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Abstracts

Ship and cargo mortgage: Two different legal viewpoints

Mohammad Abouata*
Assistant Professor, Law Department, Faculty of Hummanities, Semnan University, Semnan, Iran

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Abstract
Although the subject matters of cargo and ship mortgage are similar (i.e. providing financial security for creditors), the regulations of these contracts essentially differ from each other in terms of the conditionality of taking possession in concluding the contract, the possibility of endorsement and cession in mortgage document, the creditor's kind of real right ,the preference of prior or latter creditor in vindication of right and the effect of mortgage loss on the contract and the possibility of recovery of claim. Moreover, the cargo mortgage regulations are, in some regards and aspects, contrary to general legal rules and hence subject to criticism.

Keywords: endorsement, claim, lossmortgage, taking possession.

* abouata_m@yahoo.com Fax:+98 2333654085

Self-help sale in Vienna Convention for international sale of goods and Iranian law

Fakhroddin Asghari Aghmashhadi [1*]
Professor, Department of Private Law, Faculty of Law and Political Sciences, University of Mazandaran, Babolsar, Iran

Seyed Mehdi Mousavi [2]
Master of Arts Private Law, Science and Research Branch, Islamic Azad University, Tehran, Iran

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Abstract
One of the non - judicial enforcements add ressed by some legal systems in order to preserving rights of a contractin g party against breach of obligation of other party is the right for sale of goods in self-help type by the dama ged party. This enforcement was predicted an d addressed in both Vienna Convention for international sale of g oods and Iranian legal system. But it is still unknown and strange in Iran's legal system. In this paper we will try to study this judicial institution comparatively. Authors believe that if all requirements are fulfilled for using self-help sale, t his institution has po tential ability to be addressed in other contr acts other th an the cont racts written b y law and this enforcement can be used in a vast area.

Keywords: commission working, non- judicial enforcement, resale, self-help sale, transportation agent.

1. Corresponding Author: Fasgharia@yahoo.com Fax: +98 11 33359908
2. Smehdimusavi@yahoo.com

A legal comparative- economic analysis of apparent agency doctrine

Mansour Amini[1*]
Associate Professor, Faculty of Law, Shahid Beheshti University, Tehran, Iran

Mona Abdi [2]
M.A. of Private Law, Faculty of Law, Shahid Beheshti University, Tehran, Iran

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Abstract

Apparent agency is one of the new and practical kinds of agencies that has been consider ed in both leg al systems– common law and civil law- and in most laws o f different countries in t he world– regardless of level of economic and social de velopment - and also in some international documents. Its applications have been increased in different fields of agency such as legal entities, new emplo yment relations, hospital liabilit y, bank cards, joint venture contr acts, etc. The current article aims to stud y this theor y from legal and economic aspects with anal ytical– descriptive wa y; from legal aspect, laws of different countries are presented in a comparative way showing different models of le gislation in th is field. F indings of this stud y show that explicit acceptance of this theory, according to several legal and economic benefits in field of agency, is efficient and rejection of this theory will impose significant economic impacts on society.

Keywords: agency, appearance, comparative study in legal systems, the least-cost avoider, the least-cost principle.

1. Corresponding Author: Aminimansour@yahoo.ir Fax: +98 21 22431680
2. Monaabdi7@yahoo.com

A survey on constitutional justice

Kheirollah Parvin *
Associate Professor, Private and Islamic Law Department, University of Tehran, Tehran, Iran

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Abstract
The idea of supervising the conformity of statutory law with constitutional law is due based on necessities rooted in two essential principles: the supremacy of constitution and the hierarchy of the law. Constitution, as the supreme law in the sense of status and legal value, is placed at the top of the legal pyramid of every political system, and therefore, requires a special organization and discipline that will act as the sanction of the principles and the main content incorporated in this legal instrument. This special organization and discipline, known as Constitutional justice in the current legal literature, is studied in terms of two main patterns. The first pattern is based on supervision of courts on rules, and the other pattern is applied by emphasis on role of political institutions in supervision on rules. These two patterns have common purposes but different backgrounds and methods.

Keywords: constitution, judicial review, constitutional justice, conformity of rules, patterns of supervision.

* Khparvin@yahoo.com Fax: +98 21 61112331

Directors' liability under the doctrine of Piercing the Corporate Veil: The directors' liability for corporate debt

Laya Joneydi [1*]
Associate Professor, Faculty of Law and Political Science, University of Tehran, Tehran, Iran

Malihe Zare [2]
PhD., Faculty of Law and Political Science, University of Tehran, Tehran, Iran

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Abstract
The doctrine of piercing the corporate veil holds directors liable for corporate debt. Nevertheless, the doctrine is not a separate cause of action. Directors are bound by fiduciary duty, duty of loyalty and duty of care and skill to the corporation and its shareholders. However, there is not such a contractual relationship between directors and creditors. Thus, requiring directors to compensate creditors should be justified on tort law. In the Iranian, French and American legal systems, fault-based liability is the cause of action for directors' liability. The author found that in piercing cases, directors' liability follows the traditional rules of fault-based liability unless specified otherwise by statute as strict liability.

Keywords: articles 142 and 143 of Act Modifying Commercial Code, director, limited liability, piercing, separate legal personality.

1. Corresponding Author: Email: joneydi@ut.ac.ir Fax: +98 21 66409595
2. zare.maliheh@gmail.com

Doctrine of frustration of contract in English, American and Iranian Law: (A comparative study)

Mohammad Hadi Daraei*

Assistant Professor, Judicial Sciences and Administrative Services University, Tehran, Iran

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Abstract

"Pacta sunt servanda" is one of the most fundamental principles in the common law and Iranian legal systems, which has been exposed to exceptions over time. These exceptions are part of general doctrine of frustration. Iranian exceptions to this rule are named as "Ta`azzor" and "Ta`assor" rules. Doctrine of Frustration in Common law includes three subdivision theories: "impossibility of performance", "frustration of purpose" and "impracticability" (hardship). All of these theories are applied when a supervening event occurs. In English courts, only the first two theories are accepted but the third one is applicable in American courts. In imamieh Jurisprudence and Iranian law, "Ta`azzor" rule, in most aspects, is similar to that Impossibility and "Ta`assor" rule is somehow like Impracticability. Some Iranian lawyers have said that we have no rule like "Frustration of Purpose". The author, however, argues that some traces of this theory can be found in Imamieh jurisprudence which can be explained as a part of "Ta`azzor" rule.

Keywords: frustration of purpose, impossibility, impracticability, Ta`assor, Ta`azzor.

* Dr.daraei@yahoo.com Fax : +98 21 66729806

A comparative analysis of the role of financial fines in enforcement of competition rules

Ebrahim Rahbari *
Assistant Professor, Law Faculty at Shahid Beheshti University, Tehran, Iran

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Abstract
Financial fines are regarded as a powerful tool in the hand of Competition Authorities which are applied in order to cease anticompetitive practices and hinder agencies from entering into monopolization activities. Having considered the nature and main function of this sanction, this paper, in a comparative way, aims to clarify executive domain and primary stages of fine determining and also the fundamental factors which should be taken into account in such process. The obtained results manifest that Iranian competition law's approaches to pecuniary fine suffer from serious deficiencies and its general, ambiguous and unusual regulations need fundamental review of notions and measures which may be unrecognized or ignored in our law framework. This situation indicates the increasing importance of pursuing the most efficient solutions of other legal systems.

Keywords: anticompetitive practices, competition authorities, competition law, financial fine, sanction..

* Rahbarionlaw@gmail.com Fax: +98 21 22431758

The role and place of regional agreements NAFTA and ASEAN in advancing and guaranteeing human rights dimensions and kinds

Hossein Sharifi Taraz Koohi [1*]
Associate Professor, Imam Hossein University, Theran, Iran

Nazila Siahjani [2]
Master of International Law, Payam Noor Univercity, South Branch of Theran, Tehran, Iran

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Abstract
NAFTA and ASEAN we re concluded to pursue certain goals. ASEAN, being developed for political reasons, gradually expanded its work scope into economic, trade, security, and cultural extents. NAFTA, on the othe r hand, has b een able to form an inte grated economic and tr ade system. According to docu ments regarding the observation of human ri ghts within ASEAN and NAFTA frames, it is clearly indicated that they have persistently considered the subjects related to such issues. The present paper aims to analyze ASEAN and NAFTA degree of commitment to improvement of human rights in the region, and to compar e these two reg ional agreements efficiency on the above m entioned issue. Ther efore, the p erformance of each agreement is studi ed separately in order to determine their streng ths and weaknesses. Th e obtained results show that ASEAN, due to its region-specific complexity and particular difficulties, has underperformed NAFTA concerning its co mmitment to the observation of human rights.

Keywords: ASEAN, NAFTA, human rights, observation of human rights, regional trade agreement.

1. hsharifit@yahoo.com
2. Corresponding Author: n_siahjani@yahoo.com Fax: +98 21 22572050

Differentiation of penal policy in the light of positive paradigm and its confronting challenges

Bagher Shamlou[1 *]
Associate Professor, Shahid Beheshti University, Tehran, Iran

Mustafa Pakniat [2]
PhD in Criminal Law & Criminology, Shahid Beheshti University, Tehran, Iran

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Abstract
Positivism is an empiri cal approach for understanding of human communication and ph enomena bring up by French famous thinker, August Comte. Human and social Sciences were under domination of positive thought for a l ong time. In criminal l aw inter alia Italian famous thinkers sought to analyses the crime problem with a positive approach. However, some of their point of view such as born criminal thesis was not respected by penal scientist, but was affected by their idea assumed that experiment is the only scientific criterion and basis of criminal law. The y thought that value jud gments and normative sentences have not scientific char acter. The positivist approach developed the abstract thought of classic criminal fundamentalism, the dominate approach of penal policy towards of objectivism at etiology of crime on the basis of separation of objectivism and subjectivism. But it faced with insufficiency in both methodology and efficiency, so that somebody talked about re turning purity approach of classic fundamentalism.

Keywords: empericality, etiology, experimentalism, fundamentalism, laboratory, objectivism, positivism.

1. Corresponding Author: B-Shamloo@sbu.ac.ir Fax: +98 21 29902681
2. m_pakniat@sbu.ac.ir

Prohibition of performance requirements in international investment agreements: A comparative view

Mohammad Bagher Sheikhi *
PhD in International Law, Researcher of International Studies, University of Tehran, Tehran, Iran

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Abstract
This work examines the legal consequences of prohibition of "performance requirements" in foreign investment agreements. Performance requirements have been the significant instruments of control and management of foreign investment operation within the territories of host States. Its prohibition is one of the developing legal phenomena of the 21st century. The conflicts between general international obligations and investment specific obligations of host States is the main problem of this legal change. Although the prohibition of performance requirements reduces the conflicts of the members' obligations within the framework of free trade relations, it causes new challenges, in particular from the perspective of States' international responsibility. The author will consider the aspects of this new coming phenomenon and its legal vacuum in a comparative and critical analysis.

Keywords: foreign investment, international obligations, performance requirements, prohibition of performance requirements, tate practices.

* msheikhi@ut.ac.ir Fax: +98 21 66386496

Soft Law

Abdolhossein Shiravi [1]
Professor, Private law Department, University of Tehran, Tehran, Iran

Mohammad Hosein Vakili Moghadam [2 *]
PhD. Private Law, University of Tehran, Tehran, Iran

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Abstract
While traditional points of law are based on centralism and formalism, in the last decades, contrasting approaches emerged that deny the traditional role of government in law. "Soft Law" is one of the main concepts in this viewpoint that is completely controversial. Although soft law has evidently a great influence in practice, it is still a relatively unstudied topic in Iran. This article is an attempt to consider the arguments of opponents and pr oponents of soft law, its core characteristics, benefits and instrum ents. The article arg ues that both soft law and hard law should be used to make legal development.

Keywords: hard law, leg al pluralism, legal sociology, non-legal sanctions, private lawmakers.

1. ashiravi@ut.ac.ir
2. Corresponding Author: : Mh_vakilim@yahoo.com Fax: +98 25 36166100

International commercial arbitration and the challenge of mandatory rules of law (Case Stydy: Arbitration in antitrust claims)

Seyyed Mohammad Tabatabaei Nejad *
Assistant Professor, Faculty of Law, University of Tehran, Tehran, Iran

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Abstract
For decades, the approach of legal systems towards private arbitration in competition law has been characterized by a certain mistrust or suspicion. Initially, this attitude may somehow have been linked to the uncertainty as to the arbitrability of competition law issues, in view of the fact that, in competition law matters, generally public interests are heavily at stake. In fact, arbitration is a mechanism for pursuing a balance between the conflicts of parties' demands. However, over time, more gates have been opened for arbitration and it got not only a private means but a way in which both private and public interests are secured. The public interests so are factors that shall be precisely considered to prevent the situation whereby courts reject award in reviewing stage due to the fact that the public policy aspects of the case are not complied. In this article, based on a comparative-analytical method, we scrutinize the challenges that arbitration may encounter especially in competition law, on the one hand, and in an international environment regarding application of mandatory laws, on the other.

Keywords: arbitrability, arbitration, international trade, mandatory rules

* sm.tabatabaei@ut.ac.ir Fax: +98 21 66498576

Comparison of the commercial and standby letters of credits

Homayoun Mafi [1*]
Associate Professor , Faculty of Law and Political Sciences, University of Mazandaran, Iran
Ahmad Ali Mohsenzadeh[2]
PhD. Candidate of Private Law, Faculty of Law and Political Sciences, Mazandaran University, Mazandaran, Iran

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Abstract
The letter of credit, as a method of smoothing international payment, is a conditional security and obligation for the customer bank (issuing bank) to pay the seller (applicant). For this purpose, the letters of credit may be considered as the most usual method of payment of goods price in international trade. The classic form of letters of credit is the commercial letters of credit whose financial obligation is rooted in the documents that demonstrate the making of transaction by the beneficiary and it is used as a mechanism of payment and financial security in international transaction of goods. Contrary to commercial letter of credit, which is a payment document, standby letter of credit has been taken into account for protection of beneficiary in case of default of payment to perform obligation or payment. Standby letters of credit are equal to bank guarantee and are issued as performance and obligation security, in the form of letter of credit. This article, comparing commercial letter of credit and standby letter of credit, aims to review the similarities and differences of these two documents; moreover, the most important legal aspects of both are compared in order to answer this question that when and how (in what form) each of these means are used in international trade by the parties.

Keywords: commercial letter of credit, comparison, standby letter of credit.

1. Corresponding Author: hmynmafi@yahoo.com Fax: +98 11 35342102
2. ahmad.mohsenzadeh@gmail.com

Right of disposal of goods according to CMR convention and comparing this convention with Iran's commercial act

Saeed Mohseni[1] *
Associate Professor, Law Department, Faculty of Economic & Administrative Sciences, Ferdowsi University of Mashhad, Mashhad, Iran

Elnaz Nahavandi[2]
M.A. Student of Civil Law, Faculty of Economic & Administrative Sciences, Ferdowsi University of Mashhad, Mashhad, Iran

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Abstract
In a contract of carriage, parties have a right arising out of the contract to give orders to carrier about stopping goods in transit, delivering the goods to a person other than the consignee shown in the consignment note etc. This right mostly belongs to consigner but sometimes it's transferred to consignee. When an entry to this effect, mentioned in the consignment note for exercising his right of disposal, occurs, the consignee should already present the copy of the consignment note. This right is also provided in Iran commercial act with some similarities and differences. In this article, we'll explain the beneficiary of right and rules of application in CMR and Iran commercial act, as well.

Keywords: carrier, CMR conversion, consignee, consigner, right to dispose of goods.

1. Corresponding Author: s-mohsen@um.ac.ir Fax: +98 51 38811243
2.Elnaznahavandi6@gmail.com

An outlook on the nature of mental creations after belonging to public domain

Pedjman Mohammadi [1 *]
Associate Professor, Law Department, Shahid Chamran University, Ahvaz, Iran

Marzie Sharghi [2]
M.A. in Private Law, Shahid Chamran University, Ahvaz, Iran

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Abstract
The public domain of copyright, which considers the end of protection period, attempts to cause balance among the rights of authors, society and third parties. So, at the end of financial rights of author's protection period, the possibility of free utilization of these literary works will be possible. But in this situation, one of the controversial difficulties is the nature of these kinds of literary works which, according to some scholars, after belonging to public domain, will change into the 'Allowable'. To approve their idea, they focus on common features existing in these literary works (works relating to public domain) and the Allowable. On the other hand, it is believed that literary works, after they belong to public domain, essentially due to losing of scarcity element, are not considered property at all.

Keywords: copyright, public property, end of support, lawful property, public domain..

1. Corresponding Author: mehryar1381@yahoo.com Fax: +98 611 3337411
2. m.sharghi85@gmail.com

Peremptory norms in international law; development or revolution of sources of international law
(A comparative study of National Legal Systems)

Sayyed Fazlollah Mosavi[1] *
Professor, University of Tehran, Tehran, Iran

Hossein Khalaf Rezaee [2]
Ph.D. in International Law, University of Tehran, Tehran, Iran

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Abstract
Contemporary international law introduces a notion of peremptory norms comparable to hierarchy of norms in national legal system. A jus cogens is a norm of international law considered so fundamental that it overrides all other sources of international law. A rule of jus cogens has a specific process of emergence that will be essentially different from other sources of international law reflected in Article 38(1) of ICJ Statute. Unfortunately, there is not a precise definition of jus cogens norms. The vagueness of its definition and thereby its instances is one problematic issue that hardens the realization of ideals of the international community.

Keywords: Erga Omnes obligations, international community, international crimes, Jus Cogens, sources of international law.

1. fmousavi@ut.ac.ir
2. Corresponding Author: h.rezaei@ut.ac.ir Fax: +98 21 88325045

The 'independence' and 'impartiality' of the arbitrator; synonymy or distinction? (A comparative study in International Commercial Arbitration)

Shaghayegh Vahed [1]
M.A. Student of Private Law, Ferdowsi University of Mashhad, Mashhad, Iran
Reza Maboudi Neishabouri [2*]
Assistant Professor, Law Department, Ferdowsi University of Mashhad, Mashhad, Iran

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Abstract
The propagation arbitration as a method of dispute resolution depends on the public confidence in the method. In this regard, the independence of arbitrators and their impartiality are necessary conditions for the realization of such confidence. Independence and impartiality of arbitrators ensure a fair trial in arbitration and the lack of aforementioned features makes it impossible to trust the fairness of the dispute settlement process and its result. The importance of confidence in the health of the dispute settlement system is to the extent that many international instruments have frequently emphasized on the necessity of the two above-mentioned features. In the recent decade, contemporaneous with the incredible development of arbitration, the debate over independence and impartiality of arbitrator has become important and controversial because neither national laws nor international provisions provide a clear definition of the mentioned concepts. This article set outs to explain the exact point that independence and impartiality are distinct concepts and are not interchangeable; Independence is concerned with the relationships between the arbitrator and the disputing parties, while impartiality considers the arbitrator's conduct over the equal treatment with the parties. The aforesaid distinction includes such a legal effect that each of these two concepts shall be considered as an autonomous and separate cause for challenge of arbitrators.

Keywords: arbitrator, challenge of arbitrator, impartiality, independence, International Commercial Arbitration.

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1. sh_vahed90@yahoo.com
2. Corresponding Author: maboudi@um.ac.ir Fax: +98 511 8806305