Akademik Tarih ve Düşünce Dergisi *Academic Journal of History and Idea*
ISSN: 2148-2292
12 (1) 2025

Derleme Makalesi | Review article
Geliş tarihi |Received:19.11.2024
Kabul tarihi |Accepted:03.02.2025
Yayın tarihi |Published:25.02.2025

Mohammad Ekram Yawar

https://orcid.org/0000-0003-3198-5212
Asst. Prof. Dr. Dean of the Faculty of Law, International Science and Technology University, Warsaw, Poland, ekram.yawar@istu.edu.pl

Sameulhaq Amany

https://orcid.org/0009-0009-4681-2761
Master's student in Administration and Economics, Sabahattin Zaim University, Türkiye, sameulhaq.amany01@gmail.com

Atıf Künyesi | Citation Info

Yawar, M. E. & Amany, S. (2025). Correspondence of Forms in Sales Contracts: Examination of Existing Theories in Legal Systems and Discussion of Their Application to the Contract for the International Sale of Goods. *Akademik Tarih ve Düşünce Dergisi, 12* (1), 197-217.

Correspondence of Forms in Sales Contracts: Examination of Existing Theories in Legal Systems and Discussion of Their Application to the Contract for the International Sale of Goods

Abstract

In the world of commercial exchanges, it often happens that the buyer and seller, each by sending separate correspondence and in response, declare their intention to conclude a sales contract. General terms and forms that are previously regulated in the same way for all contracts by the buyer or seller are exchanged between the parties. These general terms may conflict with each other in the forms of the buyer and seller. When a dispute arises between the parties to a contract, the question is whether a contract has been concluded despite this discrepancy, and if so, what are the purposes of this contract? The totality of the circumstances, conditions, and conduct of the parties after the exchange of forms usually indicates the conclusion of a valid contract, and it is more logical that the meaning of this contract, also in the part that refers to the conflicting forms, should be determined by the law governing the

contract, rather than by one of the conflicting terms proposed by the parties (for example, the first or the last of them in terms of the priority and delay of the exchanged forms). If the law governing the contract is the contract for the international sale of goods, this role is assigned to the contract.

Keywords: *Conformity of Forms, Convention for the International Sale of Goods, Conflicting Contractual Terms*

Satış Sözleşmelerinde Şekil Uyumluluğu: Hukuk Sistemlerinde Mevcut Teorilerin İncelenmesi ve Milletlerarası Mal Satımına İlişkin Sözleşmeye Uygulanmasının Tartışılması

Öz

Ticari alışverişler dünyasında, alıcı ve satıcının her birinin ayrı ayrı yazışmalar göndererek bir satış sözleşmesi akdetme niyetlerini beyan etmeleri sıklıkla karşılaşılan bir durumdur. Alıcı veya satıcı tarafından daha önce tüm sözleşmeler için aynı şekilde düzenlenmiş olan genel şartlar ve formlar taraflar arasında teati edilir. Bu genel şartlar alıcı ve satıcının formlarında birbiriyle çelişebilir. Bir sözleşmenin tarafları arasında bir uyuşmazlık ortaya çıktığında, soru, bu uyuşmazlığa rağmen bir sözleşme yapılıp yapılmadığı ve eğer yapıldıysa, bu sözleşmenin amaçlarının ne olduğudur? Tarafların formların teatisinden sonraki durum, koşul ve davranışlarının toplamı genellikle geçerli bir sözleşmenin yapıldığını gösterir ve bu sözleşmenin anlamının, çelişkili formlara atıfta bulunan kısımda da, taraflarca önerilen çelişkili terimlerden biri (örneğin, teati edilen formların önceliği ve gecikmesi açısından bunlardan ilki veya sonuncusu) yerine sözleşmeyi düzenleyen hukuk tarafından belirlenmesi daha mantıklıdır. Sözleşmeye uygulanacak hukukun uluslararası mal satım sözleşmesi olması halinde, bu rol sözleşmeye verilir.

Anahtar Kelimeler: *Şekillerin Uygunluğu, Milletlerarası Mal Satımına İlişkin Sözleşme, Çelişen Sözleşme Şartları*

Introduction

A lot has been said about offer and acceptance in contracts, but in sales contracts, and especially international sales, a relatively new situation has emerged, and that is offer and acceptance, which is carried out by the buyer and seller through the successive exchange of pre-arranged and standard contractual forms. Some of these forms are completed in each transaction, taking into account the characteristics of the goods and the price and issues of this kind, which are specifically negotiated between the buyer and the seller in that transaction, and the other part, which is in the form of general conditions and common to all transactions, is sent

to the other party without negotiation in each transaction, untouched. These general and predetermined terms and conditions, which are sent by each party to the other party in the form of a special printed form, may be subject to variation. In this situation - which is called a "contradiction of forms" - two questions arise: one, whether a contract is formed despite this discrepancy? and the other, if a contract is formed, what are its terms or conditions? In the first part of the article, we will examine the answers of various legal systems and theorists and the strengths and weaknesses of each of these answers to the above questions, especially the second question. The conflict of laws in Iranian law has not been specifically addressed by the legislator, and even our lawyers have not seriously considered it.

What is presented in this article in analyzing the foundations of these theories and their reasonableness or usefulness can also be used by Iranian lawyers and in the Iranian legal system, and knowing it is necessary in choosing the best theory in Iranian law. In the second part of the article, the solution presented in the 1980 United Nations Convention on Contracts for the International Sale of Goods (United Nations Convention on Contracts for the International Sale of Goods (1980) or CISG). (for the correspondence of forms is examined. Unlike the Principles of International Commercial Contracts regulated by the International Organization for the Harmonization of Private Law (International Institute for the Unification of Private Law). Principles of International Commercial Contracts, 2010, or UPICC. Article 2.1.22) the European Principles of Contract Law (The Principles of European Contract Law, 2002 or PECL. Article 2:209) and the United States Commercial Code (Uniform Commercial Code, 2004 or UCC. Article 2-207), the 1980 Convention does not contain any specific provisions on the equivalence of forms and such in the international sale of goods. Whether the treaty actually provides a solution to this issue, and if so, what that solution is, has been the subject of much debate among commentators.

Although Iran has not yet acceded to this Convention, considering that many countries have acceded to it and considering that, as the application of the governing law, whether the law chosen by the parties to an international sale or foreign law - in fact, the Convention for the country to which it has acceded - may require consideration in Iranian courts in contractual disputes based on the rules of private international law, Iran The treaty is not without its benefits in this regard. Since this treaty seeks to find a middle ground and, as far as possible, consensus on issues concerning the conflicting legal systems, awareness of this solution in the discussion of the equivalence of forms is very useful for the Iranian legal community in finding answers

to questions related to the equivalence of forms in domestic law (Uniform Commercial Code, 2004 or UCC. Article 2-207).

1. Problem Statement, Definition and Basic Questions

One of the common occurrences in business dealings and transactions is a response given as acceptance to an offer, which may contain additions or changes to the original offer. In the course of business, especially in international trade, pre-printed orders under titles such as Purchase Order (by the buyer, who is usually the offeror) and Order Confirmation (by the seller, who is usually the addressee of the buyer's offer) are usually exchanged between the buyer and the seller to express the intention of the transaction and state the terms of the relevant contract. According to these forms, the main features of a specific contract, such as the description, quantity, and price of the goods for that specific transaction, are mainly negotiated between the parties and are specifically written on the form, but the general terms are not negotiated separately in each specific case and are usually printed on the back of the same form. The form usually indicates what and where the additional and general terms are and that the principles are behind the form. Since the general terms that each party includes in their respective form (such as the limitation of liability and the dispute resolution clause) are the ones that secure the interests of the regulator or its provider; In many cases, the general terms of the contract parties, which are sent to the other party in printed forms, are contradictory (Honnold, 2009) a situation that raises the issue of “counterpart forms” and its process and legal effects are discussed and examined in this paper. Block's Dictionary of Legal Terms defines the conflict of forms as follows:

"The conflict of terms of standard forms exchanged between buyer and seller in the course of contractual negotiations" (Garner, 2004). In order to clarify the issue and determine the scope of the discussion, it is necessary to mention two points: First, from the totality of the discussions on the conflict of forms, it is clear that the discussion of the conflict of forms is specific to the situation in which the principle of offer and acceptance is replaced by the exchange of forms. be expressed as contradictory or different, and not that the exchange of forms is a prerequisite for subsequent acceptance (Some authors, in their analysis of the conflict of forms provisions in the United States Uniform Commercial Code, have distinguished two cases: one in which the parties first reach an agreement and then exchange forms for final approval, and the other in which there is no agreement before the exchange of forms (Brown, 1990). Secondly, the provisions on the exchange of forms do not govern the amendments and modifications of the

contract made by the exchange of different forms and are solely specific to the initial formation stage of the contract (Dimatteo, 2005).

The parties to the transaction often only consider the negotiated terms and generally both parties are unaware of the other party's standard terms. In most cases, these forms are exchanged without any particular problem, and even the goods are delivered and the price is received, without the parties noticing or objecting to the contradictions between the terms of the forms (Rasmussen, 2000).

However, in practice, disputes may arise before the delivery of the goods and often after the delivery of the goods, such as when one party suffers damage due to defective goods and the extent of the seller's liability is considered differently in the forms of the parties. Here, the first question is whether a contract has been formed despite the general and conflicting conditions. And secondly, if there is a contract, what is the purpose of this contract? (Keatling, 2000).

It seems that if an exchange of forms takes place and the subsequent conduct of the parties indicates their intention to enter into a binding contract—something that is often the case in disputes arising from a conflict of forms—courts in all legal systems are inclined to recognize a valid contract despite the existence of conflicting terms (Dimatteo, 2005).

The discussions among the scholars do not show any particular disagreement in this regard. The main problem lies in determining the meaning of the contract, which will be discussed further in the body.

2. Theories on Determining the Subject Matter of a Contract in the Case of Forms

There are three theories in response to the question of how to determine the subject matter of a contract in the case of a case of conflicting forms:

1. The last form sent between the parties determines the terms of the contract
2. The first form sent determines the terms of the contract
3. None of the forms determine the terms of the contract.

2.1. The “Last Word” Theory

If we are to believe that an acceptance must be made in strict accordance with the terms of the offer in order to be considered an acceptance, we are bound by the rule of (Stephens, 2007) “the requirement of complete conformity of the acceptance with the offer.”

Therefore, if there is no complete conformity, what is expressed in the place of acceptance is in fact a rejection of the offer and a reciprocal offer. The logical consequence of the rule “the

requirement of complete conformity of acceptance with the offer" is the "last word" rule. (Gabriel, 1993).

According to the "last word" rule, the last form rejected and changed before the execution of the contract (or other similar act that is a sign of acceptance) (Stephens, 2007) is the last offer, and the execution of the contract that follows it is considered an acceptance of that offer (Gabriel, 1993).

For example, if the buyer sends a purchase order and its form and the seller sends a purchase confirmation and its form along with it and the goods, the seller's response due to the lack of full conformity with the offer is a reciprocal offer and the buyer's acceptance of the goods is an effective acceptance of that offer and the terms of the seller's form are the same as the terms of the contract (Article 194 of the Iranian Civil Code - at least at first glance - expresses the acceptance of the rule of the necessity of complete conformity of the offer with the acceptance).The "last word" rule is the traditional answer of the common law to the problem of conflict of forms (Gabriel, 1993).

Of course, it is an oversimplification to imagine that common law courts were absolutely and in all cases bound by the aforementioned mechanism. The use of the above mechanism and work has been modified to some extent under various circumstances, so that while adhering to the rule of "needing full compliance with acceptance or obligation" the governing form has not always been the final form (Gabriel, 1993).

The advantage of this theory is that the application of the "last word" rule by the court leads to certainty and finality in answering the main question in the discussion of the conflict of forms, namely, determining the meaning of the contract. Regardless of the intention of the parties, which is also sometimes difficult to ascertain, the dispute between the parties in conflicting forms is always resolved with the same formula. In addition, the time and place of the conclusion of the contract are also clarified by this description.

The disadvantage of this method is that the legal certainty and solidity present in it is due to the imposition of dry and formalistic rules on the agreements of individuals that are not necessarily applicable to the existing facts (Stephens, 2007).

Since the "last word" rule seems to be a relic of a time when, due to the simplicity and brevity of the mechanism of offer and acceptance, each party was aware of all the terms of the other party's offer it can be said that the default assumption of this method for resolving the

conflict of forms problem is that the parties are aware of the meaning of the offer and the reciprocal offer and the conflicting forms (Stephens, 2007).

The assumption that once, due to the simplicity of the structure of contracts, was consistent with reality in most cases, is now largely untrue. A serious problem with the use of the rule of complete conformity of acceptance with the offer and, consequently, the rule of last resort is that in the event of minor differences in the meaning of the offer and acceptance, the parties to what is essentially a binding contract are given the opportunity to escape from contractual obligations.

In the previous example, the buyer can always avoid forming a contract and fulfilling his obligations by not accepting the goods, in response to changing market conditions and for his own benefit. Courts have adopted various methods to deal with this problem. For example, it has been stated that a minor change in the terms of the acceptance based on commercial usage and good faith does not actually cause a change in the terms, or that the changes in the acceptance are only proposals to amend the contract, or that, by the silence of the other party, these changes in the acceptance have actually been accepted (Honnold, 2009).

The use of these methods in solving the problem leads to the application of the judge's personal interests in determining the meaning of the contract, which is the very thing that the last word rule considers to be one of its advantages. Other criticisms have also been made of the application of the "last word" rule, including the fact that the application of this rule is completely unfounded.

Why should we make the last form the criterion before execution and not the first? The same arguments that exist regarding the validity of the “last form” can also be made regarding the validity of the first form, and the behavior of the other party can be considered as an indication of its consent. Another form of application of this rule may in practice end in a round or a continuous back and forth; That is, each party, before executing the contract, sends a form to the other party, which is the last form from him, and on this basis imposes his conditions, and the other party does the same again.

The most important drawback of this theory, as previously mentioned, is that it leads to ignoring the actual agreement of the parties; What both parties intended as an acceptance of the contract turns into a mutual obligation, something that was not usually intended by the parties. (Stephens, 2007 and Viscasillas, 2002).

2.2. The Theory of "Conflicting Terms"

If we distance ourselves from the formalist perspective, which of course provides a kind of certainty in resolving disputes at the cost of ignoring the actual agreements of individuals, and look at disputes in terms of forms with the assumption that, as a rule, neither party has read the general terms of the other party in the rejected and replaced forms and is not aware of them, we arrive at the theory of "Conflicting Terms".

In this theory, if the basic terms of the contract, such as the quantity and quality of the goods and the price, have been agreed upon and the parties have begun to perform, or there is another sign of a definitive agreement, the court will conclude that a valid contract has been concluded and will not consider the conflicting and different terms and clauses as part of the contract. (Dimatteo, 2005). Because not only The parties did not agree on them, but rather assumed that they were not even aware of them. In this case, the gap created by the deletion of the conflicting terms is filled by the provisions of the law governing the contract (Schlechtriem & Butler, 2008).

The rule of "severance of conflicting terms" in the United States (The ambiguity in Rule 207-2 of the Uniform Commercial Code of the United States of America regarding the conflict of forms has created numerous and different interpretations.

In general, it seems that the attribution of the "falling of conflicting terms" theory to this law has more supporters), France and Germany (Vergne, 1985) is a way of answering questions arising from conflicts of form (In the Iranian legal contract system, the common and real intention of the parties is decisive in the formation of the contract in many cases, a clear example of which is Articles 218 and 463 of the Civil Code. In general, the importance we give to the real will of the parties as opposed to what they declare for the conclusion of the contract leads to the fact that in the conflict between the two, the real will of the parties determines the type and nature of the contract (Katouzian, 2006).

On this basis, the terms and conditions of the contract can be considered subject to the real will of the parties in the event of a conflict of forms, and the priority or delay of the exchanged forms can be considered insignificant in this context, a position that seems to be consistent with the spirit of the Iranian legal system) Further explanations of this theory will be presented in the next section of this article and in the application of existing theories to the Convention on the International Sale of Goods (Ruhl, 2003).

2.3. The "First Form" Theory

The third solution, which is less discussed in the legal literature on the conflict of forms, is the validity of the first form exchanged in the conflict of forms. After much criticism by legal commentators in the United States of the doctrine of the last word applied by common law courts, the drafters of the United States Commercial Code provided a solution to the conflict of forms in Rule 207-2 of this law, the ambiguity of which has led to much disagreement among commentators (Additional Terms in Acceptance or Confirmation.

(1) A definite and seasonable expression of acceptance or a written confirmationwhich is sent within a reasonable time operates as an acceptance even though it statesterms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) (2)The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless: a) the offer expressly limits acceptance to the terms of the offer، b) they materially alter it; or c) Notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act. Additional Terms in Acceptance or Confirmation.

(1) A definite and seasonable expression of acceptance or a written confirmationwhich is sent within a reasonable time operates as an acceptance even though it statesterms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to thecontract. Between merchants such terms become part of the contract unless: a) the offer expressly limits acceptance to the terms of the offer، b) they materially alter it; or

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the

writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.

Additional Conditions in Acceptance or Confirmation:

1) A timely and definite statement of acceptance or confirmation in writing sent within a reasonable time shall operate as acceptance even if it contains additional or different terms than those stated in the offer or agreed upon, unless acceptance is expressly made conditional on acceptance of different or additional terms.

2) Additional terms shall be construed as offers to add to the contract. Among merchants these terms form part of the contract unless:

a) the offer expressly requires acceptance to be limited to the terms;

b) they substantially alter it; or

c) notice of objection to them has been given before or within a reasonable time after receipt of notice of them.

3) The conduct of both parties acknowledging the existence of a contract is sufficient to establish a contract of sale, even if the writings of the parties do not establish a contract otherwise.

In this case, the terms of that particular contract include those terms that the parties' writings agree to in that section, plus any additional terms that are included under other provisions of this law)

According to the second paragraph of this provision, additions to what has been offered as an acceptance (Stephens, 2007) in some cases - such as transactions between non-businessmen - even in the event of a contract being concluded, (Davis, 1973) have the title of an offer only; the result is that if these changes are not accepted, the meaning of the contract is the same as that in the first form (Rosh,1990).

It is not entirely clear to what extent the first form theory can be attributed to the uniform form law and, if this attribution is correct, why, in the opinion of the drafters of these regulations, the validity of the first form should replace the validity of the last word, and even the numerous discussions among jurists have not reduced this ambiguity. These criticisms ultimately led to a change in the form-matching provision in the United States Code in 2003, although the new provision has not yet been adopted as law by the states (Uniform Commercial Code, 2024).This theory does not seem to have many supporters outside the scope of the interpretation of the United States Code, and therefore we will not consider it further.

3. Correspondence of Forms in the Contract for the International Sale of Goods

Contrary to the principles of international commercial contracts regulated by the International Organization for the Unification of Private Law (Regulation 201022 in these principles is in opposition to forms. Battle of FormsWhere both parties use standard terms and reach agreement except on those terms, a contract is concluded on the basis of the agreed terms and of any standard terms which are common in substance unless one party clearly indicates in advance, or later and without undue delay informs the other party, that it does not intend to be bound by such contract) the European Principles of Contract Law-Rule 2:209 in these principles is in opposition to forms.

Conflicting General conditions;

(1) If the parties have reached agreement except that the offer and acceptance refer to conflicting general conditions of contract, a contract is nonetheless formed. The general conditions form part of the contract to the extent that they are common in substance.

(2) However, no contract is formed if one party:

(3) General conditions of contract are terms which have been formulated in advance for an indefinite number of contracts of a certain nature, and which have not been individually negotiated between the parties) and the United States Commercial Code, the 1980 Convention for the International Sale of Goods does not contain any specific provisions on correspondence of forms with this title. Although a proposal to include provisions of this nature was made during the negotiations to regulate the treaty, it was ultimately not voted on. (The proposal by the Belgian representative to include provisions on the conflict of forms in the treaty was not successful, see. Official Records (A/CONF.97/C.1/SR.10, in A/CONF.97/19 at 288-289)

There are two theories as to whether the Convention can provide a solution to questions related to the correspondence of forms: First, the Convention does not ignore the correspondence of forms (Honnold, 2009) and the issue of correspondence of forms can be resolved on the basis of Article 19 (Schlechtriem & Butler, 2008) of the Convention (Article 19 of the Treaty: (1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter- offer.

(2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

(3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's). In support of this view, it has been noted that many national courts have used Article 19 and its rules of acceptance and obligation to resolve issues related to the equivalence of forms for the execution of a contract (Dimatteo, 2005).

Another view is that the international sales contract does not contain any provisions on the nature of the conflict of forms and that if the Convention on International Sales were to be used instead of the governing law, other methods should be used to resolve the conflict of forms issue. We will examine both views later in the article (The principle of the issue of introducing fixed and standard contractual terms and conditions into sales contracts governed by the International Sales Convention, and the validity or invalidity of these standard terms that are not independently negotiated in each contract regardless of whether they conflict with each other or not) from the perspective of the Convention, is one of the issues that has led to different practices in different countries, which, in addition to the correspondence of forms in the Convention on the International Sale of Goods, have also led to differences in practice. It is related but requires another discussion (For further reading, see Eiselen, 2011) but before that we will provide a brief explanation of the rules relating to offer and acceptance contained in Article 19 of the contract.

3.1. The rules on offer and acceptance in the contract

Article 19 of the Convention on the International Sale of Goods was one of the few important issues on which there was a wide divergence between Western and socialist legal systems. The socialist countries generally believed that for a contract to be formed, there should be no contradiction between the offer and the acceptance. Therefore, because the provisions of the first and second paragraphs of Article 19 allowed for a degree of contradiction between the offer and the acceptance, and also because of the ambiguity in the phrase "fundamental change in the terms of the offer" mentioned in the second paragraph (i.e. according to the opponents, the boundary between fundamental and non-fundamental change was not clear), a proposal was made to delete the second paragraph of Article 19, which was not voted on, but the change in the article was still desired by the opposing countries.

In order to preserve the second paragraph and to satisfy the opponents' views, a compromise was reached in which, instead of deleting or changing the second paragraph, a third paragraph was added to provide examples of fundamental changes. But these examples, if

considered alone, would be too broad and would not leave much room for changes that fall under the heading of non-essential. To overcome this problem, the third paragraph had a sentence at the end that modified it (Unless the offeree by virtue of the offer or the particular circumstances of the case has reason to believe they are acceptable to the offeror"). With the renewed objection of some countries and in order to avoid the deletion of the last two paragraphs of Article 19, which had been proposed again by the representative of Bulgaria, a compromise was reached and the last sentence of the third paragraph of Article 19 was deleted and the Article was given its present form (Vergne, 1985).

Thus, it seems that the appearance of Article 19 in its current state is more in line with the views of the socialist countries. The first paragraph of Article 19 sets out a widely accepted traditional rule. The second and third paragraphs set out exceptions to this traditional rule, but the article should be read as a whole. (243) The first paragraph is the common core of the classical approach of various legal systems to offer and acceptance, and the second paragraph corresponds to the modern practice that now exists in written and common law countries. (253) According to Article 19, what is to be accepted is considered as a rejection of the offer and a counteroffer in two cases:

1. The reply contains substantial changes or additions.
2. The offeror objects to the additions or changes without undue delay (Kelso, 1982).
3. Review of the existing theories regarding the conflict of forms in the treaty.

There are two general views on the conflict of forms in the international sales contract, which we will discuss below.

4.The Theory of the Absence of Provisions for Resolving the Conflict of Forms in the Treaty

According to this theory, the treaty does not have any provisions on the conflict of forms. Proponents of this view are generally divided into several groups: some hold that, under Article 4 of the Convention, questions relating to the validity of the contract or any of its clauses (which also include questions relating to conflict of forms) are outside the scope of the Convention (Dimatteo, 2005) and should ultimately be resolved by reference to the governing national law. Others hold that, since the Convention does not contain any provisions on conflict of forms, there The distinction between internal and external gaps in the treaty, which has been made by some authors, is interesting.

According to this literature, the absence of a provision on the conflict of forms in the treaty is an internal gap that must be resolved within the framework of the treaty; that is,

although the conflict of forms is not objectively outside the scope of the treaty, the treaty does not provide for it (McMahon, 2005) is a gap in the Convention which should be resolved under Article 7, paragraph 2, and in accordance with the general principles on which the Convention is based. In this view, reference to domestic law is not necessary because it is aimed at achieving uniform implementation. The Convention is inconsistent and is not suitable for resolving the issue (Viscasillas, 2002).

In order to fill this gap, other sources may be referred to; for example, a group emphasizing the relationship between the "Principles of International Commercial Contracts drawn up by the International Organization for the Unification of Private Law" and the Convention on the International Sale of Goods and that the use of the Principles of International Commercial Contracts is appropriate in filling the gaps in the Convention (Garro, 1994). These Principles have clear provisions on the issue of conflict of forms,prescribing the use of this provision in the absence of the Convention on the Sale of Goods (Garro, 1994).

In criticizing this group of theories that believe that the Convention does not contain any provisions on the conflict of forms, it can be said that this claim is contrary to the course of negotiations and the history of the drafting of Article 19 of the Convention.

The fact that the proposal of the Belgian representative to include a provision entitled the conflict of forms in the Convention was not approved does not mean that there is a gap or gap in the Convention in this regard, but rather that a provision on the conflict of forms, which was an exception to Article 19 of the Convention, was proposed but did not receive a vote. To clarify further, the drafters of the Convention believed that there should be no difference between printed and form terms and non-form terms, and that the same provision of Article 19, which is essentially concerned with acceptance of a different obligation, is sufficient for the conflict between printed forms (Viscasillas, 2002).

In other words, if in a set of provisions, for example in the European Principles of Contract Law, there are both provisions on acceptance with modification (Modified Acceptance, Article 2: 208) and a provision on the conflict between forms or objections to general terms(Conflicting General Terms, Article 2: 209), this means that what is stipulated in the conflict between forms is an exception to the general rule regarding acceptance with modification (Viscasillas, 2002). Therefore, while the Convention on the International Sale of Goods does not contain an exception to Article 19, the general rule contained in Article 19 also applies to printed forms.

4.1.The Theory of the Existence of Provisions for Resolving the Conflict of Forms in the Treaty

The treaty has a provision for resolving the conflict of forms, which is Article 19. Which of the theories expressed in the conflict of forms can be attributed to the treaty is the subject of examination below:

4.2.Attribution of the Theory of the Last Word to the Treaty

The most important issue in the interpretation of Article 19 is that what is stated in paragraph 3 of Article 19 in the statement of "essential" examples includes almost all possible changes in acceptance. The question of whether the provision in paragraph 2 will remain useless despite the existence of the third paragraph? According to some, the answer is yes. In this view, almost all changes in acceptance are caused by the same traditional rule as in the first paragraph: that is, acceptance accompanied by a change is a rejection of the offer and a counteroffer. According to this interpretation, it can be said that the problem of the difference between an offer and an acceptance in a treaty is resolved in the same way as the classical rule in Commenla, that is, the acceptance of the rule of "the necessity of full conformity of the terms of the acceptance with the offer" (Dimatteo, 2005). or at least to recognize the general spirit of this rule (Gabriel, 1993).

In the view of this group, Apart from its theoretical basis, Article 19 of the Convention also increases the certainty factor in contracts concluded under it (Vergne, 1985), a function which is generally positive. (On this basis, some have compared the Uniform Commercial Code of the United States of America and the Convention on the International Sale of Goods regarding the conflict of forms and believe that the Convention has chosen certainty and the Uniform Code has chosen the actual agreement of the parties (Kelso,1983).

The case of a number of national courts in the application of the Convention has also been decided (Dimatteo, 2005). In any case, the criticisms that have been made of the last word theory in general are also applicable here. For example, the buyer accepts by sending a purchase order and his general conditions are also included in the purchase order, and the seller expresses his acceptance by sending a confirmation, on the back of which the seller's conflicting general conditions are printed.

In this case, if the seller, for example, sends a letter asking the buyer to pay special attention to the terms of limitation of liability that are stated on the back of the form (and these terms conflict with the buyer's general terms) and if there is a disagreement, inform the seller before the date of shipment of the goods, it may be possible to interpret the buyer's silence and

receipt of the goods as acceptance of the seller's limitation of liability condition. However, in a case where only the exchange of two forms with conflicting terms on their backs and without the seller's notice to the buyer, it is difficult to say that the buyer paid more attention to the seller's general terms than the seller did, did or should have paid to the buyer's general terms. There is a generally accepted principle that doubt should be directed against the person who created it. Here too, the acceptor has created such a problem by sending an ambiguous acceptance that contradicts the terms of the offer and should not benefit from it (Honnold, 2009). But is it possible that the treaty, despite the flaws in the theory of the last word, accepted this theory in the Contradiction of Forms? It seems unlikely. The theory of the “last word” has been rightly criticized for being unfair and fallacious.

4.3. Attribution of the Theory of the Fall of Conflicting Terms to the Contract

If we do not accept the determination of the terms of the contract based on the theory of the "last word" in the contract and at the same time we want to resolve the issue of the conflict of forms by referring to the contract.

In the example mentioned in the previous section, suppose that in the general conditions of the buyer's form, the seller's liability is extensive and in the general conditions of the seller's form, the seller's liability is limited. The buyer sends the purchase order and the seller sends the confirmation, and at the same time the forms ar exchanged. If nothing happens from here on, then certainly no contract has been concluded under Article 19 of the Convention.

But if the matter does not end here, that is, the seller sends the goods and the buyer receives them, despite the fundamental change in the terms of the acceptance to the offer, the occurrence of the transaction is undeniable according to the provisions of the Convention (For example, Articles 29(2), 9(1), 8(2), 8(1), 16(2), 18(3), and 18 (1) confirm the occurrence of a valid contract). An issue that may lead to the emergence of a dispute, namely the extent of the seller's liability, is not resolved by referring to the contract itself. This problem that the contract alone is unable to resolve the problem that led to the dispute is an example of one of the most common issues in contractual disputes, and providing solutions to fill the gaps in the contract is one of the most fundamental functions of the law governing commercial contracts. Since in this example it is assumed that the law governing the contract is the Convention on the International Sale of Goods, reference to the articles of the Convention that deal with liability, breach of obligation and damages (for example, Articles 45, 52, 61, 65, 74) will clarify the parties' disagreement on the limits of liability and related issues. In addition to the

aforementioned reasoning, the basis for this interpretation of the contract and its conflicting terms can be considered the parties' authority to deviate from the provisions of paragraphs 1 and 3 of Article 19, which is granted to the parties in accordance with Article 6 of the Convention (Schlechtriem & Butler, 2008).

A number of national courts have also followed the theory of "suppression of conflicting terms" and the substitution of the provisions of the International Sales Convention for the conflicting terms, rather than the "last word" (Dimatteo, 2005) theory, in resolving the issue of conflict of forms in contracts governed by the International Sales Convention (Wildner, 2008).

In conclusion, it can be said that the attribution of the theory of suppression of conflicting terms to the International Sales Convention is more appropriate, but not because the appearance of Article 19 of the Convention is incompatible with this. The theory is more compatible, but also because legal logic favors this theory more and the treaty also provides the possibility of such an interpretation.

Conclusion

Conflicts of form are potentially present in many domestic and especially international sales contracts, and in some cases they actually cause contractual disputes. In these cases, courts often rule that a valid contract is formed, considering the behavior of the parties and the circumstances that generally indicate the parties' willingness to enter into a transaction. However, regarding the terms of the concluded contract, the difference of opinion fluctuates between three views: the last word, the first form, and the fall of conflicting terms.

The traditional view is that since acceptance must be made exactly in accordance with the terms of the offer, the last form sent before the act or promise indicating acceptance is considered the offer, and the terms of the last form determine the terms of the contract, which is known as the "last word" theory.

In another theory, the "first form" theory, it is believed that in the event of a contract being concluded with conflicting forms, the role of determining the meaning of the contract should in some cases be given to the first form exchanged. Both of these theories face serious problems and criticisms.

An alternative and more logical theory is that the different terms of the parties in different forms do not fall within the scope of consent and contract and, in other words, are nullified by conflict. In this case, the void caused by the nullified terms is filled by the provisions of the law governing the contract.

It seems that legal systems are moving more towards accepting this latter theory. In the Convention on the International Sale of Goods, which is a prominent and successful example of the unification of legal provisions and international sales contracts at the global level, there is no provision entitled "contradiction of forms" and only "acceptance with modification" is mentioned.

This point has led some to believe that in the event of a conflict of forms where the governing law is the Convention on the International Sale of Goods, one should refer to other sources such as domestic law. However, it seems that the provision "acceptance with modification" in the Convention is also sufficient to resolve the conflict of forms issue. The appearance of this provision is more in line with the "last word" theory.

However, the new interpretative practice in national courts and among treaty commentators is the attribution of the theory of conflicting terms to the treaty. This new approach can be a guide to answering the issues arising from the correspondence of forms in

legal systems - such as the Iranian legal system - in which the common intention or agreement of wills is a determining factor in the formation and content of the contract and is also more important than the apparent form and format of the contract.

Refrences

Baird, D. G. (2000). Commercial Norms and the Fine Art of the Small Con: Comments on Daniel Keating's' Exploring the Battle of the Forms in Action'. *Michigan Law Review*, *98* (8), 2716-2726.

Brown, C. N. (1990). Restoring Peace in the Battle of the Forms: A framework for making Uniform Commercial Code Section 2-207 work. *NCL Rev.*, *69*, 893.

Davis, J. H. (1973). Defense of the Battle of Forms: Curing the First Shot Flaw in Section 2-207 of the Uniform Commerical Code. *Notre Dame Law.*, *49*, 384.

DiMatteo, L. A. (2005). *International Sales Law: A Critical Analysis of CISG Jurisprudence*. Cambridge University Press.

Eiselen, S. (2011). The requirements for the inclusion of standard terms in international sales contracts. *Potchefstroom Electronic Law Journal*, *14*(1), 2-31.

Gabriel, H. D. (1993). The Battle of the Forms: A Comparison of the United Nations Convention for the International Sale of Goods and the Uniform Commercial Code. *Bus. Law.*, *49*, 1053.

Garner, B. A. (2004). *Black's law dictionary.* St. Paul, Thomson West.

Garro, A. M. (1994). Gap-Filling Role of the Unidroit Principles in International Sales Law: Some Comments on the Interplay between the Principles and the CISG. *Tul. L. Rev.*, *69*, 1149.

Honnold, J. O. (2009). *Uniform law for international sales under the 1980 United Nations Convention*. Kluwer Law International.

Katouzian, N. (2006). Civil Law in the Current Legal System, 14th edition, Tehran, Publication. Mizan. https://www.mizan-law.ir/Book/Details/291

Keating, D. (2000). Exploring the Battle of the Forms in Action. *Michigan Law Review*, *98*(8), 2678-2715.

Kelso, J. C. (1982). The United Nations Convention on Contracts for the International Sale of Goods: contract formation and the battle of forms. *Colum. J. Transnat'l L.*, *21*, 529.

McMahon, A. J. (2005). Differentiating between Internal and External Gaps in the UN Convention on Contracts for the International Sale of Goods: A Proposed Method for Determining Governed by in the Context of Article 7 (2). *Colum. J. Transnat'l L.*, *44*, 992.

Rasmussen, R. K. (2000). Lawyers, Law, and Contract Formation: Comments on Daniel Keating's' Exploring the Battle of the Forms in Action'. *Michigan Law Review*, *98*(8), 2748-2759.

Rosh, R. M. (1990). Demilitarizing the Battle of the forms: a peace proposal. *Colum. Bus. L. Rev.*, 553.

Ruhl, G. (2003). The battle of the forms: comparative and economic observations. *U. Pa. J. Int'l Econ. L.*, *24*, 189.

Schlechtriem, P., & Butler, P. (2008). *UN Law on international sales: The UN Convention on the international sale of goods*. Springer Science & Business Media.

Stephens, C. A. (2007). Escape From the Battle of the Forms: keep it simple, stupid. *Lewis & Clark L. Rev.*, *11*, 233.

The Principles of European Contract Law, 2002. https://www.google.com/search?q=The+Principles+of+European+contract+law+pdf&sca

UNIDROIT (International Institute for the Unification of Private Law) https://www.unidroit.org/

Uniform Commercial Code, 2024, https://en.wikipedia.org/wiki/Uniform

United Nations Convention on Contracts for the International Sale of Goods (1980). https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/

Vergne, F. (1985). The battle of the forms under the 1980 United Nations Convention on Contracts for the International Sale of Goods. *Am. J. Comp. L.*, *33*, 233.

Viscasillas, M. D. P. P. (1998). Battle of the Forms under the 1980 United Nations Convention on Contracts for the International Sale of Goods: A Comparison with Section 2-207 UCC and the UNIDROIT Principles. *Pace Int'l L. Rev.*, *10*, 97.

Viscasillas, M. D. P. P. (2002). Battle of the Forms, Modification of Contract, Commerical Letters of Confirmation: Comparison of the United Nations Convention on Contracts for the International Sale of Goods (CISG) with the Principles of European Contract Law (PECL). *Pace Int'l L. Rev.*, *14*, 153.

Wildner, K. (2008). Art. 19 CISG: The German Approach to the Battle of the Forms in International Contract Law: The Decision of the Federal Supreme Court of Germany of 9 January 2002. *Pace Int'l L. Rev.*, *20*, 1.