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RISK ALLOCATION IN INTERNATIONAL, EUROPEAN, AND TURKISH BUSINESS LAW

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Abstract

There are differences in risk allocation in agreements under the civil law and common law systems. However, similar case law on overseas sales in international business law remain apparent. Therefore, INCOTERMS has a significant impact in this regard. In addition, this effect is sometimes seen in determining the ownership rights as well. The question here is how can the same result from the viewpoint of the passing of risk and property be obtained for all parties in international business law. In this study, the Author used a comparative method by comparing the French, German, Turkish, and English laws, and the United Nations Convention on Contracts for the International Sale of Goods[2] *on risk allocation in the sale of goods. Also, case laws were analyzed and compared to find out the main differences in practice. In addition, the effects of the use or absence of INCOTERMS in practice were discussed. As a result, it is better to utilize the* Free on Board; and Cost, Insurance and Freight *INCOTERMS, as well as the jurisdiction clauses in their contracts for business parties to reach the same result in terms of the passing of risk and property.*

Keywords: *Risk Allocation, Ownership, INCOTERMS.*

A. Introduction

Risk allocation between the parties and the arrangements they make in their contracts in this regard is of great importance for the parties. As a result, the parties to an agreement want to minimize risk in their commercial relations. Therefore, INCOTERMS

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[2] Hereinafter referred to as 'CISG'. United Nations Convention on Contracts for the International Sale of Goods (adopted 11 April 1980, entered into force 1 January 1988) 1489 UNTS 3 (CISG).

are the most widely used trade terms related to risk allocation. Additionally, INCOTERMS plays an important role in determining ownership rights. The question here is how the same result from the viewpoint of the passing of risk and property can be reached for all parties in international business law.

The main purpose of the study is to reach the same result from the viewpoint of the passing of risk and property transfer in international business law. Therefore, CISG, the Sale of Goods Act (1979),[3] *Türk Borçlar Kanunu* (Turkish Code of Obligations),[4] *Bürgerliches Gesetzbuch* (German Civil Code),[5] *Code Civil Français* (French Civil Code),[6] the Uniform Law on the International Sales Act 1967 of Goods,[7] *Türk Ticaret Kanunu* (Turkish Commercial Code),[8] *Türk Medeni Kanunu* (Turkish Civil Code),[9] and *Handelsgesetzbuch* (German Commercial Code)[10] are compared to point out the differences. Additionally, case law was used to identify the main differences in practice.

The CISG was analyzed because of the nature of the Convention, which closely connects to general questions of contract law from a truly international perspective. In addition, Turkey, France, and Germany are the participating countries of the CISG. CISG is a part of *lex mercatoria*, and the harmonization of laws can be affected by the CISG. Therefore, this was also analyzed in this study.

In addition, regarding risk allocation in overseas sales, INCOTERMS are the most widely used trade terms related to risk allocation. However, the absence or presence of INCOTERMS in contracts leads to different interpretations in different jurisdictions. In this respect, case laws were compared to determine the main differences in practice.

[3] Hereinafter referred to as 'SGA'. Sale of Goods Act 1979 (SGA).

[4] Hereinafter referred to as 'TBK'. Turkish Code of Obligations, Law No: 6098, Date of Acceptance: 11.01.2011, Date and Issue of Official Gazette: 04.02.2011/27836 (TBK).

[5] Hereinafter referred to as 'BGB'. German Civil Code in the version promulgated on 2 January 2002 (Federal Law Gazette [Bundesgesetzblatt] I page 42, 2909; 2003 I page 738), last amended by Article 4 para. 5 of the Act of 1 October 2013 (Federal Law Gazette I page 3719) (BGB).

[6] Hereinafter referred to as 'CCF'. French Civil Code (Version of 6 February 2023) (CCF).

[7] Hereinafter referred to as 'Uniform Law on Sales'. Uniform Laws on International Sales Act 1967 (Uniform Law on Sales).

[8] Hereinafter referred to as 'TTK'; Turkish Commercial Code, Law No: 6102, Date of Acceptance: 13.01.2011, Date and Issue of Official Gazette: 14.02.2011/27846 (TTK).

[9] Hereinafter referred to as 'TMK'; Turkish Civil Code, Law No: 4721, Date of Acceptance: 22.11.2001, Date and Issue of Official Gazette: 08.12.2001/24607 (TMK).

[10] Hereinafter referred to as 'HGB'. German Commercial Code in the revised version published in the Bundesgesetzblatt (BGBl., Federal Law Gazette), Part III, Section 4100-1, Book 1, as amended by Article 11 of the Act of 18 July 2017 (Federal Law Gazette Part I p. 2745), Book 2, as amended by Article 14 of the Act of 22 December 2020 (Federal Law Gazette Part I p. 3256), Book 3, as amended by Article 5 of the Act of 7 August 2021 (Federal Law Gazette Part I p. 3311), Book 4, as amended by Article 184 of the Act of 19 June 2020 (Federal Law Gazette Part I p. 1328) and Book 5, as amended by Article 184 of the Act of 19 June 2020 (Federal Law Gazette Part I p. 1328) (HGB).

B. Problem Formulation

There are three questions within the scope of the problem formulation: first, what are the differences in risk allocation between civil law and common law systems? Second, what are the effects of INCOTERMS on international business law? Third, how do contracting parties reach the same result in passing risk and property in international business law?

C. Methodology

The Author followed the method of comparative research and analysis of case law. First, the Author compared normative law. To do so, French, German, Turkish, and English laws and CISG are compared in respect of the passing of risks and property and found similarities and differences between them.

Secondly, the Author looked for case comparisons to see how these norms are used and interpreted in practice and to find out the main differences in different jurisdictions. Moreover, the Author compared case law to see the interpretations in the absence or presence of INCOTERMS in contracts and to find the main differences in practice in different jurisdictions.

The Author performed normative research, basing the Author's findings on comparing the legislative instruments with occasional examples from case law. This is not empirical research; therefore, the Author focused on mapping differences in the legal authorities and making conclusions based on the law.

D. Discussion and Results

1. Risk Allocation and INCOTERMS

The meaning of risk can be expressed in different forms in a sales contract, such as physical loss, spoliation, or damage to the goods sold. However, the common characteristic in all these cases is where the loss or damage is accidental, thus not caused by an act or omission of one of the parties. As an example, it can be theft or careless handling of the goods by the carrier.[11]

Passing the risk in the contract for the sale of goods is very important in a global economy where international sales are increasing. Moreover, any product we

[11] Zoi Valioti. 'Passing of Risk in International Sale Contracts: A Comparative Examination of the Rules on Risk Under the United Nations Convention on Contracts for the International Sale of Goods (Vienna 1980) and INCOTERMS 2000' [2004] (2) Nordic Journal of Commercial Law 7-8.

consume in our countries today, perhaps by being processed in more than one country, reaches our hands by passing through many different distribution channels. In such cases, it is essential to determine who is liable for the loss that may occur in cases such as the sinking of the ship carrying the goods, the breakdown of the aircraft during the transportation of the goods, or a fire in a warehouse. Either the buyer or the seller is liable for the damage. The important thing is which party is liable for what kind of damages in which case, that is, whether the performance obligation continues.[12]

Trade terms are standardized terms used in sales contracts that describe the time, place, and manner of the transfer of goods from the seller to the buyer.[13] International trade terms are designed to define the obligations of the seller and the buyer regarding the point of delivery, procurement of transport documents, contract of insurance, and other documents necessary for the export and import of the cargo. Their purpose was to allocate the responsibilities between the parties, usually in the carriage of goods contracts.[14] The preference for trade terms is explained by the fact that mercantile customs consist of usages and practices that have evolved over centuries and, hence, have proven themselves economically efficient by having stood the test of time.[15] So, mercantile customs are the basis of trade terms, and merchants developed trade terms for merchants.[16]

When we look at the historical process, trade terms, especially the most common ones: Cost, Insurance, and Freight;[17] and Free on Board[18] were interpreted differently in different countries, leading to misunderstandings, conflicts, and problems in the performance of the contract.[19] Six international trade terms were codified in the pre-INCOTERMS edition in 1923 and applied in three countries as a guide. At the Berlin Congress in 1925, the idea that uniform rules should be

[12] Damla Sarıaslan, 'Satım Sözleşmesinde Hasarın Geçişi' (Master Thesis, Ankara University 2014) 1.

[13] Fézer Tamas, 'International Business Law: Transportation' (2016) (1) E-learning System of the University of Debrecen.

[14] Zoi Valioti (n 11) 6.

[15] I Karibi-Botoye, N Ejims Enwukwe and Blessing B Timothy. 'An Appraisal of The Passing of Risk in The International Sale of Goods Under International Chamber of Commerce Terms (Incoterms)' (2022) 2(2) The Journal of International Trade Law & Contemporary Issues 1.

[16] Juana Coetzee, 'Incoterms and the Lex Mercatoria' (2010) 1(12) Cadernos da Escola de Direito e Relações Internacionais da UniBrasil 75.

[17] Hereinafter referred to as 'CIF'.

[18] Hereinafter referred to as 'FOB'.

[19] I Karibi-Botoye, N Ejims Enwukwe and Blessing B Timothy (n 15) 6.

introduced to eliminate non-uniformity and complexity was put forward. As a result, in 1936, the International Chamber of Commerce published the INCOTERMS, providing a standardized understanding of international trade terms.[20] The INCOTERMS rules, first published in 1936, were revised in 1953, 1967, 1976, 1980, 1990, 2000, 2010, and most recently, in 2020, per changing conditions and needs. As an example, at a time after the second World War, the use of train transportation for the carriage of goods was on the rise, and the International Chamber of Commerce went into action in reviewing the INCOTERMS to suit the growing use of train carriage. Examples can be replicated in this manner.[21] INCOTERMS reflect the known trade customs and practices in international commerce and are regularly updated to adapt to changing commercial practices.[22] There is no doubt in the doctrine that INCOTERMS constitute a critical component of the *lex mercatoria*.[23] However, considering these are flexible legal rules, previous versions remain applicable nonetheless. In order to eliminate possible conflicts over which version is valid, this should be stated in the contract for which year's rules the parties intend to apply.[24] The version that came into force in 2020 addresses 11 delivery methods, four of which can only be used for sea and inland waterway transport and seven of which can be used in any mode of transport.[25] Also, with the revisions, INCOTERMS has become suitable for domestic business transactions as well as international business transactions.[26] According to the INCOTERMS 2020, types of delivery available in all modes of transport include: Ex-Works;[27] Free Carrier;[28] Carriage Paid To;[29] Carriage and Insurance Paid To;[30] Delivered at

[20] Özge Elmas Günaydın, 'Incoterms 2000, 2010 ve 2020 Revizyonlarına Genel Bakış' [2021] 11(2) Çankırı Karatekin Üniversitesi İktisadi ve İdari Bilimler Fakültesi Dergisi 758.

[21] I Karibi-Botoye, N Ejims Enwukwe and Blessing B Timothy (n 15) 4.

[22] I Karibi-Botoye, N Ejims Enwukwe and Blessing B Timothy (n 15) 13.

[23] Çiçek Özgür, 'Milletlerarası Mal Satım Sözleşmelerinde Hasarın İntikali' (Master Thesis, Erciyes University 2012) 74.

[24] Gülçin Polat. 'Uluslararası Ticarette Risk Yönetimi Bağlamında Incoterms 2020 Kuralları Üzerine Bir Değerlendirme' (2021) 23(2) Afyon Kocatepe Üniversitesi İktisadi ve İdari Bilimler Fakültesi Dergisi 219.

[25] Gülçin Polat (n 24) 211.

[26] S Özgür Başlangıç. 'Main Features of Changes in INCOTERMS 2010' (2015) 4(5) Manas Sosyal Araştırmalar Dergisi 77.

[27] Hereinafter referred to as 'EXW'.

[28] Hereinafter referred to as 'FCA'.

[29] Hereinafter referred to as 'CPT'.

[30] Hereinafter referred to as 'CIP'.

Place;[31] Delivered at Place Unloaded;[32] and Delivered Duty Paid.[33] On the other hand, types of delivery available in sea and inland waterway transport include: Free Alongside Ship;[34] Free on Board; Cost and Freight;[35] and Cost, Insurance and Fright.[36]

Over the years, INCOTERMS have evolved to address the merchants' needs more effectively and efficiently than the default law of contracts.[37] INCOTERMS are the most widely used trade terms published by the International Chamber of Commerce.[38] They are used in 90% of international sales contracts.[39] In practice, trade transactions are made between parties in countries with different laws, systems, customs, *etc*., thus there is always a high possibility of disputes over the terms of a sales contract. In addition, it is inefficient to write all the obligations agreed upon between the parties in the contract every time it is concluded.[40] Therefore, the purpose of INCOTERMS is to provide a set of international rules for interpreting the chief terms used in foreign trade contracts, for the optional use of businesspeople who prefer the certainty of uniform international rules to the uncertainties of the varied interpretations of the same terms in different jurisdictions. In addition, INCOTERMS offer stability and predictability to agreements for the international sale of goods by allowing the parties to incorporate standardized trade terms in their contracts.[41] The INCOTERMS rules determined by the International Chamber of Commerce determine the distribution of the costs arising from the transportation and delivery processes of the goods subject to international trade, the risk of damage and loss that may occur concerning the goods in question, and the obligations and liabilities regarding insurance, as well as information and customs procedures between the seller and the buyer. These rules facilitate trade by eliminating the uncertainties about the issues they cover and preventing the loss of

[31] Hereinafter referred to as ‘DAP’.
[32] Hereinafter referred to as ‘DPU’.
[33] Hereinafter referred to as ‘DDP’.
[34] Hereinafter referred to as ‘FAS’.
[35] Hereinafter referred to as ‘CFR’.
[36] Gülçin Polat (n 24) 212.
[37] Karibi-Botoye, Enwukwe and Timothy (n 15) 1.
[38] Fezer Tamas (n 13).
[39] Gülçin Polat (n 24) 211.
[40] Jin-Hwan Kim. 'The Comparative Study of Incoterms 2020 and 2010 in International Physical Distribution' (2022) 20(4) Journal of Distribution Science 102.
[41] William V Roth, Jr., and William V Roth III. 'Incoterms: Facilitating Trade in the Asian Pacific' (1997) 18(3) University of Pennsylvania Journal of International Law 732.

time that occurs if they are negotiated individually. Also, they address only certain aspects of international trade and complement the sales contract between the buyer and the seller.[42] Hence, they do not regulate all the aspects of a sales contract and only apply to the primary obligation of delivery and related issues, like risk, costs, and insurance. Also, it is unclear whether they are capable of enjoying a form of autonomous application independently of party agreement. However, general acceptance is that INCOTERMS are only applicable when used as a contractual term in a sales contract.[43]

2. CISG and Domestic Law Comparisons

Almost every national legal system includes rules on the passing of risk. Therefore, such an essential part of sales law cannot fall outside the scope of CISG, one of the most successful attempts to harmonize international sales of goods law.[44] CISG is a part of *lex mercatoria*, and the harmonization of laws can be by the effect of CISG. Turkey, France, and Germany are participating countries in the CISG.[45] Parties can exclude the application of CISG. If they do not, CISG is applied. However, even if parties wish to apply CISG, that cannot be possible for some kinds of goods in practice, according to article 2 of the CISG.[46] Therefore, as an example, if there is an aircraft trade, the Convention does not apply as the Russian Federation Chamber of Commerce and Industry states it.[47] However, England has not yet ratified CISG[48] distinguishing it from Turkey, Germany, and France.

According to the old article of TBK, the risk of loss or damage to the goods was passed to the buyer at the conclusion of the contract. Therefore, a buyer is responsible even before delivery after the contract is concluded. It is also similar to CCF. Therefore, according to article 1196 of CCF, the risk passes to the buyer when

[42] Gülçin Polat (n 24) 211.
[43] Juana Coetzee (n 16) 78.
[44] Zoi Valioti (n 11) 3.
[45] Albert H. Kritzer, 'CISG: Table of Contracting States' (Gizem Alper ed, *Pace-IICL*, 2022) < https://iicl.law.pace.edu/cisg/page/cisg-table-contracting-states > accessed 5 February 2023.
[46] UNCITRAL, Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods (United Nations 2012) 18 < https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/cisg-digest-2012-e.pdf > accessed 3 February 2023.
[47] UNCITRAL (n 46) 19; Tribunal of International Arbitration at the Russian Federation Chamber of Commerce and Industry, 255/1996, 2 September 1997.
[48] Qi Zhou. "The CISG and English Sales Law: An Unfair Competition" in Larry A DiMatteo (ed), *International Sales Law: A Global Challenge* (Cambridge University Press 2014) 669.

the contract is concluded. In other words, when the thing and the price have been agreed upon as a rule.[49] It can be similar to the SGA. The reason for that can be explained by considering two sections of SGA. First, considering section 20 (1) of the SGA, the risk passes to the buyer with the transfer of property as a rule in England. Secondly, considering section 18 of the SGA, property can be passed to the buyer when the contract is concluded, and the buyer can be an owner even before payment. Therefore, if the goods burn down before the buyer has taken them away, the buyer is still responsible for payment, as stated in Tarling v. Baxter case. Thus, the buyer was still liable to pay the price because he became the owner when the contract was made, and it was immaterial that no delivery of the goods had been made.[50] However, a general rule is that the title to property transfers when the parties intend it to transfer, according to section 17 of the SGA.[51] That is about the freedom of contract principle, in the Author's opinion. It is to be noted that. if there is no intent, it is solved by applying section 18 of the SGA. So, it can be at the time of the contract's conclusion or later, according to section 18 of the SGA.[52] Hence, the Author is in the opinion that there is a difference in the passing of the risk from TBK, CISG, and BBG.

Considering article 208 (1) of the TBK, a seller is responsible for the risks up to and until the transfer of possession. Justification of article 208 specifies that the risk of damage passes to the buyer at the time of delivery, according to the CISG. That is why article 208 is considered the time of the transfer of possession.[53] In addition, according to article 446 of the BGB, the risk of accidental destruction and accidental deterioration passes to the buyer upon delivery of the thing sold, and CISG has similar regulations in article 69.[54]

In addition, considering article 446 of the BGB, if the buyer fails to accept delivery, this is equivalent to delivery. According to the justification of article 208 of

[49] Majid H K Al-Anbaki, 'Passing of property in C.I.F. & F.O.B. contracts (comparative study)' (Ph.D. thesis, University of Glasgow 1978) 246.

[50] Nicholas Kouladis. *Principles of Law Relating to International Trade* (Springer 2006) 157-158; *Tarling v Baxter* (1827) 6 B & C 360; 108 ER 484.

[51] Scottish Law Commission. 'Sale of Goods Forming Part of a Bulk' (Scot Law Com No 145, 1993) 3.

[52] Scottish Law Commission (n 51) 20.

[53] The Government Bill on the Turkish Code of Obligations and Report of the Justice Commission, (1/499), 2008 12.

[54] Bahadır Demir. 'Transition of Damage in Contract of Sale' [2014] 3(5) International Journal of Social Sciences 27.

the TBK, Article 208 (2) of the TBK is similar to this article. According to article 447 of the BGB: "If the seller, at the request of the buyer, ships the thing sold to another place than the place of performance, the risk passes to the buyer as soon as the seller has handed the thing over to the forwarder, carrier or other person or body specified to carry out the shipment." Therefore, it is also similar to article 208 (3) of the TBK, according to the justification of article 208 of the TBK. In addition, it is similar to article 67 of the CISG.[55]

CISG, BGB, and TBK have similar regulations, unlike CCF and SGA. With that being said, the Author believes that TBK and BGB regulations are harmonized by the effect of CISG.

3. Effects of Presence or Absence of INCOTERMS in Contracts

Trade terms are standardized terms used in sales contracts that describe the time, place, and manner of a transfer of goods from the seller to the buyer. INCOTERMS are the most widely used trade terms as published by the International Chamber of Commerce.[56]

CISG incorporates INCOTERMS through article 9(2). Even if the usage of INCOTERMS is not global, the fact that they are common in international trade means that they are incorporated through article 9(2), as the US Court of Appeals for the Fifth Circuit stated.[57] Therefore, if parties do not put specific INCOTERM in their contracts, interpretation can be made by using article 8 of the CISG to find which version of a term the parties reasonably meant or by using article 9 of the CISG by providing evidence that a certain standard of trade terms definitions is a trade custom.[58] In addition, applicable national laws fill the gaps according to article 7(2) of the CISG, and the national law so applicable may look to the INCOTERMS for guidance on the meaning of trade terms.[59] However, opinions differ as to

[55] The Government Bill on the Turkish Code of Obligations and Report of the Justice Commission,(1/499), 2008 12.

[56] Fezer Tamas (n 13).

[57] '*BP Oil Int'l, Ltd. v. Empresa Estatal Petroleos de Ecuador*, 332 F.3d 333 (5th Cir. 2003).

[58] Camilla Baasch Andersen. "Macro-Systematic Interpretation of Uniform Commercial Law: The Interrelation of the CISG and Other Uniform Sources" in Andre Janssen and Olaf Meyer (eds). *CISG Methodology* (Sellier 2009) 251.

[59] Johan Erauw. "Observations on passing of risk" in Franco Ferrari, Harry Flechtner, and Ronald A. Brand (eds). *The Draft Uncitral Digest and Beyond: Cases, Analysis and Unresolved Issues in the UN Sales Convention* (Sellier 2004) 304.

whether INCOTERMS amount to an international customary law.[60] Nevertheless, on the other hand, CISG is a part of *lex mercatoria*, and there is no doubt in the doctrine that INCOTERMS constitute a critical component of the *lex mercatoria*.[61]

Moreover, if the parties do not use the jurisdiction clause, the place of jurisdiction would be determined by considering article 31 of the CISG. However, in terms of European Union[62] member states, there is a difference here. Under article 5 of the Brussels, I Regulation, it has been held that article 31 of the CISG can no longer serve as a basis for jurisdiction. As an example, if they use a price-delivery term (such as a term defined in the INCOTERMS), such a term defines the place of performance and excludes the Convention's rule[63] as stated in the decision of the Paris Court of Appeal.[64] Also, the German Supreme Court rendered a similar interpretation in 2012. Therefore, INCOTERMS can exclude article 31 of the CISG and defines the place of performance according to the decision of the German Federal Supreme Court. In this case, the legal place of performance would have been South Korea, according to article 31 of the CISG. However, there was the DDP as an INCOTERM, and the place of performance was changed because of that, and it was in the jurisdiction of Germany. Therefore, INCOTERMS can exclude article 31 of the CISG.[65] Trade terms generally determine who takes the economic risk of providing carriage, and contracts including such trade terms generally "involve[ing] carriage" in the contract in the language of article 67 of the CISG.[66] FOB, CIF, CFR, FCA and list price ex works are found to be consistent with article 67 of the CISG in some case laws.[67]

INCOTERMS were regulated in the old TTK, and if business partners did not put a specific INCOTERM in their contracts, overseas sales would default to FOB or CIF INCOTERMS. There is no equivalent article in the new TTK to the old TTK.[68] However, the Turkish Court of Cassation referred to this repealed article of old TTK and considered FOB and CIF INCOTERMS in one case in 2013. Therefore, if

[60] Camilla Baasch Andersen (n 58) 251.
[61] Çiçek Özgür (n 23) 74.
[62] Hereinafter referred to as 'EU'.
[63] UNCITRAL (n 46) 132.
[64] UNCITRAL (n 46) 134; Paris Court of Appeal, 1st Chamber, Section D, 97/25212, 18.03.1998.
[65] German Federal Supreme Court, VIII ZR 108/12, 07.11.2012.
[66] Johan Erauw (n 59) 301.
[67] UNCITRAL (n 46) 321.
[68] The Government Bill on the Turkish Commercial Code and Report of the Justice Commission,(1/324), 2007 82.

business partners do not put a term on their contracts, the overseas sale is treated as in FOB and CIF according to this repealed article of old TTK and as a rule in INCOTERMS from the viewpoint of existing TTK as stated in the decision of Turkish Court of Cassation in this case. Therefore, the risk of loss or damage to the goods passes when the goods are shipped according to the FOB and CIF INCOTERMS.[69]

From the viewpoint of the passing of risk in overseas sales, the French jurisprudence follows a different path from the CCF. The property and risks pass to the buyer at the port of loading (shipment) as in the case of FOB and CIF INCOTERMS, according to the well-known practice in French jurisprudence. This opinion is the most common one in French jurisprudence. Therefore, property transfer entails the transfer of risk in the thing, as stated in article 1196 of the CCF.[70] The Author found that this practice in French jurisprudence is similar to the Turkish Court of Cassation's interpretation because FOB and CIF INCOTERMS are considered in terms of the passing of the risks and property in the absence of the intentions of the parties.[71]

Trade terms are generally interpreted with reference to trade usage or even customary law by German Courts. However, these usages tend to differ from one place to the other and from one branch of trade to another, leading to divergent and contradictory interpretations. It is possible to interpret a trade term with reference to INCOTERMS by German Courts.[72] In the case of the U.S. District Court for the Southern District of New York, the plaintiff's expert stated that a clause FOB without specific reference to INCOTERMS was to be interpreted according to INCOTERMS simply because the INCOTERMS include a clause FOB according to the decision of the German Federal Supreme Court. Conceding that commercial practice attains the force of law under section 346 of the HGB, the plaintiffs' expert concludes that the opinion of the German Federal Supreme Court amounts to saying that the INCOTERMS definitions in Germany have the force of law as trade

[69] 7th Civil Chamber of the Turkish Court of Cassation, 2013/659, 31.01.2013.
[70] Majid H K Al-Anbaki (n 49) 261-262.
[71] 7th Civil Chamber of the Turkish Court of Cassation, 2013/659, 31.01.2013.
[72] Juana Coetzee. 'INCOTERMS as a form of standardization in international sales law: an analysis of the interplay between mercantile custom and substantive sales law with specific reference to the passing of risk' (Ph.D. thesis, University of Stellenbosch 2010) 77.

custom.[73] Moreover, INCOTERMS exclude article 31 of the CISG and define the place of performance according to the decision of the German Supreme Court. Thus, the place of jurisdiction is determined according to the INCOTERMS.[74]

From the viewpoint of the passing of risk in overseas sales, English law differs the SGA, as the French judiciary and jurisprudence follow a different way from the CCF. According to article 97 of the Uniform Law on Sales, the risk shall pass to the buyer when delivery of the goods is effected in accordance with the provisions of the contract and the present law. This rule has been applied in England for a long time.[75] However, in the absence of evidence to the contrary, an English judge applies trade terms solely as defined in his own common law practices. In English law, a trade term is never an INCOTERMS unless it says so. Otherwise, it is a trade term as understood in common law.[76] In addition, England is not a party of CISG as distinct from France, Turkey, and Germany, and article 31 of the CISG cannot be evaluated regarding English law.

Turkish and French case law is similar, and if business parties do not put specific INCOTERMS in their contracts, the property and risks pass to the buyer, as in the case of FOB and CIF INCOTERMS, as stated in French and Turkish case laws. Also, German case law can be similar to them somehow, but Uniform Law on Sales is not like them in terms of INCOTERMS.

4. Effects of INCOTERMS on Passing of Title

INCOTERMS can exclude CISG from the viewpoint of the passing of the risks. Nevertheless, other issues like the passing of the property are out of the concept of INCOTERMS and even CISG.[77] Therefore, there is a need to consider national laws. When considering the transfer of risks and property relations in terms of CCF and SGA, it is also crucial for business partners in international business law. According to section 20 (1) of the SGA, the risk passes to the buyer with the transfer of property as a rule in England. Therefore, this relationship between the

[73] Richard Schaffer, Filiberto Agusti and Lucien J. Dhooge. *International Business Law and Its Environment* (9 edn, Cengage Learning, 2014) 141; *St. Paul Guardian Ins. Co. v. Neuromed Med. Sys. Support, GmbH*, No. 00 Civ. 9344, 2002 U.S. Dist. Lexis 5096 (S.D.N.Y. Mar. 26, 2002).

[74] German Federal Supreme Court, VIII ZR 108/12, 07.11.2012.

[75] Majid H K Al-Anbaki (n 49) 310-311.

[76] Camilla Baasch Andersen (n 58) 251.

[77] Richard Kayibanda, 'Passing of Property in Goods in Contracts of International Sale of Goods' [2013] 14(2) The Estey Centre Journal of International Law and Trade Policy 72-73.

passing of ownership and risks makes it necessary to deal with this issue in international business law. According to section 18 of the SGA, there is an unconditional contract for selling specific goods fit for their ordinary purpose. The property in the goods passes to the buyer when the contract is made. Accordingly, the buyer can be an owner even before payment. Therefore, if the goods burn down before the buyer has taken them away, the buyer remains responsible for payment, as stated in the *Tarling v. Baxter* case. In the foresaid case, the buyer was still liable to pay the price because he became the owner when the contract was made, and it was immaterial that no delivery of the goods had been made.[78] It is also similar to article 1196 of the CCF because the transfer of property time is the conclusion of the contract time. There is written about possibilities to transfer property, whether delivery made or not, in this section as stated in article 1196 of the CCF. However, it can be by delivering goods according to article 929 of the BGB or by transferring possession according to article 763 of the TMK. The general rule is that title to the property transfers when the parties intend it to transfer, according to section 17 of the SGA. It is also similar to article 1196 of CCF because it is written that the parties' may defer this transfer. Therefore, that is about the freedom of contract principle. However, if there is no intention, it solved by applying section 18 of the SGA. It can be at the time of the conclusion of the contract or later time according to the rules in this section.[79] However, goods must be specific for to transfer of property according to section 16 of the SGA because otherwise, the property cannot be transferred to the buyer unless and until the goods are ascertained.[80] It is also similar and necessary to transfer property with the principle of specification in German law,[81] as stated similarly in article 1585 of the CCF,[82] and the principle of certainty in Turkish law.

However, INCOTERMS are essential in determining the time of transfer of title because INCOTERMS determine the time of delivery of the goods. In addition, it can be possible, according to section 17 of the SGA, if the parties intend to

[78] Nicholas Kouladis (n 50) 157-158; *Tarling v Baxter* (1827) 6 B & C 360, 108 ER 484.
[79] Scottish Law Commission (n 51) 20.
[80] Scottish Law Commission (n 79) 3.
[81] Mary-Rose McGuire, "National Report on the Transfer of Movables in Germany" in Faber Wolfgang and Brigitta Lurger (eds). *National Reports on the Transfer of Movables in Europe: Germany, Greece, Lithuania, Hungary* (Sellier 2011) 18.
[82] Majid H K Al-Anbaki (n 49) 306.

transfer the property on the delivery of the goods.[83] Even if there is no intention, courts in England interpret the intentions of the parties in the face of INCOTERMS as it was in *Carlos Faderspiel & Co. SA* **v.** Charles Twigg *& Co. Ltd*. It was the shipment time in the case of FOB INCOTERMS by the application of section 18 of the SGA in this case.[84] In addition, risk and property pass simultaneously according to the CCF, and risk passes at the time of shipment as an example according to the FOB or CIF INCOTERMS, which can be possible in French jurisdiction.[85] In the Author's perspective, it is more important for German and Turkish business law because the deliveries of the goods are necessary for the transfer of ownership. As a good example, the transfer of risks and property time is accepted simultaneously as a shipment time as in FOB or CIF INCOTERMS in the Turkish Court of Cassation decision. So, it was important in this case because of the right to compensation.[86]

Using INCOTERMS can make it more similar also from the viewpoint of the passing of the property. Therefore, while it is important to determine delivery time from the viewpoint of ownership in German and Turkish laws, it can be similar by using INCOTERMS in English and French laws.

E. Conclusion

Risk allocation is regulated similarly in the CISG, BGB, and TBK as distinct from CCF and SGA. So, it is harmonized between BGB and TBK by the effect of CISG. However, on the other hand, we can see similar case laws on overseas sales in international business law, including common law.

Using the INCOTERMS is important from the viewpoint of determining ownership rights, especially from the viewpoint of BGB and TMK. So, INCOTERMS determine the time of delivery of the goods and the time ownership rights according to BGB and TMK. Moreover, risk and property pass simultaneously during delivery, according to the BGB and TMK. However, CCF and SGA have different regulations on property transfer, and even it can be at the time of the conclusion of the contract before delivery. However, the same result can be achieved in overseas sales by using specific INCOTERMS in contracts. So, first of all, risk and property pass simultaneously according to French case law, BGB,

[83] Thomas Laemmli, 'Transfer of Ownership in International Sales of Goods' (Master Thesis, University of Cape Town 2014) 23.

[84] Juana Coetzee (n 72) 43; *Carlos Federspiel & Co v Charles Twigg & Co* [1957] 1 Lloyd's Rep 240.

[85] Majid H K Al-Anbaki (n 49) 313.

[86] 7th Civil Chamber of the Turkish Court of Cassation, 2013/659, 31.01.2013.

TBK, TMK, and as a rule in SGA. On the other hand, if business parties do not put a specific INCOTERM in their contracts, the property and risk pass to the buyer, as in the case of FOB and CIF INCOTERMS, as stated in French and Turkish case law. Also, German case law is identical to them somehow. However, the Uniform Law on Sales is unlike them because a trade term is never an INCOTERMS unless it specifies so. Accordingly, if business parties put FOB or CIF INCOTERMS in their contracts, the result is the same. So, INCOTERMS plays an important role in risk allocation and determining ownership rights.

Moreover, CISG incorporates INCOTERMS. Therefore, if parties do not put specific INCOTERMS in their contracts, interpretation can be made by using CISG. In addition to these, if the parties are participating countries in the CISG, we have to consider that INCOTERMS can exclude article 31 of the CISG in international business law in terms of the determination of the place of jurisdiction in the absence of a forum selection clause in contracts as we can see in German and French case law. Therefore, the intention of the parties in INCOTERMS are about more than just the risk allocation. These intentions can also be considered in terms of the passing of property rights and the determination of the place of jurisdiction in the absence of a forum selection clause in contracts. Besides these, in terms of EU member states, under article 5 of the Brussels I Regulation, article 31 of the CISG can no longer serve as a basis for jurisdiction.

So, it is better to include specific INCOTERMS and forum selection clauses in their contracts for contracting parties. FOB and CIF INCOTERMS are better because if business parties do not include specific INCOTERMS in their contracts, the property and risks pass to the buyer, as in FOB and CIF INCOTERMS, as stated in French and Turkish case law. So, risk and property pass simultaneously. In addition, risk and property pass simultaneously according to BGB and, as a rule, in SGA. This way, the contracting parties reach the same result from the viewpoint of the passing of risk and property.

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