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The Application of *Asl-Al- Ta'akhor Al-Hades* (posterior occurrence) Principle in Risk Passing of Sale Transit in the Contracts of Sale of Goods

Parviz Bagheri
Department of Digital Marketing
University of Tehran,
Enghelab, Iran
Tel: + 98 9183414064
Email: parviz873@gmail.com

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Abstract

The transfer of risk is a significant issue in contracts of sale that can lead to disputes between the parties concerned. Reflecting the stringent nature of such contracts, the buyer must pay the contract price even if he receives damaged goods, or the goods are totally destroyed. Although the United Nations Convention on Contracts for the International Sale of Goods (CISG) ratified in 2010 namely the Vienna Convention allows exporters to avoid choice of law issues, determining the exact time of the loss of the goods in transit is an outstanding issue that has already left unsolved. Applying the Islamic principle of Al-Asl Al-Ta'akhoral-Hades (posterior occurrence) and Iranian Civil Code 1936, there exists a mechanism to resolve such disputes. Based on this principle, where two incidents occur, and the time of the occurrence of one of them is clear, but the time of the occurrence of the other is uncertain, the event whose time of occurrence is uncertain is taken to have happened after the one whose time of occurrence is certain. This paper is going to scrutinise the application of Ta'akhor Hades principle to resolve international disputes regarding the issue of uncertainty in the exact time of the loss of the goods in transit.

Keywords: **Transfer of Risk Goods in Transit, Ta'akhorHades, Islamic principle, CISG Vienna Convention, Iranian Civil Code**

Introduction

In the modern commercial transactions, contracts for the sale of goods play a very important role. However, different legal systems have special ways to deal with risk passing applicable in domestic trade. Meanwhile, differences in domestic legal approaches to the resolution of the risk problem create a need for uniform rules in the international trade. There is a huge body of rules aimed at the regulation of contracts of sale, and the diversity of domestic legal systems create a necessity for the ratification of different treaties that embody uniform rules. At the meantime, the absence of such uniform rules presents numerous difficulties to contracting parties in the field of international trade. The United Nations Convention for the International Sale of Goods, which govern contracts for the international sale of goods and take into account the diversity of legal systems, would both contribute to the removal of legal barriers in international trade and promote its development. Iran has not ratified the Vienna Convention. Thus, a comparison is appropriate for the appreciation of the differences and similarities that exist between the Vienna Convention, and Iranian law. Under the Conventions on the international sale of goods the risk in the contracts of goods in transit will pass by contract conclusion alongside with some exceptions. However, in reference to goods in transit in Iran legal system there are no provisions governing this issue. Due to the complementary role of transferring risk, if the parties of contract agreed upon or either discovering indicators, it could be said that in this case the risk will be transferred after the signing of the contract. Therefore, the only applicable principle to resolve the disputes of the same area will be through Ta'akhor Hades. The passing of risk in contracts for the sale of goods is governed by five articles in the Vienna Convention, namely, Articles 66-70, and also by one article in the Iranian Civil Code 1936, namely Article 387. The Vienna Convention discusses the issue of the passing of risk in different phases. Article 68 deals with contracts for the sale of goods in transit.This paper relates to the examination of CISG Article 68, which deals with the passing of risk in contracts of sale of goods in transit (Vienna Convention) and Article 387 of the Iranian Civil Code and application of the Islamic principle of Ta'akhor Hades as well .

Examination of the transfer of risk under the CISG

Generalities: So many countries were involved in the negotiation and adoption of the CISG provisions. Therefore, this issue seems to be a challenging task because most countries had different rules governing the transfer of risk. Nevertheless, several articles of the CISG such as Articles 66-70 were devoted to the issue (Oberman, 1997). Article 68 deals with the passing of risk in goods in transit. An overview of the legal system of different countries would reveal that there are three methods for the passing of risk 1.

1. The time of the signing of the contract
2. The time of the transferring of ownership
3. The time of the delivery

With respect to goods in transit, determining the time for the passing of risk based on the time of the signing of the contract is not suitable. This is because the goods will usually be sold with indefinite nature and often, it may be that the goods have not even been produced at the time of the signing of the contract. Therefore, the passing of risk in this manner will encounter serious problems (Choudhari, 2016). If under the CISG the criterion was the time of the transferring of ownership of the goods for the passing

of risk, because of the different methods of passing ownership in different countries, the serious problem were observed. The most logical method is that, involving a rule which provides for the transfer of risk after the goods have been handed over to buyer. In addition, it could be said that all countries have unite standards in the meaning and concept of handover. It could even be noticed that both the drafters and writers of the CISG used the word “handover”, instead of “delivery”, in order to avoid potential conflicts. Based on the above strategy, the method for the passing of risk under the CISG is after the handover of the goods which is expressed generally in Article 69 thereof. In respect of goods in transit the CISG deviates from its basic principle which is the handover of the goods to buyer and instead, it provides a different method for the transfer of risk. Article 68 states that. The risk in respect of goods sold in transit passes to the buyer from the time of the conclusion of the contract. However, if the circumstances so indicate, the risk is assumed by the buyer from the time the goods were handed over to the carrier who issued the documents embodying the contract of carriage. Nevertheless, if at the time of the conclusion of the contract of sale the seller knew or ought to have known that the goods had been lost or damaged and did not disclose this to the buyer, the loss or damage is at the risk of the seller.

Literature Review

As can be seen, the aforementioned article comprises three parts. In the first part, the general rule is stated, which is that in the sale of goods in transit, the risk will pass to the buyer at the time of the signing of the contract (Schelechtim, 1998). In the second and third parts, two exceptions are provided to the general rule contained in the first part. In the first exception which rests on the criterion of “circumstances”, the passing of risk to the buyer will take effect retrospectively from the time of the handover by the seller to the carrier agent. While in the second exception which is based on the constructive, or the actual knowledge of the seller as regards the situation of the goods, the risk remains with the seller. At the meantime, the problem will arise where there is no evidence to prove the exact time of the loss of the goods. Unfortunately, the CISG does not provide any solution for such a situation (Bollee, 2015).

The first part of Article 68, as mentioned above, states that the risk in sale of goods in transit will pass to the buyer from the time of the signing of the contract. In this case, where the carriage of goods was not with regards to the order of the first buyer, we cannot resort to the first part of the Article 68. Adopting such a rule practically results in dividing the risk. This means that in the period before the signing of a contract, the risk rests with the first buyer, and after the signing of the contract, the risk passes to the second buyer. In this case, there is no problem regarding the time for the passing of risk in the case of damages. However, determining the time of damage plays a substantial role in the application of this rule. Therefore, in the case of damages immediate delivery and the time of wasting goods do not make any problem because the ability to detect priority of the damage and contract are clear. Meanwhile, if the defect in the goods or their loss occurs through gradual damages, such as ship flooding, or other factors, which render the determination of the time of the defect or loss impossible, then the application of the provisions of Article 68 turns out to be questionable. Some authors believe that in such a situation, it is sufficient for the seller to prove that at the time of the signing of the contract, the goods were intact. Meanwhile, resorting to this theory does not solve the problem and it leads to positive conflicts to prove the intact of the goods. It should be pointed out that the CISG does not offer any solution for such a case which is one of the CISG defects. However, under the Iranian legal System, by resorting to some of the Islamic jurisprudence principles such as Ta’akhor Hades it is possible to find a solution to the problem.

The exception to the first rule in CISG Article 6: As was mentioned above, the theory of the risk passing for the goods in transit is an exception to the basic rule for the passing of risk under the CISG. Meanwhile, despite the fact that Article 68 is an exception to basic rule for the passing of risk, that exception itself, has some exceptions, which are examined below.

Retroactivity of the passing of risk based on circumstances

In applying the provisions of Article 68 the CISG faces some problems, such as or when the time of such loss is uncertain. In the view of the researcher, this exception determining precisely the time when risk passes in case of the gradual loss of goods, was provided in an effort to solve such problems (Sanders, Neubuerger, Ravin, 1957). One of the exceptions of the circumstances focuses on the time of the contract conclusion. Based on this approach, it could be assumed that risk is transferred from the time the good senter the possession of the carriage agent to the buyer (Honnold, 2009). Thus, this exception implies that only if the danger had a retrogressive effect it could be retroactive.Applying this rule, there are some evidences that show the existence of a carriage contract, that would suffice, and there is no commitment for the handover of goods in the possession of the buyer. It is clear that such circumstances do not have to be agreed explicitly upon by the parties rather, this issue can be determined from the condition of the goods, and the typical circumstances of the transaction (Hoffmann, 1986). For example, an insurance policy constitutes one of the circumstances which is one of the main rules in commercial transaction. The seller endorses the insurance policy to the name of the buyer, and this insurance protects the whole right of the buyer from the time of delivery of the goods to the carriage agent (Erauw, 2005). Moreover, the other evidence which could be relied upon in this regard is payment of the costs of carriage. In this case, the risk will pass to the person who pays the costs of carriage. The reason for this rule is clear, because the seller who pays the costs of carriage has explicit knowledge that he is responsible for the carriage of the goods, as well as for every potential peril. The converse of this rule also applies, namely that if the costs are paid by the buyer, it can be concluded that the risk rests with the buyer. Based on the above interpretation, it may be said that the CISG is at variance with the national law of some countries, such as France and Iran (where the loss of goods before the time of the conclusion of a contract constitutes a ground for invalidating the contract). In the sale of goods in transit, such a rule is not accepted by the CISG. The actual or assumed knowledge of the seller as to the condition of the goods

According to the last section of Article 68

Nevertheless, if at the time of the conclusion of the contract of sale the seller knew or ought to have known that the goods had been lost or damaged and did not disclose this to the buyer, the loss or damage is at the risk of the seller. A very important issue regarding this exception is whether it covers both the first and the second situations preceding it, or whether it only covers the second situation immediately preceding it. Addressing this question is absolutely important, because if we limit this exception to the first situation covered in Article 68, then it would be one of the rules for the passing of risk. On the other hand, if we extend it to the second situation in Article 68, then it would not be a rule for the passing of risk. Instead, it will simply relate to the principle requiring the compliance of goods with the contract, which is mentioned in the last part of Article 68. At the conference for the adoption of the CISG, it was clarified that this exception only applies to the second sentence. Examining the CISG's rules it can be

concluded that the said exception cannot cover first situation in Article 68. In resolving this issue, it should be noted that in the CISG, there are two terms, which are different. One relates to the passing of risk that occurs through the handover of the goods to the buyer, the other relates to responsibility for non-compliance of goods with the contract. Each of these negates the other. That is, until the time of the passing of risk, the seller is responsible for defects in the goods based on the non-compliance of the goods with the contract. However, after the passing of the risk, he will not be responsible for such defects because risk has already been transferred. Practically, the first part of Article 68 provides for the passing of risk from time a contract is concluded, while the second part of that article provides that before the contract conclusion, and from the time of the handover of the goods to carriage agent, the risk will pass to buyer. Thus, part three of Article 68 provides that if the seller had knowledge of defects in the goods at the time of the conclusion of the contract, or at the time of the handover of the goods to carrier agent, the risk will not pass, and the seller will continue to bear such risk. Furthermore, it should be noted that the rule stated in the first part of Article 68 is an exception to the general principle governing the passing risk under the CISG. Moreover, the second part of the article is an exception to the first part, while the third part is an exception to the exceptions in the second part. However, this is a rare case in the history of law making. As a result, in the sale of goods in transit where the exact time of loss is uncertain, the goods are not covered by insurance, neither there are circumstances that can show which party has legal liability; we will be faced with a serious problem. There has no common agreed solution emerged for tackling such a dilemma so far. In the opinion of the researcher, regarding this issue, there is no alternative, other than to rely on the principle of proof in order to determine the time of the loss or the defect, and to allocate the risk to one of the parties. However, under the Iranian legal system and by the use of an Islamic principle namely Al-Asl Al-Ta'akhor Al-Hades this paper is going to offer a solution to the problem.

Examination of the passing of risk under the Iranian legal system

Under the Iranian legal system, the rule for the passing of risk from the seller to the buyer is contained in Article 387 of the Iranian Civil Code 1936. The Article states that: "If the object sold perishes before delivery, even without fault or neglect of the seller, the sale will be cancelled and the consideration restored 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 passing of risk under the Iranian legal system is based on the Prophetic Speech (Hadis-Al-Nabavi) in which Prophet Muhammad (s.w) stated that responsibility for the loss of every object before its delivery lies with the seller. According to the provision of the Iranian Civil Code and the Prophetic Speech, under the Iranian legal system, risk will pass after the delivery of goods. After such delivery, the contract is terminated and the loss of the object is of no consequence to the seller. However, if the object is lost before delivery, then the contract of sale is terminated from the time of that loss. On the passing of risk for goods in transit, under the Iranian legal system there is no specific text. Given the absence of any specific text, if we consider that Article 387 is peremptory, for goods in transit until the time that the goods are not handover, the risk rests with the seller. This situation, and especially in shipment carriage which may take a long period of time, such as two months or more to hand over the goods, is quite risky for the seller. However, on this issue, there is not the same problem as with the CISG, which was mentioned before. In other words, at what time the loss occurred is not important. It is also not important whether the damage was immediate or gradual. This is because under this theory, the time of the delivery of the goods to the buyer is the central focus. And in determining this time, the issue whether the goods were lost or damaged does not arise. In the other words, in this time determining that the goods are wasted or have

damaged or not is not an issue. Under this theory of equating the passing of risk, if the seller gives the documents of carriage to the buyer, from the time of the delivery of the documents of carriage to the buyer, the carrier continues to play the role of the buyer, and the time of the delivery of those documents, is the time of the passing of the risk. This is because at this time the carrier is considered as the buyer representative. On the other hand, considering the contrasting Islamic theory of Ijma (the Islamic jurists consensus on an issue), and the conflicting situation in Article 387, it becomes clear that Article 387 is supplementary. It could be said that the parties have the right to choose the time for the transferring of risk at the time of the signing of the contract, or perhaps before that. With reference to the above, and the suggestion that Article 387 is supplementary, the time of the signing of the contract could be equated with the time of the passing of risk. It means that the parties frankly or implicitly agreement to the contract or through circumstances such as endorsement of the insurance policy, can consider the time of signing the contract itself as the time of passing of the risk. Moreover, it should be remembered that if we accept the theory of equating the passing of risk and the signing of the contract simultaneously, the problem which was encountered under the CISG will resurface again. Meaning that, if the time of the signing of the contract is taken to mark the time of the passing of risk, and the damage or loss of the goods is gradual, the time of such damage or loss cannot be determined precisely (KT, 1957). Consequently, uncertain specification of the guarantor will remain questionable. Meanwhile, under the Iranian legal system, and based on the juristic principle of al-asl Al-Ta'akhor-Al- Hades it is possible to overcome this problem. Based on this principle, where two incidents occur, and the time of the occurrence of one of them is clear, but the time of the occurrence of the other is uncertain, then the accident whose time of occurrence is uncertain is taken to have happened after the one whose time of occurrence is certain or in a simple sentence we consider the uncertain incident posterior to the certain one. In this case, the date of the signing of the contract is certain, but it is not clear whether the accident or damage occurred before or after that date. At the meantime, through the application of the principle of, Ta'khor-Al-Hades it could be said that the loss occurred after the signing of the contract, and in fact after the transferring of the risk to the buyer. In order to buttress this point, it should be mentioned that this same principle is used in the Iranian Civil Law at Article 874 states that: "If persons who are entitled to inherit one from another die, and the date of the death of one of them is known, and it is not known whether the death of the other was before or after that date, only the person whose date of death is unknown will take an inheritance form the other, and not vice versa". Based on this interpretation, the problem encountered under the CISG can be resolved under the Iranian legal system. Thus, on this issue, the Iranian legal system is more comprehensive and responsive than the CISG provisions (Sanders, Neubuerger, Ravin, 1957).

Discussion and Conclusion

On the passing of risk for goods in transit, Article 68 of the CISG provides that risk will pass to the buyer from the time a contract is concluded. However, this international commercial instrument has left the significant issue of determining the exact time of the loss of goods in transit debatable. Under the Iranian legal system, according to Article 387 Iranian Civil Code 1936, the basic rule for the passing of risk focuses on the time of the delivery of the goods. Nonetheless, considering the legal scholars' statements and the nature of Iranian Civil Code Article 387, it could be said that the Article is supplementary, not imperative. Hence, if the parties to a contract agree upon the conditions, then risk will pass to the buyer from the time of contract signing. If the date of the signing of the contract is specified, but the date of the event, loss, or defect is uncertain, based on the Islamic principle of Al-Asl Al-Ta'akhor Al-Hades (posterior occurrence) it could be said that the loss of the object occurred after the signing of the contract. Meanwhile, on the passing of risk in International Commercial Terms

(INCOTERMS) with default conditions of this term the situation of the passing of the risk is different but the parties are able to change the provisions themselves.

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