

GENESIS OF NON-CODIFIED CUSTOM

GÉNESIS DE LAS COSTUMBRES NO CODIFICADAS

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Abstract: *The study of what is called “customary law” and “non-written rules” is always faced with ambiguity due to the lack of written resources. The reason for emphasizing the role of custom and applying the words on their customary meanings was to re-focus on this rich source of rights, which is far from sights. By reviewing the Articles, books and documentary data, we tried to look again at the status of unwritten conventions, legal rules and legal principles that could be interpreted as legal norms. If written or assigned to a bunch or a material to them, along with other laws they can be a good complement. This paper intends to review the role of custom and habit in concluding contracts by reviewing past comparative law studies and helping out the role of custom and unwritten rights. Besides, it intends to unify the material of Arts. 220, 225 and other Arts. of civil law of the parties to the awareness of the custom, because ignorance of the customary is not like ignorance of the law.*

Keywords: *Norm, Customary, Rights, Non-Codified Law, International Trade*

Resumen: El estudio de lo que suele llamarse “derecho consuetudinario” y “leyes no escritas” está siempre expuesto a una cierta ambigüedad debido a la falta de recursos escritos. La razón para remarcar el rol de la costumbre y de aplicar estas palabras a los medios de la costumbre fueron las de

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reparar nuevamente en esta rica fuente de derechos, que está lejos de la visión general. Al revisar las normas, libros y datos documentales, tratamos de examinar nuevamente el estado de las convenciones no escritas, las normas legales y los principios legales que podrían interpretarse como normas legales. Si se les asigna un contenido, junta a otras leyes, pueden ser un buen complemento. Este documento tiene la intención de revisar el papel de la costumbre y de la praxis en la conclusión de contratos, mediante la revisión de estudios anteriores de derecho comparado y el auxilio a la función de derechos fundamentales no escritos. Además, tiene la intención de unificar el material de los artículos 220, 225 y otros, relacionados con la conciencia de la costumbre, porque el desconocimiento de la costumbre no es como el desconocimiento de la ley.

Palabras clave: normas, costumbres, derechos, ley no codificada, comercio internacional

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I. INTRODUCTION

The custom in the term of “rights” has been raised as one of the subsidiary sources of law defined in its definition: tradition is a rule that is gradually established among all people or a specific group of them as a binding law (Katozian, 2008, p. 178).

In other words, what is common among people and they are humanized and behave according to them are custom (Feyz, 1995, p. 220), which may be called a practical custom and/or a literal custom (Qafi & Shariati Farani, 2014, p. 75). The custom is a process of formation of rights and is one of the important sources of knowledge of the intent and will of the interlocutors in international trade as well as the means of interpretation of the contract. In addition, it can clarify the dark and vague angles of a contract in the light of the will of its authors from the familiar values of the community or the group of those individuals. The origin of the custom is a practical method that is primarily used by one or more people due to their legal desirability and then gradually used by others as it

becomes useful. However, this method is far from opinions these days (Shahidi, 2004, pp. 301-303). The importance of the general legal principles is to the extent that Art. 38 of the Statute of the International Court of Justice considers the accepted civilized nations of legal principles as sources of international law. Some of the writers by considering how to create customary law in the United Kingdom, have considered the custom as the outcome of court judgments and one of the effects of judicial procedures. In their view, this is a judicial procedure that turns habits and customs into customary rules. In order to establish a custom, the habit of repetition in court judgments should be accepted as a legal rule, and this is the custom of courts that should be the main element of the custom. Thus, the custom is nothing but rules respected by the courts and should not be regarded as an independent source of legal rules in the line of law and procedure. In assessing this viewpoint, it should be noted that the contribution of the judicial procedure to establishing the belief in the necessity of the custom is irrefutable, but it should not be exaggerated about the effect of the judicial procedure to the extent that custom is the product of the outcome of the judiciary and blend these two concepts with each other (Katozian, 1998, p. 180).

II. FIRST TOPIC: NORM RIGHTS DEVELOPMENT MANNER

The problem with the customary conventions, as well as other types of customary law, is to prove it.

II.1. First Speech: The realm of customs

In many countries, including our country, written and unwritten laws are abundantly respected and are the main source of law, but the custom also has a great effect. The custom clarifies the obscure and ambiguous thematic matters of the contract and will eliminate its ambiguity. It is never expected and it is not possible for the legislator to stipulate all the related aspects of contract (Shahidi, 2004, p. 303). The power of common law, whether national or international, is subject to certain essential conditions and criteria. However, where should we look to find these criteria? The custom cannot speak about its own credibility. Undoubtedly, there are customary practices that are so widespread and universal in use that will be identified by any developed legal system. Certainly, it is likely that they lost their character as a trademark and acquired the status of a general legal principle. But such broad principles, such as the necessity of fulfilling contractual obligations, have been limited by the conditions and boundaries

that vary from one legal system to another, which can be only partially useful. Unless used as a means by which the referring court can support its decision without determining the applicable law. Outside of these broad principles, we cannot refer to some of the universal rules that can be measured by the validity of the custom. Because there is no law; both the traits of international trade and the conditions of its validity differ from one jurisdiction to another. So how can refereeing courts be able to persuade themselves without a national law that a custom is a valid commercial practice? The short answer is that if the custom is truly international, its existence cannot be related to a particular national law or decisions of the national court. This leads to localization and internalization of what is internationally supposed.

II.2. Second speech: How to create unstructured custom

Potential and actual custom

Should the custom in the present situation continue to be emphasized and considered? Is it true that the custom is not acceptable anymore to the commercial community and is simply accepted because it is contractually binding on the parties? When a required customary law that has executive power appear as a barrier or intruder in the face of a court, what should the court do? In case that the custom has not been compiled, the subject will be less severe. Because in this situation, what should have been done by the business community is to abandon that custom and replace it with a more favorable procedure. However, when the custom is codified and is included in the contract, it finds contractual power unless explicitly denied or agreed to change it. Such a custom cannot be changed except by changing the encoded set (Roy, 2007, p. 216).

Determining the scope of common law enforcement

A custom can be international without being global. Of course, the number of universal conventions is very limited, and their identification also has unpredictable problems. However, the application of an international custom requires the assumption that both parties are active in the domain of its influence. For transactions that take place in a systematic market or exchanges that take place in a particular area or place, it is not difficult to fulfill this assumption because usually all around are bound to this custom. But in other cases it will be more difficult to obtain this precondition. Commercial customs have evolved and developed more in those parts of the world that have evolved legal systems and the sovereignty of will is important at there. Imagine that the place of business

of one party in an international contract for the supply (or provision) is in such a part of the world while the other party has a contract in a country where the rights are not developed and is subject to political and economic objectives. As a result, the role of the contract has been weakened. The efforts of the first party (which is usually a supplier) in resorting to international custom will probably face this objection to the opposing party that why we should adhere to the custom that our country and the similar countries in terms of view, economic status and development have not played a role in its formation that are usually opposed to our views and approaches? If there is no way to determine whether a contract falls within any of these two domains, in the domain and influence of the supplier or customer, there will be no other choice than resorting to the lawful acts determined by the conflict rules of laws of the court. It seems that it is one of the factors that developed powers are reluctant to trade with poor countries. The solution to this dilemma can be the formulation of a set of commonly accepted rules by all the world's trade powers in order to not let such conflicts arise and, on the other hand, trade deals are not limited to a small number of countries. The general legal principles, apart from the rules of the international public order, are so wide-ranging that they cannot be desirable in practice, except to be certain of the referee or to be qualify for the judgment of the referee. The principle of the necessity of fulfillment of the covenant has been accepted everywhere. What matters to us is the conditions under which the contract is executed. It is still possible to derive general legal principles from conventions, but the scope of this resource has diminished with the increasing acceptance of the interpretative rules outlined in the Vienna International Convention on International Trade. Since the Convention is primarily intended to interpret general principles subject to the Convention itself and, in the absence of that reference, is governed by a law which is applicable in accordance with the rules of conflict of law.

On the other hand, the principles of public order or international ethics have the power and the authority that easily replaces and supersedes the custom of the opposition. For example, the fact that the contract that was committed with bribery is null and void, regardless of whether it is commonplace at the place of the conclusion of the bribe agreement, is unanimous (Roy, 2007, p. 222).

Many writers have pointed out that it is impossible to accurately reflect the rights of all the rules of non-documentary law, since the scope of unwritten rights is intrinsically unchangeable in nature. In addition, maybe when the rules are written down, it can be detected inadequate and inappropriate in some ways.

The conception that compilers formulate all the rules of customary law with complete loyalty when compiling, is merely a myth. Especially, at the international level there is a possibility of significant differences between the rules of a legal system and the rules of other systems. When legal professionals gather together to formulate the convention or rules of uniformity, the secretariat of the meeting organizer usually provides a comprehensive report that reflects the rules and practices in some countries. Each participant brings the expertise and knowledge of his legal system and one can expect each representative to examine the proposed rules in a manner consistent with the rules of his legal system in order to see whether the draft is a matter of past ignorance or, conversely, the development and an evolutionary proposition. But if the authors of a convention or uniform rules believe that all the known rules and procedures are available to them and they should merely try to link these rules, they will not make any progress; Because this is nothing more than a reinstatement of existing rights, and merely creates a plurality of previous rules with little change in some areas. However, this method is not a way to bring about the process of uniformity of the rules. What should be considered by the people involved in this project is to reach the best solution for a specific topic. A solution that has not gone away so far from the existing procedure that would result in disapproval of it. Therefore, the necessary changes are made to each statement, whether written or unwritten. As such, the product of an integrated work of existing rules, modified rules, and completely new rules will be. An interesting example of this issue is the International Chamber of Commerce's judgment in the case number 5713 in 1989 (Oloomi Yazdi & Babazadeh, 2010), p. 223). The seller under the sales contract was signed in 1979, was to get the price had resorted to arbitration. The buyer claimed that he was entitled to reduce his liability due to non-conformity with the description given in the contract. In the meantime, the question was raised as to whether the buyer had declared the seller to comply with the deadline or not. The arbitration authority recognized the law governing the contract as the law of the seller's country by applying the rules of public conflict resolution. Although the governing law referred to the need for a fault warning in a short time, the Court considered it to be against the generally accepted commercial norm. As a result, the referral court dismissed the legal acts that could be applied to the contract under the rules of conflict resolution and instead of that applied Arts. 38 and 39 of the Vienna Convention on the sale of goods. The Convention was regarded as a law and not merely as a reflection of the commercial law applicable to the case. It can be concluded that the judges disregarded some form of law and considered the

custom. The Vienna Convention, which has been implemented in seventeen countries, can fairly be considered as a source that reflects a universally accepted customary code of non-conformity of goods in international sales. The arbitration panel ruled that the buyer had given the non-conforming notification within the time period specified in Arts. 38 and 39. However, the seller was prohibited from using the time period specified in Art. 40 because the seller was aware of the non-conformity of the goods but didn't disclose it. Therefore, the buyer deserves compensation, which can be bartered with the seller's demands. In accordance with applicable law, this point can reasonably be deduced from this brief report of arbitration that it was decided the buyer issued a non-conforming notice outside the deadline. What is astonishing about this verdict is not that voting has expanded the scope of the Convention beyond its own boundaries—as this may occur in various ways, including the recognition of the Convention as containing existing conventions—but it is a surprise that the vote completely ignored the law governing the contract, and thus, without any discussion, it was assumed that the Vienna Convention on Commercial Bonding contains the relevant commercial law. The path to the derivation of an uncommon custom of an international trade convention is along with many ambiguities. It's considerable to what extent does the judge has the freedom to act and the power to initiate a judicial procedure based on his own knowledge (Roy, 2007, pp. 226-227).

Development of trade conventions in international trade practices

In the same way that a convention can change the customary international trademark law, the custom can also copy or explain the legal rules that govern the right of the convention. Furthermore, in cases where the Convention is a witness to the existence of a convention, its provisions may be applicable as a convention, even where there is no connection with a State Party that has been recognized by the Convention for the purpose of applying the Convention. For example, when in an international trade in goods, one of the parties does not have a trading venue in one of the Contracting States. Again, this is analogous to international law, where a state follows the convention as a treaty without its membership (Oloomi Yazdi & Babazadeh, 2010, p. 223). Both categories of principles refer to the rules of law applicable in accordance with the rules of conflict resolution; in this way, they realistically admit that the general legal and customary principles cannot completely replace the domestic laws of the countries because they do not form a complete legal system. Interestingly, in both sets of principles which expresses itself to certain rules of conduct, such as the necessity of goodwill and rules on the unilateral determination

of tension, it may be asked how principles that don't have a binding character themselves can reasonably include binding rules? At least for two reasons, the subject is not as strange as it seems. First, the parties may, by their choice, insert these principles in their contracts, in which case the rules of their principles will be binding on them, as the principles set out in these binding rules are mentioned or an exception has not been prescribed. Second, the rules that are considered to be amorphous show the acceptance of the public and the acceptance of the rules of this kind, in such a way that it makes such rules non-exceptionally with the will of the parties. However, the law applicable to the contract in another way, in other words, should be considered imperative (Roy, 2007, p. 231).

II.3. Third Speech: Comparison among different judicial systems

The Continental system: In this system, which has been based on the text of the law, the custom is a source for the interpretation and explanation of the will of the legislature and the completion of the texts of the law. In these countries, the custom has different positions. French lawyers tend to know that tradition and habit are considered as a source of the past, playing a very weak role since the compilation of rights and the adoption of the law. They are ready to accept those legal texts which in Austria and Italy predict the practice of custom and habit, only in cases where the law explicitly refers to it. In Germany, Switzerland and Greece, the rule and the custom are two common sources of law (Mohebbinejad, 2011, p. 132; René, 1996, p. 18). Thus, the custom played a very important role in the evolution of this system and is also important in conjunction with legal texts and still used in the interpretation and interpretation of the law.

Socialist system: Custom and tradition in these countries maintain their importance, as far as they are useful or necessary to interpret or enforce the law. Also, in a few cases, the law refers to custom, habit and mores, and thus reverses a little in favor of it (Mohebbinejad, 2011, p. 54; René, 1996, p. 19). Apparently, the custom and habit of this system play a very limited role.

Common Law system: Comenius is a collection of principles and rules derived from a common and very old and customary form which, over time, guarantees a greater variety of judiciary decisions and without being assigned to a given class, is dominant throughout the country. On this basis, it can be said that the elements of common law are essentially an abstract of the custom and today is the result of the adaptation of this abstract to the needs of the modern age. It is conceivable without observing the principles previously confirmed by the judge. Not only the review of

the old set of sentences in a country like Britain, which has a common legal system, suggests that the judge will not merely consider a detailed list of existing conventions but also considers those traditions that are accepted by the majority of people and it is also rational to them. From what has been said, it is possible to get into the general system of law, the main source of the law, the custom and the common habit of the people and the forgotten old customs preserved by the judiciary that of course, should not ignore the effect of judges in its formation. In this legal system, rights are not defined and specific, but stems from customs and traditions (Habibi, 2010, p. 77).

The United States system (Common Law): In this system, the custom is considered as an important legal resource, beside it is very effective in interpreting contracts and identifying common intention of the parties or completing their will. (Art. 205-1 of the Uniform Law, Clauses 1 and 2) Commercial custom is a trading method or procedure.

Iran's legal system: In Islamic jurisprudence, the terms of the contract should be carried over to the common sense. According to Shahidi (2004), Oal (1985), and Sultan Ahmadi (2010), in the legal system of Iran, there is also a need for the two kinds of material and spiritual elements. The rules of jurisprudence and various laws regarding the protection of the custom have been quoted. Our legal material corroborates the fact that the law is a source of law. We know that the terms of the contract are the basis of the contract, which is carried out in accordance with Art. 224 of the Civil Code on the common sense, and it is the reason for the importance of the custom. One of the lawyers believes that the purpose of the customary meanings mentioned in this article is a general law (Mohammadi, 2010, p. 17; Katozian, 2008, p. 92). I also say the jurisprudential ruling of al-Ma'arof in between. The custom of merchants is like their bet and the role of the custom in determining the meaning of contractual terms; Art. 224 of the Civil Code. Also, if the extent of the obligations of the parties is not specified precisely by the common will of the parties to the contract, the custom will be used to complete the existing deficiencies and will be effective as the implicit will of the parties in terms of the obligations. Art. 220 of the Civil Code and the role of the law in the time and place of performance of the obligation and Art. 280 of the Civil Code (Mohebbinejad, 2011, p. 82; Oloomi Yazdi & Babazadeh, 2007, pp. 258-259), as well as in accordance with Art. 225 of the Civil Code, are customary in the custom and habit in such a manner as to deny the contract without specification as a sign of marriage. Similarly, Arts. 356 and 357 of the Civil Code and many other materials imply an unparalleled role of the custom as complementary to the express intention of the parties, which

expresses their implicit will. In other words, it is not exaggerated to say that along with the correct terms of the contract mentioned in the text of the contract, the custom is the registration of the implied terms between the parties to the contract, whether in civil contracts or in international commercial contracts. Although the role of custom in commercial contracts is very high due to the lack of a single law.

III. SECOND TOPIC: THE REQUIREMENT OF CONVENTIONS IN CONTRACTS

Followers of the historical doctrine find that the source of all legal rules is public conscience, and therefore the custom brought directly from this source is superior to the law. A section of French writers is also inspired by the beliefs of this doctrine and by using the power of the will of the public in free states, they consider the value of the custom to be in accordance with the law and in accordance with its general rules of nonsense. The basis of the authors' argument is that in the parliamentary regimes, all power is from the nation, and their will should rule everything. If this will indirectly set the rule by way of granting representation to the constitution, it is a law and if he does not do this with any means, then the outcome of his decision is called the custom; therefore, the custom and the law are materially representative of a fact, and without any concurrency, they can reverse the old rule in the event of a conflict. But this opinion is not compatible with the legal structure of our constitution, because the public will is an ambiguous object that has a close relationship with the manner and means of expression of it. Thus, although the custom is a material source of law, but its power is never equal to the law (Katozian, 2008, p. 186). Ignorance of the customary is not like ignorance of the law. When the custom is considered as an independent source of contract, it's required for the parties of the contract to comply with the law and adhere to it. Concerning the reasons for the obligatory nature of the convention, various opinions have been expressed, some of which call for the binding force of the custom from the law and. For example, they refer to the customary validity of the terms in the contract. However, others consider the universal force as a universal belief, and believes that since unanimity is a manifestation of universal conscience and public perception, and that there is no legal conviction, it is not possible to ignore the binding force of the custom (Mohebbinejad, 2011, p. 80). The reason for the binding nature of the custom is very clear, because the parties to a contract are involved in the community and are customary, they are also aware of the current and

most commonly used international conventions. So when the parties in the contract, despite the knowledge of the custom, do not include it in the contract, in fact, the customary government has accepted the convention as a complement to their will implicitly. Of course, the Iranian legislator has extended the law in Art. 356 of the Civil Code, and even if the parties have ignored the custom, it has accepted the principle of the rule of the custom, although some of our lawyers (Shahidi, 2004) has strongly criticized this legislative practice. But, the principle of the rule of law on the contract seems to be based on a legal logic, even in the case of the ignorance of the parties to the custom. In other words, in a conventional society where individuals and businessmen live in the community; they are aware of the custom or must have been aware of it; and the lack of awareness of the custom is because of the fault and neglect of a person in the conventional attempt to the knowledge of the custom.

III.1. First Speech: The validity of conventions in contracts

Basically, the validity of the convention on the contracts is based on two principles: Firstly, the intention of the contracting authors and secondly, the acceptance of the custom as an independent source of the contract. The validity of the custom is essentially due to its indirect implication on the will of the people who have made the contract. Contract writers who are usually familiar with the trades of a particular community or group of their own (Arts. 344 and 549 of the Civil Code). Some writers in French law also consider the custom to be based on the discovery of the implicit will of the parties, and introduce its validity by the validity of the common will of the parties and its sovereignty. In other words, they consider the origin of the rule of the custom to be the familiarity and the habit of traders. So that the parties consider themselves unnecessary to clarify it (Mohebbinejad, 2011, p. 78; Sultan Ahmadi, 2010, p. 53).

Art. 135 of the Civil Code of France and Arts. 344 and 356 of the Civil Code are the basis for the validity of the convention in the contracts as the intended will of the parties. Some believe that one cannot expect a judge to know the custom as much as he is surrounded by law and is aware of it. Perhaps from the disadvantages of the custom, it is possible to point out this case and its diversity and its difficulty to identify it. In most cases, the magistrate has no means of knowing the custom, and he cannot be expected to know local customs in all matters. Judgment of the custom is not as explicit as the law (Mohebbinejad, 2011, p. 82). From the sum of Arts. 224, 344, 356, 426 of the Civil Code, it seems that the judiciary requires the judge to be aware of the custom of the area and the country.

III.2. Second Speech: The custom place in the interpretative process

In commercial and international relations, both sides are often from two countries. In terms of their rights, customary rules should be imposed upon them that they are aware of it, or they should be aware of it in terms of their profession and expertise. Law, customs, and habits play an essential role in the sociological way of thinking. In fact, it forms the basis for which rights have been made. On the contrary, doctrine of authenticity of the law has tried to understate the role of custom and habit. Therefore, the convention is not the basic element that is intended for the sociology doctrine, but it is just one of the elements that allows the discovery of the fair solution. Perhaps it does not matter as much as the law, but it is not so insignificant that we do not rethink about it (Mohebbinejad, 2011, p. 85). In Art. 1135 of French law, in Arts. 220 and 225 of our Civil Code, as well as in Art. 1159 of the Civil Code of France, the custom, which is an objective and external criterion, is accepted as the basis for interpreting the vague terms of the contract in order to discover the common purpose of the parties. As this clause stipulates, terms that are ambiguous will be interpreted in accordance with the custom of the contract where the contract is concluded. The origin of the validity of the custom in the French legal system is its exploration of the will of the subordinate. Namely, according to Art. 1156 of the French Civil Code, which states the basis of the interpretation of the contract as the discovery of the common will of the originators of the treaties, the custom can only erase the obscurity of the contract and clarify the common intention of the parties (Habibi, 2010, p. 179).

The role of the law in determining the obligations of the parties to the contract

Produce brokers presents an image of the role and the place of the custom in explaining and interpreting the contracts. In this case, there was a written agreement for the sale of goods between the parties of the dispute, according to which all disputes arising from this contract should be referred to the arbitral tribunal. After the discrepancy between the arbitrators in their vote, accepted the specific commercial convention as the basis and the source of the interpretation of the contract; the parliament also approved the verdict of the judge. The judge also ruled that the real issue would be determine the scope of the issue submitted to the arbitral tribunal, if the condition of arbitration in the contract would mean the actual commitment of the parties to the consolidation and the rule of commercial law. The arbitral tribunal has the right to make judgments and

make decisions based on these conventions, although this is not explicitly stated in the contract. Because the custom is part of the contract, and if only part of the subject related to the contract is stipulated, and the other part implicitly refers to commercial law, the primary responsibility of the jury is to investigate the issue. And then, after identifying the custom of the subject, they will interpret the issues to be clarified by the parties and the commercial custom, and will carry out both of them (Habibi, 2010, pp. 184-185).

According to the provided interpretations, the custom is an indisputable and an undeniable source in international trade. Since custom and trading practices vary from country to country and parties often do not understand the trading practices of other countries, this position can slow down business processes and cause misunderstandings and disparities that is time consuming and costly. International conventions can provide legal security and transactions' speed. The custom also plays a role in determining the obligations of the contracting party. Art. 220 of the Civil Code stipulates that: «Negotiations not only require interlocutors to enforce what is stated in it, but also the parties to all the results obtained by custom, habit or law of the contract are required». Is this article available for all transactions including international business deals? Is not the steel trader responsible for it, if he merely complies with the legal provisions of his contract, but does not observe the customs of the place of delivery of the goods and the buyer is losing? For example, if in a timber business, two well-known businessmen honor their contract and are required to comply with all the provisions, but at the same time, due to a sinister intention or a case that results from the non-observance of the commercial standard of a region, the damage to the opposite party, it cannot be said that the implementation of the transaction does not fully satisfy the consent of the party and the faith in the covenant is not properly implemented? The silence of the law is sometimes debated. While all the powers of the world are bargaining and developing trade relations for greater profitability for the well-being of their peoples, what is wrong with expanding the influence of the custom over the borders of the country and even we want to formulate a series of Arts. in the form of a collection that addresses the needs of different societies with any legal system. In this regard, a better example could be contracts that not only need to delivering goods, but also need to be taught a series of essential things about that subject. In other words, In terms of custom, it requires special training. Therefore, the shopping guide in a series of commercial products is considered by their traders as part of their rights, perhaps the knowledge of this case is in the

interest of that businessman, and the lack of knowledge of these customary rights will result in irreparable losses.

The role of the custom in interpreting of the contract

The words and phrases used in the contract document are transmitted in a customary and reasonable sense of them. In terms of the importance of the expressive will, expressiveness of English law and the consideration of the contractual terms, this is a major issue of the interpretation of the contract. In general, custom clarifies the obscure and ambiguous subject affairs of the contract, which is, and eliminates their ambiguity. The purpose of subject affairs against ruling affairs is an issue whose determination does not intrinsically fall within the competence of the legislator, although it is declared by the legislator for the purpose of communicating with a legal act based on the expression of the provisions of the custom (Shahidi, 2004, p. 303).

Although the effect of the custom on the subject affairs of the contracts is directly reflected in the legal provisions relating to certain contracts, such as Arts. 344, 356, 357 of the Civil Code and other issues, and its role as complementary to the will of the parties in civil law is explicitly stated: Can we say that in the context of international trade, the place of the custom is this or should be? Can we carry the words in the international arena on their customary meanings? Naturally, due to the abundance of international conventions, there is a need for uniformity and a kind of global uniform so that all traders can regulate the provisions of the contracts, and comfortably enter into business deals. This will not be possible unless we go a little beyond the traditional view of the law and keep pace with global relations. Awareness and success in business requires the proper knowledge of the tools and supplies of this science and the full coverage of all the rules and conventions of the global market. Therefore, the need for familiarity with international conventions is felt more than ever.

III.3. Third Speech: The basis for the adoption of the Convention

Implies the will of the parties

The validity of the custom is essentially due to its implication contract, by the indirect will of the individuals who have made the contract. Contract writers who are usually (or should be) familiar with the manner in which they deal with a particular community or group, are implicitly contemplating that familiar method. Otherwise, if they wish to abandon aforementioned method, they will stipulate unlike that before or

after the creation of the contract. So, with their silence, assuming that they are familiar with the method, it seems to accept that method in the legal relationships arising from the contract (Shahidi, 2004, p. 301).

The role of custom in determining the concepts of contract terms

Art. 224 of the Civil Code provides a short sentence in the effect of the custom on determining the meanings of the terms of an agreement: the words of the contract are predicated on the common sense. Contracting parties, insofar as they try to make clear or clarify the terms of the contract and the use of words with a clear meaning, ambiguity or ambiguities in the meanings of words, concepts, and phrases may again arise in direction or multiple directions during the interpretation of the contract.

In these cases, the law, for the purpose of determining the meanings and concepts and in the interpretation of the contract, identifies the custom as the reference point and attributes the customary meaning to the words, not literally or even lawfully meanings. The purpose of the custom is the special or general custom of the contract's parties, and thus, if the parties are of a special custom, the terms of their contract should be translated into the meaning of that particular custom, besides whenever they are of a general custom, the meaning of words and phrases in this tradition should be attributed to those words and phrases. Because in searching the meanings of the words and the terms of the contract, the main purpose is to identify the purpose of the contract's parties, which are usually familiar with the meanings of the words in their own way. When expressing, they want the same meaning from the words used against each other which is understood in their own way; can we also use the words and phrases of the terms of the contract in the customary sense of it, in business contracts and in international negotiations? The question is: in which custom? Buyer or seller's custom? Custom of origin or destination? Therefore, it is understood that the value of the writing of customary law and the same agreed upon norms in most countries can create a way to unify the standards of a series of customary practices. Because there are important principles in the world of commerce that are accepted by everyone, it is possible that the unwritten remnants of their value and position will contradict them. The solution to this paradox seems to be the signing of a series of rules and regulations internationally available to merchants.

In accordance with Art. 9.1 of the Rome Statute: (i) The parties are required to comply with any commercial practice and any procedure that they have established between themselves. (ii) The parties are obliged to observe the commercial custom in international trade which is widely recognized and regularly observed by the parties in the desired particular

business, except in the case of applying such a custom is unconventional. This article stipulates the principle by which the parties are generally obliged to use any custom and habit to meet the conditions in the Article. In addition, these conditions must be met through the custom and habit that is applicable in the cases and intentions set forth in the principles. The usual procedure between parties to a particular contract is strictly necessary, unless the parties explicitly exclude it. Whether a particular procedure can be considered “commonplace” between the two parties naturally depends on the circumstances of the case, but behavior based on merely a previous deal of the parties is usually not sufficient. For example, X, which is the supplier, accepts the claim of customer Y that the product is defective quantitatively and qualitatively up to three weeks after the delivery of the goods. When Y sends a warning about fault and defect after three weeks, the X person cannot object that it has been too late, or much time has been passed. Because the three-week warning that has not been disputed has led to the usual procedure between X and Y and therefore it’s binding on X. By stating that the parties are bound by any custom and habit, the clause of this article applies only to the general principle of freedom of contract as provided for Art. 1-1. In fact, the parties have authority to negotiate all terms of the contract or refer certain issues to other sources, including custom and habit. The parties may apply any kind of custom and habit, including custom and habit that does not belong to the commercial sector of any of them, or the custom which arises from a different type of contract. It is even conceivable that the parties are construed as referring to what they consider as misleading customs, that is to say, to a set of rules that have been published by a particular business enterprise, called “custom and habit”, but only a partial reflection of the general lines of behavior is agreed upon. The condition for the implementation of any kind of custom is that the custom must be quite commonplace between the parties in particular trade, whether it’s international, national or local. The purpose of the additional definition of “in international trade” is to avoid the implementation of the custom resulting from domestic transactions, or limited to those transactions, although these customs are in the foreign-invasive transactions. For example, A, which is an intermediary of real estate, refers to the custom of the profession in his own country in relation to B that is a foreign customer. B is not bound by this custom, if it has a local nature and is related to a business that often has an internal feature. Only in the case of exceptions, it is possible to apply conventions that are completely local or national and have not been referred to the parties. In this way, the conventions on the trade of certain goods or those in commercial

exhibitions or ports are trusted when they are also regularly implemented in relation to foreigners. The other exception is to a commercial person who has previously signed a number of similar contracts in a foreign country and therefore is bound by the custom and usual habitat in that country regarding such a contract. Example: C as a terminal operator in front of D who is an external transportation manager, refers to the custom of the local port of the terminal. If the desired port -which is used by foreigners and the custom in relation to customers- regardless of their place of business and nationality believed to be the case, D is bound to this local custom. Therefore, the rule of law, according to this example can be universal. Another example in this regard is that, A as a sales representative from the Netherlands is receiving a cash payment of 10% discount from B as a Brazilian customer. If A has a certain period of business in Brazil, he will not be able to enforce such a rule because it is limited in Brazil.

Sometimes a custom can be run regularly by the general merchants of a particular economic sector, but its implementation in a given case can be unreasonable. The reasons for this can be found in the particular operating conditions of one or more parties or the non-standard nature of it. In these cases, the rules will not be enforced. Example: There is a custom in a merchandise trade that the buyer cannot rely on defective goods if it is not approved by an internationally recognized inspection agency. A as a buyer will receive the goods at the port of landing, which is the only internationally-known international inspection agency in the harbor that is striking, and request from another agency located in the nearest port is very costly. The execution of the custom is unreasonable in such cases, and A can invoke the imperfections and defects that has been discovered, even if has not been verified by an internationally recognized inspection agency (Nouri, 1999, pp. 21-23). It seems that in our law, according to Arts. 132, 220, 224, 225, 356, 357 and many other Arts. of the Civil Code, the commercial custom's dominion on commercial contracts is obvious. As a result, the commercial custom is the custom that is usual and commonplace between traders. In general, we have a more precise definition. A common customary law in a region about certain transactions that the parties either are aware of or are well-established, generalized and uniformed that must be assumed the parties have taken action by referring to it. However, the procedures established between the parties to a specific contract are binding on their own, unless the parties expressly exclude it. In the following paragraphs, it should be said that the emergence of the rule of the custom from the common will of the contract's parties should be accepted as a rule without a doubt and its effects should be recognized in

the relations of the contract's parties. Also, ignorance is not a matter for the custom, and it is based on the fact that the parties should not be unaware of the custom. This may be possible in the context of domestic contracts, but in the international trade only in case that the custom has been written and documented can be informed, and such a task is not only on the shoulders of merchants, but also requires adequate treatment by the state and the efforts of lawyers. Even some experts have suggested that we integrate the native custom of societies with international custom, which is hard to do in practice. Because the local definition of the custom does not always coincide with the current custom of commercial contracts (WIPO, 2004, p. 2).

The validity of contractual custom in European law

Art. 1135 of the French Civil Code, which is adapted by the authors of Art. 220 of the Civil Code of Iran, provides that contracts shall not only be made in respect of what is stipulated, but also is obligatory to all the results of which the fairness, custom, or law of a commitment conforms to its nature. Art. 1159 of this law has given the ambiguous phrase "the contract is interpreted by the custom of the place where the contract was concluded". Also, according to Art. 1160, the condition of a contract must be complied with, although it has not been stated. In French law, there is no detailed discussion about the basis of the analysis of the custom and its relation to the will of the contract's parties. But at the same time, some of the writers of French civil rights have rightly considered the custom to be based on the discovery of the implicit will of the parties and its credibility is based on the validity of the common will of the parties and its sovereignty (Shahidi, 2004, p. 336) or consider the origin of the rule of the custom as the traders' habits. So that consider it unnecessary to be affirmed by the parties. The implication of the custom is not limited to the condition of the contract, and therefore, in the determination of its position they compare it with the implied provisions or the provisions of the contract, not with the implicit condition of the contract. The implied terms of the contract are those characteristics of the contract which, without specifying the words and hints, the contract's parties agree to it, besides the purpose of the building (or collusion) of the contract is the characteristics of the contract in which the parties agree on more than the requirement to accept the contract in terms of it, and then make a contract based on it, without being called upon to claim or accept it. It is also possible to approve political agreements based on ambitious custom norms and codes of conduct, and the contract for seaweed explosion, which was accompanied by a change in fishermen's subsidy, to treat such contracts in accordance with the custom of the place (Skjærset, Stokke & Wettestad, 2006, p. 118).

Conflict of the law with implicit provisions of the contract

The implication of the contract is the unassessed content of the contract, which is an implied condition. Whenever there is a conflict between the rule of law and the provisions during the contract, the criterion of precedence over one another is the strength of its relation to the will of the parties. For example, we know that the sale of a sophisticated device in a customary manner is accompanied by a vendor's commitment to teaching how to use it, but perhaps the buyer is familiar with the way of work and has no need for training; The implied terms in this agreement do not include the obligation to training, in this way there will be a conflict between the custom and the implied terms of the contract. In this situation, the implicit provisions of the contract will appear to precede the custom. Because apparently the parties, implicitly and unknowingly, have abandoned what is customary in the context of their relationship in their particular relations (Shahidi, 2004, p. 355). According to the authors, there is no possibility of conflict between the custom and the implied terms of the contract, since the custom itself determines the implicit provisions of the contract.

IV. CONCLUSION

1. According to the writers, the custom cannot be ignored because it stays behind in the field of competing with established rights. In the world of law, which is the world of credit, any possibility is possible, and it would be unreasonable to definitely comment on the rejection of the customary rules.

2. The custom can eliminate the ambiguity of the contract's subject affairs that are not explicit and transparent. We must not forget that the custom or the norms required to prove it needs to be collected, compiled and written, because everyone believes that the undocumented custom keeps it open to doubt and contradictions.

3. Commercial custom has a higher degree of credibility in the developed countries in terms of the legal system. The value of the writing of the norm rights and the common customary rules between the majorities of countries paves the way for the unity of the standard and the same procedure for the interpretation of the provisions of the contracts.

4. Because there are important principles in the law logic and the commerce world that are not written in spite of its necessity; the solution to this paradox is writing of a set of customary rules and global norms that, as

a rule in law, or criterion, rule, source, scales, or anything that can be named, is provided to the contractors.

5. The relationship between the norm and custom seems to be based on the rational quadrilateral relation to the general and special international and domestic custom; some of the norms are not custom, but some of the norms have a customary origin. Some rules that have domestic rights are part of the norm in the field of international trade law. Some of our legal principles are normative, so the most logical relation is the same.

6. At the end, we mention that norms are unwritten rights that are not written in international trade, which can sometimes be custom, and sometimes be legal rules, and in some cases, have the status of a general legal principle; but if they are written under regulations or written in some of the recommendations of the institutions, we will not call them norms.

7. The interpretation of commercial contracts should be such that the principle of goodwill and fair dealing and legitimate trust are not limited or excluded on the basis of interpretation. In addition, the judge or the arbitrator has agreed on the interpretation of international commercial contracts in the absence of law or is required to interpret the contract in accordance with the commercial law and any procedure that international business has established between themselves.

8. However, if there is no agreed commercial custom or the procedure required by the parties to the contract is not in place between the parties to the international commercial agreement, the arbitrator or judge must consolidate his interpretation on the basis of the commercial custom that is widely recognized and regularly observed in international trade by the parties in the trade, and in interpreting, considers these customs as the unwritten law of the contract's parties.

9. With regard to the above, it can be argued that, as our legislator has stipulated in Art. 220 of the Civil Code; «the contract requires not only the operatives to stipulate what is stated in it, but also the operatives to all phenomena that derived from the custom and habit are required to do so». Besides our legislator has stipulated in Art. 225 that being standard is the matter in custom and the habit is an issue to be mentioned in the contract.

10. Our judges in the interpretation of international commercial litigation must also consider all the results and effects that are obtained from the contract custom. The commonality of a business in a well-known commercial custom should be the basis for the interpretation of international business contracts, although the parties have not agreed on it or have not included it in the contract.

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