual right and based on this contract, the possessory contract is divided into two categories: 1- possessory contract causing actual right: in the civil law, there are four types of contracts whose main effect is creation of actual right for the contract party. The four contracts are: contract causing the exploitation right, contract of mortmain, contract causing right of easement, and mortgage contract, 2- possessory contract conveying actual right: investigating the contracts available in the civil law, it seems in all contracts that lead to transference of actual right, the possession right is the subject of contract. These contracts include contract of sale, exchange, lease, loan, benefaction, and possessory testimony. Contract of sale, based on article 338 of civil law, is a possessory and bilateral contract. Therefore, based on the clause 1 of article 362 of civil law, by establishment of contract of sale, the ownership of object of sale is transferred to the customer, and the ownership of the goods is transferred to the seller. Also, based on the clauses three and four of the same article, the contract of sale obliges the seller to delivery of the object of sale, customer to payment of the price. This legal act is called the "delivery". Now we want to evaluate whether the delivery is the condition for validity of contract of sale or not.

Delivery, in the contract of sale, is an obligation caused by the contract of sale, created after establishment of contract. Therefore, the entity of delivery has no effects on creation and establishment of contract of sale. However, on the contrary, delivery is a condition for validity of some contracts, including:

1 – mortmain, 2- encumbrance, 3- benefaction, 4- mortgage, 5- loan, 6- mutual exchange of gold and silver. Explanation of each of these contracts is beyond the scope of the current study (Katouzian, 1992, p.428).



The reason behind dealing with the subject of delivery in the current study is that we sought to investigate the last part of the article 387, which refers to the constructive delivery. Delivery of the object of sale is of different types, including:

- a) Practical Delivery: giving the object of the sale to the customer in a way he has the control over the possession and estates.
- b) Constructive Delivery which is divided into eight types: 1- loss to the object of sale by the customer before delivery (object of sale is certain), 2- retention of the seller's ownership on the object of sale granted by the customer as the rent-loan without the seller evicting (object of sale is certain), 3- barter (in the general object of sale), 4- debt-to-debt joint control bond (in the general object of sale), 5- remittance (if the object of sale is general), 6- novation (the object of sale is either certain or general), 7- relief from obligation (general object of sale), 8- ownership of what is in his debt (general object of sale).

Therefore, the last part of article 387 of civil law asserts: "... or if the seller refers to the lieutenant governor for delivery of the property and ....". Withdrawal of delivery has a sentence according to which, the guaranty is transferred from the seller to the customer.

Thus, in spite of possessory nature of contract of sale in Iranian law, if the object of sale is lost by force or accident before its delivery to the customer, the compensation of loss is upon the seller, and he should pay the price of the lost property or object of sale back to the customer. This responsibility for the loss is known as the "bilateral guaranty" in Iranian law. We seek to evaluate the sentence of the article 387 of civil law, to see if the cancellation of contract is the result of mutual consent and the effect of exchange, or it is a sentence opposed to the rule.

#### ***Second Clause: Evaluation of the Lawyers Opinions about the Article 387 of Civil Law***

Regarding the fact that article 387 of Iranian Civil Law is the subject of the discussion, the question arises that whether this article is caused by the parties' mutual consent and among the general rules of transactions, or it is a unique sentence.

There is much controversy among the lawyers in this regard:

- a) Some lawyers believe that this article is in lines with the rule since the customer pays the price or commits to do it, in order to take the ownership of the object of the sale in addition to the owner, and in case the property is lost before delivery, the customer would never accomplish his main goal. Thus, the responsibility of the loss being upon the seller is in lines with the legal rules. Therefore, if we approve this opinion, we should extend this sentence's application to other bilateral contracts, specially the contracts of renting, loan, compromise, and loss to the property before delivery, and it should not be only specific to the object of sale and contract of sale. Among the lawyers, Dr. Katouzian confirms this opinion and believes the article 387 of the civil law is in lines with the rule and it is the result of mutual consent and the effect of exchange. Therefore, he believes that the sentence of article 387 of civil law can be also applicable to the loss of property before delivery and extended to any possessory and bilateral contracts. He also asserts that the mutual consent on sentence other than this rule is applicable (Katouzian, *ibid.*, p.455).
- b) Some lawyers on the other hand deem the sentence of article 387 of civil law to be opposed to the rule, since by establishment of the contract of sale, the object of sale becomes the property of the customer and in case it is lost, the compensation should be upon the owner, and its benefits and emblems would belong to the owner. By



establishment of the ownership, the contract of sale is actually established, so according to the rule, the loss should not lead to the cancellation of the contract. Therefore, this sentence is opposed to the rule, and if we accept this opinion, the sentence of the article is applicable only to the contract of sale and merely for the loss to the object of sale, and it would not be applicable to the payment and other exchanges. Among the other scholars, the respected Drs. Shahidi (Shahid Sani, 1992., p.46) accepts this opinion.

### ***Third Clause: Evaluation of Application Conditions for Article 387 of Civil Law***

In order for the sentence of article 387 of civil law to be applied, some conditions should be met. Therefore, in this clause, we deal with evaluation and investigation of these conditions.

- 1- The object of sale should be certain at the time of loss to property or it should be generally certain; this subject has not been noted in the article 387 of civil law, however we know that in jurisprudence, the personal feature of the object of the sale has been noted and its necessity has been emphasized. So, if the object of sale is general, the customer is the creditor and if the property owned by the seller is lost, he is obliged to deliver another property to the customer, and even if the whole sold property is lost, since the ownership has not been specified before determining the object of sale, the contract of sale is cancelled from the first place, and there are no obstacles on cancellation of contract and execution of the sentence.
- 2- The loss to the object of sale happens before delivery to the customer; as was mentioned, the bilateral guaranty is transferred to the customer with delivery of the sold property to him. Thus, if the sold property is delivered to the customer, the loss is upon the customer and the contract would not be cancelled. In addition to the bilateral guaranty, the reason behind this phenomenon is the realization of the commitment by the seller and delivery of the property; however, this sentence is not general and the legislator, when the power/liberty of the buyer to return to seller, within three days, an animal that he has bought from him, the power/liberty of both parties to a sale to rescind a sale during negotiations, the power/liberty of the buyer or seller (or a third person) to rescind a sale over an agreed period of time immediately following the date of that sale consistent with their original agreement, are specific to the customer and only he can use these powers, again deem the sentence of article 387 of civil law applicable.
- 3- Loss to the property is happened through force or accident, and without any faults from the seller; so, the sentence of the article is applicable when the loss is due to force, otherwise the sentence would not be applicable. In this clause, some situations are considered, as follows:
  - a) If the loss is the due to the seller's fault, the contract of sale will not be cancelled, but the seller is obliged to, according to the loss and indirect damage rule, deliver the exchange for the lost property from the like of the property if it is fungible, or pay the price of it, if it is related to the price. Dr. Katouzian also notes this rule with a very good expression as this article is used for loss to the object of sale and not damaging it (Katouzian, 1992, p.96).
  - b) If the property is lost by the customer, the contract is rightful, and the customer has no right to claim from the seller in terms of the loss to property, and he should pay the price of the property back to the seller. Article 389 of civil law asserts that if, regarding the two mentioned articles, the loss to the object of sale or damaging is caused by customer's



act, the customer has no right to claim from the seller, and should pay the price of the property back to the seller (in fact, this loss would be taken as the delivery, which is known in jurisprudence as the 'Eqdam' rule).

- c) If the loss is caused by a third party, the contract would not be cancelled, thus the third party, to the customer, would be responsible for delivering the like or price of the lost property (Lotfi, 1993, p.154).

***Fourth Clause: Is the Sentence of Article 387 of Civil Law Also Applicable to the Damage and Defect?***

- a) Defect of the object of sale before delivery:

In case the object of sale is defected before delivery, based on the article 388 of the civil law, the contract of sale would not be cancelled, however the customer can cancel the contract. That is why article 388 of civil law asserts: "if the object of sale is defected before delivery, the customer would hold the right to cancel the contract" (Shahidi, 1991, p.252). Also, according to the article 389 of civil law, if the object of sale is defected by the customer's act before delivery, he would not have the right to cancel the contract (such as the case for the loss), and if the defect is caused by a third party, again the contract cannot be cancelled and the third party is responsible for the loss to the object of sale.

- b) The Deficiency of the Object of Sale before Delivery:

It might be said that the deficiency is the same as defect, but there are differences between the two. Defect means the damage to a part of the property, while deficiency is the change in condition of the whole or a part of the object of sale, without a part of it being lost. In terms of deficiency, the article 425 of civil law asserts: the deficiency of object of sale, which is happened after the contract and before its delivery, is considered as former deficiency, so the customer can cancel the contract or keep the object of the sale and claim the "arsh" (a fraction the numerator of which is the differential at a given date between the price of something if undamaged and its price after damage, the denominator representing the price of the same thing before damage at a given date) from the seller (Katouzian, 1992, p.415).

***Fifth Clause: Evaluation of the Loss to the Object of Sale Profit before Delivery***

Can the sentence of article 387 of civil law be extended to the sold property's profits or not? We know the as soon as the contract of sale is established, the object of sale is transferred to the customer and it is under his ownership until any loss happens. Therefore, the products and profits from the object of sale belongs to the customer, during the time from the establishment of the contract and delivery of the property. Now, if these products are lost before delivery of the property, would the seller still be guarantor? Or should his fault be proved? Fortunately, in this regard, the lawyers have agreed that the rule "every loss to the object of the sale before its delivery is upon the seller" is not applicable to the products of the property before its delivery. They state that the condition for cancellation of the contract in terms of loss to the object of sale is the correlation created by the will of the parties in a bilateral contract. The bilateral justice also requires that annulment of one commitment should not lead to annulment of its mutual commitment. Therefore, the sentence of the article 387 is specific to the object of sale and the price, i.e. the prices exchanged, and it is not applicable to the benefits from them. The products and benefits are not independently subject to the exchange, in order to be discussed under the



subject of bilateral guaranty transference. The benefit and product from the object of sale, in accordance with the original property, come under ownership of the customer, however it is a deposit in the hand of the seller. Therefore, whenever it is lost without force and dissipation, it is accounted for as the customer's property. Also, the seller is the guarantor of the damage due to his own faults. This responsibility also does not have a contractual root and obeys the general rules of loss and indirect damage in the civil law.

#### ***Second Discussion: Evaluation of the Guaranty in International Contacts of Sale (1980's Vienna)***

The meaning of 'guaranty' in an international trade contract can include different states such as loss, decay, and damage to the sold property. The common feature among all these items is that the loss or damage should be accidental. Therefore, the damage should not be caused by the action or omission of one of the parties of the contract.

Thus, the word 'guaranty' includes states such as theft, accidents caused by sea water, high temperature affecting the quality of goods, combination of the goods (especially the liquids), deterioration of the goods, evaporation, inappropriate storing, or carelessly controlling of the goods by the transportation people.

#### ***Clause One: The Time of Transference of Bilateral Guaranty***

The property might be lost or damaged at different points, from the time the contract of sale is established till delivery of it, since the two actions (establishment of contract and delivery of the property) might be combined and happened simultaneously, or a long period may exist between the two actions. During this time, there is always possibility, and the traders know it well, that due to an accidental, sudden and unexpected accident, that neither the seller nor the buyer is responsible for, the property is lost or damaged. As a result, for instance, the property may be lost or damaged when being packed in the seller's store, or on the way to the port from which it is exported (when the contract requires the transportation of the goods by the sea), or during the sea trip, or on the way from the destination port to the customer's living place.

The important question in all these states is that when is the guaranty and responsibility of the loss and damage to the goods transferred to the customer (Safaei, 2008, p.143). The response to this highly important question is so vital, since by answering this question, which party (the seller or the customer) would be responsible for guaranty and its results will be determined. Therefore, the rules of risk transfer are related to the point whether the customer should still pay for the lost or damaged property, even if he has never received it. It is called the 'price guaranty'. Some legal systems are responsible regarding some rules that set the 'non-execution guaranty' regardless of 'price guaranty'. The rules of non-execution guaranty set the issue whether the seller should deliver the property again and mutually, the customer holds the right to claim another property from the seller, even if it is lost or damaged accidentally.

#### ***a) The Risk Transfer Theories=Bilateral Guaranty***

From the time the property is sold till the time the customer receives it (especially the contracts in which the seller and customer are in different countries), it may face risks such as ship sinking, or stealing the cargo, or even loss or damage to the property during this time. The answer to this question differ based on the time considered for transference of the property guaranty to the customer. In addition, by guaranty, that loss or damage is meant which is caused by the accidents that cannot be attributed to the seller or the customer. Otherwise, in case the loss or damage is due to breach of commitment by for example, the seller, even if it happens



after the guaranty transfer, would be responsible. This separation is clearly expressed in the articles 36 and 66 of Vienna's convention (Safaei, 2008., p.143).

Totally, in terms of the risk transfer time or bilateral guaranty, there are three general solutions in the domestic law:

- The date of establishment of contract; this solution is accepted in the Swiss' law (article 185 of the commitment law). It is also accepted in the Spanish and Dutch laws.
- Date of ownership transfer; this solution is accepted in the France, Italy, and England's laws.
- The object of sale delivery date; in addition to the Iranian Law, it is accepted in the laws of Germany, Greece, Sweden, and the United States.

***b) Risk Transfer with the Delivery of the Property (the Select Theory in the International Trade)***

The theory is extended in the international trade. In fact, such a theory is more reasonable and fair, since the party which owns the property, is in a better position for maintaining it, taking measures for protecting it, or maintaining it after the outbreak of the accident leading to the damage. It is also the case for collecting the remnant goods saved from the loss or damage, and the damage evaluation and contacting the insurer in order to receive compensation in situations where the goods are insured.

However, in most cases of the international trades contracts, i.e. the cases that require transportation of goods, it is assumed that the seller has not directly delivered the goods to the customer, but the goods are delivered to the carrier and he, in turn, would deliver the goods to the customer. In such cases, an additional state is happened, since neither the seller, nor the customer has the physical control over the goods. Contrary to them, the carrier is the one who has the practical ownership of the goods. Usually, in such cases, the customer holds the guaranty when the goods are delivered to the carrier. This sentence seems to be unfair, since the goods are far from the customer's control. Such is the case for the seller, and the customer is not in the position to control the career (Olumi Yazdi, 2005, p.80).

However, in the international trade, after delivery of the goods to the carrier, the customer holds a sentential ownership (assumptive) on the object of sale, and it leads to the transfer of guaranty to him.

***c) Selection of the Vienna Convention and Incoterms***

The convention considers the date of the goods delivery as the main rule in guaranty transfer (article 67 of convention), and exceptionally, and as a subsidiary rule, has accepted the first solution (date of establishment of contract) (article 68 of the convention). In justification of the solution accepted in the convention (date of delivery), it is said that the person who now holds the ownership of the goods is in a better position for prevention of the risks, or taking measures for obviation of the losses such as referring to the expert or the insurer, and it is fair the guaranty of the goods be upon him (Safaei, 1996, p.144).

In 2000's Incoterms, the risk transfer is set in the sections A5 and B5, which puts it that the guaranty in all the Incoterms clauses, is transferred to the customer at the moment of delivery. The meaning of moment of delivery is expressed in the sections A4 and B4. These sections determine the time of delivery of the goods by the seller, and receiving it by the customer. The



moment of delivery is different in various types of Incoterms, so the time of guaranty transfer is also variable (Darab Poor, 2009, p.105).

Regarding the fact that the articles related to the bilateral guaranty transfer are different, in the articles from 66 to 70 of convention, each of these articles are separately investigated in this chapter.

### ***Second Clause: The Effect of Bilateral Guaranty Transfer (Article 66 of Convention)***

The article 66 of convention asserts: “the loss or damage to the goods, after the transference of bilateral guaranty (risk) to the customer, does not lead to his indulgence from his commitment for paying the price, except for the case the loss or damage is caused by the action or omission of the seller”. This article is the introduction of the fourth chapter of convention, which is about the bilateral guaranty transference, expressing the main effects of guaranty transfer. Other rules provided in this chapter are about the moment of the bilateral guaranty transfer (articles 67 to 69) and the relationship between the guaranty transfer and major violation of contract (article 70). Similar chapter that was provided in the international trade uniform law (chapter 6), was provided in the Vienna’s convention in advance, i.e. the current stance, since the bilateral guaranty and the parties’ commitments execution are interrelated (Darab Poor, 2008, p.16).

The risk, in this chapter of convention, includes any kinds of loss or damage to the goods due to any accidents, for which, none of the parties are responsible. Such a loss or damage might be due to theft, corruption of goods, reduction in goods quality, damage due to inappropriate packing or storing, etc. The customer should accept the damaged goods and pay the price without holding the rights and compensation methods mentioned in article 45, since the loss has been accidental. In this case, the customer cannot accuse the seller of non-execution, and ignore his commitments. It might seem that it is a harsh rule against the customer, but in the international trade, there is always the possibility of unpredicted accidents, especially in terms of international trade that based on its nature, is always a risky area. It is more conventional for the customer to be the party who bears the loss guaranty. Therefore, the article 66 of the convention clearly express that the customer is committed to pay the price of the goods after the transference of guaranty to him. An important point that should be noted is that the time of guaranty transfer is different and it is set by article 66 to 69 of the convention. But what the exact meaning of “customer’s action or omission” is? There are two different views that answer this question. The first view is that the terms ‘action’ and ‘omission’ is the violation of the customer’s commitment, based on the contract of sale or convention. The second view states that seller’s action or omission should not necessarily have contract violation nature, but there can be any accident for which, the seller is responsible, and can lead to the loss or damage to the goods. In such cases, the seller is either the ruling party of the contract based on law, or responsible party based on the convention and the civil responsibility rules. Based on the second view, the article 66 must be interpreted in a way that include such cases in which, the seller’s behavior is not illegal according to the contract law (violation of the commitments), but it may be illegal according to the civil responsibility rules. So, the guaranty would remain in the hand of the seller (Darab Poor,2008, p.16).

In addition, based on “Professor Honnold” view, this decision seems to be logical for unlimited application of the article 6, since the seller, through unrightfully confiscating of the goods or preventing the legal flow due to conditions that do not breach the contract, may cause damage



to the goods. On the other hand, action or omission which is clearly legal would not prevent application of the rules of guaranty (Honnold, 1999, p.3569).

Article 387 of Iranian Civil Law asserts that the loss should be flawless and negligence should be committed by the seller. Therefore, one of the conditions for application of the object of sale's loss before delivery, is the outbreak of loss due to external accident, as the jurisprudents also have differentiated the object of sale's loss and damaging it, and believe that damaging the property by the seller, customer, or even a third party would obey separate sentences. The loss to the property by the customer himself is considered as delivery of the object of sale and as a result, it can be regarded as property loss after delivery which is upon the customer, and not the seller. As for the third case, since it has a forced state, and leads to the cancellation of the contract, and either the like of the property or its price should be paid, there are controversies (Shahidi, 1991., p.219).

*a) Bilateral Guaranty Transfer in the Cases Which Require Transportation (Article 67 of the Convention)*

The bilateral guaranty transfer in trades that require transportation of the goods, is set in an independent article in the Vienna's convention, which is the article 67. And since the international trades require transportation of the goods, article 67 constitutes the general sentence of the guaranty transfer based on the convention. The paragraph one of the article 67 creates two rules: a) if the contract of sale requires transportation of the goods, and the seller is not obliged to deliver them to a specific place, the bilateral guaranty (risk) is transferred to the customer when goods in the contract of sale is submitted to the first carrier for delivery, b) in case the seller is obliged to deliver the goods to the carrier in a specific place, the guaranty would not be transferred to the customer until the time the goods are submitted to the carrier, in the agreed place.

*- Submission of the Goods to the First Carrier*

There are two views on the concept of the first carrier. One view strengthens this idea that the carrier should be necessarily international and the local carrier would not be included by the article 76 and thus, the risk transfer is not in accordance with the first rule of article 67. Another view states that the local carrier should not be differentiated from the international carrier and the submission of the goods to him would lead to risk transfer.

Another issue that arises controversy is that whether the transportation agency concept can be considered as the first carrier? There are different views on this issue some of which accepting it and some rejecting it. One view is that the transportation agency should be considered as the initial carrier and the guaranty should be transferred right from the moment the goods are delivered to it, since this agency is an independent institute that holds the control over the goods.

However, there is another view that provides a kind of separation by the use of 'responsibility criterion'. If the transportation agency (or the transportation rent agency) has an agency for doing the transportation operations, and is exempt from the responsibility, it should not be considered as the carrier in the scope of the first sentence of article. But, if he participates in goods transportation with accepting the responsibility, in this case, it should be considered as the first carrier (Valiti, 2003, p.23).

Generally, division of the guaranty during the transportation is not desirable, since serious affirmative problems would arise. Therefore, proving the time of damage is not an easy task, to



check it has happened prior or after the guaranty transfer to customer, especially when the damage is happened due to an unclear accident (such as the high temperature, damage to the goods caused by sea water), that usually is clear at the end of the sea trip. By imposition of the guaranty to the customer during the transportation, probability of guaranty division is obviated. On one hand, this sentence is fair, since the goods are no longer under the control of seller and he should not bear the guaranty of the property which is no longer in his hand.

However, on the other hand, it is not also under the physical control of the customer, but it is controlled by the carrier. Thus, isn't this rule so harsh to the customer? The answer is that the party which holds the guaranty should be the customer, since the loss or damage is usually manifested at the end of the sea trip and when the goods are in the hands of the customer. Therefore, he is in a better position than the seller, since he is the one who can keep the goods which are not completely damaged through testing them and finding the possible defects, and referring to the insurer for compensation of the loss. In addition, the rule of the first sentence of article 67 is mush effective for container transportation (Darab Poor, 2009, Vol.3, p.28).

- *Submission of the Goods to the Carrier in a Certain Place*

The second sentence of the first paragraph of article 67 asserts that if the seller is obliged to submit the goods to the carrier in a certain place, the guaranty would not be transferred to the customer until the time they are delivered to him. This rule, actually does not arise any problems, and it is applied in situations in which the parties agree on delivery of the goods in a certain place. In such situations, when the goods are submitted to the first carrier, the guaranty is not transferred, but it is transferred by delivery of the goods to the carrier in the agreed place. If the place is described generally, the seller has the right to determine it (Safaei, 1996, p.111).

This section of the article 67 has no obligations to provide solutions in cases in which, the seller is not able to deliver the goods due to customer's negligence.

Therefore, since the second rule of article 67 allows the use of commercial terms, it should be said that the most common commercial term which is in accordance with this rule is the term FCA4 (condition).

It means that the seller fulfils his commitment for delivery of the goods after clearance, when he submits them to the carrier assigned by the customer, in a certain place.

It should be noted that based on article 67, the mere delivery of the goods to the carrier does not lead to transference of guaranty to the customer, but another condition is needed and that is the determination of the goods (sentence 2 of article 67).

*b) Guaranty Transfer in the Contact of Sale of the Goods in Transit (Article 68 of Convention)*

The convention has an independent article for guaranty transfer of the goods sold during shipping. Sell during the shipping means that the goods are sold while being carried on a ship, train, or truck. It happens when the seller has purchased large shipments of oil, natural gas, wheat and metals, and in general, goods shipped in bulk, and the sea trip to a destination is initiated without formerly selling of the goods and without knowing the identity of the goods receivers. So, the contracts of sale are established while the goods are being carried, and in most cases, they are sold at different times till the final destination is reached.

It is based on the above explanations that convention evaluates this situation in article 68 and by compromising the main rule of the delivery, in such cases, the guaranty is transferred to the customer from the moment of establishment of the contract and only in particular cases, the



guaranty is retrogressively transferred to the carrier who has issued the guaranty documents. Selling of the goods in transit (especially the marine transit) is caused by one of the characteristics of bill of lading which is the reason for the ownership of the goods. This characteristic of ocean bill of lading allows its transference from the main owner to others. It is one of the most important bases of international trade. Sometimes, the ocean bills of lading, especially those of oil shipments, are transferred dozens of times. Unlike the air, rail, and road bills of lading, which are merely the goods, the ocean bills of lading are the reason for ownership. The bill of lading in the hand of the owner is the reason for ownership of the subject of it. The combined bills of lading can be set either transferrable or non-transferrable. By transference of the bill of lading through endorsement, not only is the goods ownership transferred to the receiver, but also all the rights and commitments of the ocean bill of lading holder are transferred to him.

*c) Transference of the Guaranty when the Transportation is not Required (Direct Delivery to the Customer, Article 69)*

Article 69 of convention has predicted an assumption, not provided in the two previous articles (67 and 68). This assumption is the direct delivery of the goods to the customer.

Delivery of the goods to the customer is accepted in two assumptions. The first assumption is handing the goods over to the customer by the seller, in his place of trade. In this state, the customer is required to receive the goods at that place and the guaranty is transferred to him by delivery of the goods. However, whenever the goods are given to the customer, but he refuses to receive it, the guaranty is transferred to him right from the moment the goods are given to him, providing that the customer's negligence in receiving the goods is considered as the contract cancellation (clause 2 of article 69). Therefore, in case the customer is committed to receive the goods in a certain period of time (for example in 20 days), he can refuse to receive them until the end of that period, and the guaranty would not be transferred to him until the end of the mentioned period, since without receiving the goods before expiration of the period, the contract is not violated.

The second assumption is that the seller is committed to deliver the goods in certain place other than his place of trade. In this assumption, the guaranty is transferred right from the moment the customer receives the goods, and in case the customer refuses to receive them, from the moment the goods are given to him, and he has knowledge about it, the guaranty is transferred (clause 2 of article 69). The latter condition is set because he has been able to receive the goods and they were effectively provided to him. In this regard, the mere sending of a note to the customer (based on article 27) does not suffice and he should be informed that the goods are given to him. Therefore, if the goods are in a public store, and the seller inform the customer that the goods will be his in that place, and he can receive it, then if the goods are lost before the expiration of the agreed period and before customer receives it, the seller would not bear any responsibilities, and the loss would be upon the customer (Darab Poor, 2008, Vol.3, p.41).

In addition to what was mentioned above, paragraph 3 of article 69 of convention requires the exact allocation of the goods for the contract as the precondition for guaranty transfer to the customer. Before, a similar rule in the article 67 was observed, so the seller is required to send a notice to the customer and inform him about allocation of the goods. Therefore, the seller should fulfill his commitment for customer's compliance in receiving the goods.

*Third Clause: Violation of the Contract and Guaranty Transfer (Article 70)*



The Vienna Convention has adopted many of the concepts of the Uniform International Sales Act (1964), but has made them purer and more acceptable. It also retains the distinction between the essential and non-essential violation of the contracts of sale; however, it defines the essential violation more objectively. The Vienna's convention defines the essential violation in article 25, as follows:

“the violation of contract by one of the parties is considered essential when it cause such a loss to the other party that it essentially deprives him of the right he hoped to has, by the contract, unless the violating party has not predicted such a thing, and an ordinary person similar to him also could not predict it in the same situation”. Practically, the objective criterion of the essential violation significantly limits those claims from which the cancellation of the international contracts of sale, based on the convention, can be realized (Plantage, 1998, p. 245). Briefly, the term ‘essential violation’ does not have a history. This term is a new legal term that is the result of compromise, and good or bad, can be interpreted differently, especially when the terms ‘major loss’ and ‘unpredictable’ are to be used with it. For realization of major violation, the person who has borne the loss, be the seller or the customer, should have borne a major loss. The term major loss is one of the innovations of the convention that is manifested when the convention is compared to the Uniform Law of International Trade. Form one point of view, simply, by the loss, it is meant that in some rare cases, the cancellation of the contract is allowed or the replacement is delivered, or the transfer of the bilateral guaranty of the loss is prevented. Thus, the article 70 of the convention asserts that in case the customer has committed essential violation of the contract, the rules 67, 68, and 69 do not interfere with compensation of the loss that is caused to the violation of the contract, to the customer (Darab Poor, 2008., Vol.1, P.20). In the Iranian law, the bilateral guaranty is transferred to the customer with delivery of the object of sale. In the article 367 of civil law, it is stated that “delivery is handing the object of sale over to the customer in a way that is a kind of ownerships and benefits”. Based on what was mentioned above, whenever the object of sale is given to the customer, and he refuses to receive it, the meaning of article 70 that connects the essential violation and guaranty transfer, is better inferred with an example (Katouzian, *ibid*, Vol.1, p.166).

In this way, whenever the object of sale is lost or damaged by force, after its delivery and before cancellation of contract of sale, the guaranty and loss would be upon seller, and the customer can cancel the contract and claim the price back. And if the object of sale is sale is defected, he can return it to the seller with the same status, and if it is lost, he is not obliged to give the replacement and the loss is upon the seller (deducted from Article 345 of Civil Law).

The following list covers all the compensations mentioned in Articles 45 to 52 of the Vienna Convention:

- 1) Cancellation of the contract, 2) request for execution of the contract in cases in which basically, no delivery has been accomplished or the goods are less than what it supposed to be, 3) request for replacement or repair of the goods in cases the goods quality is not in accordance with the contract, 4) proportional reduction in the contract price of the goods, and 5) claiming the loss

## CONCLUSION

By determination of different bases of bilateral guaranty including its application date, and evaluation of domestic lawyers' views as well as the international lawyers, who claim to be the innovator of a new discipline in the world, we found out that what is considered as the term 'risk' in the text of 1980's Vienna convention, is the same bilateral guaranty discussed comprehensively in the jurisprudence texts and consequently, the domestic laws. More importantly, the rules currently available in the convention are surprisingly consistent with the jurisprudence rules and the domestic laws of Iran, which is itself a sign of Shi'i jurisprudence and lack of trusteeship of the enactors of the convention, since they have not mentioned the reference they have used anywhere, and with a false prestige, know themselves as the pioneers of this subject.

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