

The Consequence of Passing of Risk in Contracts of Sale Involve Carriage of Goods ; A Comparative Study Between Iranian Law and CISG

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Abstract. The transfer of risk is a very important question in the contracts which can lead to many disputes between the parties Because of its harsh result that the buyer must pay the price although he receives damaged goods or even the goods are totally destroyed. For solving this problem, different legal systems have special ways that will be usable in internal trade but in the field of international commerce, we need to uniform rules.

Iranian law in relation to international contracts of sale seems to be rather undeveloped and Iran has not enacted the Vienna convention so a comparison can be suitable for understanding the similarities and also diversities.

This assignment examines the transfer of risk in the contract of sale involving carriage of goods that is provided in the convention and is not forecasted in Iranian codes.

Keywords: Transfer of risk, Contract of carriage, Carrier and Forwarder, Hand over.

1. Introduction

The sale contract has a very important role and is different in legal relations in the different legal systems. Vast major of rules are earmarked to the sale contract and the diversity of systems lead to the ratification of different Acts which in the absence of uniform rules, contracting parties will have different problems in the area of international trade.

The united nations convention (1980-vienna) for International sale of goods is of the opinion that the adoption of uniform rules which govern contracts for the International sale of goods and take into account diversity of legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade.

The case of passing of risk that set asides five articles (66-70) in the Vienna convention and also one article in the Iranian civil code (Art. 387. The convention discusses this matter in different states. Art. 67 to 69 consider respectively the passing of risk in the contract of sale involving carriage of goods, contract of sale concluded in transit, contract of sale in cases not within articles 67 and 68.

This essay is in connection with examination of Art. 67 about the sale contracts involving carriage of goods (Vienna convention) and Art. 387 of Iranian civil code.

2. Mining of the Risk

Frequently Risk is discussed as if it were a property concept joined to either ownership or possession. This has been well expressed in English law by Sealy:

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"The truth is that risk is a derivative, and essentially negative, concept -- an elliptical way of saying that either or both of the primary obligations of one party shall be enforceable, and that those of the other party shall be deemed to have been discharged, even though the normally prerequisite conditions have not been fulfilled [1].

The meaning of this passage can best be explored by taking the, perhaps unusual, example of the buyer who is on risk despite not yet having received the goods from the seller. In this example, the seller can require the buyer to pay for the goods even though the seller cannot, because of the destruction of the goods, deliver them to the buyer, or even though the seller, because of damage suffered by the goods, cannot otherwise require the buyer to accept the damaged goods or avoid paying damages to the buyer. [2]

So, where the goods are destroyed prior to delivery, the buyer cannot decline to pay the price on the ground that the seller has failed to deliver or that the seller has committed a breach of contract giving rise to a right to terminate or avoid the contract. If the goods are damaged so as to fall below the minimum quality or fitness standard laid down by the contract, the buyer cannot refuse to take delivery or pursue the seller with a claim for damages for non-performance of the contract. Again, it does not matter that the contractual deprivation suffered by the buyer would otherwise entitle the buyer to terminate or avoid the contract.[3]

3. Consequences of the Passing of Risk ; a Comparative View

According to Art.66 (1) of convention " loss of or damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price..." Art. 387 (IR.C.C), also provides that "after handing over" the goods to the buyer (that is, after the risk passes), the loss or damage is beard by the buyer. Art. 66 say: "after the risk has passed" instead of "hand over", the reason is that according to Art 68, about the goods sold in transit, that risk passes from the time of the conclusion of the contract. Otherwise, both in Iranian civil code and Vienna convention (Art.69) the principal rule is "the risk passes to the buyer when he takes over the goods..." and it is important to know that each party who can exercise his control to the goods, is the one that will bear the risk. ."[4]

The time when the risk passes marks the point from which the buyer must pay for the goods even though he has not received them or received them only in a damaged condition (Art. 66) [5]. and its the main effect of passing of risk that obliged the buyer to do his contractual promise however the goods are lost or damaged and has no rights against the seller arising out of any non- performance by the seller . He must pay the price and must take delivery (Art 54 to 60) and cannot assert the remedies set out in Art. 45 in so far as they arise out of the casualty in question... [No by fault] [6] .

At first glance the rule inserted in Art. 66 of convention and concept of Art.387 of Iranian civil code seems harsh and injustice because the buyer is obliged to pay the price however received nothing.

We can answer this problem: It is customary for transit loss to be covered by insurance, Moreover, loss or damage is usually discovered at the end of carriage and the buyer is in a better position that can bring an action for recovering the loss suffered [7]. We can also answer if we say that the rule is injustice, also we can say the rule established before the risk passes is also harsh to the seller and some Iranian jurists believe that this rule is opposed to the principal. [8] because after the conclusion of contract the property is passed to the buyer and just as he is the owner of profits (between the conclusion of the contract and its performance) so the accidental loss must bear by the owner (buyer), and it is in accordance with the religious rule that say:" everyone , which makes a profit, must bear the loss". Some jurists say at a moment before the goods lost, the property passes to the seller and losses in his ownership [9]

This justification is illogical because with regarding to the parties intention, the ownership of goods is for buyer and the price is for seller, so we can say this regulation covers all goods in every positions, before or after they are taken over, but the passing of risk rule is used in reciprocated contracts and only before the handing over of goods to the buyer, so the rule " everyone, which makes a profit, must bear the loss" is more general than the risk rule [10] that is: the rule about risk is used in a special case, when:

The contract is reciprocated and the goods aren't handed over to the buyer so the methods concluded in passing of risk and also before passing of it, is not harsh and has its own philosophy.

According to the latter part of Art.66 of convention, if the goods is handed over but the loss or damage is due to an act or omission of the seller, the risk must be borne by him. For example, if seller loads fruit or other perishable goods that conform with the contract, he will be liable when the goods is perished by delaying the shipment because he is in breach of contract [11]. On the other hand, Art. 25 of convention says : " A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract ... " So, a question arises that despite of these two Articles and the possibility of compensating of damages under Arts. 45 to 50 why was the article 66 passed? If it said we mean the act or omission that include fundamental breach, then the Art. 66 will comply whit Art. 25. But there are assumptions that the seller's act or omission dose not to fundamental breach. For example, where the seller exercises his right of stoppage in transit and the goods are then lost or damaged [12]. 26 so, in this cases Art. 25 is silent.

Art. 387 of civil code expressly says that the sold object must perish before delivery" without fault or neglect of the seller...", so if loss is happened by the sellers' fault, risk is not passed. The Islamic jurists believe that if the goods are wasted by the seller, a third party or by the buyer, contract remains valid, and cannot be avoided [13]. The main reason in Iranian law is that the contracts are binding so, the situations that we can avoid a contract are limited, and if the seller wastes the goods, risk would not pass to the buyer and the seller is obliged to give the similar property of the wasted goods or its price [14]. In fact, it is governed by a Islamic jurisprudence rule that say:" if anyone wastes other's property is responsible for damages [15].

Art. 362 (IR.C.C) provides that:" 3- a contract of sale makes the seller responsible for delivery of the object sold." So , if the seller didn't deliver it, and then the object losses, this lost comes from the breach of contract. For, if the seller has done his duty it would have not happened. The Art. 387 of (IR.C.C) therefore, like the Art. 66 of convention is operated where the loss is casual and not resulted from the breach of contract by the seller.

The last part of Art. 387 says " ...Unless the seller has already applied to a magistrate or his substitute for the enforcement of the delivery in which case the loss will be borne by the buyer only. The magistrate means the judge and the substitute is the court office[16].

This rule is in accordance with the justice since the seller has done his duty and after the buyer refuses to take over the good or seller cannot find the buyer to deliver the object, last part says that the seller is free from risk of loss and at the end the seller has an option to cancel the contract (Art.240 IR. C.C.) [17]. If the buyer breaches its promise to take delivery the objector payment of the consideration (Art. 402. IR. C.C.) [18]. Art. 53 (Vienna convention) bind the buyer to take delivery and pay the price and Art. 61 indicates to the remedies for breach of contract by the buyer, whereas Art.387 (last part) is useable in local trade there is not a single court in international trade since this convention applies to contracts for sale of goods between the parties whose places of business are in different states (Art -1) so Art. 61 apply for situations, which the seller has carried out his obligation, can escape from risk of loss and compensate it. [19]

4. Conclusion

As we see above the consequence of passing of risk in Iran legal system and the CISG was a little different in which examined above. As Iran is not a contractual party of the CISG this issue is predictable after Iran's Joining to CISG this little changes will be comply. Iran legal system should move forward to joining to the CISG and this process is a lengthy process and we should wait for Iranian positive moves to integration its law with CISG and other international conventions and after all about Iranian legal systems we shouldn't forget Iran is a developing country and ' The Rome was not built in a day'.

5. References

- [1] [1972B] Cambridge Law Journal 225 at 226-27.
- [2] It must however be recognized that certain contractual obligations of the seller, respecting the quality and fitness of the goods for example, have a continuing effect, so the notion of a fully executed contract is not quite accurate.
- [3] The third party may hold possession, however, as agent for the seller or buyer, depending upon the character of the

particular sale contract.

- [4] Hamid Reza Oloomy- yazdi, the concept of Risk and its connection with the passing of property and risk in the sale contract, science and politic research magazine, p.66.
- [5] Schlechtriem, op.cit., p. 500.
- [6] Albert H. kritzer, Guide to practical Applications of the United Nations Convention on Contracts for the International Sale of Goods , kluwer law and Taxation publishers, p. 438
- [7] John Honnold, Uniform law for International sales, p. 453.
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- [13] Naser katouzian, civil law, Behnashr Pub., ,Vol.1. 1991
- [14] Hassan Bojnourdi, Al- Ghavaed- Al- feghhiey, v.2., 1989, p. 17
- [15] Mohammad - G. Jafari langroudi, Terminology of law, Ganje- Danesh pub. 2008.
- [16] Art. 240 (Iranian civil code):" If when a contract has been made it is found that the carrying out of its condition is impossible or if it becomes known that the carrying out was impossible when the contract was made, the person in whose favour the contract was drawn up will have the option of canceling the contract, unless the condition becomes impossible of fulfillment owing to some act of the person in whose favour the contract was drawn up."
- [17] Art. 402 (IR.C.C): " ..., the seller has the option of rescinding the sale [when] nor the purchaser has paid the whole consideration to the seller"
- [18] Art 61 (1) (Vienna convention):" If the buyer fails to perform any of his obligations under the contract or this convention..."