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EDUCATIONAL ANALYSIS PASSING OF RISK IN IRAN AND BRITISH LEGAL SYSTEM LAW TEXTBOOKS

ANÁLISIS EDUCATIVO PASANDO EL RIESGO EN IRÁN Y EL SISTEMA JURÍDICO BRITÁNICO EN LIBROS DE TEXTO DE DERECHO

OHamidreza Ali Karami[1] (PhD student)
E-mail: a.k.hamidreza@gmail.com
ORCID: https://orcid.org/0000-0002-3432-8800
Habib Anis Hosseini[1] (PhD student)
E-mail: h.a.hosseini@gmail.com
ORCID: https://orcid.org/0000-0001-9243-9114
[1]Islamic Azad University. Arak. Iran.

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ABSTRACT

One of the most accepted legal entities in reciprocal contracts is Passing of Risk. The aim of this research is analyzing educational passing of risk in British legal system in law textbooks. According to this entity indicated on Article 387 of Civil Code, after formation of sales contract, and until delivery of object of sales, any waste or defect for the object of sales would be imposed on seller. Despite of the stated doubts, passing of risk seems to be acceptable to specific goods, not only in purchase contract and related to the object of sales but also to a specific price, and the object of sales and price for other reciprocal contracts as stated by legislator in lease contract, loan, and marriage. Considering relations of this entity with delivery as one of the Acts on nature of purchase contract, it is impossible to make opposite agreement. In British Law, the entity has been accepted under the name of Passing of Risk within section 20 for Sale of Goods Act 1979.

Keywords:

Reciprocal Contract, Passing of Risk, Delivery, British Law, Law Textbooks.

RESUMEN

Una de las entidadesjurídicasmásaceptadasen los contratosrecíprocosen la Ley el paso del riesgo. El objetivo de estainvestigación es analizar el pasoeducativo del riesgoenIrán y el sistema legal británicoen los libros de texto de derecho. Segúnestaentidadindicadaen el Artículo 387 del Código Civil, después de la formación del contrato de venta, y hasta la entrega del objeto de ventas, cualquierdesperdicio o defecto para el objeto de ventas se impondría al vendedor. A pesar de las dudasdeclaradas, la transferencia del riesgoparece ser aceptable para bienesespecíficos, no solo en el contrato de compra y relacionado con el objeto de ventas, sinotambién con un precioespecífico, y el objeto de ventas y el precio de otroscontratosrecíprocossegún lo establecido por legisladorencontrato de arrendamiento, préstamo y matrimonio. Considerando las relaciones de estaentidad con la entregacomo una de las leyessobre la naturaleza del contrato de compra, es imposiblellegar a un acuerdocontrario. En la Ley Británica, la entidad ha sido aceptada bajo el nombre de transferencia de Riesgos dentro de la sección 20 de la Ley de Venta de Bienes de 1979.

Palabras clave:

Contrato recíproco, paso de riesgo, entrega, ley británica, Libros de Texto.

INTRODUCTION

ERisk in English law is the risk of loss of damage to the objects that are subject of contract and sales, which must be imposed in terms of the Seller or the Buyer of a sales contract. Since 1979, such responsibility declared in the law for the sale of goods of this country, approved in 1979 and can be regarded as equivalent to the title of (commutative guarantee) in Iranian law. The content of the present section is discussed in the following four words.

Passing of risk in Brittan's law that is equivalent to the title of (commutative guarantee) in Iranian law is declared in article 20 of SGA, in accordance with section (1) of this law: the object of sale remains under the risk of the seller until ownership is transferred to the buyer, and when its transferred to the buyer, it's is under the risk of the buyer, whether deliverance has been made or not. The parties can agree on the contrary.

It is based on this rule of reason that the loss of each belongs to its owner. As Judge Black Burn in the case of Martineau V kitching expressed. Of course, as stated in the above article, the parties may have the ability to agree on the contrary.

The parties' agreement on the contrary to the rule stated in the above mentioned part of the SGA may be explicitly articulated in the contract or can be understood from the total of their negotiations, circumstances, or trade customs. Therefore, the parties can not only assume that the risk is imposed on the buyer before transferring ownership, but they can also stipulate that the risk will continue to be on the Seller after the transfer of ownership.

It seems that the terms related to the reserve of ownership can be seen from items in which the risk is transferred to the buyer prior to transfer of ownership, of course, in other cases that have been explained during the verdicts issued by the British courts, we see the risk transfer prior to the transfer of ownership. and for example, in the case of stern V vickers Ltd., he sold for 120,000 gallons of white wine, part of a 200,000 - gallon stored in a tank, and the seller, by issuing the certificate to the buyer about receiving that mention amount, allowed him to receive the amount of object of sale from the holding company, which was committed to act upon the orders of the defendant.

Plaintiff then transferred the bill to a dealer and he extended the contract about restoring and saving of the object of sale with the company, and also paid the rent to the company. After a while, however, the object of sale was reduced to a drop in quality, which resulted in a dispute over the responsibility of happened defect between the parties, and the Appeals Court ruled that (Silvertown, 1988).

Regardless of whether the ownership of the object of sale is transferred or not, the risk has been transferred to the plaintiff as he received the bill, so the loss must be imposed on him (Bridge, 1992). The judicial comments have also been raised in the case, which is notable for example judge Skraten stated: When the seller has delivered a receipt to the buyer, and the other hand the storing company was committed to act upon the orders of the buyer, the seller has acted upon what he was required to act. The buyer had the write to do to the mentioned company and receive the object of sale, and if he acted so, h could get the object of sale with the same appointed features.

What the buyer is trying to obtain is to impose risk and harm on the person who has no control over the sale after giving the bill on receiving to him receiving, and on the one who he had no right to go to the holding company and ask for the non-deliverance of the object of sale to the buyer. And so the risk must be imposed on the buyer.

Lord Porter (a member of the House of Lords) also states: that a certain good, is under the risk of the buyer when has not the possession of it and he is not the owner, is hard and its stated in the mentioned above case as an exception.

DEVELOPMENT

On the other hand, Lord Nermand states that the reason for such an exceptional performance in the White wine case was that the seller gave a bill of receive from to the seller. Therefore, since such a bill has been presented to the purchaser, and he could immediately get the object of sale, the risk has been transferred to him.

That is the way to differentiate between the discussed case and the case of healey v howlett, where the risk of 20 packages of fish sent to the purchaser was still placed on the Seller with 190 others, since this amount of object of sale was not still allocated to the buyer.

from the sum of the discussions we can conclude that despite the declaration of article 20(1) of SGA based on the validity of the agreements of parties about the passing risk time, it is considered valid when the ownership has been transferred to the buyer, and if it was before the ownership transference, when the object of sale is under possession of the buyer. And as Lord Porter said, and in fact it was reviewed in the case of stern Ltd v Vickers Ltd, delivering the bill of giving the object of sale, makes a kind of possession on the object of sale for him.

But if the parties agree that, even after the transfer of ownership, the risk of the object of sale is still on the Seller, it is acceptable on the basis of above mentioned article of SGA. In the case of head v tatter sall, we see such a thing.

In this case, the plaintiff bought a horse form the defendant, with the condition that it must have the ability to be used in the hunt, and a week was given to the plaintiff that if the object of sale could not pass such a test, he could return it to the seller.

The animal, before the expiration of a week, was accidentally damaged, and the buyer determined to return it with this explanation that the object of sale did not had the intended feature and then he wanted to return it to the seller, and the court acknowledged such an act and recognized the applicability of the redemption of the price for him, which expresses the imposition of a risk to the seller (Garner, 1999; Atiyah, 2001).

As a matter of fact, when despite the defect of the object of sale when it's on buyer's hand, he can return it and get the price, there is no sense other than the imposition of a risk to the Seller. In some cases, if the condition of returning the object of sale is written in the contract, according to the 18(4) of SGA, it is assumed that, before the expiration of the time of returning the object of sale, actually there is nor still a sale, and therefore, imposing the risk on the Seller is in accordance with the rule (Bridge, 1998).

The bulk of cases where after the contract of sale, the risk is still on the Seller is in matters relating to transport. As a rule, it should be noted that, if the ownership of goods is transferred to the buyer while delivering it to the buyer, the risk is transferred to the Buyer as a result of the transfer of ownership. However, if the contract of sale is for selling none certain good, the risk transfer will also be postponed until determination and allocation of the goods for buyer, since the ownership is not still realized for him.

When the contract is made explicitly or stipulated that all or part of the price is payable only when the Goods have reached its destination or delivered to the Buyer, the risk arises from the defect or waste of the object of sale along the way is on the Seller, although ownership may have been transferred to the Buyer.

According to article3 2(3) of SGA: Other than cases where its agreed against it, when transportation goods from the Seller to the Buyer requires a sea route, and the conditions are such that the good must be insured, the seller must inform the buyer in such a way that he must be able to insure the object of sale along the sea way to the buyer, and if the seller refuses to do so, the object of sale is under his risk.

The provision of the present article applies in contracts fob and c&f and in cif contracts it is the duty of the Seller to insure the goods and therefore the risk of goods in such a contract is directed to him. According to Article 33of SGA: when the seller has agreed to deliver the under risk Goods at a different location other than the occurrence of the contract, the Buyer shall be responsible for the group of defects that arises only from transportation, unless there is an opposition agreement. The acceptance of risk by the Seller in this article of law is either implicit or explicit. The defects that fall under this clause are divided into two categories:

First, the defects that are caused by the use of transport and is considered a normal thing in this regard and the other defects caused by random loss of goods and irrelevant with normal transportation conditions. The above article tries to say that even if it is stipulated that the Goods are under the Seller's risk during transportation, it is no responsibility that will be imposed to the buyer unless the condition of imposition the risk to the Seller explicitly includes these defects.

However, in the assumption of defects or loss of goods by accident, there is no doubt on imposing the risk on the Seller according to the agreed condition between the parties. Of course, relative to the first - mentioned defects, however, there is no doubt that if these defects are caused by the delivery of goods not being due to a correct manner by the seller, these defects will be imposed on the seller.

Applying the rule of imposing risk on a person who the ownership has been transferred to him in some cases will lead to outcomes that custom is not receptive to it. One of the most objectionable cases is related to the retail cases.

For example, when a person buys from a store and it is about to be sent to him later, but before sending, the store is destroyed by fire, and the good subject of contract is also lost if the buyer discovers that, despite that he did not receive the object of sale, will have to pay a the price, he would be surprised.

To avoid such a situation, we can make insurance of sold property a requirement. Therefore, the question should be asked who would have to insure the sold goods.

Seems that in custom, that person is committed to insuring the goods which possesses physical possession of goods. For example, in a purchase-obligation hire, it is not doubtful that the possessor should be required to insure. Whether this contract is related to a vehicle or any other property.

Therefore, by accepting such a justification, we find that, although in laws and principles of England, risk is transferred with ownership transfer, but it is tried to make a justification that the rules become more compatible with social

justice and equity. The task related to insuring goods is also of this category.

In the assumption that the damage to the product has been caused by the fault of each side, it is not important for who the risk is imposed. In fact, the damage is on the person whom the damage is caused by his fault, and according to Article 20 (2) SGA: when the product was accompanied by the delay caused by the fault of each, buyer or seller, the goods would be under the risk of the party, committing the fault, provided that such harm would not occur if it the fault wouldn't accrue.

Therefore, if the contrasts between responsibilities arising from fault and responsibility arising from the imposition of risk, the responsibility of the person to blame, is preferable and the loss is imposed on him. Of course, as it is clear from the text of the above section, and especially given the use of the word (possible) in its closing clause of it, the burden of approving that the accrued loss has nothing to do with the fault is on the person-to-blame,

In the case of Demby Hamilton Vs Barden, the plaintiff agreed to sell him 30 tons of apple juice that the defendant ordered to be delivered to third parties. He put the juice in special barrels for delivery to the defendant. Defendant also received a part of the goods but he delayed for the rest of them, and consequently he had no further orders from third parties. Due to this delay, the rest of the fruit juices were spoiled and destroyed. In this case, although the ownership had not been transferred to the defendant (purchaser), the court imposed the risk of fruit juice spoiling on him in his sentence.

According to the case, as Article20 (2) of SGA stated, although property has not yet been transferred to the buyer, the risk is imposed on a person who has committed the fault in the form of delay in the delivery.

According to the Article 20(3) of SGA: none of the provisions of this article affect the responsibility of any buyer or seller as the trustee of the goods before them.

CONCLUSIONS

Therefore, if the ownership of the object of sale would be transferred, but the object of sale remains in the possession of the seller, he will be recognized as the trustee until the deliverance and although they buyer is under the risk but such a thing does not mean that the seller is allowed to not do required cares for the object of sale based on the conditions and situation of each case. On the other hand, when the goods are owned by the Seller and under the Buyer's possession, even though the risk is on the owner (the Seller), the Buyer shall provide reasonable care to the Goods. In the case of Knight Vs Wilson on the sale of a boat, although ownership and risk were transferred to the buyer, the boat seller who based on committing a fault caused harm to the boat (given that he was sailing with the object of sale without the buyer permission) was recognized responsible for violating his responsibility to care and keep the object of sale safe, as a trustee.

However, when the time of deliverance come and the Goods are not yet delivered, the duty of the Seller as the trustee must be regarded. Even though the delay in deliverance is based on buyer's fault. In such condition the seller is recognized as non-contractual trustee and he must reasonably care for the object of sale. It has to be mentioned that he has the right to take fair equivalent remuneration based on the care he provided for the object of sale.

When the buyer and seller's fault interfere with each other in a way that the buyer committed fault in receiving the object of sale and the seller has also did not well in caring for the object of sale, the method of sharing and responsibility among them is based on the contributory negligence act, 1945 and the rule of causation in common law.

BIBLIOGRAPHIC REFERENCES

Atiyah, P. S. (2001). Adams, John N., Macqueen, Hector, the sale of Goods. Longman Pearson Education.

Bridge, M. (1992). Benjamin's, sale of goods. Sweet & Maxwell.

Bridge, M. (1998). The sale of Goods. Oxford University Press.

Garner, B. A. (1999). Black's Law Dictionary. West Group.

Silvertown, A. H. (1988). The law of lien. Butterworths.