**The Transfer of Risk in ancient Rome and the Origins of Insurance Law**

**by Cem Uysal**

**ABSTRACT**

The notion of “Risk”, if the term is used within the scope of Roman contract law, usually refers to *Periculum Emptoris*, the risk of destruction or deterioration of the subject of sale.

In Roman law, once a contract has been sealed (is *perfecta*), the periculum would pass to the buyer even if the delivery of the subject of sale hasn’t been carried through. One should remember that if the contract is *imperfecta*, the risk would remain on the vendor, so it is imperative to know after which steps a contract can be considered complete:

*Emptio-Venditio* was a consensu contrahitur; once the price and the subject of the sale were agreed upon by the parties, the contract would be binding. However, if a suspensive condition had not been fulfilled, the parties wouldn’t have an obligation to perform. If the property was to get destroyed before the fulfilment of the condition, the risk would still remain with the vendor and the contract would become void. That being said, if the subject matter wasn’t irreversibly destroyed, but merely damaged, the risk would pass to the buyer.

It initially seems that the norms regulating *periculum emptoris* favored the vendor over buyer. This in fact would be an interpretation not far from the truth. But one should also remember that the *emptio venditio* was a contract of good faith, so while the property remains in vendor’s possession, the vendor was obligated to care for it. Before the post-classical era the character of this responsibility was *custodia*, while later it turned into *omnis culpa*.

The legal doctrine gathers around two possible explanations for this protection towards the vendor:

The Romans might have taken into account the economical interest of the property, which remained with the vendor until the contract was completed. But starting from the moment that the contract has been sealed, any growth or increase in value would have belonged to the buyer. Some authors believe, the Romans wanted to create an equilibrium between economic interest and the risk, thus transferring it to the buyer immediately. There are others however who believe, due to their understanding of political capitalism, the Romans simply wanted to keep the commerce running.

There are many legal systems today that adopted a fundamentally different approach, but some exceptions still follow somewhat similar recipes.

We have mentioned that the vendor was obligated to care to the subject of sale until it enters the buyer’s property. Two exceptions for this responsibility at any era of Roman law were *vis maior* and natural disasters. And The Roman Empire had had its fair share of those, from natural disasters like Pompeii to not so natural disasters like the Great Fire of Rome.

Undoubtedly there is more to the concept of “risk” than the contract of sale and there is an undeniable connection between said contract and the insurance law.

Insurance contracts as we know them today didn’t exist until middle ages. But historical records show contracts that shift the risk of a transaction (most of the time born of sale agreements) have been used in Euphrates Valley since 3500 BC. It is believed that the “Pre-Babylonians”, who at the time exceeded their market far beyond the city state, used contracts similar to *“Bottomry”* or *“Respondentia”*, where a third party willingly paid money to guarantee the safe arrival of the trade caravans or the goods, and in return was awarded a designated sum of interest.

The Phoenicians took the practice and applied it to naval shipping contracts. The Greek took it from them, and the Romans picked it from the Greek, all with small nuances. The area of effect of this type of contract around the “old world” was tremendous; influencing even the Indians as far back as 600 BC.

This understanding of risk distribution has affected Roman business questions and trade customs to a great degree. Since its introduction into Rome around 700 BC, many other forms of risk shifting contracts have evolved from it:

Public indemnity for shippers against loss of ship or cargo from storms or attacks of enemies was chronologically the first to appear. Through this the Government assured private companies on the safe arrival of weapons and military attire that they produce. As indicated by Cicero, private guarantee for safe delivery of goods also existed. His writings show that, he was able to get people from Laodicea to insure the safety of the treasures he’s been sending from Laodicea to Rome. Some forms of indemnification contracts that were found in Iustinian’s Digest didn’t necessarily offer protection against maritime dangers but were applicable nevertheless. A passage from Ulpian explains that promises of safety of goods or money were proper contracts, if they were based on *stipulatio.*

There is also evidence to add to this list mutual “life insurance” agreements between civilians, veterans and military members were used in the antiquity.

In our statement, we are going to touch upon the transfer of risk in Roman law, with examples and more explanations, then we will try to carry on with an in-depth analysis on the insurance agreements that were used by the ancient Romans and other ancient societies.