Termination of International Sale Contract

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Introduction
Subject and Issues of Research

No doubt that difference and variation of national legislations in regulating the international commercial transactions would raise concerns and instability in dealing at the international level which would obstruct the flow and thriving of international trade. The variation of substantive provisions and litigation rules set by the national legislations leads to ignorance of the law rules governing such transactions by the parties of international relations. If a dispute arises between those parties – they experience surprises that result from the application of rules in conflict with different laws due to the discrepancy and difference of the substantive rules set by the national legislations in regulating the international commercial transactions.

Thus, the efforts exerted internationally long time ago intended to standardize the rules governing the international transactions to develop the commercial dealing among states and to protect the transacting parties from the risks resulting from the application of different national laws which provisions are not known by them.

Termination in international contracts is considered a harsh sanction that harms international trade for each breach of contract or its provisions. The interest of international trade is fulfilled in maintaining and completing performance of contract, even if with a breach rectifiable by remedy. The termination destroys the contract and results in returning goods after their dispatch in addition to the accompanying new freight and insurance expenses and administrative and health procedures necessary for the entry and exit of goods and to pay then refund the price. Moreover, the goods are exposed again to damage and perishing risks. Furthermore, the international sale contract is inherently associated with other international contracts such as goods transport contract, insurance contract and documentary credit through which the price is paid. If the sale contract is terminated, its effect will apply to all other associated contracts, if not performed, which produces many issues and hardships. For this reason, the termination of international contracts is given high importance that may not be given to the national contracts.

Importance of Research

Undoubtedly, the highest purpose which the UN Convention on Contracts for the International Sale of Goods seeks to fulfill is the standardization of the law rules governing the international sales. It is best known that standardization thrives and flourishes the international trade. The Convention Preamble stated this meaning, when it provided that the member states "*being of the opinion* that the adoption of uniform rules 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 barriers in international trade and promote the development of international trade".

The Convention takes into consideration that developing uniform provisions regarding the international sale of goods is insufficient to fulfill standardization. Rather, the procedures and the way of execution in different acceding states must be identified for the uniform application. We tailored this research to drill down the termination rules provided in the Convention and the UAE Civil and Commercial Transactions Law.

Objectives of Research

The international sale of goods is the backbone and axle of international trade, around which a large number of other contracts such as insurance, transport and agency revolve. The study of the sanctions levied is accordingly given a special importance, in case either party breaches his obligations, which is the termination. In view of the importance of termination in the scope of the international sale contracts and the resulting serious impacts in the international trade, we chose the way it is approached by Vienna Convention as the subject of this study, in which we attempt to identify the effort exerted by the Convention to limit the sphere of termination and minimize the undesired impacts that may result and its viability.

Method of Research

In studying this subject, we adopted the analytical and comparative method by referring to the termination provisions set out in Vienna Convention and comparing them to the provisions of the UAE Civil and Commercial Transactions Law. We showcased certain applied cases handled by the judiciary.

Research Plan

Accordingly, we divide our study into two sections. In the First Section, we define the termination and its types and cases in which the Convention and the UAE Civil and Commercial Transactions Law permitted the contracting party to terminate the contract, and the conditions that must be satisfied so that the contracting party can apply this sanction. In the Second Section, we approached the provisions and effects of termination. We illustrated how the termination is undertaken according to Vienna Convention and the UAE Civil and Commercial Transactions Law and the path chosen by the law and the Convention for this. We then illustrated the restrictions set out in the Convention and the Law on exercising the termination right. Finally, we approached the effects of the contract termination, if takes place.

First Section – Definition and Conditions of Termination

Termination in general is the sanction of the failure to discharge a contractual obligation. It is represented in the dissolution of the contractual bond, if either party fails to perform his obligations in the way imposed by the contract. The other party is accordingly permitted to terminate the contract. Such sanction protects the binding force of the contract.

First Theme: Definition of Termination

There are many definitions of the concept of termination. Some defined termination as "a form of contractual liability represented in the dissolution of the contractual bond due to the breach of the resulting obligations by either party to contract". Others defined it as "a reason of lapse of obligations that restitutes that contracting parties to their condition before the contract". All previous definitions stipulate the existence of an existing and valid contractual relation between both parties as well as a breach of contractual obligations[1], and this breach must be material.

Termination is considered one of the general sanctions that affect the contract on account of the breach of obligations by the parties during the stage of performance. This procedure appears when the debtor fails to discharge his obligation completely or even the discharge in a way other than the one agreed on between the parties, so that the offence is material and substantial. This procedure targets the contractual relation in whole and it is not the same as the previous sanctions that address a defective part of performance, rather it addresses contractual relation, as a whole. Thus, this sanction is serious in impacts because it terminates the contract as opposed to the expectation under any contract which is the performance completely to satisfaction of the parties. Consequently, the termination of contract is declaring the expiration and lapse of contract in a way other than the ordinary way of ending which is performance.[2]

In the contracts binding to both parties in general, if either contracting party fails to perform his obligation, the other contracting party may, having notified the debtor, claim performance or termination of contract together with of compensation in both cases, if required.

The judge may grant the debtor a period of time, if required by circumstances.[3] Further, the judge may reject the termination if the obligation not discharged is trivial compared to the entire obligation. This is the judicial termination that must be preceded by a notice to the debtor to perform his obligation. Practically, both parties may wish, upon the conclusion of contract, to make the termination of contract an effective and conclusive sanction so that both parties are keen on performing their obligations and agree on providing for a clause called consensual termination or agreement on termination clause in contract. This agreement has many degrees that vary in terms of force as follows:

First: Agree on the termination of contract, if either party fails to perform his obligation. This phrase is a restatement of the general rules and does not supersede the necessity to give notice and access to court to issue the termination judgment. It does not further strip the debtor of his

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[1] Mohamed Ahmed Mohamed Mahmoud Al Sherbini, *Ibid*, P. 433 – 434 quoted from Adam Abdullah Al Doum, Provisions of International Trade Contracts, Ph.D. thesis, Omdurman Islamic University, 2013, P. 358,.

[2] Ibid.

[3] Article 272 of the Civil Transactions Law provides "In the contracts binding to both parties in general, if either contracting party fails to perform his obligation, the other contracting party may, having notified the debtor, claim performance or termination of contract together with of compensation in both cases, if required".

right to avoid the termination judgment by hastening to perform his obligation before the judgment is pronounced.

Second: Agree on the automatic termination of contract, if either party fails to perform his obligation. In this case, the creditor is not relieved of the duty of giving notice. Further, a lawsuit must be filed to apply for termination. However, this condition prevents the discretionary power of the judge to grant time to the debtor, since the judge must judge termination when he faces such condition.

Third: Agree on the automatic termination of contract without the need for judgment. In this case, there is no need to file termination lawsuit, however a notice must be given to the debtor. If the debtor remains abstaining from performance, the contract is terminated. The creditor however normally finds himself obliged to access to court. The judge role then is confined to verifying that the debtor breached his obligation. If the judge verifies this, he judges termination without having the discretionary power and the judgment of termination here establishes termination but does not create termination.

Fourth: Agree on the automatic termination of contract without need for giving notice or litigation. This is the utmost force of the stipulation of termination. In this case, the contract is terminated once the date of performance falls and the debtor fails to perform, without the need for his notification or the delivery of judgment to that effect.

If the contract is terminated pursuant to the termination clause, the contract is considered as if never made and the parties are restituted to the condition they were in before the entry into contract, together with awarding damages, if required.[4]

Based on the foregoing, the termination – according to the general rules – can be defined as "the dissolution of the contractual bond for the breach by a party of his obligations". Termination can be made either by court order or by agreement on a resolutory condition in the contract or by operation of law, if either party or both parties fail to perform the obligation provided in the contract due to a foreign cause beyond their control.[5] The nature of termination varies depending on the governing legal system which makes Vienna Convention observes a termination method that fits – to some degree – the majority of the national laws that belong to different legal systems. We will indicate the meaning of termination in the UAE Civil Transactions Law then the nature of termination in the scope of Vienna Convention.

Termination according to the UAE Civil Transactions Law: The national legislations handled the subject of termination of contract by integrated rules and provisions whether at level of the general rules that govern all contracts, or through special rules regulate the sale contract only. The Federal Civil Transactions Law provides "1. In the contracts binding to both parties in general, if either contracting party fails to perform his obligation, the other contracting party

[4] Adam Abdullah Al Doum, ibid, P. 359 – 360, quoted from Mohamed Ibrahim Desouqi, ibid, P. 162-165.

[5] Seif Eldin Mahamed Mahmoud, Sanction of Non-Performance in Contracts Binding to both Parties (Termination), Ph. D. Cairo, 1982, P. 15.

may, having notified the debtor, claim performance or termination of contract". The Federal Civil Transactions Law further permits the judge to grant period of time to the debtor or seller, if required by circumstances. Paragraph 2 of the aforementioned Law provides "2. The judge may order the debtor of immediate performance or grant him a specified period of time and may order termination and awarding damages in each case, if required". We find that termination according to the Civil Transactions Law is made only by judgment or agreement. There are two types of termination, judicial and consensual. The former creates the termination while the latter establishes it.

Termination in the scope of Vienna Convention: Vienna Convention regulated the termination in dispersed articles of the Convention. Paragraph 1 of Article 49 of this Convention determined the purchaser's right to terminate, if the seller's failure to perform his obligation – of conformity for example – as contained in the contract constitutes material breach.

We find that Vienna Convention adopted the concept of material breach as the basis of termination, as opposed to the UAE law that permits termination, if there is a breach in performing contractual obligations by either party. Perhaps the purpose of adopting the concept of material breach is to avoid the undesired serious and fatal impacts resulting from the exercise of the termination right in the international trade field, for both contract parties.

Vienna Convention clearly adopted the termination theory constituted in the declaration of the contract termination by the creditor. Vienna Convention did not stipulate that the purchaser applies to the judiciary for the termination right, since it can be made by agreement of both parties, or that the purchaser declares termination and notifies the seller thereof. The termination produces its effect only when made by a notice given to the other party. We notice that Vienna Convention did not adopt automatic termination, rather sufficed with the purchaser declaration and notifying the seller of it. It is axiomatic that the purchaser is not committed to declare to the seller his intention to terminate. Yet, if the termination is made, the purchaser must notify the seller of such termination that takes place in order to be informed of it. The Convention pursued this solution to apply the doctrine of economic termination. The occurrence of termination without judicial interference is one of the features of Vienna Convention that observes the international trade requirements which needs quick revocation of the international sale contract without the need for court order which may need long duration and crucially affect the goods.

Right of Purchaser to Terminate

The termination according to the Federal Civil Transactions Law is made only by judgment or agreement[6]. Upon filing termination lawsuit, the judge has the discretionary power either to respond to or reject the termination. The debtor may perform the contract and avoid judging termination and the creditor may retract the claim of contract termination and claim its performance. Vienna Convention adopted a different philosophy in this regard. If the purchaser thinks that the breach committed by the seller in the performance of his obligation is serious so that it is no longer feasible to retain the contract, rather it is better to terminate the contract, then it is not stipulated that he applies to the court for termination. Rather, it is sufficient that he declares the termination of contract and notifies the seller thereof. Paragraph 1 of Article 49 provides "The purchaser may terminate the contract". If the seller objects to termination, he may sue the purchaser to issue a judgment that revokes the termination.

It is a desirable pursuit since the interest of international trade requires quick revocation of contract without the need for court order which may need long duration and goods may be damaged or perished before its destiny is decided.[7]

Termination Cases Available to the Purchaser:

Though Vienna Convention entitles the purchaser to terminate the contract unilaterally, however it did not leave the exercise of this right in his hand, if and when he wishes to repudiate the contract, even if the breach committed in the performance is simple. For this reason, Vienna Convention narrowed down the exercise of this right and determined exclusively the cases of exercising this right. The Convention granted the purchaser the right to terminate the contract only if the two cases provided in Article 49 are fulfilled.

First Case: Material Breach of Obligation

Paragraph 1 (a) of Article 49 permits the purchaser to terminate the contract "if the seller's failure to perform one of the obligations provided in the contract or this Convention forms a material breach of contract".

The previous provision indicates that it is insufficient that there is a breach by the seller of his obligation of handover to create the purchaser's right to terminate the contract. The breach must be material to account for the termination whatever the aspect of breach such as abstention from delivery of goods, late delivery or delivery of non-conformant goods.

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[6] Article 271 of the Federal Civil Transactions Law provides "It may be agreed that the contract is automatically terminated without the need for a judgment, upon the failure to discharge the obligations arising from the contract. Such agreement shall not relieve from giving notice, unless the parties expressly agree on such relief". Article 272 provides "2. The judge may order immediate performance or grant him a specified period of time and may order termination and awarding damages in each case, if required".

[7] Dr. Safwat Najy, Obligation of Goods Delivery in the International Contract of Sale (Study of Vienna Convention 1980) 1996, without edition, P. 70 quoted from Dr. Mohsen Shafiq, paragraph 254.

Second Case: Seller's Abstention from or Failure of Making Delivery

Clause 47.1 entitled the purchaser to grant the seller an additional period of time for delivery. If the period expires and the seller fails to perform his obligation of making delivery, or if the seller notifies the purchaser that he will not deliver the goods during this period, the purchaser may, when the seller insist not to, or fails to make delivery, declare the termination of contract.

The purchaser is entitled to terminate in this case, whether or not the non-delivery, since the beginning, forms material breach of the contract. The interpretation of this is that if the failure to deliver, since the beginning, forms a material breach, then the purchaser – according to the first case – may declare the termination of contract before granting the additional period, and it is understood that he has the same right after expiration of this period. If the breach, since the beginning, is not material, then paragraph 1 of Article 49 is understood to turn, due to the seller's insistence not to, or failure to deliver, into a material breach that permits termination to the purchaser.

Conditions of Termination of International Contract:

Termination is a procedure that compromises international trade considered one of the highly serious and fatal sanctions that threaten confidence and trust in the international trade field, on account of the destructive termination impacts on the commercial transactions and the resulting losses, considering that such commercial transactions are concluded after hard negotiations and heavy costs. Further, the subjects of the international contract are related to significant and vital needs for its parties who are concerned, in the first place, with the performance of contract not its termination. Vienna Convention emphasized on the idea of termination and attempted to narrow its scope and the way to resort to termination through special conditions and specifications.

Hence, there are conditions that must be satisfied in order to consider the contract terminated. Those conditions are represented in the existence of (material breach of contract and termination notice).

First Branch – Material Contractual Breach:

The material breach[8] of the international contract clauses is one of the most important reasons of the contract termination that entitles the other party to terminate the contract. UN Convention on Contracts for the International Sale of Goods 1980, in connection with the international contract termination conditions, provides that "The international sale contract shall not be terminated, unless the debtor's breach of his obligations is considered a material

[8] The Convention differs from the UNIDROIT Principles for the International Trade Contracts in terms of the designation of the contractual breach. The former cited it (fundamental breach) while the Principles cited it (fundamental non-performance). Though the designation is different, however in definition the substance is the same in both systems which is that the party in breach deprives the other party of his expectations under of the contract.

breach, as when the seller fails to deliver the sold object or the purchaser is in default of paying the price".[9]

The courts or the judge cannot accordingly terminate the international sale contract if the breach is not material. Article 25 of CISG provides: "A breach of contract committed by one of the parties is fundamental it is 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."

The foregoing indicates that the breach is not considered material that would terminate the contract, unless a number of conditions are satisfied:

1. A breach of the obligations is committed by either party, the seller and the purchaser, whether the breach is represented in the non-performance of obligations originally, defective partial performance or late performance such as the seller's refraining from conveying the title to the sold object to the purchaser, or the purchaser's refraining from paying the price to the seller, delivery of defective or non-conformant commodity or partial performance of the contract so that the benefit sought by the creditor is not fulfilled unless the contract is performed in whole.[10]

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[9] UNIDROIT Principles for the International Trade Contracts regulated the subject of "Termination of Contract" in Clause (7.3.1) "Right to Terminate the Contract" which provides:

(1) A party may terminate the contract where the failure of the other party to perform an obligation under the contract amounts to a fundamental non-performance.

(2) In determining whether a failure to perform an obligation amounts to a fundamental non-performance regard shall be had, in particular, to whether

(a) the non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract unless the other party did not foresee and could not reasonably have foreseen such result;

(b) strict compliance with the obligation which has not been performed is of essence under the contract;

(c) the non-performance is intentional or reckless;

(d) the non-performance gives the aggrieved party reason to believe that it cannot rely on the other party's future performance;

(e) the non-performing party will suffer disproportionate loss as a result of the preparation or performance if the contract is terminated. See Dr. Amin Dawas *et. al.* Explanation of UNIDROIT Principles of International Trade Contracts (2010) Part II, Al Halabi Right Publications, Lebanon, Beirut, Edition 1, 2017, P. 950.

[10] Dr. Amin Dawas *et. al.* P. 951.

2. The other party suffers damage that substantially deprives him of what he was entitled to expect under the contract, unless the party in beach did not foresee such result and no person could foresee such result in the same circumstances.[11] The fatality of breach alone does not account for termination, unless a material damage sustains the other party.[12]

3. In order to consider the breach material, the damage itself must be foreseen.

Hereinafter we indicate in detail the previous conditions: **First: Contractual breach resulting in damage**: First of all, there must be a breach of contract attributed to either party to contract i.e. a breach in performing the obligations, either by the non-performance in the first place, or by performance in a way other than that required by the contract. For example, the delivery of quantity of the sold object less than the agreed quantity; payment of price in a currency other than the agreed currency in the contract;[13] delivery of goods non-conformant to specifications; breach of date of place of delivery or failure to pay the price or a part thereof.

Both legislations – the Convention and the Principles – adopted the trend that suffices with non-performance for the creation of liability of the breaching party. Non-performance means the failure of a party to discharge any of the obligations prescribed in the contract including the defective performance and delayed performance. There is no distinction drawn between the non-performance with or without excuse. Both legislations permitted the termination of contract, even if the debtor is excused in the failure to perform his obligation.[14]

However, any contractual breach by either party is not in itself a sufficient reason that accounts for resorting to the sanction of contract termination by the aggrieved party. This breach must be of a high degree of substantiality and seriousness that commensurate with the amount of resulting sanction which is the termination of contract and the restitution of the parties to their condition before the contract conclusion. The recognition of the substantiality of breach must be accurate. If there is any doubt whether or not this breach is material, then based on this doubt, it is considered that the requirements of material breach are not satisfied.

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[11] See: Concept in Fundamental Breach and its Applications in UN CISG: Khaled Abdul Hamid, Termination of International Contracts of Sale under UN CISG, Ph. D. thesis – Law School – Cairo University 2000, P. 37 *et. seq.* Ibrahim Desouqi Abul Lail, Seller's Guarantee of Non-Claim by Third Party, according to UN CISG 1980, A Study Compared to the Kuwaiti Law, Law Magazine, Kuwait University, Issue 4, 2011, P. 50. Mohamed Mansour Khesha, Material Breach as an Objective System for Compliance with Conformance Guarantee, Ph. D. thesis, Mansoura University, P. 7.

[12] Dr. Ahmed Al Saeed Al Zuqrod, Principles of International Trade Law, Al Maktaba Al Asreya, Egypt, Mansoura, 2007, without edition, P. 217.

[13] Dr. Mohsen Shafiq, UN CISG, Dar Al Nahda Al Arabia, Cairo, 1998, P. 119.

[14] Khaled Abdul Hamid, Termination of International Contracts of Sale under UN CISG 1980, Al Ishaa Library and Press, Alexandria, 2002, P. 65, quoted from Beshr Ibrahim Al Khatib, Termination of International Commercial Contract under UN CISG 1980 and UNIDROIT Principles 2010, Masters Thesis, Law School, Yarmouk University, Jordan, 2016, P. 12.

The effect of breach must extend to the essence of contract (goods or price) and must lead to serious implications that prejudice the sought economic objective of the contract for the aggrieved party.[15] It is important to note that evaluation and weighing the committed breach and determination whether or not it is material is not of the authority of the aggrieved party himself. This is determined in light of the contractual relation itself because the contractual relation itself is what outlines the criteria on which basis the expectations of the aggrieved party out of the contract that he could not achieve due to the breach, are measured.[16]

We find that Article 25 of the Convention expresses the concept of material breach in broad words that do not definitely determine what is considered material breach. The Article used flexible terms and broad criteria to evaluate the value of breach and its impact on the essence of contract. This pursuit aims at keeping unspecified words in order to encompass all cases of material breach that may happen to the contract without restriction, together with maintaining the authority of the court of discretion, for each case apart.

Second: Foreseeing Damage by the Party in Breach:

It is stipulated for the creation of the right to terminate contract that the damage, that sustains the creditor and deprives him of what he expects under the contract, is foreseen by the party in breach and that an ordinary person, in the place of the debtor and in the same circumstances, would not foresee such damage or deprivation.

There are two criteria to determine foreseeing, the personal criterion which means that the party in breach – due to his circumstances – would not envisage such consequences resulting from his breach. Here, the extent of knowledge by the party in breach of the circumstances of breach of contract, and his experience and organizational capabilities are taken into consideration.[17] The second is objective which means that the ordinary person, in appropriate circumstances in the same position of the party in breach, could not reasonably envisage the occurrence of such consequences.[18] The Convention adopted that the party in breach foresees the result or his capability to foresee, even if he didn't foresee it actually.[19] The ordinary person, subject of analogy, must satisfy two things; the first is that he has the same capacity of the party in breach i.e. a trader who transacts the trade transacted by the party in breach. Further, he must have the same social and economic circumstances and this includes language, culture and general professional level. He must be also intermediate in his perception,

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[15] Ingeborg Schwenzer, Christiana Fountoulakis, Mariel Dimsey, International Sales Law a Guide to the CISG, Hart Publishing, Oxfors, 2012, P. 172, quoted from Beshr Ibrahim Al Khatib, ibid. P. 12, *et. seq.*

[16] Ulrich Magnus, Remedies: Damages, Price Reduction, Avoidance, Mitigation, And Preservation., International Sales Law a Global Challenge, Cambridge University Press, Edited by Larry A. DiMatteo, New York, 2014 , Page 265, ibid.

[17] Amin Dawas, UN CISG 1980 in Light of Judiciary and Jurisprudence Provisions, Jenin, 2013, P. 201, quoted from Beshr Ibrahim Al Khatib, ibid., P. 21.

[18] Nesrin Mahasna, Obligation of the Seller of Delivery and Conformity, Dar Al Thaqafa, Amman, 2011, P 192.

[19] Khaled Abdul Hamid, ibid., P. 101, quoted from Beshr Ibrahim Al Khatib, ibid., P. 21.

experience, carefulness and alertness. The second is that he experiences the same circumstances surrounding and influencing the party in breach. In this regard, all surrounding circumstances attributed to the circumstances of global or local market, legislations, policies, climate and everything related to the case, subject of research, are taken into account.[20]

The concept of (foreseeing damage) in the Convention involves much ambiguity which has positives[21] as it creates the right to terminate. Such ambiguity permits termination in favor of the creditor and its absence precludes termination in favor of the debtor.[22] In connection with the time of determination of foreseeing damage, both legislations kept silence regarding determination of the time in which the expectations of the aggrieved party under the contract are measured, and whether this is the time of concluding the contract or the time of the commission of breach.[23] We believe that the time of breach is the most appropriate criterion to estimate foreseeing the damage because it is difficult, upon conclusion of contract, to envisage the future violations for the contract parties. If the violations can be envisaged, the contract would have provided them. On the other side, the time of committing the breach is the time of committing the tangible act breaching the contractual obligation which the debtor then – compared to the ordinary person in the same circumstances – is assumed to foresee the damage sustaining the creditor and the amount and substantiality of this damage for the contract. The consequences of the breaching act cannot be estimated and expected unless at, and not before, time of commission.

It is left to say that the burden to prove that the debtor did not foresee and it is not envisaged that to him to foresee the damage is on the debtor in order to deny the responsibility. It is the responsibility of the aggrieved party himself to prove that he experienced a damage that substantially deprived him of whatever he expected under the contract. Whenever this evidence is established, the burden moves to the party in breach to be excused under his incapability to foresee the damage. He must prove two things: First, he could not foresee in any way the damage resulting from the breach. Second, the ordinary person in his place cannot foresee this.[24] If the party in breach succeeds to prove this, then there is no material breach.

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[20] Ibid.

[21] John Honnold, Uniform Law for International Sales Un under der 1980 UN Convention, Kluwer Law International, The Hague, 3rd Edition, 1999, page 207, quoted from Beshr Ibrahim Al Khatib, ibid., P. 22.

[22] Micheal Bridge, Avoidance for Fundamental Breach of Contract under the UN Convention on the International Sale of Goods, International and Comparative Law Quarterly, Vol. 59, Issue 4, October 2010, P. 923, quoted from Beshr Ibrahim Al Khatib, ibid, P. 22.

[23] To the contrary of Hague Convention that expressly provides to evaluate whether or not the party in breach is aware or should have been aware of the damage, at time of contract conclusion.

[24] Hossam El-Saghir, Guide to Article 25, Cited as http://www.cisg.law.pace.edu/cisg/text/peclcomp25 .html#er. Accessed on 7-Jan-2015. 18:00 - quoted from Beshr Ibrahim Al Khatib, ibid, P. 25.

Second: Notice of Termination

In order to establish the right to terminate as one effect of violation of the principle of good faith, either party must give the other a notice of termination and additional period of time to perform his obligations.

Additional period is a reasonable period given by a party to contract to the other to perform his obligations that he fails to perform during the contract term. The additional period is a mean sought to maintain the performance without termination.

[25]In this regard, a question is triggered, if the breach committed by the seller is non-material and the purchaser notifies him of the removal of breach and albeit the expiration of notice, the seller insists on his position. Can the purchaser terminate the contract? Will the breach become material based on such insistence? In the Convention, the answer is yes, if the seller breaches his obligation of delivery i.e. he fails to deliver on time, based on Clause 49.1 because the provision is confined to this case only, in which the seller fails to deliver goods on the specified date and insists not to deliver, albeit the additional period determined by the purchaser expires, provided that such additional period is reasonable. A non-material breach does not turn into material in other cases.[26]

Anticipatory Termination

Sometimes, there are circumstances that hinder the performance of obligation by either party in the international trade or there are issues related to performance. If it is undesired that such issues accelerate the termination of contract before the performance time falls for the possibility that the party may overcome it over time, it is also undesired to keep the contract in force, albeit it is obvious that a material breach of contract will be committed. Accordingly, the Convention permitted the party to terminate the contract, if it is indicated clearly before the date of performance that the other party will commit a material breach.[27]

Anticipatory breach is the one that occurs before the date of performance of obligation falls and establishes the right of the aggrieved party to suspend performing his obligation, if such breach will result in that the party in breach does not perform a significant part of his obligations. The Convention permitted the aggrieved party to resume the performance, if the party in breach provides sufficient guarantees that confirm his intention to discharge his obligations. However, the breach is expected to be of high degree significance so that it will be insufficient that the aggrieved party suspends the performance of his obligations and the party in breach does not

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[25] Clause (7.3.2) of UNIDROIT Principles provides the necessity to give notice of termination. In order that any party exercises his right to terminate the contract, it is stipulated that he gives notice to the other party. If the date of performance falls due but it is not made, the action of the debtor is dependent on his desires and wishes. He may wait to see whether the debtor will offer performance then he will decide. However, the creditor may also demand performance, but in this case, the request must be presented during a reasonable period of time after he knows or is assumed to know non-performance or termination.

[26] Dr. Taleb Hasan Mousa, International Trade Law, Dar Al Thaqafa, Amman, Edition 1, 2008, P. 193.

[27] Usama Hijazi Al Masadi, Rules Regulating International Sale Contracts and Trade, Dar Elkotob Alqanonia, P. 209.

provide adequate guarantees that confirm his intention of performance, then there must be a decisive action to face the anticipatory breach in this case. The Convention found that the appropriate action to face the breach is to declare the anticipatory termination because keeping the contract in force, though a breach is foreseen, for which the party loses each benefit, is desirable.[28] The Convention did not provide for the right of anticipatory termination in absolute way rather limited such right by conditions so that the doubt in committing any breach by the party would not be an excuse used by the other party to abandon the contract and declare its termination. The conditions of anticipatory termination include that there is a foreseen material breach and the second condition is the notice. The Convention necessitated that the party who seeks anticipatory termination of contract, if time permits him, gives the other party a notice of reasonable conditions that allow him to provide adequate guarantees confirm his intention to perform his obligations. The Convention did not define the particulars necessary in the notice but required that the notice contains reasonable conditions according to Article 72 of the Convention that provides "If prior to the date for performance of the contract, it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided. If time allows, the party intending to declare the contract avoided must give reasonable notice to the other party to permit him to provide adequate assurance of his performance."[29]

Second Section – Procedures and Effects of Termination

First Theme: Procedures of Termination

The drafters of Vienna Convention sought to establish a system that governs the procedures of terminating the international sale contract that differs from the national legislations. We notice that the termination of international sale contract by the purchaser – produces no effect – according to Vienna Convention – unless the termination is declared by a notice of termination given by the latter to the other party (seller). The termination accordingly is not effected directly after the seller commits a material breach. Rather, it is stipulated that the purchaser expressly declares the termination of contract. This declaration of termination is achieved by a simple notice of the will of the purchaser (aggrieved party) unilaterally.

If the conditions of termination of international sale contract are satisfied in one of the forms of termination cases, and the procedures of contract termination represented in giving notice to the seller by the purchaser of his decision of the contract termination are observed, then the effects of discharging both parties to the international sale contract take place and each party returns to the other what he received under the contract.

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[28] Usama Hijazi Al Masadi, ibid., P. 210.

[29] Dr. Mahmoud Samir Al Sharqawi, International Commercial Contracts, Dar Al Nahda Al Arabia, Egypt, Cairo, Edition 2, 2002, P. 202.

Based on the foregoing, we will address the procedures of termination of international sale contract then illustrate the effects of termination of this contract.

First: Legal Procedure of Termination

If the creditor believes that the debtor breaches the contract and deprives him of what he expected thereunder and believes that he suffers a damage foreseen by the debtor, then he sought to terminate the contract in lieu of pursuing any other sanction, the creditor must pursue legal procedures to declare the termination of contract without undermining his legal rights. Hereinafter we will manifest the legal procedures in two branches; giving notice of termination and the date of giving notice of termination.

a. **Giving Notice of Termination**: Since the termination is considered a serious sanction, it cannot be inferred from the silence of the creditor. Rather, the (creditor) purchaser must declare his intention that the contract is terminated because the other party materially breached his obligation. However, if the purchaser does not expressly declare the termination by a notice given by him, the most just assumption that must be adopted is that the purchaser whose interests are prejudiced by the seller – has not waived yet – his right in the necessity to perform the international sale contract.[30]

Article 26 of Vienna Convention provides "A declaration of avoidance of the contract is effective only if made by notice to the other party". The Convention does not permit automatic termination of contract without notice, or the parties will not be capable to identify the time at which the contract is terminated.[31] Hence, according to Article 26 of the Convention, in order to declare the termination of contract, the aggrieved party gives notice to the party in breach in which he declares the termination of contract. The purpose of this procedure is to inform the debtor that the creditor will not accept the performance which results in giving the debtor the opportunity to avoid potential losses that he may experience, if he continues the performance.[32]
In connection with the notice, the Convention added that "a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication".
Though the seller (addressee) according to Vienna Convention will incur the risks of loss or delay of notice, the communication mean must be appropriate to the circumstances of the contract. Each mean of communication – as a general rule – is an effective mean to declare the termination of the international sale contract.

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[30] Dr. Gamal Mahmoud Abdul Aziz, Obligation of Conformity in International Sale Contract of Goods, Cairo, without edition, 1996, P. 400.
[31] UIric Magnus, The Remedy of Avoidance of Contract under CISG- General Remarks and Special Cases, Journal of Law and Commerce, Vol. 25:423 6-2005, page 426, quoted from Beshr Ibrahim Al Khatib, ibid., P. 25.
[32] Lars Meyer, Opt. cit., Page 15, quoted from Beshr Ibrahim Al Khatib, ibid., P. 25.

In application of the foregoing, if the purchaser chooses to terminate the contract, he must not request it from the judiciary. Rather, it is adequate that he considers the contract terminated, provided that he notifies the seller of that.

The UAE law is concordant with Vienna Convention regarding the necessity that the purchaser discloses his desire of termination through declaration in the form of notification, unless the exemption from this is expressly agreed by the parties. Article 271 of the Federal Civil Transactions Law provides "It may be agreed that the contract is automatically terminated without the need for judgment when the obligations arising from the contract are not discharged. This **agreement shall not relieve from giving notice, unless it is expressly agreed by the parties to be relieved from such notice**". Vienna Convention did not define the content of the notice of termination that must be given by the purchaser. However, in any way, the content of such notice must not be confusing or vague so the debtor cannot understand its meaning. The notice must be of some clarity that allows the other party to understand expressly that the creditor terminates the contract like when the notice states the substance of material breach, the actions taken by the other party against this breach to inform the seller of them and to agree with the other party to keep the contract effective and apply sanctions other than termination.[33]

b. Date of Termination:

The Convention urged the termination declaring party to declare it quickly within reasonable period according to the circumstances. The purpose of this is to decide the implications of the contract especially in the cases where the goods are perishable. If the breach is on the part of the seller and the purchaser delays the declaration of termination, the seller may lose the opportunity to re-sell the goods in suitable price. Article 49 of the Convention provides that: (1) "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.

(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:

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

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

(1) after he knew or ought to have known of the breach;

[33] Dr. Gamal Mahmoud Abdul Aziz, ibid, P. 402.

(2) 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.

Second: Effects of Termination

The first effect produced by the contract is that both parties are relieved of all their liabilities which each party may owe to the other and he is discharged of such liabilities so that he becomes no longer committed to perform them against the other party.

a. Lapse of Contractual Obligations of Parties to Contract

The first thing that takes place upon the termination of contract is that the contract parties are relieved of their future contractual obligations. Article 81.1 of the Convention provides "Avoidance of the contract releases both parties from their obligations under it, subject to any damages which may be due. Avoidance does not affect any provision of the contract for the settlement of disputes or any other provision of the contract governing the rights and obligations of the parties consequent upon the avoidance of the contract."

At the moment the contract is declared terminated, both parties are relieved of their contractual obligations. The seller cannot claim the price and the purchaser has no right to claim the delivery of goods.

If the termination is partial, then both parties are relieved of the obligations related to this terminated part only without the remaining contractual obligations.[34] It is also the case if the contract is made in payments and the termination applies to one payment only. If both parties are relieved of their obligations, then termination is confined to this payment alone.[35]

b. Remedy

Article 81.1 of the Convention provides "Avoidance of the contract releases both parties from their obligations under it, subject to any damages which may be due". The previous Article indicates that it expressly stated that the right to claim damages remains outstanding albeit the termination of contract and the relief of the parties of their obligations under the contract. The Article allowed the combination of termination and damages so that the damages are supplementary sanction.

Vienna Convention is concordant with the Federal Civil Transactions Law in respect of the combination of termination and damages. Article 272.2 provides "The judge may order the

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[34] Denis Tallon, Bianca-Bonell Commentary on the International Sales Law, Giuffrè: Milan (1987) 601-606, Cited as: http://www.cisg.law.pace.edu/cisg/biblio/tallon- bb81.html, On 2-July-2015, 22:30. Quoted from Al Khatib, ibid, P. 55.

[35] Khalid Abdul Hamid, ibid, P. 452, quoted from ibid.

debtor of immediate performance or grant him a specified period of time and **may order termination and awarding damages in each case, if required**".

Article 81 of the Convention makes the termination results in effects. The first effect is the **lapse of contract and the relief of both parties of their obligations**. Accordingly, the seller is no longer committed to make delivery, if the goods are not delivered, and the purchaser is no longer committed to pay the price. However, according to Article 81:

(a) Termination has no effect against the right of each party to rely on the terminated contract to claim the other party to indemnify the damage suffered from the termination.
(b) Termination has no effect in the conditions of contract related to the settlement of dispute, these conditions remain outstanding after the termination of contract and produce their effects such as arbitration clause and agreement on the jurisdiction of a particular state's court or the enforcement of a particular law.
(c) Termination has no effect on the conditions of contract that regulate the rights and obligations of the parties resulting from termination such as the condition of relief of liability and the penalty clause.

Second Effect: Right to Recover

If the purchaser declares the termination of contract, the contract is discharged, not from the time of declaring termination but from the time it is originated, as termination has retrospective effect. The contract is considered terminated as if never concluded and its effect is abolished even in the past. As a result, everything must be restituted as they were before the contract conclusion and both parties are entitled to recover what they have performed under the contract. This is confirmed in Article 81 that provides "A party who has performed the contract either wholly or in part may claim restitution from the other party of whatever the first party has supplied or paid under the contract".

This means that if the seller fails to deliver the goods or delivers non-conformant goods, and the purchaser declares termination, the purchaser has the right to recover the paid price.

If the seller performed its obligation of partial delivery by the delivery of a part of goods and the purchaser pays price for this part then the purchaser (or seller) declares termination, each of them has the right to recover what they provided. The obligation of recovery by both sides must be performed concurrently and this means that each of them has the right to retain what he must return until he recovers what he is entitled to receive.[36]

The seller incurs the recovery charges whether those incurred personally or by the purchaser. Those charges are included in estimation of the compensation due to the purchaser for declaring termination.[37]

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[36] Dr. Mohsen Shafiq, paragraph 352 quoted from Safwat Najy, ibid, P. 80.
[37] Ibid.

Recovery Inclusions:

If the contract is terminated, the seller must return the received price in addition to the due interest from the day of payment to the day of returning. In calculation of the interest rate, the rules applicable in the applicable law are followed.

The interests fall due against the retention of money. In this description, interest is a debt owed by the seller and not an element in the compensation due to the purchaser because of the termination of contract.

The purchaser must return the goods and the consideration of the benefit that he gained from the goods or part thereof (Paragraph 2 of Article 84). Paragraph 1 of Article 82 provides that the purchaser is not bound to make restitution of the goods "substantially" in the condition in which he received them, which is left to the discretion of the judge or arbitrator.

Effect of Impossibility of Goods' Restitution:

If it is impossible for the purchaser to restitute the goods to the condition in which he received them or restitute them "substantially" in the same condition, he loses his right to declare termination, or if the goods received from the seller are resold, consumed, transformed or merged into other goods, or if the goods are damaged or perished. In this regard, Paragraph 1 of Article 82 provides "The buyer loses the right too declare the contract avoided or to require the seller to deliver goods, if it is impossible for him to make restitution of the goods substantially in the condition in which he received them.

However, there are three cases where the impossibility of restitution does not prevent the purchaser from exercising his right of termination:

1. If the impossibility is not attributed to the action or omission of the purchaser, as when the goods are perished in fire beyond his control or damaged due to its defect without negligence on his party in exerting effort to limit such damage.
2. If the goods or part of the goods are perished or deteriorated as a result of the examination provided in Article 38.
3. If the goods or part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before he discovered or ought to have discovered the lack of conformity.

If the purchaser makes any of those actions after the non-conformity is discovered or ought to have been discovered, he is considered to act in bad faith. Accordingly, he loses his right to terminate the contract since he should have kept the goods in its condition to return it to the seller if he decides to terminate the contract.

In this case, if the purchaser decides the termination, the full price paid to the seller is not refunded. It is not envisaged that he combines both full price and the goods that he resold or consumed or he would be enriched on account of the seller. The purchaser's right – under Paragraph 2 of Article 84 – is confined to recover from the seller the difference between the

paid price and the consideration of the benefit received from the goods. This benefit is the received price in case of re-sale and consideration of consumption in case of consumption.[38]

Conclusions:

1. Termination is a procedure that compromises international trade considered one of the highly serious and fatal sanctions that threaten confidence and trust in the international trade field. On account of the destructive termination impacts on the commercial transactions and the resulting losses, Vienna Convention emphasized on the idea of termination and attempted to narrow its scope and the way to resort to termination through special conditions and specifications. The Convention further adopted other sanctions to avoid the effects of termination of commercial transactions.
2. Vienna Convention was keen as far as possible on maintaining the international sale contract and protecting it from falling apart through the institution of the doctrine of economic termination for the fatal economic implications of termination suffered by both parties in the international trade field.
3. The Convention drew distinction between two categories of sanctions imposed on the breaching party, based on the distinction between material and non-material breach.
4. Vienna Convention imposed sanctions immediately when either party fails to perform his obligation as the nature of the international contract, as the backbone of international commercial transactions and the requirements of international trade necessitate quickness and stability of transactions which is reflected in a provision of the Convention "neither the judge nor the arbitrator shall grant the seller any period of time to perform his obligations, if the purchaser insists to apply the established sanctions, in case the former breaches the contract". This is similar to the Federal Civil Transactions Law that permitted the judge to grant the debtor a period of time to perform his obligation.
5. Vienna Convention stipulated the existence of a material breach, for the possibility of exercising the right to terminate just as the Federal Civil Transactions Law permitted the party to terminate the contract, if the other party fails to perform his obligation under the contract, conditional on giving notice.
6. Vienna Convention adopted the concept of material breach as the basis of termination as opposed to the UAE law that permits termination, if there is a breach in performing contractual obligations by either party. Perhaps the purpose of adopting the concept of material breach is to avoid the undesired serious and fatal impacts resulting from the exercise of the termination right in the international trade field, for both contract parties.
7. The Convention expresses the concept of material breach in broad words that do not definitely determine what is considered material breach. Flexible terms and broad criteria

[38] Dr. Mohsen Shafiq, margin 441, P. 266, quoted from Safwat Najy, ibid, P.82.

are used to evaluate the value of breach and its impact on the essence of contract to encompass all cases of material breach that may happen to the contract.

8. Vienna Convention did not determine the time at which the expectations of the aggrieved party under the contract are measured, and whether this is at the time of concluding the contract or the time of the commission of breach.
9. Vienna Convention did not determine the substance or the form of the notice.
10. Vienna Convention did not permit automatic termination of the contract without giving notice, or the parties will not be capable to recognize the time at which the contract is terminated.
11. The Convention permitted the aggrieved party to combine both termination and compensation. In this regard, the Convention is concordant with the Federal Civil Transactions Law that permits the judge to judge termination and compensation, if required.
12. Vienna Convention and the Federal Civil Transactions Law agree on the necessity that the purchaser discloses his desire of termination through declaration in the form of notice, unless it is agreed by the parties on the exemption from such notice.
13. Vienna Convention clearly adopted the termination theory constituted in the declaration of the contract termination by the creditor. Vienna Convention did not stipulate that the purchaser applies to the judiciary for the termination right, since it can be made by agreement of both parties, or that the purchaser declares termination and notifies the seller thereof. The termination produces its effect only when made by a notice given to the other party.

Recommendations:

The Convention determines the time at which the expectations of the aggrieved party under the contract are measured. We propose that it is measured from the time the breach is committed for the reasons previously explained in the Research.

The Convention outlines the substance of notice to include the substance of the material breach and the procedures decided by the other party against such breach.

Addition of the indemnification of intangible damage and bodily effort as part of the damage suffered by the debtor, to the Convention provisions. It is not just or fair that such damage is not recognized as part of the damage suffered by the aggrieved party.

Ahmed Al Saeed Al Zuqrod, Principles of International Trade Law, Al Maktaba Al Asreya, Egypt, Mansoura, 2007, without edition, 2007.

Mohsen Shafiq, UN CISG, Dar Al Nahda Al Arabia, Cairo, 1998.

Federal Civil Transactions Law.

Nesrin Mahasna, Obligation of the Seller of Delivery and Conformity, Dar Al Thaqafa, Amman, 2011, P 192.

Beshr Ibrahim Al Khatib, Termination of International Commercial Contract under UN CISG 1980 and UNIDROIT Principles 2010, Masters Thesis, Law School, Yarmouk University, Jordan, 2016.

Adam Abdullah Al Doum, Provisions of International Trade Contracts, Ph.D. thesis, Omdurman Islamic University, 2013.

Safwat Najy, Obligation of Goods Delivery in the International Contract of Sale (Study of Vienna Convention 1980) without edition, 1996.

Amin Dawas et. al. Explanation of UNIDROIT Principles of International Trade Contracts (2010) Part II, Al Halabi Right Publications, Lebanon, Beirut, Edition 1, 2017.

Dr. Taleb Hasan Mousa, International Trade Law, Dar Al Thaqafa, Amman, Edition 1, 2008.

Usama Hijazi Al Masadi, Rules Regulating International Sale Contracts and Trade, Dar Elkotob Alqanonia.

Dr. Mahmoud Samir Al Sharqawi, International Commercial Contracts, Dar Al Nahda Al Arabia, Egypt, Cairo, Edition 2, 2002.

Dr. Gamal Mahmoud Abdul Aziz, Obligation of Conformity in International Sale Contract of Goods, Cairo, without edition, 1996, P. 400.