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PASSING OF RISK IN CONTRACT OF SALE

Abstract:

Due to social, physical or economical reasons that countries could not meet their requirements by own resources, international trade was appeared. Also with the development of global economy, the borders between world trades were disappeared. Due to effect of more than one national law to a trade relation, confusion causes on the determination of the norms to be applied and problems occur between the parties during determination of norms.

Since there is no supranational jurisdiction system is available to take role during the solution phase of problems, national courts become competent judicial authority; thus, they remain incapable of objectivity and area of specialization. In the commercial life where international actors take place, the requirement of international solution mechanism is inevitable.

As a result of seeking fulfillment for this need, on 11.04.1980 in trust of United Nations the diplomatic conference was held in Vienna and Convention on Contracts for the International Sale of Goods under common name Vienna Sale of Goods Agreement ("Vienna Sale of Goods Agreement") was accepted. As of January 2013, 80 state parties are existed to CISG . Austria is one of the first 5 countries who constituted and signed the convention . In Austria, CISG officially become valid on 01.01.1989 and the validation is still continued. Turkey become a party to a convention on 07.07.2010 and agreement become valid as of 01.08.2011. Hereunder CISG Agreement is applied for the sale of good agreements between the parties where their business places are in different countries and upon the condition that, these countries are the contracting states. In addition to this, CISG application area can be performed if attributed the international law rules to a contracting state.

The purpose of our study is, to discuss the passing of risk matter which incorporates many problems, in national and international sale of goods agreements within the frame of CISG and Turkish Code of Obligations regularizations. In our study, primarily risk and passing of risk concepts were mentioned in general; then the moment that, damage was devolved, conditions and exceptions were emphasized. At the final section of our study, in sale of goods agreements passing of risk results were discussed and in case of violation of agreement, the status of circumstances was indicated in the point of CISG.

Keywords:

Sale of Goods, Passing of Risk, CISG.

PART ONE: THE PASSAGE OF RISK IN SALES CONTRACT

1. The Concepts of Risk and Passage of Risk in Sales Contract

A. The Concept of Risk

Though there are many definitions¹ of the concept of risk in the doctrine, risk generally means “*damage caused by any event*”² and “*damage occurring to goods outside the will of parties*”³. Although risk is mentioned more than once in the Turkish Code of Obligations and the Turkish Commercial Code, such codes do not give any definition of this concept.

The concept of risk has two meanings: one broad meaning and one narrow meaning. In a broad sense, risk bears the meaning used in the daily life. Accordingly, it refers to “*any risk occurring as a result of a challenging event such as breaking, deterioration, and decay*”⁴. As is seen, risk, in a broad sense, mostly involves casualness⁵. In a narrow sense, it refers to any danger that emerges as performance becomes impossible due to circumstances that cannot be attributed to the obligor (faultlessly) in the period between the birth and fulfilment of the obligation and threatens one or both of the parties (only within the context of obligatio)⁶.

B. The Concept of Passage of Risk

The issue of when a particular party will start to suffer risks (i.e. whether the buyer or the seller will suffer the risk) is referred to as “*passing of risk*”^{7, 8}. The Article

¹ Risk refers to “inadvertent or accidental loss of goods due to a reason not attributable to the acts of the buyer or the seller” See BIANCA, C.M./BONELL, M. J., Commentary on the international sales law, the 1980 Vienna sales convention art. 66, Rn. 2.1. According to another definition, “risk (Gefahr, risque, periculum) refers to the perishing and depreciation of the thing sold due to reasons not attributable to any party” See ARAL, Fahrettin/AYRANCI, Hasan, 6098 sayılı Türk Borçlar Kanununa göre hazırlanmış Borçlar Hukuku Özel Borç İlişkileri [The Code of Obligations-Private Debt Relations prepared pursuant to the Turkish Code of Obligations No. 6098], Ankara 2012, p. 73. According to another definition, “in a broad sense, risk refers to harmful situations that occur to a thing and lead to such various results as breaking, deterioration, and perishing. In a narrow sense, it refers to any danger that emerges as performance becomes impossible due to circumstances that cannot be attributed to the obligor (faultlessly) in the period between the birth and fulfilment of the obligation, and threatens one or both of the parties (only within the context of obligatio)” See. AKÇAAL, Mehmet, Satış Sözleşmesinde Yarar ve Hasarın Geçişi [The Passage of the Benefit and Risk in Sales Contract], <http://www.konyabarosu.org.tr/pdf.aspx?id=13&dergiid=10>, (Accessed on 28.04.2014).

² http://www.tdk.gov.tr/index.php?option=com_gts&kelime=HASAR, (Accessed on 28.04.2014).

³ ÖZCAN, Hüseyin, Ansiklopedik Hukuk Sözlüğü [Encyclopedic Law Dictionary], Ankara 1975, p. 238.

⁴ ÖZDEMİR, p. 360.

⁵ AKINTÜRK, Turgut, Satım Akdinde Hasarın İntikali [The Passing of Risk in Sales Contract], Ankara 1966, p. 22.; GÜMÜŞ, Mustafa Alper, Borçlar Hukuku Özel Hükümler [The Code of Obligations Special Provisions] Volume I, İstanbul 2012, p. 35.; ÖZDEMİR, p. 360.; YETİŞ-ŞAMLI, p. 305.; ARAL/AYRANCI, p. 73.

⁶ YAVUZ, Cevdet, 6098 sayılı Türk Borçlar Kanununa Göre Borçlar Hukuku Dersleri (Özel Hükümler) [Lessons on the Law of Obligations as per the Turkish Code of Obligations No. 6089], İstanbul 2012, p. 32.; YETİŞ-ŞAMLI, p. 305.; ÖZDEMİR, p. 360.

⁷ ÖZDEMİR, p. 361.; ARAL/AYRANCI, p. 74.; YAVUZ, p.33.; YETİŞ-ŞAMLI, p. 306.; ÇETİNER, Bilgehan, İstanbul University Journal of Faculty of Law, Volume: LXVII-LXVIII, İstanbul 2010, p. 98.; ALTAY, p. 13.; ERZURUMLUOĞLU, Erzan, Sözleşmeler Hukuku (Özel Borç İlişkileri) [The Law of Contracts (Private Debt Relations)], Ankara 2012, p. 31.

⁸ The description of passing of risk has been included in the judicial opinions provided by the Supreme Court, too. Accordingly, “*The passing of benefit and risk in sale contract refers to the time when natural and legal consequences occurring in the thing in the period between the birth and the fulfilment of the contract and the harmful situations occurring to the thing and causing it to break down, deteriorate, perish, etc. pass to the buyer*”. See Supreme Court 13th Civil Chamber. Date 15.09.1994, File 1994/6197, Resolution 1994/7587, Kazancı Bilişim İçtihat Bilgi Bankası [Kazancı Bilişim Judicial Opinion Data Bank] (hereinafter referred to as “KBJODB”).

208 of the Turkish Code of Obligations No. 6098 regulates until what time the buyer holds the benefit and risk. According to the Article 208 of the Turkish Code of Obligations:

“Except for exceptional situations arising from the law, the related circumstance, or the special conditions prescribed in the contract, it is the buyer who holds the benefit and risk until the transfer of possession in the sale of movables, and until the time of registration in the sale of immovables”.

In the sale of movables, when the buyer lapses into default in taking over the possession of the sold, the benefit and the risk of the sold pass to the buyer as if the transfer of possession took place.

If the seller, upon the request of the buyer, sends the sold to a place other than the place of performance, the benefit and risk pass to the buyer at the very moment when the sold is delivered to the carrier”.

It is evident in the justification related to this provision of law that new regulations introduced by the provision have been influenced by the relevant provisions of CISG and German Civil Code (BGB). For example, on this subject, BGB § 446 contains the following provision:

*“The risk of accidental destruction and accidental deterioration passes to the buyer upon **delivery of the thing** sold. From the time of delivery the emoluments of the thing accrue to the buyer and he bears the charges on it. If the buyer is in default of acceptance of delivery, this is equivalent to delivery.”*

The provision in the article 69 of CISG is as follows:

*“In cases not within articles 67 (about carriage of the goods) and 68 (about goods sold in transit), the risk passes to the buyer when he **takes over the goods** or, if he does not do so in due time, from the time when the goods are placed at his disposal and he commits a breach of contract by failing to take delivery.”*

As is seen, the law prescribes that in all cases of the sale of movables, the risk and benefit pass to the buyer at the moment of the transfer of possession regardless of the nature of obligation (i.e. obligation for substitutable goods versus obligation for non-substitutable goods)⁹.

Taking into consideration that the possession of movables would pass also through other ways concerning the transfer of possession than delivery, the-law maker did not limit the time of passing of risk to the time of delivery¹⁰. BGB § 446 and CISG article 69 took the time of delivery of the sold to the buyer as the time of passing of risk. However, when the explanations about these provisions made in the doctrine and relevant judicial practices are considered, it is seen that the concept of “*delivery*” is construed quite broadly, and delivery is deemed to come true in terms of passing of risk when indirect possession is provided to the buyer¹¹. In essence, all of the three regulations take the time of delivery as the primary point of passing of risk. In other circumstances, the fruition of the economic result intended for the buyer with the sales contract is taken as the basis of passing of the benefit and risk¹².

⁹ ÇETİNER, p. 100.; ÖZDEMİR, p. 365.; GÜMÜŞ, p. 36.

¹⁰ ÖZDEMİR, p. 365.

¹¹ YETİŞ-ŞAMLI, p. 308.

¹² ÇETİNER, p. 99.

2. The Concepts of Material Performance Risk and Substituted Performance Risk in Sales Contract

A. General

There is a logical link between performance risk and substituted performance risk¹³. To answer the question of “who is to bear the substituted performance risk?” performance risk must belong to the obligee¹⁴. In other words, it refers to the obligor getting out of obligation due to his performance becoming impossible later on and the obligee having to fulfill the performance. Nevertheless, provided that the obligor still has to fulfill his performance due to an impossibility occurring later on, the performance risk will belong to the obligor, and substituted performance risk will not be addressed at all¹⁵. Hence, the issue of passing of risk is, in fact, the issue of “to whom does substituted performance risk belong?”¹⁶

B. Material Performance Risk

Material performance risk addresses the question of whether or not the buyer loses his right to demand something subject to a sale free from defects to pass into his ownership and possession without having any right to compensation in the form of secondary performance obligation¹⁷. In other words, this risk type is about an obligor’s failing to get out of obligation and having to perform it again despite risk.

Material performance risk occurs when the sold is non-substitutable, it has not been personalized yet through distinction and identification to performance, or it has not been sent yet if it is to be sent to another place¹⁸.

If the performance obligation of the seller continues as required, the performance risk is held by the seller¹⁹. The seller is always capable of supplying and delivering the same type of the goods as the one that has perished or deteriorated, and thus of performing his obligation²⁰. The risk pertaining to the performance may appear both in the contracts burdening a single party with obligations and in the contracts burdening two parties with obligations²¹.

Even if the seller does not have any fault in the perishing or deterioration of the sold, he cannot get out of his obligations completely or partially, and he is obliged to perform his obligation through supplying another one in place of the goods perishing

¹³ **DURAL, Mustafa**, Borçlunun Sorumlu Olmadığı Sonraki İmkânsızlık [Subsequent Impossibility for Which the Obligor Is Not Responsible], İstanbul 1979, p. 162.

¹⁴ **ÖZDEMİR**, p. 363.

¹⁵ **ARAL /AYRANCI**, p.74.

¹⁶ **ÖZDEMİR**, p. 364.

¹⁷ **ARAL, AYRANCI**, p. 74.

¹⁸ **AKINTÜRK**, p. 27.

¹⁹ **ALTAY**, p. 24.

²⁰ **AKINTÜRK**, p. 27.

²¹ **T.C. ADALET BAKANLIĞI (REPUBLIC OF TURKEY MINISTRY OF JUSTICE)**, Borçlar Kanunu'ndan Türk Borçlar Kanunu'na [From the Code of Obligations to the Turkish Code of Obligations], p. 290.

or deteriorating provided that such new one is of the same type as the one perishing or deteriorating²².

C. Substituted Performance Risk

Substituted performance risk exists in the contracts burdening two parties with obligations²³. When the sold is substitutable or it has been personalized through distinction and identification to performance though it was non-substitutable in the beginning, the perishing or deterioration of the sold makes it impossible to perform the delivery obligation or to perform it properly²⁴.

Thus, although the seller gets out of obligation to perform properly as the sold has suffered damage, he still has to reimburse completely the sales price provided by the buyer²⁵. That is, substituted performance risk refers to the obligee's facing the risk of having to pay the price although he cannot obtain the subject of sale after it suffers damage²⁶. For instance, let's assume that a car that has been bought but not delivered yet is stolen. If the seller can demand the money from the buyer, the risk belongs to the buyer. However, if the buyer does not have to pay the money, the risk belongs to the seller.

3. Requirements Concerning Passage of Risk in Sales Contract

A. General

If the thing subject to sale suffers risk in the period between the formation of the sales contract and the delivery of the thing, the buyer will not have to pay the price specified with the contract²⁷. In other words, even though the sales contract has been formed, ownership, and thus risk and benefit, as a rule, start to belong to the buyer when the possession is transferred in the case of movables, but at the moment of registration in the case of immovables.

B. The Formation of Sales Contract

Within the framework of the Turkish Code of Obligations, the formation of a contract is possible only if parties declare their intentions mutually and consentaneously (Turkish Code of Obligations article 1/l). Therefore, the parties have to come to an agreement on the principal provisions of the sales contract so that such a sales contract can be formed²⁸. In the sales contract, the seller has to declare that he is willing to sell something, and the buyer has to state that he is willing to buy it²⁹.

²² AKINTÜRK, p. 27.

²³ ALTAY, p. 14.; YETİŞ-ŞAMLI, p. 307.; YAVUZ, p. 362

²⁴ AKINTÜRK, p. 28.

²⁵ ÖZDEMİR, p. 363.; T.C. ADALET BAKANLIĞI [The Republic of Turkey Ministry of Justice], p. 293.

²⁶ ARAL/AYRANCI, p. 75.

²⁷ ÖZDEMİR, p. 364.; GÜMÜŞ, p. 36.; YAVUZ, p. 361.

²⁸ GÜMÜŞ, p. 47.

²⁹ EREN, Fikret, Borçlar Hukuku Genel Hükümler [The Code of Obligations General Provisions], 16th Edition, Ankara 2014, p. 261.

In the cases involving willing parties, the contract is both formed and gives birth to its provisions and results when the buyer provides his declaration of acceptance³⁰. However, in the cases not involving willing parties, the contract is formed and gives birth to its provisions and results at different times³¹. In such cases, the contract gives birth to its provisions and results when the positive reply of the buyer to the seller reaches the control area of the seller³².

C. The Transfer of Possession

The fact that the article 208 of the Turkish Code of Obligations contains “*transfer of possession*” rather than “*delivery*” results from the fact that delivery is just one of the ways of passing of possessing³³. To address the emerging needs better, passing of risk has been allowed in all forms of possession (Turkish Civil Code article 977, delivery between those who are willing; Turkish Civil Code article 978, delivery between those who are not willing; Turkish Code of Obligations article 979, transfer without delivery; Turkish Code of Obligations article 980, delivery of the deeds representing the goods)³⁴.

Pursuant to the article 208 of the Turkish Code of Obligations, it is necessary but not enough for the benefit and risk of the sold to pass to the buyer that the sales contract has been formed and has started to give birth to its provisions³⁵. This is because; the article 208 of the Turkish Code of Obligations takes the time when the possession is transferred to the buyer (the time of title deed registration in the case of immovables), but not the time when the contract is formed and gives birth to its provisions as basis for the passage of the benefit and risk to the buyer³⁶.

The subject of the contract does not have to be delivered to the buyer for possession to be transferred³⁷. In a broad sense, delivery means making a thing reach its owner³⁸. Therefore, the parties of the sale contract may decide on a situation requiring the indirect transfer of possession³⁹.

D. Risk Must Result from an Extraordinary Reason

Within the framework of the Turkish Code of Obligations, a risk refers to the sold thing's disappearing or suffering damage due to an extraordinary reason not

³⁰ GÜNAY, p. 794.

³¹ YAVUZ, p. 34.

³² ÖZDEMİR, p. 367.

³³ DİNÇ, Mutlu, Yeni Borçlar Kanununda Neler Değişti? [What Changes in the New Code of Obligations?], Ankara, 2012, p. 69. Also see the government justification of the article.

³⁴ ÖZDEMİR, p. 368.

³⁵ YAVUZ, p. 36.; ALTAY, p. 35.; ÖZDEMİR, p. 366.

³⁶ DEMİR, Mehmet, 6098 sayılı Türk Borçlar Kanunu'nun Borçlar Hukuku Alanında Getirdiği Yenilik ve Değişiklikler [The Innovations and Changes Introduced by the Turkish Code of Obligations No. 6098 to the Field of Law of Obligations], Ankara 2012, p. 43.; GÜNAY, p. 793.; ÇETİNER, p. 99.; YAVUZ, p. 33.; ARAL/AYRANCI, p. 75.; ÖZDEMİR, p. 365.; UYGUR, Turgut, Türk Borçlar Kanunu Şerhi [Commentary on the Turkish Code of Obligations] Volume I, Ankara, 2012, p. 11297-1198.

³⁷ DİNÇ, p. 69.; DEMİR, p. 44.; ERZURUMLUOĞLU, p. 31.

³⁸ See <http://ked.tdk.org.tr>, (Accessed on 26.03.2014).

³⁹ ÖZDEMİR, p. 369.

attributable to any party⁴⁰. For example, risk occurs when a car sold or bought in another city is destroyed as a result of flood. Pursuant to the article 208 of the Turkish Code of Obligations, since not only the formation of the sales contract but also the transfer of possession of the sold thing to the buyer (registration in the case of immovables) is required for the passing of the risk to the buyer, the seller shall bear the economic risk of the deteriorations and decays to occur from the formation of the sales contract to the transfer of the possession of the sold to the buyer⁴¹.

In the event that the obligation of the obligor is pecuniary debt, the seller shall bear the substituted performance risk with regard to the price gotten from the buyer if risk occurs following the formation of the contract due to reasons not attributable to the seller⁴². If the seller has a fault in the emergence of deteriorations and decays, the buyer shall have “*Right of Withdrawal*” against the seller not fulfilling his obligation of protecting the sold pursuant to the article 7/3 of the Regulations on Distance Contracts numbered 27866. Moreover, since the formation of the sales contract is not enough for the passing of risk to the buyer, fault or faultlessness of the seller will not have any effect on the passage of the risk to the buyer as it is already the seller who bears the risk occurring until the transfer of possession.

4. Exceptions to the Rule of Passing of Risk in Sales Contract

Regulations concerning the passing of risk provided in the article 183 of the Turkish Code of Obligations numbered 818 are not prescriptive. In the same way, rules regarding the passing of the benefit and risk regulated in the article 208 of the Turkish Code of Obligations numbered 6098 can be determined by opposing parties. The article 183 of the Former Code of Obligations made mentioned of two exceptions that could be decided by the parties in the following statement: “*the related circumstance, or the special conditions*”. However, “exceptions arising from the law” were not included, which is criticized in the doctrine, too. The most important exception arising from the law is the default of the obligor⁴³.

As can be seen in the article 208/I of the Turkish Code of Obligations, “*Except for exceptional situations arising from the law, the related circumstance, or the special conditions prescribed in the contract, it is the buyer who holds the benefit and risk until the transfer of possession in the sale of movables, and until the time of registration in the sale of immovables*”, the law-maker prescribed three exceptions in regard to the passing of risk: exception arising from the law, exception arising from the related circumstance, and exceptions prescribed in the contract.

A. Exceptions Arising from the Law

a. Exception Arising from the Default of the Buyer

If the seller does not fulfill the performance that he is obliged to do, and thus delays in performance, he shall be responsible for both the result of default and the

⁴⁰ ALTAY, p. 3.; ARAL/AYRANCI, p. 74.; GÜMÜŞ, p. 35.; ÖZDEMİR, p. 361-362.; YAVUZ, p. 32.; ÇETİNER, p. 98.

⁴¹ YAVUZ, p. 39.; ÇETİNER, p. 99.; ÖZDEMİR, p. 361.

⁴² GÜMÜŞ, p. 35. Also see **The Turkish Code of Obligations** article 136/I.

⁴³ ÖZDEMİR, p. 377.

harmful results of the unexpected situation occurring during default⁴⁴. Indeed, even if the subject of the sale disappears as a result of earthquake in the period when the seller is in default, the seller is responsible for indemnifying it⁴⁵.

b. Exception Arising from Sales Based on the Suspensory Condition

The last provision of the article 183 in the Former Code of Obligations provided for sales based on the suspensory condition was removed with the New Code of Obligations. However, as per the article 172 of the Turkish Code of Obligations (article 151 of the Former Code of Obligations), the obligee to whom the thing constituting the subject of the obligation is given before the fulfillment of the condition becomes the owner of the benefits obtained until the fulfillment of the condition if the condition is fulfilled. If the condition is not fulfilled, the obligee has to return the benefits he has obtained in accordance with the last provision of the article 172 of the Turkish Code of Obligations.

Although the benefits obtained until the fulfilment of the condition are regulated in the law in this way, the risk is born by the seller until the fulfilment of the condition (according to the dominant view) even if the thing has been delivered to the buyer prior to the fulfillment of the condition in the case of suspensory condition. This is because; it is likely that the condition is never fulfilled and ownership never passes to the buyer⁴⁶.

B. Exceptions Arising from the Contract

The article 208 of the Turkish Code of Obligations is a non-prescriptive rule of law. With an agreement to be drawn up, the parties may make arrangements to the contrary of the rule indicated in the article 208/I of the Turkish Code of Obligations⁴⁷.

In overseas sales, principles regarding the passing of risk are regulated by a contract⁴⁸. In these kinds of sales, the parties generally use the records used in international commerce such as transfer of possession, payment of sales price, and passing of risk⁴⁹. At this point, the “*International Chamber of Commerce*” (ICC)⁵⁰ offers rules regarding the interpretation of main commercial records used in international contracts. These rules are included in the publication of ICC numbered 560 revised in 2000 for the last time⁵¹.

⁴⁴ ÇETİNER, p. 101.

⁴⁵ ÖZDEMİR, p. 377.

⁴⁶ T.C. ADALET BAKANLIĞI [THE REPUBLIC OF TURKEY MINISTRY OF JUSTICE], p. 294.; GÜMÜŞ, p. 45-46.

⁴⁷ ERZURUMLUOĞLU, p. 32.; GÜNAY, p. 793.; DEMİR, Mehmet, Türk Borçlar Kanununun Getirdiği Yenilikler [The Innovations Introduced by the Turkish Code of Obligations], Ankara 2012, p. 47.; DEMİR (6098), p. 42.; ÖZ, Turgut, Yeni Borçlar Kanunu'nun Getirdiği Başlıca Değişiklikler ve Yenilikler [The Main Changes and Innovations Introduced by the New Code of Obligations], İstanbul 2012, p. 32-33.; DİNÇ, Mutlu, p. 70.

⁴⁸ ARAL/AYRANCI, p. 76

⁴⁹ ÖZDEMİR, p. 373.

⁵⁰ “*International Chamber of Commerce*”

⁵¹ ARAL/AYRANCI, p. 76.

C. Exceptions Arising from the Relevant Circumstance

Although exceptional situations arising from the relevant circumstance are not prescribed in the law or in the contract, there are some exceptional situations justifying the belonging of the benefit and risk to the seller as per good faith in the 2nd article and rules of law and justice in the article 4 of the Turkish Civil Code numbered 4721⁵². This provision must be construed on a narrow basis⁵³.

To give an example of the exception arising from the relevant circumstance, let's assume that the delivery of the sold is delayed for the good of the seller. Then the risk up to the delivery is covered by the seller, or it will again be the seller who bears the risk if the buyer does not have any possibility to dispose of the sold or to prevent any possible harm to the sold as a result of the measures taken by the seller⁵⁴.

5. The Default of the Buyer

The default of the buyer occurs when the buyer does not receive his receivable in appropriate periods offered to him or avoids proper preparation behaviors for performance in the case of the sale of movables⁵⁵. Here, the law-maker accepted that the benefit and risk of the sold had to belong to the buyer as he had to be responsible for his own behaviors⁵⁶. When the buyer lapses into default, the benefit and risk will be transferred to him as of the time he avoids accepting the performance. In other words, if the thing suffers damage when it is hold by the sender, such damage shall be covered by the buyer. This provision is also included in BGB § 446/II and CISG article 69⁵⁷.

6. Risk in the Case of Distant Sales (When Obligation Is to Be Sent)

A. General

Distant sale is a sales contract type where the parties decide for the sold thing to be sent to a place other than the legal place of performance⁵⁸. When the seller sends the sold to a place other than the place of performance upon the request of the buyer, the risk passes to the buyer at the moment when the sold is delivered to the carrier⁵⁹.

However, sales made through sending the sold after its delivery to the buyer are not distant sales⁶⁰. This is because here the seller sends the sold to a different place for the sake of the buyer after he fulfills his delivery obligation, and thus the risk passes to the buyer.

⁵² UYGUR, p. 1197.

⁵³ ARAL/AYRANCI, p. 76.

⁵⁴ YAVUZ, p. 40.

⁵⁵ GÜNAY, Cevdet İlhan, Türk Borçlar Kanunu Şerhi [Commentary on the Turkish Code of Obligations], Ankara 2012, p. 794.; YAVUZ, p. 34.

⁵⁶ ÖZDEMİR, p. 373.; ARAL/AYRANCI, p. 76.; ÇETİNER, p. 101.

⁵⁷ GÜMÜŞ, p. 37.; ÇETİNER, p. 101.

⁵⁸ ARAL/AYRANCI, p. 77.

⁵⁹ See The Turkish Code of Obligations article 208/III.

⁶⁰ T.C. ADALET BAKANLIĞI [THE REPUBLIC OF TURKEY MINISTRY OF JUSTICE], p. 294.

When the thing subject to sale is delivered to an independent carrier for the good of the buyer, the responsibility of the seller ends⁶¹. In addition, what is meant by distant sale in the law is not necessarily the sending of the sold thing to a different geography like a different province or a different district. It refers to any situation where the sold thing cannot be delivered by hand. In this sense, distant sales contracts can be implemented even for transactions in the same city within the framework of the article 208/III of the Turkish Code of Obligations.

For instance, a seller may sell three cans of oil to three buyers, and sell all of them via the same courier company. There is no problem if there is a distinctive mark on each can of oil. When the cans of oil are delivered to the courier company, the risk passes to the buyers. However, if the cans of oil are put in a single parcel package and are delivered to the courier company without any distinctive mark on them, the risk does not pass to the buyers if their consents to it are not obtained in advance. If the cans of oil are carried in a single parcel package in accordance with the consents of the buyers and damage occurs as a result, the buyers must bear the damage together in proportion to their shares in the goods⁶².

PART II: THE PASSING OF RISK WITHIN THE FRAMEWORK OF CISG

A. GENERAL

The time, conditions, and exceptions of passing of risk were addressed in part 1 in the light of both the Turkish national law and CISG. This part will mostly discuss the specific regulations in CISG.

The article 90/V of the Constitution of the Republic of Turkey⁶³ contains the provision, *“International agreements duly put into effect have the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional. In the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail.”* That clearly shows that international agreements duly put into effect have the same weight and importance as the Laws of the Republic of Turkey.

Turkey became a party to CISG in 2010, and put it into effect in 2011. CISG has the force of law pursuant to the article 90/V of the Constitution of the Republic of Turkey. It is in effect in harmony with other articles in the Turkish national law.

A provision not existing in the current regulation has been added to the third clause of the Turkish Code of Obligations in regard to the passing of risk. Accordingly, *“When the seller sends the sold to a place other than the place of performance upon the request of the buyer, the risk and benefit pass to the buyer at the moment when the sold is delivered to the carrier”*. With the addition of this provision, an attempt was made to establish a parallelism with the 67th article of *“The United Nations Convention*

⁶¹ **SEVÓN Lief**, *Passing of Risk*, p. 6, <http://www.cisg.law.pace.edu/cisg/biblio/sevon3.html>, (Accessed on 27.04.2014).; **ROMEIN Annemieke**, *The Passing of Risk A comparison between the passing of risk under the CISG and German law*, p. 7, <http://www.cisg.law.pace.edu/cisg/biblio/romein.html> (Accessed on 28.04.2014).

⁶² **ARAL, Fahrettin**, *Kötü İfa [Malperformance]*, Ankara 1985, p. 85.

⁶³ Official Gazette Law no.: 2709 Acceptance Date: 7.11.1982.

on *Contracts for the International Sale of Goods*" (CISG⁶⁴; The Vienna Convention) regarding the passing of risk in the sales contracts giving birth to sending obligation and the paragraph 447 of BGB⁶⁵.

Within the framework of CISG, while the time of passing of risk in the sales contracts involving sending obligation is the time of delivery of the first goods to the independent carrier⁶⁶, the place of location is generally the workplace of the carrier⁶⁷. For example, when a product manufactured in Turkey is to be exported to Russia, the risk occurring during exportation starts to be under the responsibility of the buyer as of the time when the seller delivers the product to the carrier. The buyer shall be obliged to pay the price to the seller even if the product perishes after it is delivered to the carrier.

If the subject of the sales contract is obligation for non-substitutable goods and no distinction and identification to the contract⁶⁸ have been performed during delivery to the carrier, the risk *"does not pass to the buyer until the goods are clearly identified to the contract, whether by markings on the goods, by shipping documents, by notice given to the buyer or otherwise."* However, it passes to the buyer when distinction is made. The seller shall be responsible for the risks occurring before their passage to the buyer⁶⁹.

Since the Turkish Code of Obligations and Convention provisions function as auxiliary rules of law for the sales contract, the parties may modify, as they desire, the obligations included in the Turkish Code of Obligations or the Convention (e.g. manner, place, and time of performance of such obligations) within the framework of the principle of freedom of contract. They may also include some other obligations not included in the Turkish Code of Obligations and the Convention in their contract⁷⁰.

CISG Article 6 is as follows: "The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions." Thanks to this possibility provided by CISG for the parties, the contract types which the parties prefer to use in regard to the passing of risk most within the framework of the principle of freedom of contract (apart from CISG) are CIF and FOB-type sales contracts. In this respect, these two contract types are explained in general terms below.

⁶⁴ It was published in the official gazette dated 07.04.2010 and numbered 27545 in Turkey, and entered into force on 01.08.2011.

⁶⁵ ÖZDEMİR, p. 373.

⁶⁶ VON HOFFMANN, Bernd, Passing of Risk in International Sales of Goods, p. 11, <http://www.cisg.law.pace.edu/cisg/biblio/vonhoffmann.html>, (Accessed on 28.04.2014).; MINEIRO Michael C., CISG and the Final Frontier: Contracting for the International Sale of Goods that Originate from, Are Delivered to, or Transit through Outer Space and the Passage of Risk, p. 5, <http://www.cisg.law.pace.edu/cisg/biblio/mineiro.html>, (Accessed on 28.04.2014).

⁶⁷ ACAR, Hakan, Uluslararası Satışlarda Hasar Riskinin Geçişi [The Passage of Risk in International Sales], İstanbul 2009, p. 88.

⁶⁸ CISG does not contain provision concerning how to make the said distinction and identification. Thus, that shall be determined freely by the contracting parties in accordance with mutual and consentaneous declarations of intention.

⁶⁹ ATAMER, Yeşim, Uluslararası Satım Sözleşmelerine İlişkin Birleşmiş Milletler Anlaşması (CISG) Uyarınca Satıcının Yükümlülükleri ve Sözleşmeye Aykırılığın Sonuçları [The Obligations of the Seller and the Results of Noncompliance with Contract As Per the United Nations Convention on Contracts for International Sale of Goods (CISG)], İstanbul 2005, p. 266.

⁷⁰ ERDEM, Ercüment, Milletlerarası Mal Satım Sözleşmeleri Hakkında Birleşmiş Milletler Sözleşmesi (Viyana Satım Sözleşmesi) [The United Nations Convention on Contracts for International Sale of Goods (Vienna Sales Convention)], Volume XVI, Issue 3, Batider, 1992, p. 67.

C. The Passing of Risk in CIF and FOB Sales

a. The Passing of Risk in CIF Sales

CIF is the abbreviation of “*Cost, Insurance, Freight*”⁷¹. As a rule, the term CIF can be used in only those sales contracts where transportation is by sea and inland waterway⁷².

In practice, the term CIF is used with the name of the port of arrival added to it. For examples, if the goods are to be sent to the Port of Venice, it reads “*CIF-Venice*”⁷³.

If the seller wishes to send the goods to the port of arrival by CIF, he has to pay all necessary expenses (Cost, Insurance, and Freight). However, as of the time when the goods pass through the ship’s rail⁷⁴ in the port of loading, risks of loss pertaining to the goods and increases to occur in expenses are transferred to the buyer⁷⁵.

b. The Passing of Risk in FOB Sales

FOB is the abbreviation of “*Free On Board*”. In sales involving this term, the delivery obligation of the seller is fulfilled when the goods go beyond the ship’s rail in the pre-determined port of loading⁷⁶. FOB is not only used in overseas trade, and it has the same importance in commercial activities involving air, land, and railway⁷⁷.

The seller has to report, along with all details, that the goods have been loaded⁷⁸. The responsibility of the buyer is to make a carriage contract at his own cost for the carriage of the goods from the pre-determined port of loading and to undertake

⁷¹ **Freight:** The fee paid to a shipping company for the transportation of goods by sea and river. See tr.wikipedia.org/wiki/Navlun, (Accessed on 08.04.2014).

⁷² **KUYUCU, Aslihan Sevinç**, Incoterms (International Commercial Terms), Istanbul 2011, p. 128. Although the rule prescribes that, CIF is also used in the sales contracts where transportation is by land. In the case subject to the resolution of the **19th Civil Chamber of the Supreme Court dated 24.3.1995**, the goods subject to sale were loaded on train by the seller on Slovakia. The sales contract between the parties contained the term CIF. The Supreme Court stated that “CIF-Kapikule” was mentioned in the sales confirmation and letter of credit following price determination, and thus place of arrival was Kapikule-Turkey; the term CIF indicated that the place of performance was the place of loading, and in that case, the place of performance was Slovakia as the goods were loaded on the train in Slovakia. In this way, the Supreme Court accepted that the term CIF could be used in the sales contracts where transportation would be by road rather than sea or inland waterway. **ŞANLI, Cemal/EKŞİ, Nuray**, Uluslararası Ticaret Hukuku [International Commercial Law], Istanbul 2006, quoted from p. 3. **The Supreme Court 19th Civil Chamber, File: 1994/6589, Resolution: 1995/2726, Date: 24.3.1995**. See KBJODB. (Accessed on 06.05.2014).

⁷³ **KUYUCU**, p. 128.

⁷⁴ **Ship’s rail:** Railing, shielding, protection areas, fences constituting the edges of a ship (maritime language) See www.uludagsozluk.com/k/kupeste/, (Accessed on 06.05.2014).

⁷⁵ http://www.hititglobal.com/index.php?option=com_content&view=article&id=14:teslim-ekilleri&catid=1:bilgibankasi&Itemid=6, (Accessed on 06.05.2014).

⁷⁶ **KUYUCU**, p. 94.

⁷⁷ **KUYUCU**, p. 95.; In the case subject to the resolution of **The Supreme Court 11th Civil Chamber dated 10.11.1987**, the plaintiff sent furniture to the buyer abroad. The furniture burned away during transportation by the defendant’s articulated lorry. The sales contract included the term FOB. The plaintiff demanded the indemnification of TL 3,098,956- by the defendant transporter due to the damage occurring in the goods because of transportation. The Supreme Court stated that in the sale contracts using the term FOB, benefit and risk would belong to the buyer as of the date when the goods subject to sale were loaded on the transport vehicle: **ŞANLI/EKŞİ**, quoted from p. 118.

⁷⁸ http://www.hititglobal.com/index.php?option=com_content&view=article&id=14:teslim-ekilleri&catid=1:bilgibankasi&Itemid=6, (Accessed on 08.03.2014).

all kinds of losses and damages to occur to the goods from the time they are received until they reach the point of arrival⁷⁹.

CONCLUSION

The issue of passing of risk emerges in the period between the formation and the performance of the sales contract. Indeed, what is meant by the passing of risk is determination of the party that is to be exposed to the risks coming out as a result of the sold thing's perishing, getting lost, or deteriorating after the formation and before the performance of the contract due to reasons not attributable to the seller.

The passing of risk in sales contract was regulated in the article 183 of the Code of Obligations no. 818. As per the article, the risk passed to the buyer as of the formation of the contract. However, both the continuous judicial opinions of Federal Supreme Court of Switzerland and the Turkish Law doctrine criticized the contractual principle of this law negatively. Such criticisms focused on that the contractual principle was against the Swiss/Turkish legal system, and reduced the seller's efforts to protect and take care of the sold until its delivery. Eventually, the regulation introduced by the Turkish Code of Obligations no. 6098 prescribed that risk in sales contracts would belong to the seller until the transfer of possession (delivery) in the sale of movables, and until the time of registration in the sale of immovables.

Moreover, to the contrary of the Code of Obligations no. 818, the Turkish Code of Obligations no. 6098 eliminated the distinction between obligation for substitutable goods and obligation for non-substitutable goods in regard to the passing of the benefit and risk. They were replaced by the concept of obligation to be sent. In parallel with the Vienna Convention, the general perspective adopted in the Turkish Code of Obligations is that the benefit and risk pass when the subject of sale is delivered to the first seller.

The conclusion to be drawn from CISG and the Turkish Code of Obligations is that the benefit and risk of the sold movable belong to the seller until the transfer of possession. There are two important preconditions regarding the passing of the risk: transfer of possession, and default of the buyer. Accordingly, when the buyer lapses into default in taking over the possession of the sold, the benefit and risk shall belong to the buyer as of the time of default.

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⁷⁹ http://www.hititglobal.com/index.php?option=com_content&view=article&id=14:teslim-ekilleri&catid=1:bilgibankasi&Itemid=6, (Accessed on 08.03.2014).

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