THE SELLER'S OBLIGATION TO DELIVER THE GOODS UNDER A CONTRACT OF SALE OF GOODS

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Abstrak

Kontrak jualan mempunyai peranan yang sangat penting dalam urusniaga jualan dan hubungan undang-undang mereka adalah pelbagai dalam sistem undang-undang yang berbeza. Kewajipan untuk menyampaikan ialah satu tugas yang paling penting yang dikenakan oleh undang-undang kepada peniaga, dan komitmen yang sepadan oleh pembeli adalah dengan membayar harga kepada penjual. Sebelum peniaga menyerahkan barangan, pembeli tidak mempunyai kuasa untuk mengikut pemilik barangan tersebut. Banyak negara maju dan membangun yang berminat dalam bidang penjualan kontrak barangan dan sewajarnya , mereka telah dijelaskan tentang tindakan khas untuk mengawal selia kontrak pada tahap dalaman dan antarabangsa. Di Negara Iraq, penjualan kontrak barangan telah dikawalselia melalui perubahan dalam CISG sejak tahun 1991 dan tambahan lagi, undang-undang yang berkaitan di negara ini masih di tahap membangun. Objektif kajian ini adalah untuk mengkaji kepentingan elemen penyampaian dalam jualan kontrak barangan pada peringkat antarabangsa dan ia juga bertujuan untuk memeriksa kewajipan peniaga berikutan pelanggaran dalam kontrak jualan barangan. Untuk menjalankan kajian ini, pendekatan undang-undang doktrin diterima sebagai reka bentuk penyelidikan. Berikutan perkembangan ini, pengkaji telah merujuk kepada sumber data kedua, iaitu buku-buku ujian, artikel jurnal, laporan kerajaan dan peruntukan undang-undang dan peraturan yang berkaitan dengan negara-negara terpilih . Semua data yang dikumpul telah dianalisis secara deskriptif dan mendalam. Kajian ini mendapati bahawa undang-undang Iraq dalam penjualan kontrak barangan perlu mengamalkan prinsip-prinsip umum yang boleh diterima seperti yang dipersetujui di peringkat antarabangsa. Beberapa penambahbaikan terhadap undang-undang perlu dilaksanakan untuk menjadikannya lebih menyeluruh dan mampu mengelakkan pertikaian.

Kata-Kata Kunci: kontrak jualan, penjual, barang, penyampain.

Abstract

Sale contracts have a very important role in sale transactions, and their legal relations vary in different legal systems. The obligation to deliver is one of the most important obligations imposed by law on the seller, and the corresponding commitment by the buyer is to pay the price to the seller. Until sellers deliver the goods, buyers do not have authority pursuant to the owner. Many developed and developing countries are interested in the area of sale of goods contracts and accordingly, they have specified special acts to regulate the contracts at internal and international levels. In Iraq, sale of good contracts have been regulated through the ratification of the CISG since 1991; yet, the country's relevant law is still under developed. The objective of this study is to study the importance of the delivery element in a sale of goods contract at international level; it also intends to examine the seller's liability following a breach in a contract of sale of goods. To carry out the study, a doctrinal legal approach was adopted as the research design. On this account, the researcher has mainly referred to secondary data, namely test books, journal articles, government reports and the provisions of the relevant laws and legislations of selected countries. All the collected data were analyzed descriptively and critically. This study found that the Iraqi legislation on sale of goods contracts should apply the common acceptable principles as agreed internationally. Some improvements to the law need to be implemented in order to make it more comprehensive and capable of avoiding disputes.

Key words: sale contracts, seller, goods, delivery.

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List of Abbreviations

UNIDROIT	…….	International Institute for the Unification of Private Law in Rome
SOGA 1979	…….	English Sale Of Goods Act 1979
SOGA 1957	…….	Malaysian Sale Of Goods Act 1957
ULIS 1964	…….	Uniform Law on International Sale of Goods 1964
ULF	…….	Uniform Law on the Formation of Contracts for the International Sale of Goods
UNCITRAL	…….	United Nations Commission on International Trade Law
CISG	…….	United Nations Convention on Contracts for the International Sale of Goods
NIl	…….	National Investment Law 2006
ICC	…….	Iraqi Civil Code NO.40 of 1951
INCOTERMS	…….	International Commerce Terms
CLOUT	…….	Case Law on UNCITRAL Texts
CLJ	…….	Current Law Journal
CA	…….	Contract Act 1950
CIF	…….	Cost, Insurance and Freight
FOB	…….	Free on Board

CHAPTER ONE

INTRODUCTION

1.1 Introduction

This study will discuss the seller's obligation to deliver the goods in the sale of goods contracts according to the provisions of the Vienna Convention 1980 and Malaysian law. In this chapter, the researcher discussed the background of the study, by highlighting the importance of the seller's obligation in delivering the goods in a contract of sale of goods. The research then highlights the issues involved with the failure of seller to deliver the goods. It later mentions about the research objective, i.e. the aims to be achieved by having this study. Under this part also, research questions and significance of the study are laid down. Moreover, research methodology is presented whereby the approach used is the doctrinal research. At the end of this chapter, a summary of chapter is given.

1.2 Research Background

Businesses which buy or sell goods at international level often face unique legal, financial, cultural and geographical issues that are governed by the contract between the buyer and the seller. The sale contract particularly, has a very important role and its legal relations vary in different legal systems. A vast number of rules are earmarked to sale contracts and this diversity has led to the ratification of different Acts, which in the absence of uniform rules, will cause the contracting parties to have different problems in the area of international trade. The 'Sale of Goods'

contracts in particular, are the most common and most important of all commercial contracts in businesses as well as in daily life. To clarify, 'sale of good' is defined as "an agreement whereby the seller transfers or agrees to transfer property in goods to the buyer for a money consideration called the price"[1].

The Contracts for International Sale of Goods (CISG Vienna convention 1980), which aims to promote uniformity of international sales laws, is based upon the recognition that international sales and domestic sales contracts differ in significant ways. The CISG is essentially a codification of uniform rules which are intended to promote harmonization among different common laws and civil law systems. In this sense, the CISG is considered superior to national or provincial sales laws, which do not necessarily reflect the emergent issues of globalization, cross-border transactions and international trade[2].

The Convention applies to contracts for the sale of goods[3], in which parties have their places of business in states that are parties to the Convention, or when the rules of private international law determine the law of the contracting state because the law is applicable to the transaction. Nevertheless, parties to a contract have the right to exclude the application of the Convention.

Although the CISG clearly governs the sale of goods, it does not include an expressive definition of the sale of goods contract. Regardless, such definition may

[1] UK Essays. Sale Of Goods Contracts [Internet]. November 2013. [Accessed 29 May 2014]; Available from: http://www.ukessays.com/essays/law/sale-of-goods-contracts.php?cref=1.

[2] Considering that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States,
Being of the opinion that the adoption of the uniform laws which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barrier in international trade and promote the development of international trade,…
http://apps.americanbar.org/intlaw/fall09/materials/Pribetic_Antonin%20I._25_AP1030103025_CLEMaterials_sysID_1508_685_0.pdf.

[3] Contracts for the sale of goods for personal, family or household use are not governed by the Convention. Also contracts of services are not included. Certain issues are also excluded from the Convention scope such as validity of contract, the liability of the seller for death or personal injury caused by the goods.

be deduced from the CISG provisions themselves, as stated in Article 30 and 53 respectively. These articles particularly state that seller must deliver the goods together with their related documents, and transfer the property in the goods as required by the contract and this Convention. The buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention. Accordingly, the sale of goods governed by the CISG is a contract "pursuant to which one party (the seller) is bound to deliver the goods and transfer the property in the sold goods and the other party (the buyer) is obliged to pay the price and accept the goods"[4].

In the Malaysian Sale of Goods Act (SOGA 1957)[5], a contract of sale of goods[6] is defined in Section 4 (1)[7] as a contract in which the seller[8] transfers or agrees to transfer the property in goods to the buyer[9] for a money consideration called "the price[10]", and the contract of sale may be between two or more parties [11]. For other contracts, the rules and principles are governed by the Malaysian Contracts Act 1950 (CA), which is the parent law governing contractual relationships. Additionally, the CA governs three important phases of contract law: formation of contract, discharges of contracts and damages. Parties who wish to be bound under an enforceable and

[4] see UNCITRAL Digest of Case Law on the United Nations Convention on the International Sales of Goods – 2008 revision, 4, available at <http://www.uncitral.org/pdf/english/clout/08-51939_Ebook.pdf> see UNCITRAL Digest of Case Law on the United Nations Convention on the International Sales of Goods – 2008 revision, 4, available at <http://www.uncitral.org/pdf/english/clout/08-51939_Ebook.pdf>

[5] The Act applies to contracts for the sale of all types of goods, including second-hand goods and makes no distinction between commercial sales. The SOGA applies to Peninsular Malaysia except Sabah and Sarawak. The law in these two states is governed by section 5 (c) of the Civil Law Act 1956.

[6] Atiyah, P. S. 1989. The Sale of Goods. London: Pitman Publishing

[7] On the other hand, where the transfer of property in goods is to take place at a future time or subject to a condition to be fulfilled thereafter, then the contract is "an agreement to sell." It"s an executory contract. An agreement to sell becomes a sale when the time lapses or upon fulfillment of the condition subject to which the property in the goods was to be transferred (See S.4 (3)&(4)SOGA 1957

[8] Seller -a person who sells or agrees to sell goods

[9] Buyer -a person who buys or agrees to buy goods.

[10] Price - means the money consideration for a sale of goods

11 LAWS OF MALAYSIA, Act 382 SALE OF GOODS ACT 1957 Chapter 2 section. 4 (1)

valid contract must satisfy all the elements of the contract,[12] which include 'Offer'[13], 'Acceptance of Offer', 'Intention to Create Legal Relations', 'Consideration', and 'Capacity'.

While Malaysia has distinct provisions that govern normal contracts and sale of goods contracts, Iraqi's law doesn't have such provisions. Therefore, this study attempts to examine the provisions of the Vienna convention and relevant Malaysian laws on this issue. Wherever appropriate, recommendations can be made to the Iraqi's law. This discussion will also cover the provisions of relevant international law in this regard.

The CISG governs some–but not all–key terms and conditions of contracts for international sales of goods. It covers the formation of contracts, the rights and obligations of sellers and the rights and obligations of buyers[14]. The provisions on formation of contract, which are found in Article 14 - 24 of CISG (as discussed below), can be excluded by declaration in accordance to Article 92 CISG. As stated in Article 92:

(1) A Contracting State may declare at the time of signature, ratification, acceptance, approval or accession that it will not be bound by Part II of this Convention or that it will not be bound by Part III of this Convention.

(2) A Contracting State which makes a declaration in accordance with the preceding paragraph in respect to Part II or Part III of this Convention is not to be considered a

[12] An Iraqi contract consists of three main elements: consent, a valid object, and a lawful cause. A valid contract is one that is lawful, concluded by parties with full capacity, free of defects, has a lawful cause, and has a lawful object. Iraq Civil Law N. 40 of 1951 section 133(1).
[13] Section 2 (a) & (b) of CA 195
[14] It does not cover liability of a seller for death or personal injury caused by the seller's goods. It also does not cover transfer of title, existence of agency relationships, forum selection, statutes of limitations, interest rate issues, currency of payment or even the validity of the contract itself.

Contracting State within Paragraph (1) of Article 1 of this Convention in respect of matters governed by the Part to which the declaration applies.

Article 92(1) of the Convention permits a State to make a declaration–at the time of signature, ratification, acceptance, approval or accession–that it will not be bound by Part II (formation of the contract) or Part III (obligations under the contract) of the Convention.

For example, Sweden, as one of the signer's states, has made an Article 92 declaration providing that, "with reference to Article 92, Sweden will not be bound by Part II of the Convention (Formation of the Contract)" (15 December 1987). In October 2009, the Ministry of Justice of Sweden announced that it would adopt Part II by withdrawing this Article 92 declaration[15].

In accordance to Article 14 of CISG, a valid offer must be sufficiently specific with regard to the offeree(s), and has a sufficiently definite content. As a rule, a proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity of goods to be delivered and the price[16]. A recognizable intention of the offeror to be bound by an acceptance of the offer must be indicated, and the offer must reach the addressee[17].

An offer may be revoked if the revocation is communicated to the offeree before the offeree dispatches his or her acceptance[18], unless the offer (a) indicates that it is irrevocable, e.g., by stating a fixed time for acceptance, or (b) is reasonable for the

[15] 2012 UNCITRAL Digest of case law on the United Nations Convention on the International Sale of Goods. Digest of Article 92 case law. Available in the(http://www.cisg.law.pace.edu/cisg/text/digest-2012-92.html)
[16] This sentence 2 of Article 14(1) CISG clearly conflicts with Article 55 CISG, which addresses the case that the parties have not expressly or implicitly fixed or made provision for determining the price
[17] See article 24 CISG
[18] (Article 16(1) CISG)

offeree, and can be relied by the offeree as being irrevocable[19]. Under the CISG, the offeror can withdraw even an irrevocable offer if the withdrawal reaches the offeree before or at the same time as the offer[20].

Article 18 of CISG states that acceptance of an offer is made by the expression or conclusive declaration by the addressee that he or she accepts the offer. Silence alone does not lead to the conclusion of a contract. As a rule, the acceptance is valid once it reaches the offer although in certain circumstances, an acceptance can be indicated by the performance of the contract.

In fact, several CISG provisions admit that an offer may include expressive terms. In the second part of Article 14 (1), CISG deals with implied terms in the offer itself. It stipulates that "a proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price". Secondly, if the offer has either expressively or implicitly fixed or made provision in the proposal for determining the price, then "the price generally charged" to serve as a gap filler[21], as stated in Article 55 of CISG[22]. Thirdly, the usages and practices of which the parties have established between them are binding, pursuant to Article 9(1) CISG[23]. All these can be inferred to when a proposal does not establish the quantity or the price or the goods, yet the offer can still be considered definite under the CISG.

[19] (Article 16(2)
[20] (Article 15(2) CISG).
[21] Article 55 CISG raises another troublesome issue: whether the failure of the parties to state a price prevents contract formation.
[22] Article 55 CISG reads: "Where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned".
[23] Article 9(1) CISG reads: "The parties are bound by any usage they have agreed and by any practices which they have established between themselves".

The CISG governs two aspects of an international sales transaction: formation of international sale of goods contract and the right and obligations of parties in these contracts[24]. Article 30 imposes on the seller an obligation to deliver the goods and relevant documents, and to transfer the property in the goods[25]. In the official English text of CISG, the term "goods" is used whereas the term "merchandise"[26] is adopted the official French version of the reference. According to Section 2 of SOGA 1957, goods it defined as "every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass and things attached to or forming part of the land which are agreed to be served before sale or under the contract of sale". These different definitions of "goods" must be considered. The prevailing view for the definition to include all movable, tangible objects relating to commercial sales contracts. In the CISG, the types of contracts governed are (1) delivery of goods by installment[27], (2) sales involving a carriage of goods delivery sold directly from the supplier to the seller's customer and (3) an agreement to modify or rescind a sales contract[28].

In Malaysian Sale of Goods Act 1957, Section 31 states: "delivery is the duty of the seller to deliver the goods whilst the buyer's duty is to accept and pay for them in accordance with the terms of the contract of sale, unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions"[29]. Delivery is a voluntary transfer of possession from one person to another[30]. As stated in Section 33

[24] Chapter 2 of Part III of the Convention deals with the obligations of the seller. This is dealt with in terms of Articles 30 to 52.
[25] CISG, Articles 30-34-Seller's Obligations
[26] The new Consumer Protection Act, 2002, S.O. 2002, c. 30, Sched. A ["CPA 2002"] came into force in Ontario on July 30, 2005. . It states the definition of "goods" to "any type of property" ("merchandises"): "goods" means all chattels personal, other than things in action and money, and includes emblements, industrial growing crops, and things attached to or forming part of the land that are agreed to be severed before sale or under the contract of sale; ("objects")).
[27] Section 5(1), SOGA 1957 and Section(534) in Iraqi Civil Law.
28 Pribetic, Antonin I. "An unconventional Truth': Conflict of Laws Issues Arising under the Cisg." (2008).
[29] section 32, SOGA 1957
[30] Detta, Lee Mie Pheng . Ivan Jeron. *Commercial Law*: Oxford Fajar sdn. Bhd., 2011.

of the Act, delivery of goods may be made by doing anything which the parties agree on, and this very act shall be treated as delivery or be treated as an act that has the effect of putting the goods in the possession of the buyer or any person authorized to hold them on the buyer's behalf.

Article 34 of the CISG provides an obligation of the seller to deliver the goods, and hand over any documents relating to them; the seller must also transfer the property in the goods as required by the contract and this Convention. This clause is self-explanatory because its requirement is very clear: if the contract makes provisions for issues relating to delivery, documents, transfer of property, risk, and the like, then the seller must deliver the goods as per the provisions of the contract[31]. In fact, the Convention also makes provisions for the bills of lading or shipping documents. In terms of this article, the seller is specifically obliged to tender not only the delivery of the goods, but also the documents relating to such goods. The law relating to payment of goods document also entails that a seller commits a fundamental breach of an agreement, if he or she fails to deliver to the purchaser certain documents such as the bill of lading, other shipping documents, the insurance documents or commercial invoices.

1.3 Historical Background of Iraqi's Legal System

Iraq, an important developing country, is one of the Arabic states which is located in the Arabic Middle East region. Geographically, the country lies in the west south of the Asian continent, to the north of Kuwait & Saudi Arabia, to the south of Turkey, to the east of Syria and Jordan and to the west of Iran[32]. The country's volume of

31 Article 30 CISG

[32] Present day Iraq exists on land known to the ancient world as Mesopotamia. The territory was defined by its position between two rivers, the Tigris and the Euphrates. This location provided two major assets: fertile land, irrigated by river waters that produced a surplus of food, and a good placement for trade with other settlements.

international business transactions has been expanding, and such continuous economic and business growth does not only involve dealings with the Asian regions, but also with North America and Europe. Iraq has more than one seaport on the Arabian Gulf, the most important being Umm Qasr. Although not a member in the Gulf Cooperation Council, the country is also one of the Arabic Gulf states. The principal religion in Iraq is Islam with 96 percent of its population being Muslims[33].

The Iraqi legal system is based on the civil law, with its foundation being built upon the original civil law system of France, and modified by a variety of sources including the Egyptian legal system. Perhaps to the common law jurist, the most distinguishing feature of the civil law is the system's hierarchy of legal sources. According to the civil law system doctrine, legislation and custom are authoritative or the primary sources of law. They are contrasted with persuasive or secondary sources of law, such as jurisprudence, doctrine, conventional usages, and equity that may guide the court in reaching a decision in the absence of legislation and custom. Thus, the primary basis of law for a civil law system is legislation and not prior decisions of the courts (as in the common law). This concept of 'stare decisis' nevertheless, is foreign to the civil law[34].

In the absence of any applicable legislative provisions in the law, courts shall adjudicate according to custom and usage. That is to say, in the absence of custom and usage, courts shall rule in accordance with the principles of the Islamic Shari'a,

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While these advantages made the region one of the key sites for the development of human civilization, the location also made the area desirable to outsiders and subject to repeated invasions over the course of its history. The region experienced many types of rule and many formal and informal legal systems

[33] Barro, Robert J. "Iraq: One Nation under Allah." ECONOMIC VIEWPOINT2005.

[34] Thomas, Luther D. "Dan". "Establishing Justice in Iraq: A Journey into the Cradle of Civilization." *International Journal For Court Administration*, (2008).

which are the most consistent with the provisions of the Iraqi Civil Code, though courts are not bound by any specific school of thought[35].

In drafting the Iraqi Civil Code, the draftsmen had sought to blend principles from both the Sharia and the civil codes of other countries, particularly of the Egyptian civil code. Thus, a significant number of rules[36], principles and maxims of Islamic jurisprudence have been included in the Iraqi Civil Code[37]. Abdel Razzak Al-Sanhouri, the great Egyptian jurist, presided over the drafting of the Iraqi Civil Code, as well as the Egyptian, Syrian and Libyan civil codes (Al-Sanhouri also helped in drafting the 1961 Kuwaiti Commercial Code). Shortly before his death, Al-Sanhouri was asked which code he considered to be his outstanding legislative achievement. His response was "The Iraqi civil code", because to him, that code was closer to Sharia than the Egyptian code[38]. Otherwise, the Iraqi Code states that courts are to rule in accordance with the laws of equity. As noted, the legislator had exerted all efforts to reconcile the provisions drawn from the two primary sources, Islamic Sharia and Western legislation, fusing them together into a whole that almost conceals the two different sources. Thus, in the abuse of the right theory and other general theories, the legislator has successfully brought together Islamic and Western jurisprudence, which harmonizes the differing points of view and thereby, facilitates

[35] Mr Saleh Majid and Faris Lenzen, "Application of Islamic Law in the Middle East", international construction law review http://www.mondaq.com/x/52976/international+trade+investment/Application+Of+Islamic+Law+In+The+Middle+East.
(visited 31/3/2014)

[36] Article 1 of the Iraqi Civil Code states that in the absence of relevant Civil Code provision: the courts shall first look to customary law, then Islamic law, and finally to equitable principles. Article 1(3) states that the courts are guided in all
of this by court decisions and jurisprudence in Iraq, then "in other countries whose laws are comparable to the laws of Iraq"

[37] the paragraph 10 of the explanatory background (al-asbab al mujiba) to the Iraqi civil code states;
The provisions of this Code have been taken from: the Egyptian code which, on the whole, contains the best choice from rules established in the most advanced Western legal systems; from existing Iraqi rules, foremost of which is the Majalla [Ottoman-era code of Islamic principles] and the land law; and from the Islamic Sharia. [In the latter,] the vast majority of provisions were derived from the various schools of Islamic jurisprudence, without being restricted to any specific school.

[38] Taha, Khalid Issa, and and Howard L. Stovall. "Selected Aspects of Iraqi Commercial Law."

the inclusion of the many principles of the Journal of Legal Rules (Majalla) and the writings of Moslem jurists, as well as the Western legislation. Islamic jurisprudence has thus, retained its position, and the past, present and future remain interconnected[39].

The legal system as a whole also includes constitutional law, legislation and statutory provisions, usage and custom, judicial precedent, and authoritative juridical opinions. Iraq, the birthplace of the Hanafi School of thought, came under Ottoman rule in the 17th century. A monarchy was established under King Faisal in 1921 following the Arab Revolt. In 1932, Iraq gained full independence from its Mandate status. A military coup in 1958 had brought an end to the monarchy and Iraq then, became a republic[40].

Thus far, this study has offered a general overview of the Iraqi Civil Code and has demonstrated that the Iraqi Code has retained a great deal of the structure and legal principles that comprise a traditional civil law jurisdiction despite being markedly influenced by the country's Islamic environment. This global legal tradition has bound Iraq to the vast majority of the world's jurisdictions and offers the advantage of centuries of legislative development. In today's world, this is of more than trivial or academically significant[41].

The third and final paragraph of Article 1 of the Iraqi Civil Code states: "The court shall in all the foregoing be guided by the adjudication determined by the judiciary and jurisprudence in Iraq and then of the other countries the laws which are

[39] Ibid
[40] Johnson, Constance. "Iraq: Legal History and Traditions." *The Law Library of Congress*, (2004).
[41] STIGALL, DAN E. "Iraqi Civil Law: Its Sources, Substance, and Sundering." *J. OF TRANSNATIONAL LAW & POLICY* Vol. 16:1, (2006).

proximate to the laws of Iraq." Thus, as the Iraqi court develops and grows, it may rightfully look to the common law jurisdictions for guidance[42].

By improving awareness from the Iraqi Bar and the law faculties of the universities on the seller's obligation to deliver the goods internationally, Iraq will play a growing role in UNCITRAL and in other international forums in which unification of international sales law is advocated. The comparative analysis contained in this research is intended to contribute to an improved awareness of what is at stake; it also intended to show that unfamiliarity with the details of the Vienna Convention rules on the obligations of the seller needs not unduly impede evaluation of their benefits for Iraq, particularly in participating in legal rationalization on the transnational plane.

1.4 Problem Statement

The legal environment surrounding global trade and related issues is complex. The complexities range from the structures and laws relating to cross country matters. In 1980, the United Nations conventions noted: "concerns from the barriers resulting from the legal diversity spans the countries"[43]. This defines the constraints of a successful bilateral and contractual agreement for a beneficial international trade. Additionally, the United Nations Convention on Contracts for the International Sale of Goods, Part 1, Article 1 states: "This Convention applies to contracts of sale of

[42] Stigall, Dan E. "From Baton Rouge to Baghdad: A Comparative Overview of the Iraqi Civil Code." *Louisiana Law Review*, (2004). judiciary Journal, 1956 1957.

[43] John O. Honnold , Harry M. Flechtner. *Uniform Law for International Sales under the 1980 United Nations Convention*. 4th ed.: Wolters Kluwer Law & Business, 2009. (accessed 28/42014).

goods between parties whose places of business are in different States"[44]. 'State' in this case is defined as the destination, country of the manufacturers.

The Iraqi law in relation to international contract seems to be underdeveloped[45]. Few scholars have attributed this to the transitional period of the 2003 invasions that had led to the fall of the Saddam Hussain's Regime, which had affected the government machinery. In fact, Iraq at that time did not have a written constitution as well as a civil, criminal and personal statutory law, not until 2008 when the legal system was comprehensive and available online for users[46].

The obligation to deliver is one of the most important obligations imposed by law on the seller, and the buyer corresponding commitment by the buyer of the performance the price to the seller, due to the fact that the buyer does not have the authority pursuant to the owner, except if the seller delivers the goods.

During decades of war and sanctions, the Iraqi courts have become isolated from the developments of international commercial transactions. To overcome the problems of having personnel not being familiar with such conventions, the Iraqi judges were exposed to opportunities to learn about the application of international conventions and best practices in relations to international sales contracts, commercial court procedure and litigation, international arbitration, intellectual property and documentary credit. These measures were taken to ensure consistency and predictability for foreign companies dealing in the Iraqi legal environment. The U.S. Department of Commerce's Commercial Law Development Program (CLDP) then

[44] LAW, UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE. *United Nations Convention on Contracts for the International Sale of Goods*. New York: United Nations, 2010. http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf (accessed 3/1/2014).

[45] Hayawy, Nabeel Abdul-Rahman. *The Provisions of Iraqi Civil Law No.40 of 1951and Its Amendments*. Iraq: The legal library-Baghdad, 2010.

[46] Inc, I. *Iraq Business Law Handbook Volume 1 Strategic Information and Basic Laws*: International Business Publications USA, 2013.

conducted a multi-phase judicial development effort to support Iraq's commercial courts; this effort had featured seven in-depth workshops for nearly 100 judges from Iraq's different provinces in all of the requested program areas. The CLDP's workshops have also been used as the Iraqi judiciary's primary tool to select and prepare judges for the country's new commercial courts[47].

Due to the increasing number of disputes arising from contracts between government ministries and foreign suppliers, the Iraqi judiciary has specifically requested a specialized training for its trial court judges in the area of international sales contracts. Iraqi government institutions, specifically those assigned with service delivery, often complain of foreign companies failing to deliver goods and services or delivering of incomplete or expired goods[48].

These failures stem largely from the institutions' limited capacities to draft and negotiate durable sales contracts in addition to a lack of legal awareness of their rights and recourse to recover funds. Also lacking were the legal remedies to be adopted when the seller breaches his or her obligation to deliver the goods. All of these shortcomings are a few of the bottlenecks, which have created an environment of uncertainty in the realization of the desired and safe international trade with the rest of the world. Among the specific problems (summary) are:

- Lack of stability in the economy as a result of fail contractual agreements between government organs or agencies responsible of foreign suppliers.
- The legal system in Iraqi not meeting the required technical know-how in international transaction and the legal requirements and environment.

[47] As part of the US government's efforts to support Iraq's nascent commercial courts, CLDP held a workshop for 20 Iraqi judges in Erbil, Iraq from March 19-22. The workshop was led by Federal Judge Delissa Ridgway of the U.S. Court of International Trade and focused on adjudicating disputes arising from international sales contracts. The Iraqi participants were primarily first instance court judges who represented over thirteen Iraqi provinces in addition to two commercial court judges from Baghdad and Basra

[48] CLPD. *Iraq: Judicial Training Workshop in Erbil on International Sales Contracts*. Erbil, 2012.

- Iraq not having adequate statutory protection for parties in trade due to limited legal documentation for international transaction; the database was not available for some documentation recently.
- The crisis in Iraqi since 2003, which has not been supporting a safe, legal environment for international trade.

The issues raised in this study pose the statement of problems as mentioned above.

1.5 Research Questions

1. What is the status/role of the element of "delivery" in contract sale of goods as provided in the international convention of Vienna 1980?
2. How will the seller be liable if he or she fails to deliver or delay in delivering the goods to the buyer?

1.6 Research objectives

1. To study the importance of delivery element in a contract sale of goods at the international level.
2. To examine the seller's liability when there is a breach in a contract of SOGA.
3. To make recommendation to improve the Iraqi law by adopting the provisions from international law and Malaysian law wherever suitable.

1.7 Research Significance

This study attempts to comparatively examine (1) the provisions in the Vienna Convention 1980, which govern contracts for the international sale of goods, and (2) the relevant Malaysia laws on this issue. The research also aims to further suggest the benefits of these provisions if adopted in the Iraqi law. A clear understanding on the international sale of goods contracts and the importance of the delivery element is crucial to remove any ambiguous provision in the Iraqi law on seller's obligation to deliver the goods under the sale of goods contracts. It was anticipated that this research may provide information and recommendations to the Iraqi's policy makers, and all those interested in this field. By providing the important points, this research also intends to encourage the target readers to improve the legislation by regulating the element of delivery of international sales of goods contract. The findings of this study will also help lawyers, judges and the public to have a deeper understanding on the legal status of the international sales of goods contracts. Additionally, they can contribute to the existing literature for the benefit of future studies in this regard.

1.8 Scope and limitation of study

This study will briefly introduce the CISG and the relevant Malaysia laws on the Iraqi law if necessary. In this thesis the term "CISG" will be used interchangeably with the terms "Code" and "Convention". All three terms will denote the same meaning. This Convention was prepared by the United Nations Commission on International Trade Law (UNCITRAL) and was adopted by a diplomatic conference on 11 April 1980**.**

The CISG is divided into four parts. Part I establish the sphere of application and enumerate upon other general provisions. Part II governs the formation of the contract. Part III discusses the sale of goods, the obligations and remedies of the buyer and the seller, and the passing of risk. Part IV encapsulates the administrative provisions regarding the CISG and the declarations or reservations that are available to signatory states. This study focuses on Part III of the Convention. The primary focus is on the obligation of sellers to deliver the goods and penalties that may be imposed on the sellers should this obligation is breached.

The main status regulating a contract of sale of goods in Malaysia is the Sale of Goods Act 1957 (SOGA). Modeled upon the Indian Sale of Goods Act 1930, which originates from English Sale of Goods Act 1893, SOGA 1957 is a revision of the 1957's Sale of Goods (Malay States) Ordinance.

The Sale of Goods Act 1957 is applicable to govern all contracts of sale of goods only in Peninsular Malaysia. The Act applies to contracts for the sale of all types of goods (including second hand goods) and it makes no distinction between commercial sales and private sales or between wholesale and retail. The goods applicable under the Act include all movable property and exclude all immovable property such as land and houses.

In Iraq, the absence of any legislative measures toward the organization of contract provision for international sale of goods at domestic level means that the ruling is subjected to the General Rules of Civil Law and other relevant commercial laws. For example, international conventions at international level have been organizing international sale of goods, but Iraq has not internally issued a law that is published in The Official Gazette.

Perhaps one of the most difficult challenges for the researcher was in getting the sources in Arabic doctrine. The related sources on Iraqi Jurisprudence were also scarce, particularly on the subject of modern issues of the world. Malaysia on the other hand, has a resource called (Current Legal Journal (CLJ) for use by legal and social researchers. Furthermore, the researcher's attempt to find any official website on law cases in Iraq was unsuccessful.

CHAPTER TWO

LITERATURE REVIEW

2.1 Introduction

The purpose of a contract is to establish the agreement that the parties have made and to fix their rights and duties in accordance with that agreement. The courts must enforce a valid contract as it is made, unless there are grounds that bar its enforcement. The binding force of a contract is based on the fact that it evinces a meeting of minds of two parties in Good Faith. A contract, once formed, does not contemplate a right of a party to reject it. Contracts that were mutually entered into between parties with the capacity to contract are binding obligations and may not be set aside due to the caprice of one party or the other unless a statute provides to the contrary. This chapter will examine and discuss the seller's obligation to deliver the goods as required by the CISG, the relevant laws in Malaysia, and the current Law in Iraq.

A contract of sale is a legal contract an exchange of goods, services or property to be exchanged from seller (or vendor) to buyer (or purchaser) for an agreed upon value in money (or money equivalent) paid or the promise to pay same. It is a specific type of legal contract. The main cause behind formation of an enforceable contract of sale of goods between parties to establish main obligations of parties. In order to be obvious their legal limitations, and establish remedies for the innocent party against the other when the breech is happening.

2.2 Definitions of Key Terms

This section defines the key terms used in this study based on the relevant Articles in CISG and provisions in Malaysian statutes and other references.

In Malaysia the Sale of Goods Act 1957 (SOGA herein forth) was enacted in 1957 and the statue was applicable to sale of goods in peninsular Malaysia (East Malaysia). The states of Sabah and Sarawak (West Malaysia) are governed by. The English Sale of Goods Act 1979, which is a revision of the Sales of Goods Act 1893.

Seller:

According to section 2 of chapter 1 the Malaysian SOGA 1957 seller:

Means a person who sells or agrees to sell goods

Buyer:

Means a person who buys or agrees to buy goods

Delivery:

The Hague Convention (1964) stated the definition of delivery, in the first paragraph of Article (19) which provides that:

Delivery consists in the handing over of goods which conform with the contract[49].

And According to the definition of hand over or delivery verb from the Oxford Advanced Learner's Dictionary:

It is to give somebody else your position of power or the responsibility for something[50].

The term delivery is defined under section 1 of Malaysian SOGA 1957 as:

[49] Uniform Law on the International Sale of Goods (1964)
[50] Oxford Advanced Learner's Dictionary, Oxford University Press (accessed 1/5/2014 2014).

Means voluntary transfer of possession from one person to another; goods are said to be in a "deliverable state" when they are in such state that the buyer would under the contract be bound to take delivery of them.

While the section (31) of Malaysian SOGA 1957 defined it as

Delivery of goods sold may be made by doing anything which the parties agree shall be treated as delivery or which has the effect of putting the goods in the possession of the buyer or of any person authorized to hold them on his behalf.

Sale of goods contract:

CISG does not directly define a sale. Sale of goods contract is defined according to section (4) of the Malaysian SOGA 1957 as:

A contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price.

(2) A contract of sale may be absolute or conditional

Subsections (3) and (4) give different names to two transactions:

(3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale.

(4) Where under a contract of sale the transfer of the property in the goods is to take place at a future time or subject to some condition later to be fulfilled the contract is called an agreement to sell.

While the Iraqi Civil Code 1951define the sale as:

Sale is exchange of one property for another property

This definition is originated from the Journal of Legal Rules (Majallat Al Ahkam Al Shar'iyyah). This definition need to be more developed as English SOGA 1979 and Malaysian SOGA 1957 which stated above.

Goods:[51]

Section 2 of the Malaysian SOGA also defined it as:

"goods" means every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

2.3 The United Nations Convention on Contracts for the International Sale of Goods (CISG) 1980

The United Nations Convention on Contracts for the International Sale of Goods (CISG) has been recognized as the most successful attempt to unify a broad area of commercial law at the international level[52]. The self-executing treaty aims to reduce obstacles to international trade, particularly those associated with choice of law issues, by creating even-handed and modern substantive rules governing the rights and obligations of parties to international sales contracts. The CISG has attracted more than 70 Contracting States that account for well over two thirds of international

[51] CISG did not define the term goods, but exclusions and wording of provisions suggest "goods" must be tangible and not intangible rights. Art. 2: "This Convention does not apply to sales: (a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use; (b) by auction; (c) on execution or otherwise by authority of law; (d) of stocks, shares, investment securities, negotiable instruments or money; (e) of ships, vessels, hovercraft or aircraft; (f) of electricity.

[52] As of April 1, 2014, the UN reports that 80 countries are party to the Convention, including the US, China, Canada and Mexico.

trade in goods, and that represent extraordinary economic, geographic and cultural diversity.

The CISG is a project of the United Nations Commission on International Trade Law (UNCITRAL), which in the early 1970s undertook to create a successor to two substantive international sales treaties Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF) and the Convention relating to a Uniform Law for the International Sale of Goods (ULIS) both of which were sponsored by the International Institute for the Unification of Private Law (UNIDROIT). The goal of UNCITRAL was to create a Convention that would attract increased participation in uniform international sales rules. The text of the CISG was finalized and approved in the six official languages of the United Nations at the United Nations Conference on Contracts for the International Sale of Goods, held in 1980, in Vienna. The CISG entered into force in eleven initial Contracting States on 1 January 1988, and since that time has steadily and continuously attracted a diverse group of adherents.

The CISG governs international sales contracts if (1) both parties are located in Contracting States, or (2) private international law leads to the application of the law of a Contracting State (although, as permitted by the CISG Art. 95), several Contracting States have declared that they are not bound by the latter ground). The autonomy of the parties to international sales contracts is a fundamental theme of the Convention: the parties can, by agreement, derogate from virtually any CISG rule, or can exclude the applicability of the CISG entirely in favor of other law. When the Convention applies, it does not govern every issue that can arise from an international sales contract: for example, issues concerning the validity of the contract or the effect of the contract on the property in (ownership of) the goods sold

are, as expressly provided in the CISG, beyond the scope of the Convention, and are left to the law applicable by virtue of the rules of private international law (Art. 4). Questions concerning matters governed by the Convention but that are not expressly addressed therein are to be settled in conformity with the general principles of the CISG or, in the absence of such principles, by reference to the law applicable under the rules of private international law.

In general, Prof. Dr. Huber Peter,[53] He discussed the basic principles of CISG. The CISG relating to seller obligations in Chapter II (Art. 30-52 CISG) deals with the obligations of the seller. Art. 30 CISO setting out the obligations of the seller in broad terms, Section 1 (Art. 31-34 CISG) deals with the delivery of the goods and the handing over of documents. Section II (Art. 35-44 CISG) deals with the conformity of the goods and with third party claims, and finally, Section III (Art. 45-52 CISG) contains the core clement of every sales law, the buyer's remedies for breach of contract by the seller.

2.3.1 The Obligation of the Seller to Deliver the Goods According to CISG

The Convention does not expressly define the concept of "delivery". However, Prof. Dr. Huber Peter[54] argued that there are a number of points can he made about what the concept involves. First, "delivery" refers only to the steps that the seller must take in order to ensure that the buyer obtains possession of the goods. Thus, as a general rule, the delivery obligation can be performed unilaterally by the seller without the need for the buyer's cooperation. Secondly, the delivery obligation may

[53] Huber, P., and Alastair Mullis. *The CISG: A New Textbook for Students and Practitioners*: International Specialized Book Service Incorporated, 2007.

[54] Ibid.

he performed notwithstanding that actual possession has not been given or any transportation been made to the buyer. For example, Art. 31 CISG, the seller may perform his delivery obligation either by handing the goods over to the first carrier or by placing them at the disposal of the buyer.

Unlike under ULIS, where delivery depended upon the handing over of "conforming goods", there is no requirement in the CISG that performance of the delivery obligation depends upon delivery of "conforming" goods. Delivery of non-conforming goods will, therefore, generally constitute a delivery under the CISG; the seller will, however, be liable for the breach of his obligations under Art. 35 of CISG.

Accordingly, the seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention. The meaning and purpose of the Article 30 states and summarises the main duties which the seller is obliged to fulfil. The seller, however, is equally bound to perform any additional obligation provided for in the contract or by any usage or practice between the parties, such as a contractual duty to deliver exclusively to the buyer. In addition, the seller is obliged to deliver the goods. In several instances the parties specified the duty to deliver the goods by using one of the Incoterms which then prevails over the rules of the Convention.

The second obligation is to hand over documents relevant to the sold goods. The Convention obliges the seller to hand over the documents concerning the goods but does not itself establish a duty of the seller to issue certain documents on the goods.

There are two kinds of delivery, the constructive delivery is happen when the seller enable the buyer to take the possession over the goods by deliver to him the related document in order to empowered the buyer to resale or any action. For example, the Malaysian SOGA 1957 section 2 defined the delivery as (Voluntary transfer of possession from one person to other), this similar to the situation of SOGA 1979.

While, the actual delivery is request the seller to take physical action to provide goods to the buyer. For example, ULIS in Art 19 linked between the obligation of the seller in handing over the goods and the conformity of them to the buyer.

In this regard the CISG is comprised both kinds of delivery when mentioned in its articles Art 31,67 and 69 to the term of (handing over) refer to the actual delivery. Meanwhile, it mentioned to the term of (delivery) which refer to the constructive delivery. This mixture of these types in the CISG is to avoid difficulties that arise from the passing the risk[55]. Generally, when the seller delivers the goods to the buyer by either actual or constructive delivery, the seller's duty is completely fulfilled.

Honnold[56] defined the meaning of the handover in the CISG as" the Convention speaks of physical acts of transfer of possession the `handing over' of the goods". From the different uses of `delivery' and `hand over', it

[55] Raoof, Nagham Hanna. "The Obligation of Delivery of the Seller in the International Contract of Sale of Goods According to Vienna Convention of 1980." The Council of College of Law University of Mosul 2004.

[56] John O. Honnold , Harry M. Flechtner. *Uniform Law for International Sales under the 1980 United Nations Convention*. 4th ed.: Wolters Kluwer Law & Business, 2009. (accessed 28/42014).

can be suggested that `delivery' is a broader term which can be used to express the obligation of the seller as a party in the contract without any additional specification of how this obligation is to be performed.

However, `handing over' implies an extra meaning of positive action to be taken. This can be seen in the practice of the CISG where these terms are used. For the seller's obligation regarding documents, the duty is to hand them over to the buyer; where the norm for documents is for them to be sent to the other party rather than being placed at his disposal at the seller's place of business. This is because the goods can either be dispatched or made available to the buyer; hence, the term `delivery' can be used in either case in the CISG[57].

Additionally, the most important rights and remedies available to the buyer and the seller under the CISG will be examined. Under the CISG the buyer may enforce any of his/her rights contained in articles 46 to 52 in the instance of the seller breaching the contract. In addition, the buyer may claim damages as provided for in articles 74 to 77.The CISG makes the following remedies available for the buyer in case of breach of contract by the seller. These remedies are:

A) Claims for Performance:

1. Right to performance (Art. 46 (1) and 47)
2. Reparation (Art. 46 (2))
3. Delivery of substitute goods (Art. 46 (3))

[57] CLOUT case No. 226 [Oberlandesgericht Koblenz, Germany, 16 January 1992]. Available at: http://cisgw3.law.pace.edu/cases/920116g1.html

B) Avoidance of the contract (Art. 49) and its limit: the seller's right to cure (Art. 48)

C) Reduction of the price (Art. 50)

D) Remedies for partial non-performance or partial lack of conformity (Art. 51)

E) Refusal to take early delivery or delivery of excess goods (Art. 52 (1) and (2)

F) Suspension of performance (Art. 71)

G) Claim for damages

Article 45 clearly stipulates that the buyer is not deprived of his right to claim damages by exercising his/her right to other remedies. This general principle parallels with the position under Malaysian law where the innocent buyer is entitled to claim damages in addition to any other remedy at his/her disposal. Articles 61 to 65 provide remedies for seller in the instance of the buyer having breached the contract. The seller, like the buyer, is further entitled to claim damages under articles 74 to 77.

It is important to touch on the concept of good faith provided for in article 7 of the CISG. The CISG is to be interpreted in a manner that observes good faith. The meaning of good faith under the CISG is ambiguous. While good faith was intended to be an interpretative tool, courts are extending its application to the performance of the contract[58].

[58] The inclusion of the good faith principle as an interpretation tool is a concession that arose out of heated debates. No compromise could be reached during negotiations and thus its meaning was left open. Article 7 has been used by courts to introduce the principle of good faith into the other provisions of the CISG.

Proffesor Arthur Rosett[59] argued that the Good faith may prevent a party from terminating a contract based on a minor breach. It may further create obligations requiring the parties to communicate during performance and to co-operate in curing defects or modifying obligations in unforeseen circumstances. The drafters of the CISG refrained from relying heavily upon the concept of good faith and therefore did not expressly mention it in respect of party conduct. The principle of good faith enjoys limited scope in the CISG and is uncertain in its contents, but should be borne in mind whenever parties interact with one another.

The remedies that are available to the buyer when the seller breaches his contract are differing between the common law and civil law system. For instance, remedy of the specific performance which may benefit the buyer on such an occasion is treated as an exceptional remedy in common law, by contrast to Iraqi law where the first available remedy for an aggrieved party is to ask for the specific performance (which is, in this case, delivery of the goods as described by the contract).

Moreover, the Vienna Convention in its regulations concerning the correlation between the parties obligations and the available remedies for breach has dealt equally with both the seller and the buyer, in a way which does not cause any practical difficulty For example, in Articles 71, and 72 the right to suspend or avoid the contract when it becomes apparent that one of the parties will not perform a substantial part of his obligations (Art, 71) or will commit a

[59] Rosett, Arthur. "Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods." *Ohio State Law Journal*, (1984).

fundamental breach (Art. 72) has not been designated only to the seller or to the buyer, but are available equally to both parties.

According to the Convention either of the parties may suspend the contract when it becomes apparent that the other party will not perform his obligations. But the necessity of giving an immediate notice of suspension to the other party and the duty of the suspending party to resume the contract when he receives an adequate assurance from the other party eliminate the possibility of the occasions on which both parties can suspend the contract due to failure of the other party in fulfilling his obligations. Hence, practically, the actual performance of either of the parties is not a condition as to the other party's duty to perform. The assurance of performance given by either of the parties adequately binds the other party to continue with the performance of the contract. What is an adequate assurance of performance is a matter of fact, which differs from one circumstance to another.

In addition, the right of avoidance is recognized for the aggrieved party when the possibility of a concurrent performance of the parties' obligation is seriously jeopardized. Termination of a contract as a remedy for breach of terms and conditions of the contract in the course of performance also offers a high degree of protection to the aggrieved party who has not received what he is entitled to receive.

Different legal systems offer this right on different grounds and occasions. This right is called by the Vienna Convention "the right of avoidance". Iraqi law call it as "faskh" from Islamic law , while the Malaysian call it as

repudiate, but in English texts different translations such as "termination", "cancellation" and "rescission are used to express this concept.

Moreover, failure of one of the parties to perform his obligation is repudiation when the result of non-performance amounts to a fundamental breach?' Therefore, a contract of sale is regarded as repudiated if either of the parties makes it plain to the other party that he is unable or unwilling to perform his obligation or he has, by his own act or default, completely disabled himself from performing his obligation.

2.4 Delivery under Malaysian SOGA 1957

Under section 31 of the Malaysian SOGA 1957 stated (It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale).

Profissor Atiyah[60], argued that the legal meaning of delivery is very different from the popular meaning. In law, delivery means the voluntary transfer of possession, which is different thing from dispatch of the goods. there is indeed, no general rule requiring the seller to dispatch the goods to the buyer, for under S 29 of the Malaysian SOGA 1957;

(1) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between parties.

[60] Atiyah, P.S., J.N. Adams, and H.L. MacQueen. *The Sale of Goods*. 10th ed.: Pearson/Longman, 2001.

(2) A part from any such contract, express or implied, the place of delivery is the seller's place of business, if he has one, and if not, his residence, except that, if the contract is for the sale of specific goods, which to the knowledge of the parties when the contract is made in some other places, then that place is the place of delivery.

Meanwhile, Lee Mie Pheng and Ivan Jeron Detta[61], based on the said Act the delivery is voluntary transfer of possession from one person to another. Every delivery needs not to involve physical transfer. Section 33 of the Sale of Goods Act 1957 provides that delivery of goods may be made by doing anything which the parties agree shall be treated as delivery or which has the effect of putting the goods in the possession of the buyer or of any person authorized to hold them on his behalf. If the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may sue the seller for damages for non-delivery[62]. Moreover, the buyer may bring an action for the specific performance of the contract by the delivery of specific or ascertained goods. But this remedy is available only at the discretion of the courts.

For instance, in the case of the Mensa Mercantile (Far East) Pte Ltd v Eikobina (M) Sdn Bhd [1989] 2 MLJ 170). In this case, the defendant agreed to sell certain used heavy construction machines to the plaintiff. The contract for this sale of goods was breached. The plaintiffs alleged that having decided to buy the machines it had advertised to sell the same machines to third parties and had incurred obligations to such parties. The issue is whether specific performance was the proper remedy or whether damages were adequate remedy?

[61] Detta, Lee Mie Pheng . Ivan Jeron. *Commercial Law*: Oxford Fajar sdn. Bhd., 2011.
[62] Section 57, COGA 1957

The court held;

1- In deciding whether or not to make an order for specific performance on addition to determining the type of goods in question, the court entitled to look at all the surrounding circumstances of the case including the conduct of both parties and to consider the hardship which an order for specific performance would inflect the on the seller.

2- The plaintiff's obligations to third parties cannot form the basis of a decree of specific performance especially so this in this case when such obligations were incurred before subject-matter of such sales had come into the plaintiff's possession.

3- If anything at all the plaintiff must show the machines were not easily available in the market and such they were of unique interest and value to it. Since such goods can be located in the market, either singly or in bulk, the test of their unique value had not been discharged by the plaintiff and on this ground alone damages was an equally adequate remedy.

The seller is required to transfer ownership in the property to the buyer. The Convention is however silent on the manner in which ownership is to be transferred; parties are to consult the domestic law of the State who has jurisdiction over the matter[63]. After passing ownership, the seller is required to make the goods available to the buyer; often referred to as delivery.

[63] Article 4 states that the CISG governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer. It further states that, except where otherwise expressly provided, it is not concerned with: the validity of the contract or any of its provisions or of any usage; or the effect that the contract may have on the property in the goods sold. The domestic law of the individual state will therefore regulate the excluded matters. The passing of property was excluded from the Convention because of the difficulty of reconciling national differences. In addition, the transfer of ownership impacts other areas beyond the boundaries of the law of contract. The CISG provides for several related matters, such as the seller's obligation to deliver goods free of third party claims (Articles 41-43) and the passing of risk (Articles 66-70).

2.5 Situation of Iraqi Bossiness laws

Iraqi's economic activity begins to resume and revived. This demand for all types of goods and services is growing fast. Iraq presents a huge commercial opportunity across a broad range of sectors. After five years when security was the dominant issue in Iraq, the country has now entered a new, positive phase. As the Iraqi government and security forces have stepped up their capacity, the environment for trade and investment has transformed for the better. Millions of Iraqis now have the freedom to live, to trade, to work and to travel without fear. Security improvements are now substantial and tested. There have been notable improvements in the regulation of the business environment. The private sector has grown more important and is open to foreign investment for the first time in decades. These factors combine to create opportunities for trade and investment on an unprecedented scale.

2.5.1 Iraqi Investment Law No 13 of 2006

In response to that the Government of Iraq passed a modern and open investment law in 2006 which encourages both local and foreign private investors to invest in the country and which protects investors' property rights. The National Investment Law (NIL), originally passed in 2006, provides a baseline for a modern legal structure to protect foreign and domestic investors in addition to providing tax and other incentives. However, Article 27 of the NIL, which details the rights of Iraqis and foreigners with respect to Iraqi law, refers to dispute resolution between foreign and Iraqi part. However, the absence of implementing regulation makes application of the law uncertain in practice. So that the legislative legal environment need to be more developed by amending exists provisions in order avoid of the conflicts of laws in

Iraq. And when the parties involved in the international contracts of sale they must be aware about their rights and obligations as well as the remedies available when one party breach his obligations.

2.5.2 Iraqi Civil Code No.40 of 1951

The Iraqi Civil Code is divided into a preliminary part and two main parts, each main part composed of two books. The preliminary part contains definitions and general principles that find application throughout the rest of the code. Part I of the Code and its two books address obligations in general and sub elements of that area of law, such as contracts, torts, and unjust enrichment. Part II and its two books address property, ownership, and real rights.

The Iraqi Civil Code defines a contract as the unison of an offer made between two parties to affect a certain object. An Iraqi contract consists of three main elements: consent, a valid object, and a lawful cause. A valid contract is one that is lawful, concluded by parties with full capacity, free of defects, has a lawful cause, and has a lawful object. It can be made for sale, gifts, loans, rent, or for a certain act or service. Further, a contract is considered valid so long as its object is not forbidden by law, to the prejudice of public order, or against morals. While, it defined the sale as exchange of property, for international level this definition is very ambiguous for the parties to know the basic elements of sale contracts[64].

The Iraqi Code states that Iraqi nationals shall be tried before the courts of Iraq when the suit is a matter of rights owed by the Iraqi national. The rules regarding the

[64] STIGALL, DAN E. "Iraqi Civil Law: Its Sources, Substance, and Sundering." *J. OF TRANSNATIONAL LAW & POLICY* Vol. 16:1, (2006).

competence of a court to hear a case and all procedural matters are governed by the law of the country where the proceedings were initiated. Foreign nationals are to be tried before Iraqi courts if foreign nationals are located in Iraq, if the litigation concerns property located in Iraq, if the litigation concerns a contract which has been executed in Iraq, or if the case involves an event which took place in Iraq. Foreign judgments have no effect in Iraq unless deemed enforceable by an Iraqi court[65]. In addition, ICC stated in Art.49 (2) when a foreign juristic person have however, commenced its main activity in Iraq the Iraqi law shall apply thereto.

2.5.3 The Iraqi Commercial Code, Law No. 30 (1984)

Iraqi Commercial Code regulates various commercial matters applicable to businesses, such as commercial registration (authority for which has been delegated to local chambers of commerce), commercial books and trade names. The Commercial Code contains extensive provisions on banking transactions such as current accounts, money deposits and bank transfers. The Commercial Code also contains rules on letters of credit and bank guarantees[66].

As mentioned above by the two laws forth, noted that there is no mentioned that the international contracts of sale of goods will be regulated by the ratified CISG 1980 in Iraq since 1991. This issue should be considered by the Iraqi legislator. There are many gaps relating to the sale of goods and the obligations of the parties in the said contract.

[65] Art. 33 (2)
[66] Taha, Khalid Issa, and and Howard L. Stovall. "Selected Aspects of Iraqi Commercial Law." (1979).

Professor Schlechtriem[67] states that principles of the CISG must seep into domestic law, especially when the domestic regulation is silent on certain matters regulated by the CISG. The Convention indirectly influences changes in domestic law as it was during the reform of German Civil Code and Scandinavian and Netherlands law. Courts also tend to use the CISG and other model law instruments when interpreting domestic contracts, which have some gaps.

2.6 Relevant countries that have ratified the CISG68

The seller's obligations and the buyer's interdependent obligations are outlined in Articles 30 to 44 CISG. Undoubtedly, the seller's obligations are the cornerstone of any sales contract[69].

Franco Ferrari[70], discussed the impact of the CISG on national legal system in many ratified and unratified countries on it, he is provide an important discussion relating to this study. The awareness of CISG should be raised in the countries in order to improve the domestic legislation.

This promoted through undertook a considerable activities in order to promote the knowledge of the convention such as the writing of scholars, the publication of both commentaries and court decisions in specialized law reviews, and more importantly for raising general awareness of the CISC general law reviews.

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[67] Schlechtriem, Peter, Butler, Petra. *Un Law on International Sales; the Un Convention on the International Sale of Goods*: Springer, 2009.

[68] Gerard Sanders is a Deputy General Counsel, European Bank said that:
Assisting countries in improving their laws is today a mainstream activity of many multilateral organizations. For the international financial institutions, this work goes to the heart of their efforts to foster progress, particularly by seeking to improve the climate for both domestic and cross-border trade and investment

[69] Schlechtriem, Peter, Butler, Petra. *Un Law on International Sales; the UN Convention on the International Sale of Goods*: Springer, 2009.

[70] Ferrari, F. *The Cisg and Its Impact on National Legal Systems*: sellier.european law publishers, 2008.

The researcher agrees with this point of view, so that he conducted this study to overcome this problem in Iraq's situation. Due to an increasing number of disputes arising from contracts between government ministries and foreign suppliers, the Iraqi judiciary has specifically requested specialized training for its trial court judges in the area of international sales contracts. Iraqi government institutions, specifically those tasked with service delivery, often complain of foreign companies failing to deliver goods and services or delivering incomplete or expired goods. These failures stem largely from their limited capacities to draft and negotiate durable sales contracts in addition to a lack of legal awareness of their rights and recourse to recover funds[71].

In Switzerland, this acceptance dates back to 1 March 1991, when the CISC entered into force. Already in 1989, the Swiss Federal Council emphasized the increasing importance of the international sale of goods and the necessity for a clear and transparent set of rules governing contracts in this area of law, It considered that ratifying the CISC would to a large extent eliminate difficult questions concerning conflict of Laws, since the CISC regulated its sphere of application autonomously in its Article 1(1)(a).5 Moreover, the Federal Council stated that the CISC offered solutions tailored to the needs of international commerce, in particular by substantially restricting the seller's duty to cure any breach of its obligations[72].

In Germany, The CISG has entered into force in Germany on 1 January 1991. Since then it is part of German law. A differentiated picture as to the CISG's acceptance in Germany will become apparent when the different fields are examined where the CISG may play a role. But if an overall answer is to be given it can he said that the

[71] CLPD. *Iraq: Judicial Training Workshop in Erbil on International Sales Contracts*. Erbil, 2012.
[72] Ibid

CISG is the only private law convention, which in Germany has had and still has a broad impact on almost all possible fields where it can play a role.

Lawyers who practice in Germany in the field of international sales law are in their vast majority aware of the existence of the CISC). It can only he speculated how practicing Lawyers have become aware of the CISG). The sources from which practitioners may have drawn their knowledge are probably the following: In the first years after the CISG's entry into force in Germany many introductory courses on the CISG were offered by lawyers' associations, chambers of commerce, publishing houses and even universities. Today, the CISC) is part of the ordinary curriculum of most German law faculties (although generally not on a mandatory but optional basis). Moreover, since the CISC) is commented on in almost every standard commentary on the German Civil code, since CISG cases arc published in the law journals, since there exists a special journal on(CISG) cases. Unfortunately, Iraq did not have any steps of the mentioned before. Hopefully, this study will provide the sufficient information about the obligation of seller to deliver the goods and his liability if any breach happened through this obligation.

CHAPTER THREE

RESEARCH METHODOLOGY

3.1 Introduction

The objectives of this study are (1) to explore the importance of the delivery element in a contract sale of goods at the international level, (2) to examine the seller's liability when there is a breach in a contract of sale of goods, and (3) to make recommendation to improve the Iraqi law by adopting the provision from international law and Malaysian law wherever suitable. Based on these objectives, this study will adopt a doctrinal legal approach in collecting the data. The study will be conducted to investigate the importance of 'the seller's obligation to deliver the goods in the sale of goods contract' as a one of the most important duty imposed upon the seller by the Contracts for the International Sale of Goods (CISG Vienna convention 1980).

3.2 Research Design

Research design is a framework or blue print for conducting a research. It specifies the details or the procedures needed to obtain the information relevant to the research problem. The research design used in a study should be the one that is most suited for answering all the research questions. In this study, the researcher has adopted a

qualitative research design as the method was ideal for describing the provisions of element of delivery in the CISG, Malaysian SOGA and Iraqi's ICC laws[73].

Qualitative research is a systematic, subjective approach to describe life experiences and give them meaning, with the approach's aim to ascertain opinions, attitudes behavior, likes or dislikes. In particular, the main purpose of a qualitative study is to ascertain how people feel, what they think about a certain phenomenon or why they behave in a certain way. The main forms in this approach include field observation, content analysis, group studies, and in-depth interviews. The data collected in qualitative researches are in the form of field notes or some form of textual materials. A qualitative research basically involves data in the form of words, description or narratives. As for this study, the researcher has used content analysis approach in analyzing the laws on sale of goods contracts and the provisions of the CISG articles of the seller's obligation to deliver the goods. The role of data analysis in a qualitative research is to extract meanings from what the researcher has studied, and what and how something happens or exists[74].

In this study, the design adopted is a doctrinal legal approach which is very similar to the qualitative study in social sciences. Doctrinal research (also referred to as the orca, pure legal, academic, traditional, armchair research) is essentially a library-based study, which means that the materials needed by the researcher may be available in libraries, archives and other databases. The basic aim of such research is to discover, explain, examine, analyses the working of certain laws or legal institutions–and present in a systematic form, facts, principles, provisions, concepts, theories. On this account, the researcher has mainly referred to secondary data

[73] Parker, Andre Charles. "A Qualitative Study of Key Success Factors for Multinational Corporations Operating in Sub-Saharan Africa." Stellenbosch: University of Stellenbosch, 2009.

[74] Yaqin, Anwarul. "Legal Research and Writing" *Malaysialaw Journal Sdn Bhd* (2007).

namely test books, articles from journals, government reports and the provisions of the relevant laws and legislations. Generally, the objectives of such research are achieved through these approaches.

This study conducts a comparative analysis between Malaysian SOGA 1957 and the provisions of CISG. Separate discussions are firstly conducted of the relevant rules in CISG, Malaysian law and Iraqi laws in order to provide a general understanding of each set of obligations by conducting a comparison. In addition to discover the similarities and the differences between them as well as the between Common law and Civil law systems.

3.3 Data Collection

Reliability and consistency are always determining the method of data collection used for a study. In order to further enhance the overall value of this study, both primary and secondary sources of data will be used. Primary source refers to historical data (speeches, interviews, government records, records of organizations, minutes, reports, correspondence, books and, laws) or the main text or work that is discussed as the actual data or research results. Secondary sources refer to the records generated by an event but written by non-participants in the event. While they are interpreted of analyzed, the secondary data are based on or derived from primary sources (most journal articles, most published books journals, newspaper, and articles). The armchair method will be used by the author to access the required information in conducting the study, and those information are readily available through online from the Iraqi government websites such as Electronic Iraqi Newspaper and Iraqi Trade information Center (ITIC). The UUM Virtual Library

and other legal websites will be the sources for the author. Subsequently, all the data obtained from the above sources will be critically analyzed by the author.

In order to have a complete data set, thorough reading and re-reading is necessary to ensure that all recurring information and variations are identified. Only when no new information can be obtained will the volumes of data be gathered throughout the data collection process, which requires the researcher to complete a reduction in data through categorizing and identifying similar themes. This process allows the researcher to interpret the findings more easily.

CHAPTER FOUR

DATA ANALYSIS AND FINDINGS

4.1 Introduction

This chapter attempts to discuss and cover both research objectives. That are; (1) To study the importance of delivery element in a contract sale of goods at the international level. (2) To examine the seller's liability when there is a breach in a contract of Sale of Goods. For this purpose, the discussion in this chapter will focus Firstly, on the element of delivery in a Contract Sale of Goods. Secondly, the buyer's remedies when the seller breach his obligation to deliver the goods. Accordingly, legal provisions of CISG, Malaysian SOGA 1957 and Iraqi's Civil Code No.40 of 1951 will be examined. This also chapter presents results of the data analysis and the findings of this study. That is, the data gathered are used to answer the research questions of this study.

4.2 Delivery

Article 30 of United Nations Convention on Contracts for the International Sale of Goods states: "The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and the Convention." In addition to setting out the basic elements of due performance under this Convention, the article also makes explicit the importance of the terms of the contract in determining the content of those obligations. As dictated: "The scope and substance of those obligations are determined chiefly by the terms of the contract".

Markedly, only when the contract is silent will the recourse to the provisions of the Convention be necessary. Additionally, Article 6 of CISG permits parties to exclude the application of the Convention, or to derogate from, or vary the effect of any of its provisions. This implies that in cases of conflict between the contract and the provisions of the Convention, the seller must fulfil his obligations as required by the contract.

The seller's primary obligation is to deliver the goods. This delivery obligations are found in Article 31 of CISG, which dictates that the delivery of good consists of dispatching of the goods to the buyer, or in the seller's placing the goods at the buyer's disposal. In this article, the primary rule is supplemented by Article 32 and 33 of CISG, which lay down the rules relating to notice of dispatch, the conclusion of the contract of carriage, insurance (Article 32 of CISG) and the time of delivery (Article 33 of CISG). Article 34 of CISG governs the handing over of documents.

In practice, the parties will more often than not specifically agree that the above matters are to be governed by standard delivery terms, such as CIF, FOB or ex ship. Such terms are "shorthand descriptions of particular delivery obligations." If the parties contract on such terms, the seller's delivery obligations will be determined by the terms of the contract, not by the provisions of the Convention.

4.2.1 General Overview

Three Articles of the Convention deal with the seller's obligation to deliver the goods. Firstly, the substance of the delivery obligation and the closely-related issue of the place of delivery are dealt with in Article 31 of the CISG. In Article 32, a

number of supplementary rules relating to the giving of notice is provided along with the conclusion of a contract of carriage and transportation arrangements. Finally, Article 33 sets out the rules relating to the time of delivery.

4.2.2 The Meaning of "Delivery"

Article 30 of the Vienna Convention outlines the obligations of the seller before the buyer. In particular, it states what should be the main obligations under the contract of sale of goods. Other secondary liabilities of the seller are to (1) conclude a contract of carriage of goods, (2) do a contract of insurance and (3) commit to the maintaining of the goods. Nevertheless, these liabilities leave the agreement to the parties or deal with treatment limited in their texts, or what is the custom in similar transactions.

The main obligations of the seller are as follows:

1. The delivery of goods.

2. Delivery of documents relating to the goods.

3. Transfer of ownership of the goods as required in accordance with the contract and according to the provisions of the Convention.

While the Convention does not expressly define the concept of "delivery", a number of points can be made about the concept. First, "delivery" refers only to the steps that the seller must take in order to ensure that the buyer obtains possession of the goods. As a general rule, the delivery obligation can be performed unilaterally by the seller without the need for the buyer's cooperation. Second, the delivery obligation

may be performed notwithstanding that the actual possession has not been given or any transportation has been made to the buyer. For example, under Article 31 of the CISG, the seller may perform his delivery obligation either by handling the goods over to the first carrier or by placing them at the disposal of the buyer[75].

The Hague Convention (1964) states the definition of delivery in the first paragraph of Article 19: "delivery consists in the handing over of goods which conform to the contract."[76] In Oxford Advanced Learner's Dictionary, the verb 'hand over' is defined as "to give somebody else your position of power or the responsibility for something[77]." Accordingly, the text decides that the delivery of goods must conform to what the parties agreed in the contract, and this means that in this definition, conformity' is an additional requirement for the seller to perform their obligation of delivery. The rationale for this is to increase the consequence of breaches of conformity; in other words, the consequence has to be the same as if the seller does not deliver the goods.

However, the link between delivery and conformity seems to cause practical difficulties in the passing of risk in some cases in which the buyer intends to accept minor defects in the delivered goods. In such a case, the question of the passing of risk will remain unanswered because the passage of risk is associated with delivery. In other words, the delivery of non-conforming goods is not effective unless the buyer accepts the delivery. Here, the buyer's declaring of acceptance becomes the certain time for passing the risk. [78]. This case was developed by Uniform Law on

[75] Raoof, Nagham Hanna. "The Obligation of Delivery of the Seller in the International Contract of Sale of Goods According to Vienna Convention of 1980." The Council of College of Law University of Mosul 2004.
[76] Uniform Law on the International Sale of Goods (1964)
[77] " Oxford Advanced Learner's Dictionary", Oxford University Press (accessed 1/5/2014 2014).

[78] So that, if the delivered goods are not matching what has been agreed upon, it was considered a breach of the obligation of delivery according to the section 36 of Vienna convention 1980

International Sale of Goods 1964 (Hagu Convention ULIS) and was then transferred to the Vienna Convention. the conformity, it is one of the issues of delivery because the seller does not obliged to just deliver goods but, also, free from defects that miss utilization and conform with the agreed terms in the contract sale of goods. It is noted by researcher that the Vienna Convention dedicates the conformity of goods in Section II of Chapter II of Part III under conformity of the goods and third party claims[79].

Accordingly, also noted that the text of Article 19 of the Hague Convention has raised a number of criticisms and questions in jurisprudence, and this is pushing the Vienna Convention to avoid such questions and criticisms in defining this commitment, particularly by leaving it up to the jurisprudence of the national law[80].

The lack of commitment in the Vienna Convention, as argued by Gabriel Henry, this would create disturbance in doing businesses. Hence, it is suggested that a definition of delivery be stated because the delivery obligation is one of the most important effects of sales contracts; it is also one of the most important responsibilities upon the seller in all forms of international sales, according to the rules of incoterms 1990[81].

According to Malaysian Sale of Goods Act 1957, it explained the delivery as it is the duty of the seller is to deliver the goods while the buyer's duty is to accept and pay for them in accordance to the terms of the sale contract[82]. Unless agreed, the

[79] CISG 1980 section 35-44

[80] Raoof, Nagham Hanna. "The Obligation of Delivery of the Seller in the International Contract of Sale of Goods According to Vienna Convention of 1980." The Council of College of Law University of Mosul 2004.

[81] Gabriel, Henry. "The International Chamber of Commerce Incoterms 1990 - a Guide to Their Usage." *Vindobona Journal of International Commercial Law and Arbitration*, (1999).

[82] Ibid section 31

delivery of the goods and payment of the price are concurrent conditions[83]. Delivery is a voluntary transfer of possession from one person to another[84]. In this case, the seller is under an obligation to voluntarily transfer the possession of the goods in accordance to the parties' agreement. This can be satisfied by placing the disposition of the buyer's goods in a deliverable state, unless the parties agreed that the seller should send them to the buyer under Section 36. It can also be satisfied by a third party's acknowledgment that he holds the goods on behalf of the buyer, as dictated in Section 36 (3) of the said act. This shows that the voluntary transfer need not involve any physical activity on part of the parties. Delivery of goods may be made by doing anything which the parties agree to be treated as delivery, or which has the effect of putting the goods in the possession of the buyer or of any other person authorized to hold them on the buyer's behalf[85].

While, The Iraqi Civil Code Law No. 40/1951 ("ICC") Section 538 Article states: "delivery of the thing sold will be by surrendering the thing sold to the purchaser in a manner which enables the purchaser to take delivery thereof without any impediment (obstruction) or obstacle."

Nevertheless, there is one exception with regard to the obligation of passing of property and transferring of title, as mentioned in Article 30. The article however, does not mention this matter in detail. The CISG does not define when the property passes, nor what is required in obtaining the passage of the property, since these issues are left to be governed by the jurisdiction of the applicable national law[86].

[83] Ibid section 32
[84] SOGA 1957 section 2
[85] Ibid section 33
[86] This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:
(a) the validity of the contract or of any of its provisions or of any usage;

Although some courts state that the Convention is exhaustive[87], there are matters not governed by the Convention. These matters are to be settled either in conformity with the applicable uniform rules[88] or through the application of domestic law that must be identified on the basis of the rules of private international law of the forum[89].

The CISG emphasizes parties' agreements in the contract, which is the fundamental source of their rights and obligations, as expressed in Article 6[90]. This article was designed specifically to address this principle. Hence the obligations of the CISG can be used only as supplementary to the parties' contract.

The approach of the CISG Articles related to delivery[91] intends to describe how the seller can perform their obligations, rather than whether or not delivery actually takes place[92]. Therefore, a delivery may involve some action by the seller, such as transferring the goods to a carrier or at the buyer's place of business. On the other hand, delivery may not need any positive action from the seller if for instance, it is the buyer's duty to come and collect the goods. In this case, the duty of the seller is to place the goods at the buyer's disposal.

Expressions of "delivery" and "hand over" are mentioned in the CISG several times. Honnold defined the meaning of “hand over” in the CISG as “the Convention speaks

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(b) the effect which the contract may have on the property in the goods sold..

[87] Switzerland 15 September 2000 Supreme Court [4C.105/2000] (FCF S.A. v. Adriafil Commerciale S.r.l.). at http://cisgw3.law.pace.edu/cases/000915s2.html]

88 France 13 September 1995 Appellate Court Grenoble (Caito Roger v. Société française de factoring).Available at http://cisgw3.law.pace.edu/cases/950913f1.html]

[89] Switzerland 28 January 2009 Tribunal cantonal [Higher Cantonal Court] Valais (Fiberglass composite materials case). Available at http://cisgw3.law.pace.edu/cases/090128s1.html

[90] The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.

[91] Articels 30-34 0f CISG

92 Honnold, John O. Uniform Law for International Sales under the 1980 United Nations Convention. Third eddition ed.: Kluwer Law International, 1999. http://www.cisg.law.pace.edu/cisg/biblio/honnold.html (accessed 1/5/2014).

of physical acts of transfer of possession[93]-the `handing over' of the goods"[94]. Based on the different uses of `delivery' and `hand over', it can be suggested that `delivery' is a broader term which can be used to express the obligation of the seller as a party in the contract without any additional specification of how this obligation is to be performed or whether or not the seller should take any positive action.

'Handling over', however, implies an extra meaning that a positive action should be taken. This can be seen in the practice of the CISG where these terms are used. As for the seller's obligation regarding documents, his duty is to hand them over to the buyer, and the norm is for him to send the documents to the other party rather than to place them at his disposal at the seller's place of business. This is because the goods can either be dispatched or be made available to the buyer; hence, the term `delivery' can be used in either case in the CISG.

The CISG takes a clearly practical approach to the meaning of `delivery', and it considers the seller's performance of the duty of delivery by placing the goods as required by the contract. The CISG is enough for the purpose of fulfilling the obligation of delivery, even in cases in which the goods are defective or do not meet the condition of conformity. On this ground, defective delivery will be considered only under the obligation of conformity[95].

[93] The Iraqi Civil Code Law No. 40/1951 ("ICC") section 538 Article. 531. — (1) Delivery of the thing sold will be by surrendering the thing sold to the purchaser in a manner which enable. the purchaser to take delivery thereof without any impediment (obstruction) or obstacle.
(2) where the vendor has been the purchaser taking delivery of the thing sold and kept silent this will be deemed to be a permission by the vendor to the purchaser to take delivery thereof.

[94] Articels 30-34 0f CISG

[95] Henschel, René Franz. "Interpreting or Supplementing Article 35 of the Cisg by Using the Unidroit Principles of International Commercial Contracts and the Principles of European Contract Law." (2004). http://www.cisg.law.pace.edu/cisg/text/anno-art-35.html [accessed 29/4/2014].

4.2.3 Place of Delivery

Article 31 of CISG provides rules on the place of delivery. Primarily, it is the parties' agreement on the relevant place of delivery. In the absence of such an agreement, several situations have to be distinguished, and accordingly, Article 31 (a) of CISG will apply if the contract of sale involves carriage o the goods. In other cases, one should first refer to Article 31 (b) of CISG before resorting to the residual rule in Article 31 (c) of the covenant.

A) Seller's bound to deliver at a Particular Place

The provisions in Article 31 of CISG relating to the place of delivery apply only "if the seller is not bound to deliver the goods at any other particular place." In such a case, the parties have expressly or impliedly agreed that the goods are to be delivered at a particular place (for instance at the buyer's place of business or at the seller's place of business). Under this circumstance, the place of delivery is determined by the agreement, and recourse to the provisions in Article 31 CISG is unnecessary[96].

If parties are contracted by reference to a particular delivery term (such as one of the Incoterms), the substance of the delivery obligation and the place of delivery must be determined in accordance to the express terms of the contract. Thus, for example, if the parties contract on CIF Incoterms, the seller must "deliver the goods on board the

[96] Article 541. (1) The mere issue (tenor /execution)* of the contract necessitates the delivery of the thing sold at the place where it lies at the time of the contracting; if the thing sold is a movable object the location of which has not been designated it will be deemed as lying at the place of the vendor's residence.
(2) If the contract has stipulated that the vendor must deliver the thing sold at a specified place the delivery must be effected at that place.

article 396. (1) If the subject matter of an obligation to be delivered is one which has value and weight such as things that are measured by volume or weight (quantitatives and weightables) commodities and similar things and if the contract is absolute (unrestricted) which did not specify a place for delivery the thing will be delivered at the place wherein it was lying at the time of the contract.
(2) s regards the other obligations the discharge will take place at the debtor's domicile at the time of maturity or at the place wherein lies his business premises if the obligation is related to this business unless there is an agreement otherwise.

vessel at the port of shipment on the date or within the period stipulated." In relation to some delivery terms, the Incoterms produces the same place of delivery and delivery obligation as Article 31 of CISG. Regardless of whether the contractual delivery term produces the same effect as the one produced by Article 31 of CISG, the substance of the delivery obligation and the place of delivery are to be determined in accordance to the provisions of the contract (e.g., the delivery term), and not with the "fall, back" provisions contained in Article 31 of CISG.

B) Contract of Sale Involving Carriage of the Goods

Article 31 (a) of CISG states: "where the contract of sale involves the carriage of goods, and the seller is not bound to deliver the goods at any particular place, the seller performs his delivery obligation by handing the goods over to the first carrier for transmission to the buyer."

Article 31(a) is applicable only to contracts that involve "carriage." In this case, the seller's duty is to deliver the goods to the first carrier for transmission to the buyer. The concepts of "carriage" and "carrier" necessitate an independent carrier between the seller and the buyer. Hence, if the goods are effectively moved by the parties' own actions, the concepts of carriage and carrier as in Article 31(a) will not apply, and the seller will still be responsible for the goods that are still under his or her custody.

Delivery in this circumstance means to hand over the goods to the carrier, which means to transfer the physical control of the goods, as mentioned earlier. That is to say, the seller is responsible for the goods if he leaves them on an unattended jetty pending arrival of the carrier.

However, in cases related to group FOB terms in which the seller is not responsible for arrangement of carriage, it is the buyer's obligation to conclude the contract of carriage and to inform the seller of this arrangement. Thus, if the seller fails to deliver the goods because of the buyer's failure to co-operate, the seller's liability will be excluded according to Article 80. In this case, the buyer is responsible for not taking the delivery.

Handing over the goods to the first carrier may apply even though there is an indication to contrary customary terms if the parties fail to agree on a particular place. In such a case, the seller still fulfils his or her obligation by handing the goods to the first carrier. However, when there is an agreement on the place, such as a railway station or an FOB airport, the parties' agreement will prevail and the seller has to deliver the goods to that place, even if the delivery to this place is not to the first carrier. However, it is difficult to consider a forwarding agent as the first carrier in this case.

In such a case, the answer depends on the position of the forwarder, and whether or not he or she plays a role in taking responsibility over the goods as the carrier. If not, the seller will not be considered to have discharged his or her duty until the carrier delivers the goods.

4.2.3.1 Supplementary Obligations of Arrangement for Shipment

As most international sales of goods involve carriage, the CISG supplements the provisions of Article 31(a) with Article 32, which deals with various cases in which there is no agreement with respect to the arrangements for the carriage of goods.

Subparagraph 1 considers the seller's obligation to give notice of delivery to the buyer as follows:

“If the seller, in accordance with the contract or this CISG, hands the goods over to a carrier and if the goods are not clearly identified to the contract by markings on the goods, by shipping documents or otherwise, the seller must give the buyer notice of the consignment specifying the goods.”

Giving the consignment notice is a crucially important action to be carried out by the seller in commercial practice, and this action is usually affected in the documents issued by the carrier. However, Article 32(1) requires notice as an obligation of the seller to inform the buyer of the consignment specifying the goods if the goods are not identified by markings on them or by the shipping document. This notice protects the buyer from the seller’s identifying the goods for the contract later, particularly after the goods have been damaged or lost, and consequently, has the risk passed to the buyer.

The result of the seller’s failing to give notice of the consignment is that the risk will not be passed to the buyers. This is considered to be a breach of contract, and the remedy depends on whether or not the breach is deemed fundamental.

When the contract involves arranging for carriage of the goods, Article 32(2) identifies what the seller is required to do in order to fulfil his or her obligation as follows:

“If the seller is bound to arrange for carriage of the goods, he must make such contracts as are necessary for carriage to the place fixed by means of transportation appropriate in the circumstances and according to the usual terms for such transportation.”

This paragraph relates to cases in which the seller is bound by the contract to arrange for carriage, even if the transport itself or its cost is not his or her responsibility. It provides that the seller's conduct for these arrangements must be made according to appropriate means that conform to the circumstances, such as selecting the right carrier and giving the correct instructions. Moreover, it is an obligation of the seller to arrange for appropriate vehicles and routes. The standard for these obligations must be according to the usual terms.

The last provision of Article 32 is related to the seller, who is not bound to affect the insurance for the goods to be delivered. Paragraph 3 states: "if the seller is not bound to effect insurance in respect of the carriage of the goods, he must, at the buyer's request, provide him with all available information necessary to enable him to affect such insurance."

This obligation applies only when the buyer requests such information. However, when the buyer requests insurance information, the seller is obliged to send it as soon as the information is available. Failing to do so will cause the seller to be liable to pay for the damages under the CISG's rules.

The place of delivery is stated in SOGA 1957: 'whether the seller is required to send the goods to the buyer or the buyer has to take the possession of the goods depends on what has been agreed upon between them[97]."

Apart from such agreement, the general rule is that sold goods are to be delivered at the place at the time of the sale. Goods agreed to be sold are to be delivered at the

[97] SOGA 1957, section 36 (1)

place at which they are at the time of the agreement to sell, or, in the case of goods which are still non-existent, at the place of manufacture or production[98].

When the seller agrees to deliver the goods at his own risk at a place other than that they are sold at, the buyer shall–unless otherwise agreed–take any risk of deterioration in the goods in the case of necessary incident to the course of transit[99].

4.2.3.2 Delivery not Involving Carriage of Goods

It is uncommon for international sale contracts to be concluded without the involvement of the carriage of goods. The CISG provides Article 31 (b and c), which states: "there is neither an arrangement under the contract as to the place of delivery nor is carriage an obligation of the seller."

4.2.3.3 Goods at A Particular Place

Article 31(b) applies in cases in which the place of the goods is known to the parties at the time of concluding their contract, even if the goods are yet to be manufactured or produced, as long as both parties know that particular place. In this respect, the place of delivery is the particular place known to the parties; hence, the seller's duty is to place the goods at the buyer's disposal at that place to enable the buyer to collect them. Thus, placing the goods at the buyer's disposal requires doing everything necessary to enable the buyer to take complete control of them, such as giving the buyer a delivery order, giving instructions to the warehousemen and giving the buyer

[98] Ibid
[99] Detta, Lee Mie Pheng . Ivan Jeron. *Commercial Law*: Oxford Fajar sdn. Bhd., 2011.

a notice to inform him that the goods are placed at his disposal, if required. The place of delivery in this subparagraph is the same as in the ex-work clause of Incoterms'.

The requirement of identifying the goods has been dealt with in the chapter on passing risk. Article 69 (3) states: "the goods are considered not to be placed at the disposal of the buyer until they are clearly identified to the contract." The method of identifying the goods to the contract is dealt with in Article 67, which dictates: "by markings on the goods, by shipping documents, by notice given to buyer or otherwise."

For the purpose of covering all of the possible options for the place of delivery, the CISG deals, in Article 31(c), with cases of delivery, in which neither the carriage of goods nor the place of goods are known during the conclusion of the contract. In such cases, the place of delivery is the seller's place of business at the time of the contract's conclusion.

If the seller has more than one place of business, Article 10 (a) may be referred. The article defines the place of business as: "which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of contract. Additionally, a habitual residence can be adopted as a reference if a party does not have a place of business."

4.2.4 Time of Delivery

Under the seller's obligation of delivery, the CISG tackles the issues related to the time of delivery mainly under Article 33, which is divided into three subparagraphs:

(a) and (b) deals with the contractual agreement where a date or period of time is fixed by the parties and (c) is concerned with contracts that do not mention the time of delivery.

4.2.4.1 Delivery at a Specific Time

Article 33 states: "the seller must deliver the goods if a date is fixed by or determinable from the contract, on that date."

In this subparagraph, there is no negative legal issue, as the time of delivery is clear and the duty of the seller is to deliver the goods at that time. In addition, a definite time can be implicitly referred to in the contract, such as when an event takes place after the contractual time or at the request of the buyer or the third party.

The article however, does not explicitly dictate the question of counting usage as a reference to identify the time of delivery. However, usage can be included under the meaning of "determinable from the contract" in this subparagraph, as well as from the general principle of recognition of usages and practices in the CISG. Hence, the time recognised by both parties through usage or practice should be recognised as a determinable time. Finally, in cases of an indefinite event or date of delivery, the seller's obligation to deliver might not apply under this subparagraph and the contract should be considered as if there is no indication as to the time of delivery in the contract. The applicable rule for such a contract is Article 33(c). If the contract

indicates only the time of taking delivery, then it is the seller's duty to deliver the goods with enough time to enable the buyer to take the delivery[100].

According to Iraqi Civil Code No.40 of 1951[101]:"The vendor shall deliver the thing sold and accessories to the purchaser on payment of the price to him and if the purchaser stipulated to take (delivery of) the thing sold at a certain specified time prior to payment permissible (allowable)." However, for international sales, the delivery is unavailable in the same time when the sale's contract concludes.

Under the contract of sale in Malaysia, the seller is bound to send the goods to the buyer, but not to fix the time to send the goods. The seller's binding to send the goods within a reasonable time is a question of fact[102]. Demand or tender of delivery may be treated as ineffectual unless it is made at a reasonable hour[103].

Article 33 (a) does not specify at which part of the day the seller has to deliver the goods. This issue has also been given no attention in the literature: the commentators' focus has been on defining the correct date in different types of agreement. Nevertheless, Viscasillas has highlighted the problem of time for receiving documentation after business hours on the fixed date, suggesting that as long as the delivery can be proven by means which indicate the time (such as email or fax), the delivery should still be effective "because it was delivered prior to midnight". On

[100] Iraqi Civil law No.40 of 1951, stated in the Article 394. (1) If the debt is for a term or if it has been made payable in instalments the creditor may not claim from the debtor either the debt or the instalments before the date of maturity.

(2) The debt must be paid immediately (forthwith) if it is not for a term or it has matured the court say however where necessary if it is not barred by a provision in the law accord the debtor a suitable time limit (to pay) if his condition necessitates such action provided no great prejudice is caused therety to the creditor

[101] Ibid Article 536

[102] Detta, Lee Mie Pheng . Ivan Jeron. *Commercial Law*: Oxford Fajar sdn. Bhd., 2011.

[103] SOGA 1957, section 36 (4)

these grounds, it can be suggested that the CISG is not concerned with this issue, following its general approach of not engaging with all the details in contracts. However, in the CISG, time can be determined by reference to the common usage and practice which is, as mentioned above, before the midnight on the relevant day. In addition, several other issues need to be taken into account, namely the role of the fundamental breach, as mentioned in the above case in which the court considered that a delay of two days is not fundamental.

4.2.4.2 Delivery in a Specific Period of Time

The second paragraph of Article 33 continues to describe the legal conditions of the contractual agreement in terms of the time of delivery as discussed in the following paragraphs:

"If a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the buyer is to choose a date."

While Article 33(a) deals with the contract involving a fixed date of delivery, the other option for determining the time of delivery in the contract is through a period of time: any day in this period can be the time for the seller to deliver the goods; in turn, the buyer's obligation is to be ready to take the delivery during that period. However, according to this paragraph, in some cases, instead of authorizing the seller to choose the time within the period, the buyer has to choose the appropriate date for delivery. Such cases can be found in FOB contracts in which shipment is fixed by the contract to be under the buyer's responsibility. In such a case, the buyer will determine the date of shipment when he or she selects the ship at the port of delivery.

Similarly, in ex work contracts, the buyer may have to take delivery within a stipulated period of time in which the goods have been placed at his or her disposal at the seller's place of business.

This provision can be illustrated by a German case in which the contract included that "autumn goods, to be delivered July, August, and September". The German buyer refused to accept the goods.

Because the delivery was made on 26 September claiming that the period for the delivery had expired, the court applied CISG as the applicable law and awarded the Italian seller the full sales price, since the delivery was made during the contractual period of time. In this case, even though the buyer expected to receive one-third of the goods during each month, there was insufficient evidence to support the allegation. Thus, the delivery during the explicitly defined period was justified by the court.

4.2.4.3 Delivery in a Reasonable Time

The final paragraph of Article 33 intends to cover cases that do not fall into the above circumstances. It states: "(c) in any other case, within a reasonable time after the conclusion of the contract."

In these cases, reasonable time is the time of delivery and the time begins to run after the conclusion of the contract. In order to determine the "reasonable time" for performing a delivery, acceptable commercial conduct and practice in relation to similar circumstances as the case should be introduced. Honnold stated: "what is 'reasonable' can appropriately be determined by ascertaining what is normal and

acceptable in the relevant trade." In this respect, a reasonable time can be affected by various aspects, such as the buyer's purpose of the goods, the location of the parties (whether or not they are close to one another) and the situation of the goods (whether they are to be manufactured or not). Also, observing the general principle of good faith [Article 7 (1)] is important as an element in identifying the reasonable time.

In one case, an Italian plaintiff sold a bulldozer to a Swiss defendant who refused to pay as a result of late delivery. The court held that since the delivery was made within no more than two weeks after the seller had received the first instalment, handing over the machine to the carrier could be considered in time, since no date had been fixed by the parties [Article 33(a)]. Accordingly, Article 33(c) was applied. In this article, the CISG does not deal with issues relating to early or late delivery. These matters are left to Article 47, 49 and 52.

4.2.5 Handing over of Document

Relations between the parties in international trade are often not close enough to justify a delivery on credit by the seller. Therefore, arrangements for the use of documents to control delivery of goods can be sufficient for an exchange of goods for a price. These documentary exchanges are widely recognized in international trade practice[104]. In the CISG, Article 34 was designed to deal with delivery of documents as follows:

"If the seller is bound to hand over documents relating to the goods, he must hand them over at the time and place and in the form required by the contract. If the seller

[104] John O. Honnold , Harry M. Flechtner. *Uniform Law for International Sales under the 1980 United Nations Convention*. 4th ed.: Wolters Kluwer Law & Business, 2009. (accessed 28/42014).

has handed over documents before that time, he may, up to that time, cure any lack of conformity in the documents, if the exercise of this right does not cause the buyer unreasonable in convenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention[105].”

The reference to handing over of documents in Article 34 merely concerns the contractual agreement itself. However, Article 30 includes the obligation of handing over documents as one of the main seller's obligations, as mentioned above. The approach of the CISG to delivery suggests that the obligation of the seller to deliver the goods is independent of his obligation to tender of documents relating to the goods. Thus, Article 34 addresses the handing over obligation separately from the obligation of delivery of the goods, which is dealt with under Article 31, 32 and 33. In this regard, the seller's duties can be confined to the tender of documents. For instance, if the goods to be sold are in the possession of a third party, the seller may fulfil his or her obligations merely by the tender of documents, which transfers control of the goods to the buyer[106].

Unlike with the delivery of goods provision, the CISG does not lay down particular rules with regard to time, place, and form for the handing over of documents; rather, it refers merely to the parties' agreement, requiring the seller to fulfil the agreed handing over of documents without suggesting rules for silent contracts. Bridge

[105] Raoof, Nagham Hanna. "The Obligation of Delivery of the Seller in the International Contract of Sale of Goods According to Vienna Convention of 1980." The Council of College of Law University of Mosul 2004.

[106] Huber, P., and Alastair Mullis. *The Cisg: A New Textbook for Students and Practitioners*: International Specialized Book Service Incorporated, 2007.

criticized the approach of the CISG on documentary rules by claiming that "it is a blank page"[107].

There is no need for particular rules for handing over of documents [108] because this obligation is linked to the goods themselves and the payment for them. Thus, the place and time of document delivery can be determined from the rules of delivering the goods and payment. In other words, if the contract does not mention these rules, their interpretation can be made by the general principles of the CISG[109].

4.2.5.1 Documents Relating to the Goods

Article 34 neither provides a definition of the required documents nor enlists them. It simply requires the seller to deliver the documents related to the goods. In this regard, the documents which the seller has to hand over should be provided by the contract, and they can also be identified by indicating one of the Incoterms in the contract[110]. For example, if the contract mentions the CIF term, the documents

[107] Bridge, M. The International Sale of Goods: Law and Practice: Oxford University Press, 2007. p. 29 compares the CISG and the Sale of Goods Act of the UK, suggesting that even though the Sale of Goods Act is mute on the seller's obligations related to documents", there has been time to develop a rich body of case law on documentary duties under the Act, whereas, even after 20 years of its application, there is insufficient evidence in the case law of any distinctive approach of the CISG to the strictness of the seller's documentaries duties"

108 The original draft prepared by UNCITRAL does not contain the provision of Art. 34, which was proposed by the Canadian delegation during the diplomatic conference

109 These principles of interpretation can be found in Art. 8, which refers to the contract meaning, Art. 9 to the relevant usage and Art. 7(1) the observance of good faith in international trade. See John O. Honnold , Harry M. Flechtner. Uniform Law for International Sales under the 1980 United Nations Convention. 4th ed.: Wolters Kluwer Law & Business, 2009. (accessed 28/42014).

[110] Mexico 29 April 1996 Conservas La Costeña S.A. de C.V. v. Lanín San Luis S.A. & Agroindustrial Santa Adela S.A. M/21/95. Available[http://cisgw3.law.pace.edu/cases/960429m1.html] In this case the Argentinian-Chilean firm (the seller) did not provide the Mexican buyer with the due invoice for the entire agreed price. The Compromex held that both the Argentinian and the Chilean firms (the seller's subcontractors) should have provided the buyer with all documents(invoices) corresponding to the amount and value of the goods paid for by the buyer.

required are: a clean negotiable bill of lading[111], an invoice of the goods shipped, an insurance policy, and the certificate of origin and consular invoice.

4.3 Liability of Seller in Breach of Delivery

Obligations of the seller and the buyer as well as the remedies available to each of them are dealt with in Part III of the Convention. This part also contains rules regarding the passing of risk and some general and common provisions to both the seller and the buyer.

Obligations of the seller include delivering goods that conform to the contract and handing over the documents related to the transfer the property of the goods. The buyer's obligation is to take the delivery and pay for the price. Additionally, the buyer should also examine the goods to verify their conformity and give notice of non-conformity to the seller within a reasonable period of time.

The remedies available for both the buyer and the seller are described in a unified scheme that is clear and easy to follow. Apart from reflecting some of the Civil Law aspect, the remedies' range is wider than what is available under the Common Law, and some of these remedies are even foreign to the said law. The issue of remedies is one of the fields in which the diversity of legal systems is obvious.

The most controversial remedy has been specific performance, which is the primary remedy in the Civil Law. In the Common Law, the primacy is for damages. The Convention makes specific performance available to both the seller and the buyer. The provisions regarding this matter will be examined in detail later in the specific

[111] Hinkelman, E.G. *Dictionary of International Trade*: World Trade Press, 2010.

performance part in this chapter. Another remedy available for buyers include avoidance, which can be exercised in case of fundamental breach and in the case of fixing an additional time for performance at the end of which the buyer has not performed damages and price reduction.

Understanding the rules on remedies and their uniform application are considered as the backbone of unifying the law of sale internationally[112]. The remedial system of the CISG provides a separate section on remedies for each party to set forth after the obligations of the other party; it then continues to provide the common provisions for both parties[113]. This study attempts to explore the sections which specifically looks at buyer's remedies to provide a clear understanding of the sections' in order to compare them with their counterparts in Malaysian and Iraqi laws. Generally speaking, the CISG's remedies for breach of contract were designed to cover all failures of a party to perform any of their obligations.

In terms of the seller's breach of contract obligations[114], Article 45 of the CISG summarizes all the buyer's remedies and the links between them:

(1) If the seller fails to perform any of his obligations under the contract or this

Convention, the buyer may:

(a) Exercise the rights provided in articles 46 to 52;

(b) Claim damages as provided in articles 74 to 77.

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[112] Schlechtriem, P., and I.H. Schwenzer. *Commentary on the Un Convention on the International Sale of Goods: (Cisg)*: Oxford University Press, Incorporated, 2005. This author considers the area of remedies to include the most important differences between the CISG and the English Sale of Goods Act.

[113] The seller's remedies are set out in Arts. 61-65. Art. 61 sums up the seller's remedies in the same way as Art. 45. for the buyer's remedies. The common provisions for both parties are drawn in Arts. 71-88.

[114] Ibid

(2) The buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies.

(3) No period of grace may be granted to the seller by a court or arbitration tribunal when the buyer resorts to a remedy for breach of contract.

According to Article 45 (1) (a), in the event of a breach of contract due to the seller's failure to perform his obligations[115] under the contract and the CISG, the buyer has the right to practice the available remedies as detailed in the CISG, mainly in Article 46 to 52. Although all the remedies provided in these articles require that a breach of an obligation has occurred, the provisions make distinctions as to what kind of breach applies. In particular, Article 46(2), 49(1) (a) and 51(2) require a fundamental breach[116].

The main remedies under the CISG can be divided into three basic types: (1) specific performance, which includes repair and the delivery of substitutes in cases of non-conformity (Article 46), (2) avoidance of the contract (Article 49), and (3) reduction in price (Article 50). The other provisions in the buyer's remedies section are merely supplementary rules. Article 47 deals with an additional period for performance while Article 48 governs the right of the seller to cure the defects. Partial breaches are dealt in Article 51, early delivery in Article 52(l) and the delivery of extra quantities in Article 52(2).

[115] Ibid. The buyer cannot see any remedy before the performance is due except in the case of anticipatory breach(Art. 72) or early delivery (Art. 52).

[116] 2012 UNCITRAL Digest of case law on the United Nations Convention on the International Sale of Goods. "Digest of Article 45 Case Law", http://www.cisg.law.pace.edu/cisg/text/digest-2012-45.html (accessed 7/4/2014).

In addition, claiming damages is a supplementary remedy for both the buyer and the seller. Article 45(1)(b) forms the basis of the right of the buyer to claim damages and according to its language, the buyer may claim damages even if the seller is not at fault for failing to perform his obligations[117].

Paragraph 45(2) expressly indicates that practicing the right to claim damages can be an exclusive or a cumulative remedy in addition to other remedies that require performance, reduction in price or avoidance of the contract. Article 45(2) gives the buyer the advantage in demanding damages even if the use of other remedies is rejected.

The aim of Paragraph 45(3) is to exclude the influence of various domestic national laws which may permit the courts or arbitral tribunals to delay the practice of the buyer's remedies. This provision is important in protecting international trade and avoiding judicial discretion which may favor one party at home[118]. The rights of the buyer in the case of a breach of contract are applicable immediately at the time of the breach and cannot be deferred by a court or arbitration panel.

As stated above, the CISG system of remedies covers all failures, and thereby, each remedy can serve every breach of the obligations even if the failures differ in nature from one another.

However, in order to be practical, some remedies require more criteria to be satisfied than others. Thus, this study will provide a brief discussion of those remedies

[117] John O. Honnold , Harry M. Flechtner. *Uniform Law for International Sales under the 1980 United Nations Convention*. 4th ed.: Wolters Kluwer Law & Business, 2009. (accessed 28/42014).

[118] Ibid

available to buyer when the seller breaches his delivery obligation; it will also compare the remedies with those under the Malaysian, Iraqi and other relevant laws.

4.3.1 Specific Performance

In the event of breach of a contract by the seller, the CISG entitles the buyer to require that the seller perform or complete the performance of any of his obligations undertaken under the contract. Article 46 provides for the aggrieved buyer one of three forms of remedies as follows:

(1) The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement.

(2) If the goods do not conform to the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract and a request for substitute goods is made either in conjunction with notice given under Article 39 or within a reasonable time thereafter.

(3) If the goods do not conform to the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable after having considered all the circumstances. A request for repair must be made either in conjunction with the notice given under Article 39 or within a reasonable time thereafter.

It is readily available as a primary remedy for breach of contract to force the party in breach to fulfil his or her obligations to deliver the goods as agreed or to repair effective delivery. This seems to be the natural remedy as long as its performance is possible.

The approach adopted by the CISG to this remedy is similar to the one followed by many civil law systems such as Egypt and French[119]. In common law, this remedy is regarded as an exceptional remedy to be implemented at the court's discretion when alternative remedies are inadequate, whereas claiming for damages is the immediate remedy[120].

However, the provisions of national legislations vary in terms of implementation of the obligations–it can be voluntary or compulsory. In specific performance of the Iraqi, Egyptian and French laws, the remedial right is considered as the original one for the buyer, and it can be requested if the seller breaches his or her obligations under the contract sale of goods. Nevertheless, the implementation of compensation of it is a kind of exception. Whenever possible, remedial measures force the debtor to comply after excusing him to implement his obligation by the specific performance. However, if the implementation of specific performance causes exhaustion to the debtor, he may be exempted from the payment of monetary compensation if this decision will not cause serious damage[121].

This is contrary to the English and Malaysian laws, which consider remedial rights as an exception; in most cases, compensation is the original 'remedy'. The English law[122] identifies the implementation of specific performance so in any action of breach of contract to deliver specific or ascertained goods, the court may, on the application of the plaintiff, give judgment directing that the contract be performed specifically without giving the defendant the option of retaining the goods on payment of damages; the judgment may be unconditional or upon terms and

[119] Article (246) of the Iraqi civil law, and thus The CISG was identical to the agreement of the Iraqi civil law
[120] DiMatteo, L.A. *International Sales Law: A Critical Analysis of Cisg Jurisprudence*: Cambridge University Press, 2005.

[121] Iraqi Civil Law 1951 section (246)
[122] SOGA 1979 section (52)

conditions as to the damages, payment of the price and otherwise, and the application by the plaintiff may be made at any time before the judgment. In essence, the English law is identical to the Malaysian law[123].

In the event of breach, this remedy provides a right for the buyer to bring a court case against the seller in order to order such performance be enforced by the means available to it under the court's law. Subject to Article 28, (as discussed below) the court has no discretionary power to refuse the buyer's request[124].

Regarding late delivery, it is sometimes difficult to decide whether or not the buyer, by demanding late performance, wants to apply Article 46(1) for specific performance, or whether he or she voluntarily offers the seller a modified contract according to Article 29. In this case, reference should be made to the interpretation of the buyer's demand. If the buyer's intention is not clear, the declaration ought to be interpreted as a requiring performance under Article 46, since non-delivery is a breach itself and the buyer's demand for performance is one of its remedies[125].

Article (146/2) of the Iraqi Civil Code relates to the emergency circumstances theory that allows the judge to reduce the onerous obligation to a reasonable extent, under certain conditions.

[123] Section 58. Stated: Subject to Chapter II of the Specific Relief Act 1950 [Act 137], in any suit for breach of contract to deliver specific or ascertained goods, the court may, if it thinks fit, on the application of the plaintiff, by its decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages. The decree may be unconditional, or upon such terms and conditions as to damages, payment of the price or otherwise, as the court may deem just, and the application of the plaintiff may be made at any time before the decree.

[124] According to Article 28 a courts is not bound to grant specific performance unless it would do so under its own law in respect of similar contracts not governed by the Convention

[125] Boghossian, Nayiri. "A Comparative Study of Specific Performance Provisions in the United Nations Convention on Contracts for the International Sale of Goods (Cisg)." McGill University, 1999.

4.3.1.1 Requirements for Substitute Goods and Repair

Beside the original remedy of performance in Article 46 (1), the right of the buyer to demand cure of non-conforming goods may be exercised in the form of requiring the seller to deliver substitute goods or to repair defects. Article 46 (2) and (3) particularly specify the extra requirements for practicing each of these remedies. Even though these two alternative remedies are separate, both can be resorted simultaneously since the parties may agree to substitute some of the goods and repair the rest of them.

Since the shipping of a second delivery of goods and disposing of the non-conforming goods may cost the seller considerably more than the buyer's loss from having nonconforming goods, the application of the substitute remedy is restricted to cases where "the lack of conformity constitutes a fundamental breach" as in Article 46 (2). The buyer has to have suffered a detriment which substantially deprived him of what he was entitled to expect under the contract. If the breach cannot be proved to be fundamental, then the buyer may be entitled to the remedy of repair[126].

The performance remedy is designed for generic goods[127] because under a contract for specific goods, the seller has not undertaken any duty other than to deliver the particular goods[128].

The last part of Article 46 (2) provides a further requirement: it suggests that the buyer requests a supply of substitute goods in conjunction with notice, which is required by Article 39, or within a short time after the submission of the notice[129].

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[126] Ibid

[127] A goods that are sold using the name for the type of good that it is, rather than a brand name. A generic product is typically not heavily marketed and competes with other brand name products largely on a price basis. Packaged food and drugs are commonly offered to shoppers as generic products

[128] In ULIS this issue has been dealt with expressly under Art. 42 which provides that the buyer could only require the seller to deliver substitute goods where the sale related to unascertained goods.

As far as the requirements for substitute delivery are concerned, Article 82(1) requires that the buyer be able to return the non-conforming goods which he has received from the seller in order to require the seller to deliver substitute goods[130].

However, to protect the buyer to whom the delivered goods are defective and the breach is not fundamental, Article 46(3) entitles the buyer to require repair which is not reliant upon the concept of fundamental breach. This requirement is different from the seller's right to cure defects in Article 48, since the right of the seller to cure applies in order to limit the buyer's right to avoid the contract. Although repair does not require fundamental breach, it is still restricted to cases in which it would be reasonable for the seller to repair the defect, having regarded all the circumstances as in Article 46 (3). Therefore, these circumstances should include not only the nature of the defect, but also among others, the technical difficulties involved, the characteristic of the goods and any other circumstances. If the cost to repair the defect is disproportionate to the price of the goods or of acquiring a substitute, it would be unreasonable for the seller to repair[131].

Moreover, a claim for repair could be unreasonable if the seller is a dealer who does not have the means for repair, or if the repair can be achieved by the buyer at the least cost. In general, it is unreasonable for the seller to be obliged to repair if there is no reasonable relationship between the cost of the repair and the advantage that the buyer may gain from such an action.

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[129] DiMatteo, L.A. *International Sales Law: A Critical Analysis of Cisg Jurisprudence*: Cambridge University Press, 2005.

[130] Art. 82 (2) (a) (b)(c) of CISG

[131] Huber, P., and Alastair Mullis. *The Cisg: A New Textbook for Students and Practitioners*: International Specialized Book Service Incorporated, 2007.

For instance, in an Austrian case of a cooling system the court held that "the expenses for such a repair may be compensated only insofar as they are reasonable in relation to the intended use of the sold goods taking into account all the circumstances of the case (urgency, time needed to replace the faulty device, claims from the main contractor)[132]." The last part of Article 46 (3) repeats the requirement of the buyer's notice in 46 (2)[133].

In spite of the general meaning of Article 46, the buyer's right for performance is subjected to some significant limitations. One limitation is provided in Article 46, while the other is provided in Article 28. Alongside these articles are other general limitations to performance remedy.

The first major limitation is expressed in Article 46 itself, which instructs the buyer to not "resort to a remedy which is inconsistent with this requirement". Even though Article 46 (1) does not specify which remedies are inconsistent with the remedy of specific performance, the one that exercises the right of declaring the contract avoidance or reduction in price would certainly be inconsistent with this remedy[134].

The second important limitation derives from Article 28[135]; the main reason for this provision is to take into account the domestic laws in which the availability of specific performance is not recognized. Accordingly, the court of the contracting state is not bound to grant the litigation for a performance remedy unless the court

[132] "Austrian Case." In *Case law on UNCITRAL texts* Oberster Gerichtshof . Supreme Court, 2002. Available at; http://cisgw3.law.pace.edu/cases/020114a3.html.

[133] DiMatteo, L.A. *International Sales Law: A Critical Analysis of Cisg Jurisprudence*: Cambridge University Press, 2005.

[134] John O. Honnold , Harry M. Flechtner. *Uniform Law for International Sales under the 1980 United Nations Convention*. 4th ed.: Wolters Kluwer Law & Business, 2009. (accessed 28/42014).

[135] ….a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention

implements the same remedy in respect to similar contracts of sale not governed by the CISG[136].

In addition to these two expressive limitations, other general limitations in the CISG that should also be considered[137] are the obligation of mitigating the damage (Article 77) and the duty to preserve the goods or dispose them [Article 85,86,88(2)]. These may prove to be significant in limiting the buyer's right to require specific performances[138].

There is no provision under the CISG which defines how the court should employ the specific performance remedy to order the seller to perform what was agreed upon by the contract. In fact, the convention was deliberately intended to leave such matters to the procedure of the applicable law[139].

4.3.1.2 Buyer's Additional Period for Performance

In cases in which the seller delays delivery, Article 47 of CISG offers the buyer provision for fixing an additional final period for delivery as follows:

(1) The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations.

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[136] This limitation was to achieve a compromise between civil law and common law. John O. Honnold , Harry M. Flechtner. *Uniform Law for International Sales under the 1980 United Nations Convention*. 4th ed.: Wolters Kluwer Law & Business, 2009. (accessed 28/42014).

[137] Most of these limitations are, generally speaking, similar to many national laws with some difference in the degree of the limitations. See Huber, P., and Alastair Mullis. *The Cisg: A New Textbook for Students and Practitioners*: International Specialized Book Service Incorporated, 2007.

[138] John O. Honnold , Harry M. Flechtner. *Uniform Law for International Sales under the 1980 United Nations Convention*. 4th ed.: Wolters Kluwer Law & Business, 2009. (accessed 28/42014).

[139] Ibid

(2) Unless the buyer has received notice from the seller that he will not perform within the fixed period, the buyer may not, during that period, resort to any remedy for breach of contract. However, the buyer is not deprived thereby of any right he may have to claim damages for the delay in performance.

However, the function of Article 47 is to provide a balance between the buyer who wants to get out of the contract and the seller whose interest is to keep to it. Article 47 permits the buyer to set a time for performance of the essence of the contract by fixing an additional period of reasonable time for the seller's performance. In this regard, one of the two grounds for avoidance set forth in Article 49 is when the seller fails to deliver the goods "within the additional period of time fixed by the buyer in accordance with paragraph (1) of Article 47."

Moreover, an additional period can be used to demonstrate the buyer's interest in performance, since resort to declaring that the contract is avoided is not always the best solution for the buyer. "Setting an additional period of time is optional for the buyer, and is not a precondition for avoiding the contract if a fundamental breach already exists. The buyer may also still require performance even when the additional period has expired. For the purpose of Article 47, it is required that the additional period is specified, and it is unacceptable for the buyer to ask for goods to be delivered as soon as possible.[140]"

In analyzing a reasonable time in this regard, consideration should be given to whether or not the breach of the seller can be fundamental without this additional period. Thus, if the buyer is not entitled to avoid the contract without specifying the additional period, objective measures should be applied. In other cases, the discretion

[140] Ibid see "German Case." In *CISG database*: Provincial Court of Appeal, 1995. Available at; http://cisgw3.law.pace.edu/cases/950920g1.html

of the buyer should be taken into account. This can be illustrated by the case of a German seller who failed to deliver a used printing press to an Egyptian buyer after the latter fixed an additional period of 11 days. The court found that this period was significantly too short. However, because the buyer avoided the contract only after seven weeks, it was held that the buyer's actual avoidance was reasonable[141].

The seller also has to be informed of the new specific period. According to Paragraph 47 (2), once the additional period has been fixed by the buyer, he is not allowed to exercise any of his other remedies during this new period unless the seller declares that the delivery of the goods will not be performed within that period[142].

4.3.1.3 Seller's Additional Period for Cure

As mentioned, the seller is provided with certain rights in Article 37 to cure any defective performance up to the date for delivery. However, a more limited possibility for the seller to cure defects after the date of delivery is provided, in similar rules to those of Article 37 under Article 48, which states:

"Subject to Article 49, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. However, the buyer retains any right to claim damages as provided for in this Convention."

[141] "German Case." In *Case law on UNCITRAL texts (CLOUT)*: OLG Celle [OLG = Oberlandesgericht = Provincial Court of Appeal], 1995.

[142] Ibid

Article 48 grants the right to the seller to cure any type of failure, since in international trade, errors may happen with some of the goods delivered. The goods may not conform to the contract; documents may be defective; or a third party's claim may appear to cause conflict. In such cases, allowing an effective remedy by the seller to cure failure can be preferable to avoidance for both parties.

To enable the seller to practice this right, Article 48(1) provides conditions which have to be met. The first is related to Article 49, to which this right of the seller is subjected. According to this article, the buyer can declare that the contract is avoided in two cases: (a) that a fundamental breach has occurred and (b) after the expiry of any additional period of time for performance provided by Article 47. However, in the case of a fundamental breach, the relationship between the buyer's right to avoid the contract and the right of the seller to cure is unclear[143].

According to Huber's view[144], the right of the buyer to avoid the contract pursuant to Article 49 should be given priority, so that once the buyer resorts to avoiding the contract, the seller cannot cure his failure to perform. Thus, the seller may cure his breach only as long as the contract is not declared avoided by the buyer.

[143] Ibid
[144] Huber, P., and Alastair Mullis. *The Cisg: A New Textbook for Students and Practitioners*: International Specialized Book Service Incorporated, 2007.

4.3.2 Buyer's Right to Avoid the Contract

Although the injured buyer is entitled to resort to the avoidance remedy of the contract under the CISG, this right cannot be used for all breaches and it does not automatically applied.

In some domestic contract law, such as English and American law, the injured party is entitled to avoid for any breach. The Malaysian law has the similar remedy in which the buyer's first and primary for breach of contract by the seller is to repudiate the contract of sale and reject the goods. As we have seen, the remedy of repudiation is available to the buyer only when the seller's breach of contract goes to the root of the agreement, either because it is a breach of condition or because of the nature and consequences of a breach of an innominate term[145]. The right to reject is separate from the right to repudiate the contract, and circumstances giving rise to a right of rejection do not necessarily put an end to the contract, even if the right is exercised[146]. Until the time of performance has expired, the seller usually tender a conforming delivery[147]. If the contract is by instalments, as according to Section 38 of SOGA 1957:

(1) Unless otherwise agreed the buyer of goods is not bound to accept delivery thereof by instalments.

(2) Where there is a contract for the sale of goods to be delivered by stated instalments which are to be separately paid for, and the seller makes no delivery or defective delivery in respect of one or more instalments, or the buyer neglects or

[145] Cf. J & J Cunningham v R A Munro & Co Ltd (1922) 28 Com Cas 42, 48

[146] In CLJ (1966) 192, 149 Lord Devlin pointed out that what creats the breach is failure to tender conforming good within the contract time. Furthermore, where rejection of the goods for breach of condition is a termination of the contract. See Atiyah, P.S., J.N. Adams, and H.L. MacQueen. *The Sale of Goods*. 10th ed.: Pearson/Longman, 2001. Page 501.

[147] Borrowman Philips & Co v Free & Hollis (1878) 4 QBD 500

refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract, or whether it is a severable breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated.

The Iraqi Civil Code 1951, gives the buyer the right of rescission in Article 177 (1) of ICC, particularly in bilateral contracts. If either party fails to perform his obligations under the contract, the other party may demand rescission of the contract after service of notice (Formal summons), and where necessary, claim damages; the court may however, accord the debtor a further time limit (to pay) and may also reject the application for rescission. This decision is taken if that which has not been performed by the debtor is trivial in terms of the total obligation. It may be agreed that the contract will be deemed *rescinded ipso facto* without the need for a judicial judgment in the case of non-performance of the obligation arising therefrom; in this case, this agreement shall not waive the service of notice (formal summons) except where the contracting parties have expressly agreed that the notice would not be necessary[148].

The main characteristic of the remedies in the CISG is to protect the contract by keeping it alive as far as possible[149]. Even if the conditions are met, avoidance can take place only through a particular process. Furthermore, the buyer is not required to avoid the contract, and may insist on retaining his right to demand performance according to Article 46.

[148] ICC 1951 Article 178
[149] Ibid

Avoidance is a powerful remedy that releases both parties from their obligations under the contract, subject to any damages that may be due[150]. Article 81(1) protects certain aspects of the avoided contract from being terminated. It states that all contractual provisions governing the dispute settlement or the rights and obligations of parties subsequent to avoidance will be fully enforceable against the parties. Article 49 of the CISG stipulates the circumstances under which avoidance may be claimed.

Article 49(1) states: "The buyer may declare the contract avoided:

a) If the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or

b) in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 47 or declares that he will not deliver within the period so fixed."

The most important instrument used in the CISG to save a contract is the notion of fundamental breach as a condition to entitle the aggrieved party to access remedies which are not available in ordinary breaches[151]. The level of seriousness for the breach to qualify the aggrieved party for the avoidance remedy in civil law and common law is slightly different from the level in the CISG. The civil law systems recognize the concept of *actio-redhibitoria*[152], which allows the buyer to avoid the

[150] Article 81 (1) CISG

[151] Reference to fundamental breach was made in the CISG in the following Arts.: 46 (2) the buyer's right to require delivery of substitute goods; 49(1)(a) avoidance of contract for fundamental breach; 51(2) the right of the buyer to avoid the entire contract; 64(1)(a) the seller's right to avoid the contract where the buyer committed a fundamental breach;7 0 passage of the risk; 72 avoidance for foreseeable breach;7 3(1/2) fundamental breach in the case of contract of delivery by instalment.

[152] The action which the buyer of goods can bring to set aside a contract of sale and claim the return of the entire purchase price (if already paid) against the return of the article because the article sold is latently defective to such an extent that it cannot be used for the purpose for which it was sold, or because the article materially fails to satisfy a claim made by the seller in regard to its attributes.

contract even when the breach is minor. Similarly, in common law, the concept of the so-called perfect tender rule is still practiced, which allows the rejection of goods that do not fully conform to the contract. However, avoidance in the CISG, as discussed in this section, is allowed only for very serious breaches.

4.3.2.1 Fundamental Breach

The CISG provides for the concept of a 'fundamental breach', which allows a contract to be avoided as in Article 49(1). It is necessary to consider the nature of a fundamental breach more closely because this circumstance can have a dramatic effect on contracts.

Under the CISG, a breach of contract is considered fundamental if the breach falls within the provision of Article 25, which states: "a breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result."

In order to decide whether or not a breach is fundamental, one may refer to Article 25, which states three forms of criteria that qualify a fundamental breach. Firstly, the breach must be of detriment to the other party, the assessment of which includes both subjective and objective measures. For the former, the buyer must suffer an actual detriment without referring to a person in the same circumstances. As for the latter, the actual detriment has to be the result of the seller's breach of obligations, and such a detriment is based only on the buyer's expectation.

Firstly, the 'detriment' concept was developed as a consequence of the perceived weakness in ULIS. Article 10 of ULIS provides the following definition of fundamental breach:

"For purposes of the present Law, a breach of contract shall be regarded as fundamental wherever the party in breach knew, or ought to have known, at the time of the conclusion of the contract, that a reasonable person in the same situation as the other party would not have entered into the contract if he had foreseen the breach and its effects."

The second element of fundamental breach is the substantial deprivation of what the aggrieved party is entitled to expect under the contract. Thus, the detriment has to contain a degree of seriousness of the result of which will deprive the other party of what he was expected by the contract. In other words, if the seriousness of the breach does not relate to what the buyer expects, then there is no fundamental breach. The same consequence ensues if the buyer is deprived of what he or she has been expecting, but this does not reach a substantial level.

When these two conditions are met, the breach is considered fundamental unless the party in breach does not foresee, and a reasonable person of the same kind in the same circumstances will not have foreseen such a result[153].

Malaysian SOGA 1957 distinguishes between condition and warranty and it considers breach of condition as the fundamental breach. Nonetheless, the warranty breach is not identical to the fundamental breach in the CISG. Such a case can be gauged from the case of Themes Sack and Bag Co Ltd v Knowles & CO Ltd (1918),

[153] John O. Honnold , Harry M. Flechtner. *Uniform Law for International Sales under the 1980 United Nations Convention*. 4th ed.: Wolters Kluwer Law & Business, 2009. (accessed 28/42014).

in which the sellers had sold a quantity of goods and this was a spot contract form with a payment date scheduled to be on or before the 19th of September. Because the sellers had failed to do so, this contract was repudiated. If the only issue at hand here were failure to pay on time, then the buyers would not have the right to repudiate the contract for that is not the essence of the contract; however, because the buyers had not removed the goods by that date, they were entitled to repudiate the contract.

Section 12 of the Sale of Goods Act separately mentions between a condition and a warranty. A condition is important for the basis of the contract and having it not being met gives the right for cancellation. However, a warranty is a stipulation and a warranty not being met allows one to claim for damages but not cancel or repudiate the contract.

However, according to Section 13, the buyer is entitled to treat a condition as a breach of warranty. We can see this in the case of Associated Metal Smelters Ltd v Tham Cheow Toh, in which the plaintiff purchased a furnace from the defendant. It was stated in the contract that the furnace could reach a temperature of about 2600 F but the furnace apparently could not. Hence, the plaintiff had sued for damages. It was held that they were allowed to treat the breach of conditions as a breach of warranty as sue for damages.

Fundamental breach, therefore, may be resulted from various different breaches including from delivery of non-conforming goods, defects in title or documents, and any other breach which can be objectively considered as fundamental. Court

decisions have been showing that it is a fundamental breach to deliver a second hand machine which falls far short of "the digital pictures, as `good-as-new"[154].

There are different causes for breach of contract, namely, non-performance, delayed performance, and delivery of non-conforming merchandise. Various remedies for breach of contract are housed in Article 46-52, in addition to the claim for damages in Article 74-77. Under certain circumstances, a breach of contract is considered to be a fundamental breach, which makes additional remedies available to the aggrieved party.

4.3.2.2 Procedures of Avoidance

When the buyer is entitled to avoid the contract for fundamental breach of any obligation or for non-performance after the expiration of the additional period, the CISG requires the buyer to practice this right by following a particular procedure. Article 26 and Article 49(2) provide rules for the declaration of this right and the time limit for avoidance.

4.3.2.3 Notice of avoidance

Even in the case of an obvious breach, a buyer who decides to avoid the contract must inform the seller of his wish, according to Article 26 which provides:

[154] . In *Case law on UNCITRAL texts*: Tribunal cantonal / Kantonsgericht, 2005. Available at; http://cisgw3.law.pace.edu/cases/050221s1.html

"A declaration of avoidance of the contract is effective only if made by notice to the other party. Declaration must also be clear to the extent that the other party implicitly understands the buyer's intention to avoid the contract. To a certain extent this differs from one case to the next according to the circumstances. For instance, the buyer's refusal to take late delivery is sufficient to show the buyer's interest in avoiding the contract. However this declaration would be unclear in the case of rejection after delivery of the goods, because this rejection can be understood as a demand to repair or deliver substitute goods."

There is no duty for the buyer to give the defaulting seller a prior notice of the proposed avoidance or to give him an opportunity to provide an assurance of performance. According to Article 45(3), there is no requirement for the purpose of avoidance to resort to a court's judgment and a court or arbitration tribunal cannot give a period of grace to the defaulting seller[155].

4.3.2.4 Time Limits for Avoidance

As a rule, the buyer can practice his right to declare that the contract is avoided without any limitation as to the period of time. However, if the goods have already been delivered, Paragraph (2) of Article 49 provides some timely restrictions as follows:

(2) However, in cases where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so:

[155] John O. Honnold , Harry M. Flechtner. *Uniform Law for International Sales under the 1980 United Nations Convention*. 4th ed.: Wolters Kluwer Law & Business, 2009. (accessed 28/42014).

(a) In respect of late delivery, within a reasonable time after he has become aware that delivery has been made;

(b) In respect of any breach other than late delivery, within a reasonable time:

(i) After he knew or ought to have known of the breach;

(ii) After the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of Article 47, or after the seller has declared that he will not perform his obligations within such an additional period; or

(iii) After the expiration of any additional period of time indicated by the seller in accordance with Paragraph (2) of Article 48, or after the buyer has declared that he will not accept performance.

The buyer may lose his or her right to avoid the contract when such a reasonable time has expired, and there are two different cases for when this time begins:

If the seller delivers the goods after the expiration of the contractual time of the delivery, the reasonable time runs from the moment when the buyer becomes aware that the delivery has been made [Article 49(2)(a)]. This may be at the time of receiving a notice of dispatch or transport documents. However, this does not prevent the buyer from using his right to avoid more promptly so long as the delay constitutes a fundamental breach even before delivery[156].

However, if the buyer has given notice under Article 47(1) requiring the seller to perform within a reasonable period of time, it is from the expiration of that period or from the seller's declaration that he will not perform his obligation within that time.

[156] Ibid and DiMatteo, L.A. *International Sales Law: A Critical Analysis of Cisg Jurisprudence*: Cambridge University Press, 2005.

If the seller intends to investigate or remedy the defect, the reasonable time will not commence until the inquiry ends or by the failure to repair[157].

4.3.3 Reduction in Price

Besides the specific performance remedy and the remedy of avoidance, the buyer is entitled under the CISG to the remedy of a reduction in price. The CISG adopts civil code to treat the remedy of reduction in price as an adjustment of the contract. This is a different kind of remedy from one for damages[158]. However, the application of this remedy under the CISG has its own rules. Article 50 states:

"If the goods do not conform to the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of delivery bears to the value that conforming goods would have had at that time. However, if the seller remedies any failure to perform his obligations in accordance with Article 37 or Article 48 or if the buyer refuses to accept performance by the seller in accordance with those articles, the buyer may not reduce the price."

The price reduction remedy applies only when the buyer accepts the contract and intended to keep the non-conforming goods, and it is only available if "the goods do not conform to the contract". Thus, as provided in Article 35, the goods will not conform to the contract if they do not conform to the contract in quality, quantity and description or are not packaged in the method mandated by the contract. However, a reduction in price is not applicable if the breach is related to the obligations of

[157] Ibid
[158] Ibid

delivery (Article 31-34) and also does not apply given the existence of third party claims (Article 42, 43) [159].

However, the buyer cannot change his declaration of reduction in price to other remedies if the seller changes his position after relying on the buyer's declaration. In the case of disputes over the value of the delivered and conforming goods, the burden of proof is on the buyer[160].

In addition to the remedies under Article 46-52, Article 45 (1)(a) and (b) offers the aggrieved buyer the remedy of damages under Article 74[161]. Thus, the buyer may combine the two remedies of a reduction in price and damages (such as the cost of an expert's report), provided that he does not receive double compensation for the same loss[162].

While the Iraqi law does not have this remedy in the Iraqi Civil Code (ICC), it does mention about the claim for damages[163]. Damages, has been defined in the Iraqi court of appeal, are "damages which given to the aggrieved party and cannot be described as a punishment upon the breaching party or a source of profit for the aggrieved, but

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[159] When the buyer requires performance under Art. 46, or declares the contract avoided under Art. 49, he is not entitled to the reduction remedy. John O. Honnold , Harry M. Flechtner. *Uniform Law for International Sales under the 1980 United Nations Convention*. 4th ed.: Wolters Kluwer Law & Business, 2009. (accessed 28/42014).

[160] Ibid

[161] Article 169.(1) of ICC 1951 stated that : If the compensation (damages) has not been estimated in the contract or in a provision of the law it will be assessed by the court.
(2) The damages shall be in respect of every obligation which arises from the contract be it an obligation of conveyance of property, a benefit or any other right in rent, or an obligation to do or to abstain from doing an action and includes the loss of and the lost profit suffered by the creditor on account of loss of or delay in receiving the right provided this was a natural result of the failure of or delay by the debtor to perform the obligation.

[162] "Ginza Pte Ltd V Vista Corporation Pty Ltd." In *Pace Law School Institute of International Commercial Law*: Supreme Court of Western Australia, 2003. Available at; http://cisgw3.law.pace.edu/cases/030117a2.html

[163] Raoof, Nagham Hanna. "The Obligation of Delivery of the Seller in the International Contract of Sale of Goods According to Vienna Convention of 1980." The Council of College of Law University of Mosul 2004.

it is for reparation of damage[164].” The damage here is what affects one of the parties in the contract for the International Sale because of the failure of the other party to perform or breach his obligation. In the same way, the English law also considers the claim of damages[165] as the original penalty to the seller’s breach of his obligation to deliver the goods. This situation is similar to the Malaysian SOGA 1957, which states:

“Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may sue the seller for damages for non-delivery)[166]. It is considered it as general remedy for the buyer, and the avoidance and specific performance are exceptional remedies available when the seller breached his obligation of delivery[167].”

The buyer is not entitled to reduce the price if the seller has offered the buyer a cure for the nonconformity according to Article 37 and 48. Under Article 50, the latter rules takes express priority over the right of reduction in price[168]. This restriction highlights the importance of the buyer's duty to mitigate damages according to Article 77[169].

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[164] Shahid, Ammar. "Moral Damage." Decision Number (2086 ,c , 1956), *judiciary Journal*, 1957.

[165] Section 51(1) of SOGA 1979, stated as follows; (1) where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery. Air Studios Limited v Lombard North Central Plc [2012] EWHC 3162 (QB). http://www.internationallawoffice.com/newsletters/detail.aspx?g=f3df640c-5e20-472a-9a98-838522478071

[166] Section (57)

[167]Section 58. Stated: Subject to Chapter II of the Specific Relief Act 1950 [Act 137], in any suit for breach of contract to deliver specific or ascertained goods, the court may, if it thinks fit, on the application of the plaintiff, by its decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages. The decree may be unconditional, or upon such terms and conditions as to damages, payment of the price or otherwise, as the court may deem just, and the application of the plaintiff may be made at any time before the decree

[168] DiMatteo, L.A. *International Sales Law: A Critical Analysis of Cisg Jurisprudence*: Cambridge University Press, 2005

[169] John O. Honnold , Harry M. Flechtner. *Uniform Law for International Sales under the 1980 United Nations Convention*. 4th ed.: Wolters Kluwer Law & Business, 2009. (accessed 28/42014).

In conclusion, the reduction in price is the third remedy for the aggrieved buyer and because this remedy does not require the return of the goods, it is not essential for the breach to reach the level of fundamental in order to resort to this remedy. However, for the purpose of encouraging cooperation between the parties, the right of the seller to cure is given the priority over the right to reduce price. This approach can be seen as an application of good faith in which each party should fulfil their duty (the seller to deliver conform goods and the buyer to pay the full agreed price).

In addition, previous practice between the parties and customary trade usage are the important elements that specify what documents the seller must provide to the buyer, as stated in Article 9 [170].

The provisions of Article 34 deal mainly with the documents of title which give the holder control over the goods, such as bills of lading and warehouse receipts[171]. Other relevant documents covered by this article include the insurance policies, commercial invoices and certificates of origin. Furthermore, technical documentation relating to the goods may be required in the case of plant and machinery[172].

The question of whether or not a seller is obliged to procure an export license in the case of an absence of a contractual agreement can be answered with regard to the general principle of the CISG concerning international trade usage and delivery. In general, the seller is not obliged to procure customs documents for the export of goods. Being widely known as reference in international trade usage, Incoterms 2000 dictates that the seller is not bound to deliver the goods at any particular place if the

[170] Huber, P., and Alastair Mullis. *The Cisg: A New Textbook for Students and Practitioners*: International Specialized Book Service Incorporated, 2007.

[171] Ipid
[172] Ibid

contract does not involve the carriage of goods. Here, the seller has no duty to provide the buyer with an export license and or to pay export taxes[173].

The second and third sentences of Article 34 provide a solution or a cure for the problem of non-conforming documents. This allows the seller to cure any lack of conformity in the documents as long as the cure is within the agreed time of delivery and does not cause the buyer any unreasonable in convenience or expense. For example, the seller could replace the documents if they are originally in the wrong language, or supplement the documents if copies are missing[174].

[173] John O. Honnold (2009) rightly suggested at "Its best of the parties deal specifically in the contract with the question of responsibility for export licenses and export taxes
[174] Ibid

CHAPTER FIVE

DISCUSSION, SUMMARY AND RECOMMENDATIONS

5.1 Introduction

This chapter concludes the findings that have been compiled from the data collected and the procedure used for this study. The scope of the study, as well as data analysis, gives us additional information to draw conclusion. Based on the finding that had been discussed in the previous chapters, the same conclusion is presented here. This chapter ends in providing suggestions for future work.

5.2 Discussion

This study was conducted to investigate the value of the Seller's obligation to deliver the goods in the contract of sale of goods as a critical obligation upon the seller by conduct a comparison between the provisions of United Nations Convention on Contracts for the International Sale of Goods, Malaysian SOGA 1957 and relevant countries that have ratified the CISG as well as Iraqi laws that govern the contract of sale of goods. The study aimed to answer the following research questions: (1) what is the status (role) of the element of “delivery” in the contract sale of goods as provided in the international convention of Vienna 1980? (2) How will the seller be liable if he or she fails to deliver or delay in delivering the goods to the buyer? For purpose of examining the laws on the sale of goods contracts in Iraq, to identify Malaysian laws that have regulated the sale contracts, and the CISG that governed the elements of the seller's obligation to deliver the goods and the remedies available

to the buyer when the seller breaches his obligation in order to, avoid the disputes between parties that came from different legal systems, and to analyse whether the Malaysian laws and CISG on sale of goods contracts can be adopted in Iraq.

5.2.1 Findings of the first Research Question

The first research question is ‘what is the status (part) of the element of “delivery” in the contract sale of goods as provided in the international convention of Vienna 1980?. The purpose of that is to study the importance of the delivery element in a contract sale of goods at the international level.

Majority of the countries possess their own laws. These laws are implemented differently and have different implications. Iraq has two codes that govern the commercial transactions the Iraqi Civil Code No.40 of 1951 and Iraqi Commercial Code No.30 of 1984. As stated above by the two laws forth, noted that there is no mentioned of the international contracts of sale of goods will be regulated by the ratified CISG 1980 in Iraq since 1991. The Iraqi legislator should consider this issue. There are many gaps relating to the sale of goods and the obligations of the parties in the said contract. Iraq has no adequate statutory protection for parties in the trade due to limited legal documentation for international transaction; the database was not available for some documentation recently.

In both the CISG and Iraqi law delivery has been recognised as the transfer of control from seller to the buyer so that the latter can exercise his property rights as owner of the sold goods. The CISG identifies different actions are constituting effective delivery by the seller (Art. 31), whereas Iraqi law has left the question of practical, effective delivery to custom and trade usage whether practised by actual or

constructive methods. In constructive delivery, both systems require the seller to identify the goods specifically to the contract. In both systems reference to the time and place of delivery are given in the contractual agreement and custom. In the absence of contractual agreement, they are similar, requiring the seller to deliver the goods without delay after the conclusion of the contract. However, the CISG provides more detail according to whether or not the place of the goods at the contractual time of delivery is identified.

5.2.2 Findings of the Second Research Question

The second research question is ‘’How will the seller be liable if he or she fails to deliver or delay in delivering the goods to the buyer? In order To examine the seller’s liability when there is a breach in the Contract of Sale of Goods.

The significant potential differences in the remedies between Iraqi law and the CISG concern the specific performance remedy and the concept of fundamental breach.

The contract of sale in Iraq and Islamic law gives priority to specific performance over other remedies. So difficulties may arise in cases where the applicable law does not recognise this remedy, as in systems based on common law. Given that the rules of remedies are not imperative, and the parties have the right to agree otherwise, by choosing to adopt the CISG the parties implicitly waive their rights according to its provisions. The same can be said regarding the right to claim repair, which is not addressed in Iraqi Civil Law. The best of the buyer to give an additional time and the sellers right to cure is addressed similarly by both laws. Nonetheless, the CISG provides clearer guidance for resorting to these rights where the additional time is

required to make the time of delivery of the essence and specific rules govern the seller's notice of cure in order to prevent misunderstandings between parties whose places of business are in different countries. It can be clearly seen that the imposed remedies are clearly varied between the common law system, i.e. Malaysia and UK and the civil law system, i.e. Iraq.

In conclusion, due to the growing number of disputes arising from contracts between government ministries and international suppliers, the Iraqi judiciary has specifically requested a specialized training for its trial court judges in the area of international sales contracts. Iraqi government institutions, specifically those assigned with service delivery, often complain of foreign companies failing to deliver goods and services or to deliver of incomplete or expired goods.

These failures stem largely from the organizations' limited capacities to draft and negotiate durable sales contracts in addition to a lack of legal knowledge of their rights and recourse to recover funds. Also lacking were the legal remedies to be adopted when the seller breaches his or her obligation to deliver the goods. All of these shortcomings are a few of the bottlenecks, which have created an environment of uncertainty in the understanding of the desired and safe international trade with the rest of the world.

5.3 Conclusion

A summary of what has been concluded from the findings is presented in this section. This study deals with the obligation of the seller of delivery in the international contract of sale of goods according to the United Nations Convention on Contracts for the International Sale of Goods 1980. It is an analytical study of obligation of delivery with the comparison of Malaysian Sale of Goods Act (SOGA 1957) as well as related laws when this comparison is necessary.

Although, Iraq in one of the members in the CISG since 1991. However, it is noted throughout this research by the researcher that the discussed Iraqi laws that govern the commercial transactions were conflicts. The governing of the international sale of goods is weak and has in many positions gaps should be considered by the government authorities which specialized in the international commercial transactions.

There is growing the number of disputes arising from contracts between government ministries and foreign suppliers. These disputes stem mainly from the organizations' limited capacities to draft and negotiate durable sales contracts in addition to a lack of legal awareness of their rights and recourse to recover funds. Also lacking were the legal remedies to be adopted when the seller breaches his or her obligation to deliver the goods. All of these shortcomings are a few of the bottlenecks, which have created an environment of uncertainty in the understanding of the desired and safe international trade with the rest of the world.

Accordingly, the researcher realized that these issues need to be addressed by them to provide the Iraqi traders with full understanding and knowledge by issuance the

CISG provisions and publish it in the official Gazette to govern the international sale of goods contracts.

The seller has his own obligation to deliver the goods with all the required documents. Delivery must take place according to an agreement about the time and the place unless there is another agreement. Moreover, the seller must deliver the goods according to the agreed specifications; there is the quantity, and there is quality and packaging them.

The convention precise upon the time of transfer of possession of goods alongside the delivery. As for the place of delivery, it is the ultimate objective of the contract. Thus, the convention insists on the determination of the place of delivery. This means that the seller has performed his obligation completely as far as he delivered the required quantity as specified by the contract.

Certain buyer's remedies are imposed by the convention of the part of the seller who violated his obligation concerning his delivery. These sanctions might be original as specific performance and cancellation and reduction of price or it might be complementary as the damages, when all the conditions are met. In fact, it is not possible to mix these sanctions with the compensation when the buyer uses on of these sanctions he will not lose his right to ask for any compensation according to the convention. Moreover, the buyer has the right to put an additional delay for the seller in order to respect his obligation. He will not be able to use these sanction before the extinction of the delay when the seller received and announcement from the buyer because of not executing it during this period.

On the other hand, the buyer has the right to use the sanction of avoidance when the seller fails in delivering, this will be considered as one of the fundamental violation.

The convention will allow avoiding the sale contract if the seller does not deliver the goods while the additional delay determined by the buyer of the seller declares that he will not deliver the goods during that period.

It is clearly seen that the imposed remedies are clearly varied between the common law system, i.e. Malaysia and UK and the civil law system, i.e. Iraq. The convention succeeded to satisfy both systems. This comparison will be as a good example to the Iraqi legislature to consider these differences when the Iraqi government amends the existing law relating to the sale contracts in order to enact and provide Iraq the opportunity to deal with the development of global trade.

This study attempt to bridge the gap between Iraqi law and the CISG has shown that although the CISG is derived from civil and common law, whose origins differ widely from the Islamic background of Iraqi law, the two systems share much common ground in one of the major parts of sales of goods contracts; namely, the seller's obligations and the buyer's remedies.

5.4 Recommendations for Future Work

This study highlights the importance of seller's obligation of delivery. Despite its limitations, the study offers valuable insights on how Iraq can enact special laws or at least amend it to govern the international sale of goods contracts. Three additional things must occur for Iraq’s accession to be meaningful and to bear fruit. First, the Turkish bar must become familiar with the CISG and must become familiar with the differences between the CISG. On the one hand, Iraq domestic sales law or other national sales laws, such as the Malaysian Sale of Goods Act 1957, on the other

hand. Second, the Iraq Legislators and other decision-makers, such as arbitrators, must interpret and apply the CISG faithfully. Third, Iraqi law schools must play their part in facilitating understanding of the CISG by preparing tomorrow's lawyers and judges to render good decisions.

While this study would have benefited from the use of a quantitative method, owing to lack of time only a qualitative method was used. To gain a deeper understanding of the issue, future researchers should consider using a mix-method approach, which includes a questionnaire survey in Iraq to the lawyers and judges that practiced in this area, get lawsuits from the commercial courts relating to the disputes of international delivery.

The researcher's suggestions for legislative authorities in Iraq are as follows:

1. In the light of these findings, increase of awareness about the CISG by the Iraqi authorities should be considered. Iraqi traders, lawyers and academics should consider the CISG as an important alternative for international contracts. In recommending the adoption of the CISG and applying its rules in Iraq, attention should be paid to the state of current Iraqi law and the advantages of the CISG.

Iraqi legal experts have not had the exposure to international trade disputes that legal experts from major trading States have had.

Iraqi law in relation to international contracts of sale seems to be rather undeveloped. The initial perception is that Iraq should reactivate working of the Convention to create a climate of trust through which trading relations may be built with foreign States. The performance of international trade contracts often spans over long distances and mostly via sea transport. As such there are endless possibilities for a

breach of contract to occur. Parties may therefore be more comfortable dealing with the State that is subject to the same law as they are[175].

2. We call the Iraqi legislature to pass the law of the Convention and its publication in the Official Gazette, to be adopted as law issues of international trade. Its publishing will be relevant in the field of Iraqi commercial legislation with the international legislation.

3. The proposed of this study is to help lawyers, judges and all the legal profession to have a deeper understanding and understand the legal status of the international sale of goods contracts, as well as, the importance of the delivery obligation upon the seller in the international contracts.

4. Regarding the development of Iraqi law must the Ministry of Justice and the new commercial court publishes the judicial decisions and makes them easily accessible for the public. In addition, novelty in classical Islamic literature in sale contracts has to be considered jurists and judges should apply some amendments to provide rules responding to the contemporary international contracts. To achieve this target, legislator should engage in studying international law including the well-established rules of sales of goods under the CISG. More academic research of the CISG and its numerous case laws and elaborated commentaries are necessary for a better understanding of their functions. It is hoped that the modest conclusions of this thesis could provoke many more comparative academic research between the CISG and Iraqi Civil Code.

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