THE PASSING OF RISK IN THE INTERNATIONAL SALE OF GOODS

A comparison between the CISG and the Incoterms

Masterproef van de opleiding
‘Master in de rechten’

Ingediend door

Michiel Buydaert

studentenr. 00603190

Promotor: Prof. Dr. Johan Erauw
Commissaris: Dhr. Cedric Vanleenhove
Preface

After a lot of late night writing sessions, loads of coffee, hard work, dedication, desperation, some cursing, newfound hope, and a lot of support, I can write down the last words of this dissertation. I would like to thank professor Johan Erauw, my promoter, for supporting this dissertation and giving me advice, not only on the topic of this thesis but also on my future, commencing an LLM abroad next academic year.

I would also like to thank my Aussie friend, whom I met in Denmark, Max Hardy, who was so kind to check the spelling and grammar of this dissertation. May the future bring us back together.

A very special word of gratitude goes out to Camilla Fossem. Her support, comments and questions helped me to stay focused on the main topic and explain the sometimes complicated rules in an accessible manner.

Finishing this dissertation would not have been possible without the support of my parents. I would like to thank them for their believe in my academic education.

Buydaert Michiel

4.6 Article 69 CISG: the residual rule ................................................................. 51
4.6.1 History ........................................................................................................... 51
4.6.2 Article 69 in detail ......................................................................................... 52
   A Overview ......................................................................................................... 52
   B The basics: taking over at the seller’s place of business ................................. 53
   C Breach of contract by the buyer ...................................................................... 55
      i Failure to take delivery .................................................................................. 55
      ii Other breaches by the buyer ...................................................................... 55
   D Taking over at a different place ...................................................................... 57
   E Identification of the goods............................................................................. 61
4.6.3 Conclusion ..................................................................................................... 62

4.7 Article 70 CISG: fundamental breach ............................................................. 62
4.7.1 History ........................................................................................................... 62
4.7.2 Article 70 in detail ......................................................................................... 63
   A Overview ......................................................................................................... 63
   B The basics ......................................................................................................... 64
      i Fundamental breach .................................................................................... 65
   C Article 82: conditional right to avoidance or to require substitute goods ......... 66
   D Avoidance in case of non-delivery within the additional period of time ......... 67
   E Specific cases ................................................................................................. 68
      i Casualty after receipt by the buyer ................................................................. 69
      ii Partial avoidance ....................................................................................... 70
4.7.3 Conclusion ..................................................................................................... 70

4.8 Overall conclusion on the passing of risk under the CISG .................................. 71

CHAPTER 5: PASSING OF RISK UNDER THE INCOTERMS 2010 ...................... 72

5.1 Overview .......................................................................................................... 72

5.2 Division ............................................................................................................. 73
   5.2.1 Division under Incoterms 2010 .................................................................... 73
   5.2.2 Division under the older versions ............................................................... 74

5.3 Incoterms’ relationship with the CISG ............................................................... 74
   5.3.1 In general .................................................................................................... 74

5.4 E-term: EXW .................................................................................................... 76
   5.4.1 EXW and the CISG ..................................................................................... 77
5.5  **F-terms** .................................................................................................................................................. 78
    5.5.1  FCA .................................................................................................................................................. 79
    5.5.2  FAS .................................................................................................................................................. 80
    5.5.3  FOB .................................................................................................................................................. 81
    5.5.4  F-terms and the CISG ......................................................................................................................... 82

5.6  **C-terms** .................................................................................................................................................. 84
    5.6.1  CPT and CIP ..................................................................................................................................... 84
    5.6.2  CFR and CIF ..................................................................................................................................... 85
    5.6.3  C-terms and the CISG ......................................................................................................................... 85
        A  C-terms and article 67 .......................................................................................................................... 85
        B  C-terms and article 68 .......................................................................................................................... 86

5.7  **D-terms** .................................................................................................................................................. 87
    5.7.1  DAT .................................................................................................................................................. 88
    5.7.2  DAP and DDP .................................................................................................................................... 88
    5.7.3  D-terms and the CISG ........................................................................................................................ 89

**CHAPTER 6: CONCLUSION** ........................................................................................................................ 91

**DUTCH SUMMARY** ....................................................................................................................................... 93

**BIBLIOGRAPHY** ........................................................................................................................................... 101
Introduction

We live in a globalised world. A box of Belgian chocolate that is sold in a Norwegian grocery store is produced in a chocolate factory in Ghent. In this factory, German machines will mix Ecuadorian cacao with French milk, Brazilian sugar and Turkish hazelnuts. The chocolate will be wrapped in paper produced in a Finnish company using Swedish pulp. To get the box of Belgian chocolate to the Norwegian grocery store, all the different products used for the production of the chocolate have to be transported from their country of origin to Belgium. They will be transferred from factories to warehouses and from port to port. A lot can go wrong during the production process of this box of chocolate. The vessel transporting the cacao can capsize bringing the load to the bottom of the ocean; the warehouse that stores the paper can catch fire destroying the wrapping paper intended for the chocolate, the cooling system of the container holding the chocolate can malfunction leading to the melting of the chocolate, etc.

In an international sale of goods, the risk for damage to or loss of the goods will be either on the seller or on the buyer. And the parties will want to know which party will bear the risk. This is important because it means that if the risk has passed from the seller to the buyer, the buyer will have to pay the price, even if the goods get lost or damaged.

If the parties to a contract of international sale of goods have their place of business in different contracting States or if the private international law leads to the application of the law of a contracting State, the 1980 UN Convention on Contracts for the International Sale of Goods (CISG) will be applicable. This CISG consists of default rules. They will apply if the contracting parties have not changed the given provisions or created their own terms.

One way the parties to a contract of sale can deviate from the rules of the CISG is by including three-letter Incoterms by the International Chamber of Commerce (ICC) in their contract. By referring to the ICC Incoterms, the parties include a set of rules that arrange for delivery, passing of risk, the obligation to take insurance, carriage, etc.

This dissertation will compare these two regimes. First it will take a look at the history and field of application of the UN Convention on Contracts for the International Sale of Goods. After that, the same will be done for the Incoterms. The evolution of the Incoterms will be described, starting with the first version in 1936 till the last version published by the ICC in 2010. Chapter three will explain what is included in the term ‘risk’ and will briefly compare different systems of risk passing. Chapter four deals with the
passing of risk according to the rules of the CISG. Every aspect and article of the Convention concerned with the passing of the risk will be examined. The rules provided by the Incoterms 2010 are the subject of chapter five. The Incoterms will be divided into group and compared with their possible equivalent in the CISG. Based on the findings of this research and the conclusions made throughout the dissertation a final conclusion on the way risk is transferred in the CISG and the Incoterms will be made

1.1 History

On 10 April 1980, a conference with diplomats from sixty-two States approved a set of rules providing a uniform law for international sales of goods. By December 1986, the treaty was ratified by eleven States (Argentina, China, Egypt, France, Hungary, Italy, Lesotho, Syrian Arab Republic, United States of America, Yugoslavia and Zambia). Today, seventy-eight States have adopted the 1980 United Nations Convention on Contracts for the International Sale of Goods, the Republic of Benin being the last to ratify (Effective date: August 1, 2012). Because of this success the CISG is seen as the first law of sales treaty to win acceptance on a worldwide scale. Some seventy CISG contracting States account for more than two-thirds of all world trade, so the amount of money involved is enormous.¹

Brazil, Hong Kong, India, South Africa, Taiwan and the United Kingdom are the only major trading countries that haven’t adopted CISG. There is no doubt about the influence of this treaty on international trade. Brazil has now finished their national procedures in ratifying the CISG, and thus, this BRIC-country² will soon become a contracting State.

The work that resulted in the Vienna Convention started in the 1920s and early 1930s by a group of scholars that were asked by the International Institute for Unification of Private Law (Unidoit) to draft a uniform international set of rules on international sale of goods.³ In 1935 the group presented their first draft.⁴ After being suspended during the Second World War a conference of twenty-one nations encouraged the continuation of the project in 1951.⁵ During this conference in The Hague a special Sales Commission

---

² Acronym that refers to the countries of Brazil, Russia, India and China, which are all deemed to be at a similar stage of newly advanced economic development. It is typically rendered as ‘the BRICs’ or ‘the BRIC countries’ or ‘the BRIC economies’ or alternatively as the ‘Big Four’.
⁴ Ibid.
⁵ Ibid.
was appointed that produced two drafts. These drafts were internationally well received and thus adopted at a 1964 Conference in, again, The Hague. The conventions adopted in The Hague are the Convention on a Uniform Law of International Sales (ULIS) and the Convention on a Uniform Law in the Formation of Contracts for the International Sale of Goods (ULFC). In the end these conventions weren’t very successful considering that only a few countries ratified them.

One person who had a great influence on the CISG and on the development of its predecessors is the Austrian scholar Ernst Rabel (1874-1955). He started the process of the harmonisation by suggesting to Unidroit to make this into the first project of the Institute, which it did. He was also member of the commission that produced the two drafts that led to ULIS and ULFC. He contributed a lot to the international law of sales until his death in 1955.

The 1964 conventions were of great value and importance because of their content and their innovation but because of their low rate of ratification they did not have a big practical impact on international trade. The conviction within the international community grew that in order to be successful worldwide a worldwide participation was needed. Thus the General Assembly of the United Nations established a worldwide representative body to promote ‘the progressive harmonization and unification of the law of international trade.’ This body was named the United Nations Commission on International Trade Law (UNCITRAL) and held its first meeting in 1968. After ten years of work UNCITRAL submitted a Draft Convention (the New York Draft) in 1978, which covered both the formation of the contract and the specific rules on sales. Two years later the United Nations held a Diplomatic Conference that took place in Vienna. During this conference sixty-two States adopted the New York Draft unanimously. Since then the contracting States have been growing steadily.

---

7 Only ratified by 9 States: Belgium, Gambia, Germany, Israël, Luxembourg, the Netherlands, San Marino and the United Kingdom; P. HUBER in P. HUBER and A. MULLIS, The CISG, Sellier, Mainz, 2007, 2-3; only ratified by 9 States: Belgium, Gambia, Germany, Israël, Luxembourg, the Netherlands, San Marino and the United Kingdom.
9 Ibid.
10 Ibid.
1.2 Field of application

Part I of the Convention contains the rules on the application of the CISG. In order to be a contract that falls under the scope of the CISG the contract needs to be a contract for the international sale of goods. Different criteria are given here: it has to be a sale of goods and this sale of goods needs to be international. In addition, the basic rule of the Convention, expressed in article 6, provides the parties with the possibility to contract out the application of the CISG. This means that parties can opt out the application of CISG when it normally would apply but also that parties can contract in the CISG rules when these rules wouldn't be applicable to their contract; although the latter is not based on article 6 but rather on the principle of freedom.

In order to have the Vienna Convention as the applicable law governing the contract needs to be a contract for the international sale of goods. ‘Internationality’ refers to the fact that the parties need to have their main place of business in different CISG contracting States. However, according to article 1(1)(b) the rules of the Vienna Convention are also applicable if the private international law of the forum country leads to the application of the law of a contracting State. Even if the case is a ‘national’ case at the time of creation of the contract but because of delivery in a different country became international and the rules of conflict of laws lead to the law of a contracting State, the CISG will be applicable. Countries can, however, make an article 95 reservation to this way of application and decide not to apply the CISG if one of the parties’ places of business is not in a contracting State.

The CISG regulates the sale of goods. ‘Goods’ under the CISG are goods that are moveable, tangible objects. ‘Goods’ under CISG need to be understood as widely as possible. By

14 J. Lookofsky, Understanding the CISG, 11.
15 J. Lookofsky, Understanding the CISG, 27.
16 J. Lookofsky, Understanding the CISG, 29.
18 J. Lookofsky, Understanding the CISG, 15.
20 The United States of America and China are States that made this reservation on ratification of the Convention; J. Lookofsky, Understanding the CISG, Copenhagen, Djøf Publishing, 2008, 16.
virtue of article 2 of the convention six specific categories of sale of goods are excluded.  

The exclusions are made based on the nature of the transaction and the nature of the goods. Excluded are: consumer sales, sales by auction, forced sales, sales of negotiable instruments, ships, aircraft and electricity.

The Vienna Convention will be the applicable law on a sale of goods contract between parties whose main places of business are in different CISG contracting States and under the condition that the parties did not contract out the application of (a part of) the Convention. Thus, the CISG has the status of supplementary law. One way for the parties to opt out certain parts of the Convention is by including an ICC Incoterm in their contract.

---

Chapter 2: The ICC Incoterms 2010

2.1 History and evolution

Since times past, merchants have been using various trade terms that give appropriate answers to questions such as:26

- Which of the parties should bear the risk for delay in the carriage of the goods?
- Who should bear the risk in case the goods get lost or get damaged in transit?
- On what terms should a contract of carriage be concluded?
- Who should pay for carriage and related costs?
- Which party pays for insurance?

Shorthand expressions such as FOB (Free on Board) and CIF (Cost Insurance Freight) are used to answer these questions but unfortunately, these terms do not tell us much regarding what they mean and how they should be interpreted.27 The oldest and most common abbreviations, mainly used for carriage by sea, are FOB and CIF, however, these abbreviations do not always have the same meaning in different ports around the world.28 These differentiations lead to confusion and conflict in international trade. The International Chamber of Commerce (ICC) with its headquarters in Paris performed a study in the 1920s to determine how trade terms were understood in different countries/legal systems.29 The result of this research was that there were many different opinions as to the interpretation of trade terms. Since the differentiation in interpretation of these terms creates uncertainty in world trade, the ICC developed rules of interpretation that were first published in the 1936 version of Incoterms.30 Since that first publication, Incoterms has been revised multiple times: in 1953, 1967, 1976, 1980,

---

1990, 2000 and the latest in 2010. This appears to suggest that, in recent times, the Incoterms were revised once in ten years; however, this is merely a coincidence since the purpose of revision is to reflect international commercial practice and, commercial practice does not change with a ten-year interval.\(^{31}\) Developments in international trade and innovation of the means of transport were taken into account for each amendment.\(^{32}\)

The first version of the Incoterms focused on the trade of commodity goods, since this was the economic reality at that time. These 1936 Incoterms rules fixed the important delivery points at the ship’s side or at the moment the load was taken on board of the ship.\(^{33}\) To represent the minimum obligation of the seller, EXW (Ex-works) was introduced by the Incoterms 1936 rules.\(^{34}\)

After World War II, carriage of goods by rail had increased and it became apparent that there existed a necessity to introduce appropriate terms for this practice.\(^{35}\) Work on the revision of the Incoterms rules was resumed and in 1957, two trade terms were added: FOR and FOT (‘Free on Rail’ and ‘Free on Truck’, same manner as FOB since the carriage was in practice arranged in the same way.).\(^{36}\)

The 1976 revision added a specific term for air transport, namely FOB Airport.\(^{37}\) The changes made in 1980 were mainly a result of the container-revolution in the transport industry.\(^{38}\) The revision shifted the point of delivery from delivery over the ship’s side to delivery of the goods for stowage in the container.\(^{39}\)

In 1990, the Incoterms rules were revised so they could deal with the important changes introduced by the computer revolution; now parties increasingly agree to communicate electronically by Electronic Data Interchange (EDI).\(^{40}\) All trade terms that applied to a specific mode of transport were removed from the 1990 version of the Incoterms.\(^{41}\)

---


\(^{32}\) H. Van Houtte, International Trade, 172.


\(^{34}\) Ibid.

\(^{35}\) Ibid.

\(^{36}\) Ibid.


\(^{38}\) J. Ramberg, International Commercial Transactions, 56.

\(^{39}\) Ibid.

\(^{40}\) Ibid.

was sufficient to use the general term FCA, signifying ‘Free Carrier named point’; a term introduced in 1980 to deal with the increased container use in international transport (introduced as FCR).\textsuperscript{42} This is considered to be an improvement since the existence of various terms (FOR, FOT and FOB Airport) could lead to chaotic situations, creating uncertainty in international commercial relations.

Because of the gigantic increase in the use of containers, the FCA Incoterms rule became one of the most important, although it took a while before merchants realised that it was better to use FCA instead of FOB when, in practice, the goods were not handed over to the carrier on board the ship but at an earlier reception point in the country of shipment (the so called container yards or container freight stations).\textsuperscript{43}

The main problem with the Incoterms 2000 rules, and a reason for the 2010 revision, was that it was not sufficiently clear which rules should be applied in certain circumstances.\textsuperscript{44} Another reason for the 2010 revision was that in the United States, since the removal of the 1941 definitions of trade terms from the Uniform Commercial Code (UCC), a possibility to expand the use of Incoterms rules had arisen.\textsuperscript{45} The interpretation of the key trade term FOB was different in the United States’ Uniform Commercial Code than under the ICC Incoterms rules. In the United States FOB merely represents a point that could be anywhere whereas under the Incoterms rules FOB is used only for carriage that involves shipping by vessel.\textsuperscript{46} Therefore, a new trade term was introduced: DAP (Delivered at Place). Merchants can use this term to appoint any appropriate place.\textsuperscript{47} In cases where the goods need to be unloaded from the means of transport in order to be delivered to the buyer, DAP is inappropriate. For those specific cases, another trade term, DAT (Delivered at Terminal) was added; this term is used when the unloading of the goods from the means of transport should be performed at the seller’s cost and risk.\textsuperscript{48} DES (Delivered Ex Ship) and DEQ (Delivered Ex Quay), two

\textsuperscript{43} J. Ramberg, ICC Guide to Incoterms 2010, 8.
\textsuperscript{44} Ibid.
\textsuperscript{45} Ibid.
\textsuperscript{48} Ibid.
specific maritime terms were replaced, respectively, by DAP and DAT, hence creating the possibility to use them in non-maritime transport.\textsuperscript{49}

Merchants retain old habits and it is not easy to persuade them into using non-maritime terms (which are recently developed, compared to the traditional maritime terms) for non-maritime transport.\textsuperscript{50} The Incoterms 2010 rules therefore start with presenting trade terms that can be used by any mode of transport and only then present the trade terms that can only be used for sea or inland waterway transport. By doing this, the ICC wants to induce merchants to first take a look at the general trade terms before contemplating whether to use the traditional maritime trade terms.\textsuperscript{51}

In total Incoterms 2010 consist of 11 trade terms frequently used in international trade. They cover a wide range from the seller’s minimum obligation to make the goods available Ex Works to the buyer at the seller’s premises, handing over the goods for carriage with or without the obligation to arrange and pay for carriage under the F- and C-terms respectively and, finally, three variants of D-terms.\textsuperscript{52}

We will discuss the different Incoterms rules and their specific application in Chapter 5: \textit{infra}.

\section*{2.2 Field of application}

The main principle of the law relating to commercial agreements is based on the freedom of the contracting parties to agree as they wish; according to this general freedom of contract rule, parties may derogate from the application of convention provisions, including the CISG provisions on passing of the risk.\textsuperscript{53} The general freedom of contract rule is incorporated in to the Vienna Convention by article 6 providing that, \textit{the parties may exclude the application of this Convention or derogate from or vary the effect of any of its provisions.}

The parties have to agree to apply Incoterms rules to their contract. By including a shorthand reference to a particular ICC Incoterms rule in their contract, the parties

\begin{itemize}
\item \textsuperscript{49} \textit{Ibid}.
\item \textsuperscript{50} \textit{Ibid}.
\item \textsuperscript{52} J. RAMBERG, \textit{International Commercial Transactions}, 56-57.
\item \textsuperscript{53} J. LOOKOFSKY, \textit{Understanding the CISG}, 101.
\end{itemize}
incorporate the set of rules of that term in that contract. Court decisions and arbitral awards recognise the contractual nature of the Incoterms rules’ binding force. Even if the parties don’t expressly refer to a certain Incoterms rule, the Incoterms rules may become part of the contract since they reflect generally recognised principles and practices. This was expressed in the BP Oil case, where the US Federal Court equated the parties’ inclusion of a CFR term with ‘incorporation’ of the Incoterms version of that term: ‘even if the usage of Incoterms is not global, the fact that they are well known in international trade means that they are incorporated through article 9(2) of the CISG.’ However, it is important to note that Incoterms rules are not part of international customary law and for this reason merchants cannot rely blindly on the ICC Incoterms defined usage. Parties will have to make a clear reference to an ICC Incoterm if they want to apply the Incoterm to their contractual relation, unless if they established a practice between them. This occurs when parties regularly contract under ICC Incoterms, thus creating a usage that binds them by virtue of article 9 of the Convention. According to HANS VAN HOUTTE, “the Incoterms aspire to reflect the common practice in various countries. However, in reality the national usages are so diverse, that it is impossible to give them a common interpretation.”

In order to avoid confusion and difficulties in applying Incoterms rules, the ICC strongly advises parties to refer to the current version of the Incoterms in their contract of sale. They should also check whether a standard contract used in their contract of sale contains such a reference, and if so, update this reference to the latest version of the Incoterms. The questions arises what will happen with contracts where parties refer to Incoterms of an older version of the ICC Incoterms, e.g. DAF, DES, DDU and DEQ. Due to

---

54 Ibid.
55 H. VAN HOUTTE, International Trade, 175.
58 J. LOOKOSKY, Understanding the CISG, 101.
61 Also see: 5.3; J. O. HONNOLD and H. M. FLECHTNER, Uniform Law for International Sales, 169.
64 J. RAMBERG, ICC Guide to Incoterms 2010, 16.
the fact that Incoterms are soft law, hence only applicable when parties explicitly or implicitly agree on incorporation, the moment of conclusion should decide the version of the Incoterms applicable to the contract. Consequently, if parties conclude a contract of sale prior to 1 January 2011 and refer to DAF, DES, DDU or DEQ, these Incoterms should be interpreted under the Incoterms 2000 rules.

---


66 Ibid.
Chapter 3: Risk

International trade consists of many risks. During the whole process of a commercial transaction many things can go wrong which may lead to the damage or loss of the goods. A factory where cars are produced can catch fire, burning the already finished cars to the ground; the ship might capsize destroying its bulk of grain; the cooling system of the container can malfunction leading to the deterioration of the load of chocolate; etc. Because of these risks, the possible casualties will almost always be covered by insurance; a topic that, albeit very interesting, will not be discussed in this dissertation. Although the risk is insured, the question remains: which party is in the best position to take out insurance, to salvage the goods and to press claims against the insurer? It is also important to note that certain risks are not capable of being covered by policies of insurance.

Another important issue is defining what exactly is meant by ‘risk’ as per the CISG. Articles 66-70 of CISG refer to ‘the risk’ without actually defining it. This chapter will give an explanation of what ‘the risk’ means and how it is transferred in different legal systems.

3.1 The meaning of ‘risk’ in the international sale of goods

In order to be able to understand the system of passing of risk in the international sale of goods, one must know what risk as a legal concept really is. According to ROTH, risk as a legal concept refers to ‘accidental injury to the goods. It therefore covers theft, seizure, destruction, damage and deterioration.’

Article 66 of CISG formulates the main obligation of the buyer after the risk has passed:

‘Loss of or damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price, unless the loss or damage is due to an act or omission of the seller.’

---

69 J. LOOKOFFSKY, Understanding the CISG, 99.
This means that the buyer is obligated to pay for the goods notwithstanding his subsequent loss or damage.\textsuperscript{71} On the contrary, article 36 makes the seller liable for any lack of conformity that exists at the time when the risk passes to the buyer.\textsuperscript{71}

The wording of article 66 implies that it is the risk of physical loss or damage that passes from seller to the buyer. This includes complete destruction of the goods as well as disappearance of the goods by misplacing them, transferring them to the wrong address and mixing them up with other goods.\textsuperscript{72} The risk of delay by the carrier after handing over the goods to that carrier is also included; this was clearly expressed in a case between a French seller and a Swiss buyer where the Swiss court ruled that ‘if the seller has handed over the goods to an independent carrier in charge of delivery, the risk passes on delivery of the goods by handing them over to that carrier. That being the case, the seller should not bear the eventual consequences of delay by the transporter.’\textsuperscript{73}

The damage or deterioration can occur during the transportation from one party to the other, during handling and during storage. This can be the result of natural processes leading to a decline in quality, (e.g. melting of chocolate is a natural process) howsoever caused (e.g. malfunctioning of the cooling system of the container).\textsuperscript{74}

If the risk has passed from seller to buyer and the goods are lost or damaged, and this is not due to an act or omission of the seller, the buyer will be obliged to pay the price. That is why the risk referred to in international sale of goods is the price risk. The buyer can also be liable for costs created by its non-acceptance of the delivery (e.g. storage charges). If the goods, on the other hand, perish while being at the seller’s risk, not only is the buyer not liable for the price, but the seller may also be liable for damage caused by its non-delivery (e.g. delivery at a higher market price).\textsuperscript{75} Therefore, it is crucial in the international sale of goods to allocate risk and determine the moment of its transfer from seller to buyer. Where insurance cover is absent or inadequate, the allocation of the


\textsuperscript{73} Tribunal Cantonal Valais (Switzerland) 19 august 2003, http://cisgw3.law.pace.edu/cases/030819s1.html.

\textsuperscript{74} J. ERAUW, “CISG Articles 66-70: The Risk of Loss and Passing It”, \textit{Journal of Law and Commerce} 2005-06, 204.

\textsuperscript{75} P. M. ROTH, “The passing of risk”, \textit{The American Journal of Comparative Law} 1979, 291.
risk has an even greater impact.\textsuperscript{76} The moment of passing of risk will be handled in depth by Chapter 4: of this dissertation.

According to professor \textsuperscript{ERAUW}, the risk of loss of documents relating to the goods passes together with the risk for the goods; and the risk-of-loss rules of the Convention apply as easily to documents as to goods.\textsuperscript{77} ‘Documents relating to the goods’ include documents that give their holders control over the goods, such as bills of lading, dock receipts, and warehouse receipts but also certificates of insurance, commercial or consular invoices, certificates of origin, weight or quality and the like.\textsuperscript{78} In my opinion the risk-of-loss rules of the CISG apply as easily to the documents relating to the goods as to the goods but I do not subscribe to the opinion that the risk of loss of the documents relating to the goods passes together with the risk for the goods. Article 34 of the Convention binds the seller to hand over the documents relating to the goods at the time, place and form required by the contract. Imagine the situation where there is a contract between art traders and a unique certificate of authenticity belonging to the traded painting arrives by mail a few days before the painting at the seller’s place of business. The contract between parties stipulates that the risk passes when the painting is handed over to the seller at his place. It would be an unfair situation to put the risk of losing the certificate on the seller, since the risk of loss of the painting is still with the seller, while the buyer has complete control over this certificate.

The fact that article 34 is located together with the articles dealing with the delivery of the goods emphasises the close relationship between the handing over of documents and the delivery of the goods,\textsuperscript{79} nonetheless, in my opinion, this does not lead to an automatic simultaneous passing of risk of goods and documents.

Legal risk is the chance that the authority will confiscate, intervene or forbid possession, use or further commercial exploitation of a certain good. Through operation of law, a party would be deprived of the right to make valuable use of the goods.\textsuperscript{80} The CISG rules focus on the actual impairment of the goods and give the risk to the party who normally insures against that risk; acts of State are legal measures that can be contested by the

\textsuperscript{76} J. O. HONNOLD, \textit{Documentary History}, 453.
\textsuperscript{77} J. \textsuperscript{ERAUW}, “CISG Articles 66-70: The Risk of Loss and Passing It”, \textit{Journal of Law and Commerce} 2005-06, 205.
\textsuperscript{79} J. O. HONNOLD, \textit{Documentary History}, 421.
\textsuperscript{80} J. \textsuperscript{ERAUW}, “CISG Articles 66-70: The Risk of Loss and Passing It”, \textit{Journal of Law and Commerce} 2005-06, 205.
party concerned.\textsuperscript{81} The question whether account should be taken of acts of States, and if so, what the consequences should be, is a question that must be answered by international trade law and the distribution of risk agreed upon by the parties.\textsuperscript{82} Thus parties can allocate legal risk by using Incoterms rules in their contract. However, if there is no reference to Incoterms or a clause specifying the allocation of risk in the commercial agreement, the set of rules concerning risk-of-loss can be used to determine the risk and its passing.\textsuperscript{83} In a case between a Belgian seller and a German buyer, the Belgian Court of Appeal ruled that loss of or damage to the goods after the risk has passed does not discharge the buyer of his obligation to pay the contracted price.\textsuperscript{84} In this case, the government, due to chance of dioxin contamination, sealed the meat after the risk passed to the buyer.

The economic risk of fluctuation in the price or currency exchange rate of the goods sold is not included in the risk that passes from seller to buyer arranged by article 66-70 CISG. These fluctuations don’t lead to the loss or damage of the goods; they merely give an advantage to either the seller or the buyer. The economic risk passes at the moment of conclusion of the contract.\textsuperscript{85}

The contractual risk is the risk that both parties take when executing the contract. It is the risk of non-satisfactory performance by the parties.\textsuperscript{86} When going into a contract the CISG obliges the seller to make a conforming delivery, generally measured at the moment the risk passes, the buyer will, in exchange, have to pay the price.\textsuperscript{87} Article 66 provides that the risk does not pass where ‘the loss or damage is due to an act or omission of the seller.’ The rules of the Convention on passing of the risk handle the accidental loss of or damage to the goods; the rules on buyer’s remedies cover loss or damage resulting from the seller's breach of contract.\textsuperscript{88} This is a clear distinction emphasised by article 36 of the Convention, that clearly expresses the seller’s liability for lack of conformity which exists at the time when the risk passes to the buyer or which occurs after that time as a

\textsuperscript{81} G. HAGER and M. SCHMIDT-KESSEL in P. SCHLECHTRIEM and I. SCHWENZER, Commentary, 923.
\textsuperscript{82} Ibid.
\textsuperscript{84} Hof van Beroep Ghent (Belgium) 16 June 2004, Mermark Fleischhandelsgesellschaft mbh/Cvba Lokerse Vleesveiling, http://cisgw3.law.pace.edu/cases/040616b1.html.
\textsuperscript{86} Ibid.
\textsuperscript{87} Ibid.
\textsuperscript{88} G. HAGER and M. SCHMIDT-KESSEL in P. SCHLECHTRIEM and I. SCHWENZER, Commentary, 924.
consequence of his breach of contract and by article 66 that provides that risk does not pass where ‘the loss or damage is due to an act or omission of the seller.’ Article 35 of CISG mentions the different possible deficiencies on the point of conformity. According to article 36 of the Vienna Convention the seller’s liability for the breach does not pass to the buyer if there was a lack of conformity at the time the risk normally passes to the buyer. This is a result of article 70 of the Convention that determines the relationship between risk passing and fundamental breach; a subject I will discuss in 4.7, infra.

Once purchased goods can cause damage to persons or to other goods. They can, by their failure, disturb processes and cause a loss of expected profit. This is all damage subject to contractual or tortious liability between parties or towards a third party. Contractual liability between seller and buyer for damage is exclusively based on breach of contract (a lack of conformity) and this is arranged by article 74 of the Convention that states that “damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit suffered by the other party as a consequence of the breach.” This is a mere application of article 36(2) that makes the seller also liable for any lack of conformity which occurs after the time of the passing of the risk and which is due to a breach of any of the seller's obligations.

The Convention on the International Sale of Goods only treats contractual liability. Tort law and the rules on claims concerning liability for damages caused by tortious acts, fall beyond the scope of the CISG. Even contractual liability for damage caused to other property of the buyer doesn’t fall within the sphere of article 66-70 of the CISG. These risk-of-loss rules clearly limit their ambit to loss or damage to ‘the goods’ or ‘in respect of goods sold.’ The wording of the articles limits their field of application to ‘the goods sold’.

---

89 Ibid.
91 Ibid.
92 Ibid.
93 Ibid.
94 Ibid.
95 Ibid.
3.2 Different methods of passing

If we compare different legal systems we see that there are three main points at which passing of risk in sales transactions may occur:

a) the conclusion of the contract,

b) the transfer of ownership from seller to the buyer,

c) the transfer of physical possession from the seller to the buyer.96

a) The conclusion of the contract
This principle, expressed by the formula Periculum est emptoris, can be traced back to Roman Law.97 The Institutes of Justinian expressly state that the risk passes from buyer to seller at the conclusion of the contract even if the buyer is not yet in possession of the goods.98 The transfer of risk at the moment of conclusion is not very practical, since, especially in international sales, at the moment of conclusion of the contract the goods will probably still be under the seller’s control.99 This rule has been adopted in The Netherlands, Spain and Switzerland.100

b) Transfer of ownership
Also known as Res perit domino.101 This rule was developed by the proponents of natural law (Grotius, Pufendorf) during the 17th century. This theory does not correspond to the latest practices of sale of goods with retention of ownership. Under this theory, the seller will have to bear the risk even if the goods are in control of the buyer.102 Nowadays we can find this rule in France, Belgium, Italy and England.103

97 B. Von Hoffmann, Dubrovnik Lectures, 268.
98 Ibid.
100 In Switzerland restrictively construed by the Federal Court; B. Von Hoffmann, Dubrovnik Lectures, 268.
101 Ibid.
103 B. Von Hoffmann, Dubrovnik Lectures, 268.
c) Transfer of physical possession  
The linkage of the passing of the risk to the transfer of physical possession seems the most fair since the party which has control over the goods, thus in the best position to guard the goods, will bear the risk. We can find this theory of risk passing in Germany, Greece, Sweden and the USA.  

We have seen what is meant by ‘risk’ in the rules on passing of the risk in the Vienna Convention and we have made an inquiry into the different means of ‘passing the risk’ in different legal systems. The next item that will be analysed by this dissertation is the system of transfer of risk under the Vienna Convention on the International Sale of Goods; the moment of passing and the modalities that affect the transfer. After that we will look deeper into how this subject is handled by the International Commercial Terms developed by the International Chamber of Commerce.

---

104 B. Von Hoffmann, Dubrovnik Lectures, 269.
Chapter 4: Passing of risk under the CIGS

4.1 Overview

Chapter IV (article 66 till 70) of Part III of the Convention on the International Sale of Goods contains the rules on the passing of the risk in international sale of goods. Article 66 of the Convention formulates the basic obligation the buyer has, namely to pay the price. The obligation to pay the price is not created by article 66; that obligation is defined by article 53. Article 66 stipulates the consequence of passing of risk while articles 67 till 69 determine the moment when the risk passes in different situations. Article 67 handles the international contracts for the sales of goods that involve carriage as well. Goods that are sold in transit are handled by article 68. In situations that are not within articles 67 or 68, a residual rule for passing of risk is formulated in article 69 of the Convention. The relationship between risk passing and fundamental breach is determined by article 70; this article is also the last article examining the subject of the transfer of risk in the Vienna Convention.

As a general rule, the seller who has satisfied his obligation to deliver goods or documents will cease to bear the risk of loss or damage. The language used in chapter IV on the passing of risk and in articles 31 till 34 on delivery of the goods and handing over of documents, is often identical. Under the Uniform Law of International Sales of 1964, the predecessor to CIGS, the passing of risk was linked to the 'delivery' (déliverance) of the goods. During the preliminary work on the CIGS it was decided to make specific rules on passing of risk for specific 'transportation methods.' Further in this chapter we will discuss this in greater depth.

107 Ibid.
4.2 Burden of proof

Chapter IV of the Convention does not say anything with regard to who has the burden of establishing that the risk has passed to the buyer. According to SCHLECHTRIEM and FERRARI, the leading doctrine advocates a rule with respect to the burden of proof similar to the Roman principle ‘ei incumbit probation, qui dicit non qui negat’, which basically means that each party bears the burden of proof of all factual aspects of a legal provision on which it bases its claims and that are favourable to itself (…für die tatsächlichen Voraussetzungen beweispflichtig ist, die für sie gunstig sind).

One must distinguish two situations: firstly when one must provide proof of the fact that the goods were conforming at the time of passing of the risk and, secondly, the proof of whether that moment of risk passing actually took place.

In cases where the seller brings an action to recover the price in accordance with article 62 of the Convention, cases clearly show that the burden of proof lies on the seller. A German court found that a buyer was not obliged to pay the purchase price according to article 66 CISG because the plaintiff did not prove that the goods were lost after the risk had passed to the buyer. In this case, under the parties’ agreement, the buyer was bound to take over the goods at a place other than the seller’s place of business and the conditions for passing of risk in this situation, namely due delivery and the buyer’s awareness that the goods were placed at his disposal were not fulfilled.

In cases where the buyer receives goods that are damaged and a dispute arises at the moment the damage occurred, it is up to the buyer to prove that the damage occurred before the risk passed from the seller to the buyer. This was clearly expressed in yet another case before a German court where a French buyer claimed that meat had undetectably perished and, therefore, had been returned by its customers. The court left it open whether the goods had been defective at the moment of the passing of risk and stated that ‘the buyer had to prove that the goods did not conform to the contract

---

111 Infra.
when the risk passed; however, the buyer failed to do so.’ According to some courts, the burden of proof shifts in situations where the buyer immediately rejects the goods on delivery or where he notifies the seller of non-conformity in compliance with article 39 CISG; in those disputes it’s up to the seller to supply proof that the goods have been in conformity with the contract at the time of the passing of the risk.114

An example of this is a Finish case where the court held that the seller bears the burden of proof of conformity.115 In this case a load of phenol was being transported from Kotka (Finland) to Antwerp (Belgium) and the court stated that the burden of proof included the responsibility to prove that the loading pipe was free from defects when the loading took place. The seller had not provided direct proof that it was free from defects. The buyer, however, proved with sufficient certainty that the phenol did not get contaminated due to the conditions of the ship. Thus, the phenol did not meet the quality requirements reasonably expected by the buyer and there was a defect in the goods when the risk passed.

4.3 Article 66 CISG: the basic obligation of the buyer

Article 66 summarises the effect the passing of the risk has on the buyer. The buyer will have to pay the price, even if the goods are damaged or get lost; he will not be able to invoke article 58(1) of the Convention in order to refuse payment by claiming that the seller did not place the goods at his disposal.116 Nor will the buyer be able to claim that he, because of the loss or the severe damage to the goods, is substantially deprived of his contractual expectations based on article 25 CISG.117 So he will not be able to invoke the consequences of avoidance stated in articles 80 and 84 of the Convention.118 The possibility to exercise the rights to reduce the price given to the buyer by article 50 CISG

117 M. BRIDGE, Festschrift for Albert H. Kritzer, 81.
118 Ibid.
will not be open for use by the buyer. Risk is not mentioned in these various provisions but according to Michael Bridge, it is a characteristic feature of the doctrine of risk that it overrides normal rules on contractual performance precisely because its function is to override those rules.

A Russian court held that it is an established international practice that property rights to goods are transferred at the same time as the passing of risk – and the passing of the risk consequently leads to the transfer of property – unless the contract provides otherwise. Article 4 of the CISG however states that the Convention does not govern the effect the contract has on property rights, thus one has to solve problems regarding this matter by applying domestic law, which is determined according to private international law.

Article 66 repeats the main obligation of the buyer expressed in article 53 of the Convention namely to pay the price. This article does not provide us with rules as to when the risk of loss or damage passes; this is determined by the parties’ contract and, if the contract is silent, by articles 67-70.

4.3.1 Damage or loss of the goods before payment

The simple message in article 66 is that once the risk has passed, in accordance with the contract and the Convention, the buyer must pay the price agreed, and this rule applies even if the goods were damaged or lost; the buyer has to pay even if the goods ‘go down with the ship’ and never arrive at their destination. The buyer must perform his obligations under the contract even though the goods he bought are lost or damaged and he has no rights, arising out of non-performance, against the seller due to that loss or damage. The buyer will have to pay the price, he must take delivery and he cannot use the remedies set out in article 45 of the Convention. This basic rule has been confirmed by the many decisions where it has been established that the risk passed before the goods got lost or damaged and therefore, the buyer was obliged to pay the price. The

---

119 Ibid.
120 Ibid.
122 J. Lookofsky, Understanding the CISG, 100.
123 E.g.: District Court Komarno (Slovakia) 12 March 2009, Frozen Peas case, http://cisg3w.law.pace.edu/cases/090312k1.html; Hof van Beroep Ghent (Belgium) 16 June 2004, Mermark Fleischhandelsgesellschaft mbh/Cvba Lokerse Vleesveiling.
buyer might have the possibility using remedies that do not arise out of the casualty; this situation is considered in article 70, infra.124

4.3.2 Damage or loss of the goods due to seller's act or omission

Based on the last part of article 66 of the Convention, the seller is responsible for loss or damage that is due to his ‘act or omission’, even after risk has passed. The rules on the passing of the risk are based on accidental loss of or damage to the goods while the rules on the buyer's remedies cover loss or damage resulting from the seller's breach of contract.125 This distinction is clearly expressed by, on one hand, article 36 that lays down that the seller is liable for any lack of conformity which exists at the time that the risk passes to the buyer or which occurs after that time as a consequence of his breach.126 And on the other hand, by article 70 that states that the articles on the passing of the risk do not impair the remedies available to the buyer in case of fundamental breach of contract by the seller. With the same thought in mind, article 66 of the Convention provides that risk does not pass where ‘the loss or damage is due to an act or omission of the seller.’127

If it is established that the loss or damage was due to an act or omission of the seller, the buyer's obligation to pay may be discharged. In a Chinese arbitral award the tribunal found the seller of a chemical substance liable for the loss of the goods by melting.128 The contract between the Chinese seller and US buyer contained a trade term that made the risk pass after the goods passed the ship's rail (CIF) at the Chinese port. The seller was found liable for failing to give the carrier the agreed instructions on the temperature at which the goods were to be stored during carriage, leading to the goods being lost after


125 G. HAGER and M. SCHMIDT-KESSEL in P. SCHLECHTRIEM and I. SCHWENZER, Commentary, 924.

126 Ibid.

127 Ibid.

the risk passed to the buyer. In another case the court regarded the seller to be liable for
damage to bottles under article 36(2) and 66 CISG, even though the risk passed to the
buyer.\textsuperscript{129} The court held that the seller failed to perform his obligation to provide proper
packaging of the goods.

Article 66 goes further than article 36(2), since it only requires an act or omission of the
seller while article 36(2) states that the seller is liable for any lack of conformity which
occurs after the time the risk passed and which is due to a breach of any of his
obligations, clearly narrowing its scope to a mere contractual breach.\textsuperscript{130}

The question that rises after reading this paragraph might be whether ‘act or omission’,
as in article 66, must be understood as covering only those acts governed by article
36(2), being acts or omissions that constitute a breach of contract, or whether the article
addresses any conduct by the seller.\textsuperscript{131} According to the Secretariat’s Commentary on the
1978 Draft\textsuperscript{132} on article 78 of the Draft (article 66 of the Convention):

“The loss or damage to the goods may be caused by an act or omission of the seller
which does not amount to a breach of the seller’s obligations under the contract. For
example, if the contract was on FOB terms, the risk would normally pass when the
goods passed the ship’s rail. If the seller damaged the goods at the port of discharge
when he was recovering his containers, the damage to the goods may be considered
not to be a breach of the contract but, instead, to constitute a tort. If the loss or
damage to the goods constitutes a tort rather than a breach of contract, none of the
buyer’s remedies under articles 41 to 47 would apply. Nevertheless, article 78
provides that the buyer would not be obligated to pay the price as stated in the
contract but would have the right to deduct the damages as they would be
calculated under the applicable law of tort.”\textsuperscript{133}

\textsuperscript{129} Oberlandesgericht Koblenz (Germany) 14 December 2006, Clout case no. 724,
http://cisgw3.law.pace.edu/cases/061214g1.html.
\textsuperscript{130} G. HAGER and M. SCHMIDT-KESSEL in P. SCHLECHTRIEM and I. SCHWENZER, Commentaries, 924.
\textsuperscript{131} Ibid.
\textsuperscript{132} In 1978, UNCITRAL requested the Secretary-General to prepare under his own authority a commentary
on the 1978 Draft and to circulate this Draft and the Commentary for comments and proposals. This
Commentary builds on and integrates earlier commentaries on the 1976 Working Group ‘Sales’ Draft and
the 1977 Working Group ‘Formation’ Draft. The Commentary provides helpful analysis of the 1978
UNCITRAL Draft and the later text of the Convention.
\textsuperscript{133} J. O. HONNOLD, Documentary History, 454; X., “Commentary on the Draft Convention on Contracts for
(hereafter referred to as X., Secretariat’s Commentary); the articles referred to are articles 41 till 47 of the

25
This shows that the final phrase of article 66, ‘unless the loss or damage is due to an act or omission of the seller’, is not confined to acts or omissions of the seller that constitute a breach of his obligations under the contract. The commission rejected a proposal that would have had this effect when the draft was discussed. The practical significance of this ‘dispute’ is not particularly great since the act or omission in question will most likely be a breach of contract. But in some situations, as the example above shows, the act of the seller that causes the loss of the goods will not constitute a breach of contract. During preparatory work on the CISG the rule concerning liability for non-conforming goods was reformulated from ‘the seller shall be liable for the consequence of any lack of conformity (...) if it was due to an act of the seller or of a person for whose conduct he is responsible’, into its present form, ‘(...) lack of conformity (...) which is due to a breach of any of his obligations (...).’ This has the result that the seller’s liability for subsequent lack of conformity of the goods presupposes the breach of a contractual obligation.

The reason for this restriction was that the adoption of the more extensive rule in ULIS might lead to ‘contractual’ liability for the seller caused by a breach of a non-contractual obligation.

On the other hand, a proposal to delete the second part of article 66 of CISG out of fear that a simplification could be misinterpreted and lead to the fact that the buyer does not need to pay if there is a fault or defect in the goods was withdrawn. In opposition to the proposal, it was argued that the second part of article 66 is of great importance since, even after the risk has passed, the seller can still interfere with the goods in such a manner as to cause damage and the second part of article 66 makes it clear that the buyer would not have to pay the price when the loss or damage is caused by an act of the seller. Even a proposal to change the wording of the second part of article 66 CISG with the effect that it would be limited to an act or omission of the seller that amount to a contractual breach was not retained. In opposition to this proposal it was pointed out that the seller might act in a way that was not a contractual breach but still caused

1978 Draft which correspond to articles 45 till 51 of the 1980 Vienna Convention.
damage.\textsuperscript{142} The purpose of the wording of the last sentence of article 66 of the Vienna Convention is, therefore, clear. It covers the situations, in addition to cases of breach of contract, where the seller doesn’t breach his contractual obligations but conducts a breach of a legal duty, which may be unlawful under the law of tort, but not under the law of contract.\textsuperscript{143}

\subsection*{4.3.3 Risk and the action for the price}

When the risk has passed from seller to buyer the buyer must pay the price agreed, even in situations where the goods have been lost or damaged, and the seller can demand the buyer to do so. This presupposes that the seller can go to court to bring an action for the price.\textsuperscript{144} Article 62 of the Convention states that ‘the seller may require the buyer to pay the price, take delivery or perform his other obligations.’ This is the seller’s equivalent for article 46 that states that ‘the buyer may require performance by the seller of his obligations.’\textsuperscript{145} In cases where the buyer has accepted the goods, the seller can recover the price by bringing an action similar to an action to collect a ‘debt’ implemented by execution on the debtor’s property.\textsuperscript{146} In some legal systems, other than common law, the breach by the buyer to pay the price may give a right of recovery of the goods to the seller.\textsuperscript{147} This article differs from the law of common law countries in which the seller’s remedies in respect of the price are more restricted.\textsuperscript{148} In order to compromise between legal systems where courts are authorised to order specific performance of an obligation and legal systems where courts are not authorised to do so, article 28 was introduced.\textsuperscript{149} The remedy to require performance, stated in article 46 (buyer’s remedy) and article 62 (seller’s remedy), are subject to article 28, which states that ‘a court is not bound to enter a judgement for specific performance unless the court would do so under its own law.’\textsuperscript{150}

\begin{flushleft}
\textsuperscript{142} X, \textit{UNCITRAL Yearbook VIII}, New York, United Nations, 1977, 63, no 531.


\textsuperscript{144} G. Hager and M. Schmidt-Kessel in P. Schlechtriem and I. Schwenzer, \textit{Commentary}, 925.


\textsuperscript{146} \textit{Ibid.}

\textsuperscript{147} Art. 81(2) CISG; J. O. Honnold and H. M. Flechtn, \textit{Uniform Law for International Sales}, 493.

\textsuperscript{148} X, \textit{Secretariat’s Commentary}, 48-49.


\end{flushleft}
This means that irrespective of the loss of the goods after the risk has passed, the buyer does not need to pay the price if under the law of the forum the court would not order him to do so in a similar situation.\textsuperscript{151}

The courts of the contracting States can only order performance if they would do so in similar sales contracts according to domestic law.\textsuperscript{152} Article 28, which was introduced as a concession to the common law States, stands in opposition to the principle of harmonisation of laws; the principle that was the goal of the Vienna Conference.\textsuperscript{153} Through article 28, national limitations on specific performance are admitted to the CISG.\textsuperscript{154} In my opinion the drafters of the Convention should have tried to make a compromise leading to one rule being applicable in all cases falling under the Convention instead of referring to the law of the forum State. Consequently, article 28 should have been left out of the Convention.

In practice, however, article 28 of the CISG has only limited importance since the cases where a party might think of using article 28 of the CISG are cases where common law grants specific performance.'\textsuperscript{155} In a case before a Swiss court, where a Swiss seller sought payment of the price by the buyer, the court stated that ‘\textit{the seller's right to require performance is restricted by article 28 CISG but that article 148 of the Swiss Law of Obligations provides for the independent right of the seller to require the contract price. In contrast to the Common Law, the seller can claim payment independently from claims for damages. Thus, the restriction under article 28 CISG can be disregarded in the case at hand.}’\textsuperscript{156} HAGER offers us an example in which American law would take effect under the CISG by virtue of article 28: if the buyer of fungible goods breaches the contract by failing to take delivery of them and the seller preserves the goods for him for an unreasonably long period in which the goods are accidentally destroyed.\textsuperscript{157} Despite the fact that the risk did pass from seller to buyer, the UCC prevents the seller from bringing an action for

\textsuperscript{151} G. HAGER and M. SCHMIDT-KESSEL in P. SCHLECHTRIEM and I. SCHWENZER, \textit{Commentary}, 925.
\textsuperscript{152} M. MÜLLER-CHEN in P. SCHLECHTRIEM and I. SCHWENZER, \textit{Commentary}, 468.
\textsuperscript{156} Handelsgericht Bern (Switzerland) 22 December 2004, http://cisgw3.law.pace.edu/cases/041222s1.html.
\textsuperscript{157} G. HAGER and M. SCHMIDT-KESSEL in P. SCHLECHTRIEM and I. SCHWENZER, \textit{Commentary}, 925.
the price based on the idea that the period during which the buyer in breach must bear the risk should be limited.\textsuperscript{158}

\subsection*{4.3.4 Conclusion}

Article 66 formulates the main obligation the buyer has after the risk passed, namely his duty to pay the price. As I explained, there might be some difficulties in case the goods are damaged or lost due to an act or omission of the seller that is not a contractual breach. Article 36(2) of the Convention makes the seller liable for contractual breach, even after the risk has passed, while article 66, next to contractual liability, protects the buyer from damage or loss caused by a breach of a legal duty, which is unlawful under the law of tort, but not under the law of contract.

By using article 28 of the Convention the buyer can escape being forced to pay the price if the law of the forum would not force him to do so in comparable cases under its own law. Although this article only has limited importance, it stands in opposition to the principle of harmonisation of laws, which is, in my opinion, a situation that should have been avoided in the CISG.

\subsection*{4.4 Article 67 CISG: risk when the contract involves carriage}

We have seen that article 66 of the Vienna Convention formulates the basic obligation of the buyer after the risk passed. The next articles concerning passing of risk under the CISG that will be discussed, are those determining the exact moment the risk passes from seller to buyer. The most important risk-rules are those applying to contracts of sale of goods involving carriage of the goods since this accounts for almost all international sales.\textsuperscript{159} Different types of transport reflect different geographical settings, various types of goods and special needs of the parties.\textsuperscript{160} Since the 1970s, transport contracts have mainly been influenced by the so called ‘container revolution’ which has made the multimodal transport - where the load is stowed in a container that is sealed at

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{158}] Ibid.
\item[\textsuperscript{159}] J. O. HONNOLD and H. M. FLECHTNER, Uniform Law for International Sales, 516; J. LOOKOSKY, Understanding the CISG, 100.
\item[\textsuperscript{160}] J. O. HONNOLD and H. M. FLECHTNER, Uniform Law for International Sales, 516.
\end{enumerate}
\end{footnotesize}
an inland point and carried by a series of different modes of transport to the buyer - as one of the main ways of transport of this time.\textsuperscript{161}

\subsection*{4.4.1 History}

The passing of risk is one of the areas of CISG in which the Convention differs the most from its predecessor, the ULIS.\textsuperscript{162} Under the Uniform Law of International Sales of 1964, the passing of risk was linked to the ‘delivery’ (déliverance)\textsuperscript{163} of the goods.\textsuperscript{164} There was a widespread agreement on the principle that the risk should pass from the seller to the buyer once the seller had done all he is required to do by the contract.\textsuperscript{165} Article 97(1) of the 1964 Uniform Law in the International Sale of Goods states:

\begin{quote}
‘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.’\textsuperscript{166}
\end{quote}

During preliminary work on the CISG this point of view was abandoned.\textsuperscript{167} The main reason for dropping the linking of risk and delivery was that the concept of ‘delivery’ was excessively complicated because of its different functions.\textsuperscript{168} Delivery was used to define the seller’s obligations, the time and place of payment and the moment the risk passed and because of this, the ULIS’ rules on passing of risk were considered to be unnecessarily complicated since they were depending on interrelation of widely dispersed articles.\textsuperscript{169} The UN Sales Convention’s policy was not to use the ambiguous word ‘delivery’ as the deciding factor for risk transfer but they replaced it with a typological one.\textsuperscript{170} The Convention consists of different rules for different transport situations. Due to the above reasons and after considerable discussion it was decided to

\textsuperscript{161} J. O. HONNOLD and H. M. FLECHTNER, Uniform Law for International Sales, 516.
\textsuperscript{162} B. NICHOLAS in C. M. BIANCA and M. J. BONELL, Commentary, 487.
\textsuperscript{163} Not delivery as in English law, but more like in French law; P. M. ROTH, “The passing of risk”, The American Journal of Comparative Law 1979, 295.
\textsuperscript{164} G. HAGER and M. SCHMIDT-KESSEL in P. SCHLECHTRIEM and I. SCHWENZER, Commentary, 927.
\textsuperscript{165} B. VON HOFFMANN, Dubrovnik Lectures, 276.
\textsuperscript{166} Ibid.
\textsuperscript{168} G. HAGER and M. SCHMIDT-KESSEL in P. SCHLECHTRIEM and I. SCHWENZER, Commentary, 927.
\textsuperscript{170} B. VON HOFFMANN, Dubrovnik Lectures, 279.
separate the passing of risk from the concept of delivery and to develop rules for the passing based on commercial practice.\textsuperscript{171} In practice however, the rules have the same effect in the CISG and risk will still pass upon delivery of the goods, it’s only expressed differently. The rules on passing of risk are now different in contracts where carriage is involved (article 67 or 68) and contracts where no carriage is involved (article 69). Thus, it is quite important to know whether the parties agreed to include transportation of the goods in the sales agreement. Too often the agreement remains vague on this matter.\textsuperscript{172}

4.4.2 Article 67 in detail

A Overview

Article 67 governs the passing of risk where the contract of sale involves carriage of goods. It’s the Convention’s general rule on risk during transit and it lets the risk pass from seller to buyer when the goods are handed over to the first carrier.\textsuperscript{173} Most international sales contracts involve carriage of the goods, but only if the contract does not contain a trade term, article 67 of the CISG provides the gap- filling rule:\textsuperscript{174}

\begin{itemize}
\item[(1)] If the contract of sale involves carriage of the goods and the seller is not bound to hand them over at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract of sale. If the seller is bound to hand the goods over to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place. The fact that the seller is authorized to retain documents controlling the disposition of the goods does not affect the passage of the risk.
\item[(2)] Nevertheless, 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.
\end{itemize}

\textsuperscript{171} P. M. Roth, “The passing of risk”, \textit{The American Journal of Comparative Law} 1979, 296.
The practical significance is, however, limited since in international trade the parties will usually agree on the inclusion of certain trade terms (such as the Incoterms rules) into the contract, which will take priority over article 67 by virtue of articles 6 and 9 of the Vienna Convention, *infra* 5.3. Nevertheless, there are situations in which parties do not include trade terms or alter the CISG rules; therefore we will look closer at the modalities of article 67.

**B The basics**

According to article 67(1), if he seller is not bound to hand the goods over at a particular place, risk passes from seller to buyer when the goods are handed over to the first carrier. The article does not distinguish between transport by air, sea or road nor does it treat specifically refer to the situation of multimodal transport.

By virtue of article 67(1), third sentence, the mere fact that the seller retains transportation documents, or that he has already passed them over, doesn’t affect the passing of the risk. Retention of the documents, and the corresponding rights over the goods, for reasons of securing payment does not hinder the passage of the risk to the buyer. This third sentence of article 67 makes it clear that the passing of risk is independent of the transfer of title.

This was clearly expressed in a case before a German court concerning a dispute between a seller and buyer of a stallion. The court stated that ‘the passing of risk at the time of handling over of the goods is independent of the passing of ownership, this also applies in respect of the CISG, as can be derived from the provision in article 67(1), third sentence, of the CISG applying to the sale of goods to be transported.’ A Chinese court confirmed this in a dispute over insurance claims where it said that ‘the transfer of risk and the ownership of the goods should determine the

---

179 *Ibid*.
180 X., *Secretariat’s Commentary*, 64.
insurable interest; however, the risk and ownership could be separated. CISG stipulates the transfer of risk, but does not stipulate the transfer of ownership.¹⁸²

The risk also passes without regard as to who is responsible for arranging transport and insurance. The mere fact that one of the parties is responsible for the arrangement of transportation does not make him liable for the loss of or damage to the goods. In a dispute between an Italian seller and a Spanish buyer, the Spanish court held that risks relating to the goods passed to the buyer when the goods were loaded on the vessel, irrespective of whether the buyer had arranged the insurance of the goods.¹⁸³

The word ‘destination’ that was used in the 1979 New York Draft was replaced by the word ‘place’ and because of this change, article 67(1) does not deal with situations where the seller is under the obligation to deliver the goods to the buyer at the buyer’s place of residence; the latter is now arranged by article 69(2) of the Convention.¹⁸⁴

C  Handing over to the first carrier

Article 67 of the Convention governs the passage of the risk of loss where the contract involves carriage of the goods and the parties have not, by the use of trade terms or otherwise, provided for a different rule in respect to the risk of loss.¹⁸⁵ Transferring the risk from seller to buyer after the goods have been handed over to the first carrier is in accordance with a widely recognised international rule.¹⁸⁶ Placing the transit-risk on the buyer is justified by the fact that the buyer is in a better position to assess the damage and to make a claim against the carrier or the insurer.¹⁸⁷ According to Honnold, followed in his opinion by Hager, it might be better, in case of a sale of ‘high-tech’ goods, to place the transit risk on the seller, since he is capable of repairing or adjusting the

¹⁸⁴ G. Hager and M. Schmidt-Kessel in P. Schlechtriem and I. Schwenzer, Commentary, 928.
¹⁸⁵ X., Secretariat’s Commentary, 64.
highly technological goods. The Convention does not provide an exception for these categories of goods but parties are of course free to use article 6 of the Convention to create their inter partes rules concerning passing of risk; rules that would provide for the transfer of risk after a test-run at the final destination.

i The first carrier

The gap-filling rule when the contract involves carriage places the moment of passing of risk when handing over to the first carrier. To determine this moment it is important to make an inquiry into the nature of the first carrier. The Convention does not define this concept but scholars and case law did. Only handing over to an independent carrier causes the risk to pass. This independent carrier can be e.g. a courier service or a postal service. If the seller delivers the goods using his own trucks or other means of transport, the goods are not ‘handed over’ to a carrier in the way stipulated by article 67(1) of the Convention. When using his own means of transport, the goods remain physically in the hands of the seller and, therefore, he is closer to the goods and he can more easily take preventive measures to protect the goods from deteriorating. The handing over of the goods in the article 67(1) sense signifies a transfer of power of control over the goods and, thus, presupposes a different legal entity.

Another reason for the seller holding the risk when he is also the carrier of the goods is that damage during transportation is likely to generate a claim against the seller for his lack of care and when the seller engages to deliver the goods with its own means of transportation, the price will reflect this service provided by the seller; including cost of insurance of vehicles and load. So leaving the risk with the seller is the most effective

---

194 B. VON HOFFMANN, Dubrovnik Lectures, 288.
allocation of risk in situations where the seller provides for the transportation of the goods. In those cases, the risk will pass according to article 69, second paragraph, if the goods are handed over to the buyer at a place different than the seller’s place of business (in detail see 4.6.2 D, infra) or according to article 67, first paragraph, the risk passes when the goods are handed over to an independent carrier at a particular place.

According to Von Hoffman it is not a good policy to leave the risk with the seller because it ‘penalises the seller who provides transportation services that are quicker or cheaper than those of established transport organisations.’\(^{197}\) He suggests that this policy operates in favour of the buyer only, since he is the one profiting from the specific measures of the seller to compete in transport with other established institutions.\(^ {198}\)

A seller could induce the passing of risk at the handing over to the first carrier by changing his legal structure: if a division of the seller that is not legally independent of the seller’s company transports the goods then article 69 applies and the risk will be on the seller during transit.\(^ {199}\) However, if the seller uses a legally independent entity that is a subsidiary of the seller’s company, article 67 applies and the risk goes over to the buyer.\(^ {200}\)

The placement of the risk on the seller when he carries the goods himself can, however, lead to practical problems. When the seller transports a container with his own truck to a port where it is handed over to an independent carrier, the risk of transit is ‘split’ in two, which can encourage disputes over the exact moment when the damage occurred and who at that time carried the risk.\(^ {201}\) Parties are advised, and follow this advice most of the time, to allocate the risk \textit{inter partes} by using trade terms in their contract.

\textbf{ii Handing over of the goods}

Hager defines ‘handing over’ as transferring the goods into the carrier’s custody.\(^ {202}\) The handing over of the goods is complete when the goods are in the physical custody of the carrier. In a case between an Italian seller and a German buyer of plants, the court stated that ‘handing over requires that the carrier takes custody of the goods, which implies an
actual surrender of the goods to the carrier.' Further, the court said that 'it is no doubt necessary for the seller to load the goods onto or into the respective means of transport. Thus, the risk only passes when loading is completed.' This was confirmed by a decision of the Swiss Supreme Court in 2008 where a machine got damaged by falling off a forklift just before loading on the truck. The court said: 'when a contract involves carriage of goods, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer. This stage was not reached in this case.'

In the case of sea transport it is, therefore, sufficient to place the goods alongside the ship under the condition that the carrier has taken the goods into his custody. This is important since this means that the risk during loading on the ship, a risky business, is on the buyer. When the load is accepted prior to loading, it is often difficult to determine whether damage to the goods occurred before, during or after loading. In situations described above, the parties should use trade terms to avoid disputes regarding the moment the damage occurred.

**D Carriage from an agreed place**

If the contract requires the seller to hand the goods over to a carrier at a particular place, the risk passes from seller to buyer upon handing over of the goods at that place. This was included for situations where the seller has his business somewhere inland and agrees to deliver the goods at a seaport; a situation in which the risk does not pass according to the first sentence of article 67(1) but by applying the second sentence of article 67(1). If the seller agrees to hand over the goods to a carrier at a particular place, it doesn’t matter whether the goods get at the place by the seller’s own trucks or if they get there by a transport company engaged by the seller. In both situations – in opposition to the rule expressed in the first sentence of article 67(1) of the Convention – the risk will be on the seller and he will be responsible for transit damage occurred before handing over to the carrier at that particular place. In a case between an

---

208 X., *Secretariat’s Commentary*, 64.
Italian seller and a German buyer of pizza cartons, the court held that in absence of proof that the parties agreed on delivery at specific place, the risk passes when the goods are handed over to the first carrier.\textsuperscript{210}

In cases where the particular place is defined in general terms, \textit{e.g.} shipped French Mediterranean Sea coast, the place that is chosen by the seller to ship the goods will be the particular place where risk passes from seller to buyer.\textsuperscript{211}

The second sentence of article 67(1) is not applicable in situations where the contract provides that the seller needs to hand the goods over to the buyer at a particular destination.\textsuperscript{212} Situations like that fall under article 69(2) of the Convention, see 4.6.2 D, \textit{infra}.

\textit{E Retention of documents}

It is a normal practice in international trade to let the unpaid seller retain the shipping documents of the goods as a form of security until the payment is made.\textsuperscript{213} Some legal systems link the ‘\textit{title}’ or ‘\textit{property}’ of the goods with the handing over of the documents.\textsuperscript{214} This might lead to insecurity on the issue of the passing of risk and whether this passage is influenced by retention of documents. In arranging a documentary transfer, the parties are more concerned with the price being paid than with the possibility of the goods being damaged.\textsuperscript{215} It can occur that according to the contract, payment of the price is due while the goods are still in transit. In these situations it would be too difficult to link the passing of the risk to the handing over of the documents since most of the times it is hard to determine the exact moment the damage occurred, thus leading to possible disputes.\textsuperscript{216} Article 67(1) third sentence states that the passing of the risk is not prevented by the seller’s retention of documents controlling the disposition of the goods.\textsuperscript{217} This rule is important and useful to avoid the

\textsuperscript{210} Amtsgericht Duisburg (Germany) 13 April 2000, Pizza Carton case, \textit{Clout case} no. 360, http://cisgw3.law.pace.edu/cases/000413g1.html.

\textsuperscript{211} G. HAGER and M. SCHMIDT-KESSEL in P. SCHLECHTRIEM and I. SCHWENZER, \textit{Commentary}, 930.

\textsuperscript{212} X., \textit{Secretariat’s Commentary}, 64.

\textsuperscript{213} \textit{Ibid}.

\textsuperscript{214} \textit{Ibid}.


\textsuperscript{216} J. O. HONNOLD and H. M. FLECHTNER, \textit{Uniform Law for International Sales}, 525.

basic rule on risk losing its effect.\textsuperscript{218} In modern transactions, where no documents are issued, the right to control the disposition of the goods follows from the contract of carriage; this is a confirmation of the rule expressed in article 67(1), third sentence.\textsuperscript{219}

\section*{F Identification of the goods}

A buyer under the Convention should only bear the risk of damage or loss if it is clear that the goods damaged or lost in transit are his.\textsuperscript{220} It can happen that on shipment of the goods it is not possible to tell from markings on the packaging or from documents accompanying the goods that certain goods should be delivered to a certain buyer.\textsuperscript{221} This might happen in situations where the seller ships the goods to another person than the buyer; \textit{e.g.} an agent of the seller, who needs to arrange delivery to the buyer.\textsuperscript{222} Or it happens that goods being sold under different sale contracts to separate buyers are shipped in bulk.\textsuperscript{223} In these situations, a given buyer will require assurance that the goods damaged or lost in transit were indeed the very goods the seller wanted that particular buyer to receive.\textsuperscript{224} For this reason article 67(2) lists the identification of the goods as an additional requirement for the passage of risk; the risk does not pass to the buyer unless and until the goods are clearly identified to the contract.\textsuperscript{225} Goods can be identified by markings on the goods, by shipping documents, by notice given to the buyer or otherwise.\textsuperscript{226} A Russian arbitral tribunal found that a seller could clearly identify the goods for the purposes of the contract by means of shipping documents.\textsuperscript{227} If the goods cannot be identified, the risk stays with the seller until the moment the goods are identified.

\begin{itemize}
\item[\textsuperscript{218}] J. O. HONNOLD and H. M. FLECHTNER, \textit{Uniform Law for International Sales}, 525.
\item[\textsuperscript{219}] G. HAGER and M. SCHMIDT-KESSEL in P. SCHLECHTRIEM and I. SCHWENZER, \textit{Commentary}, 931.
\item[\textsuperscript{220}] J. LOOKOFSKY, \textit{Understanding the CISG}, 102.
\item[\textsuperscript{221}] X., \textit{Secretariat's Commentary}, 64.
\item[\textsuperscript{222}] Ibid.
\item[\textsuperscript{223}] Ibid.
\item[\textsuperscript{224}] J. LOOKOFSKY, \textit{Understanding the CISG}, 103.
\item[\textsuperscript{225}] P. SCHLECHTRIEM, \textit{Uniform Sales Law}, 89.
\item[\textsuperscript{226}] J. LOOKOFSKY, \textit{Understanding the CISG}, 103.
\end{itemize}
4.4.3 Splitting the risk

Following the application of article 67 the risk can split in three cases, firstly if the seller uses his own trucks or other means of transportation for a part of the way, secondly the case in which he is obliged to hand over the goods to a carrier at a particular place and thirdly where the goods are identified to a particular contract only after the goods were shipped. Situations like this, where the risk is split during the voyage between seller and buyer, might create disputes over the exact moment the damage occurred. In quite a lot of these situations it cannot be established when the goods got damaged or lost and, therefore, the party that bears the risk of loss will ultimately be the party that bears the burden of proving the existence of conforming or non-conforming goods, see 4.2 supra.

4.4.4 Conclusion

Nearly all international sale of goods will include carriage. Therefore, article 67 of the Vienna Convention is the article on passing of risk that pertains to most international sales. We need, of course, to keep in mind that in practice most international sale contracts will include trade terms (like the ICC Incoterms), in which the parties will allocate the risk themselves. However, unless the buyer and seller have included such a provision in their contract the risk in cases that also involve carriage must be borne by the buyer from the moment the goods are handed over to the first carrier for transport to the buyer. Although the drafters of the CISG chose very clearly to place the transit risk on the buyer, they should have given a clear definition of the concept of the ‘first carrier’ and ‘handing over’.

---

228 G. HAGER and M. SCHMIDT-KESSEL in P. SCHLECHTRIEM and I. SCHWENZER, Commentary, 932.
229 Ibid.
4.5 Article 68 CISG: goods sold in transit

The next article we will discuss is article 68 of CISG. This provision deals with the situation in which goods are already in transit at the time of the contract of sale.231

4.5.1 History

Article 68 of the Vienna Convention, that deals with the situation in which goods are sold while being in transit, was subject to much controversy during its drafting.232 At the Conference in Vienna this provision on allocation of risk in sale of goods in transit unexpectedly gave rise to some problems.233 The draft version of article 68 CISG (article 80 of the Draft) provided that the buyer assumes the risk of damage or loss from the time the goods were handed over to the carrier who issued the documents controlling their disposition.234 According to the Secretariat’s Commentary to the Draft article 80, this rule, which makes the risk pass prior to the conclusion of the contract, ‘arises out of purely practical concerns.’235 It is normally difficult to determine the precise moment in time when goods suffered damage or loss and it is therefore more convenient for the buyer to pursue a claim for such loss or damage against the carrier and the insurance company than it is for the seller; therefore, the risk of loss is deemed to have passed retroactively at the time the goods were handed over to the carrier who issued the documents controlling their disposition.236

At the Vienna Conference, a number of developing countries, that mostly import goods, rejected the retroactive assumption of risk by the buyer.237 They based their criticism on the grounds that it was irrational and unjust to put the risk on the buyer before the contract was made, especially in situations in which the goods had not been insured prior to that date.238 They also argued that the buyer could have no insurable interest

---

231 B. NICHOLAS in C. M. BIANCA and M. J. BONELL, Commentary, 496.
232 Ibid.
233 G. HAGER and M. SCHMIDT-KESSEL in P. SCHLECHTRIEM and I. SCHWENZER, Commentary, 933.
235 X, Secretariat’s Commentary, 65.
238 B. NICHOLAS in C. M. BIANCA and M. J. BONELL, Commentary, 496; B. VON HOFFMANN, Dubrovnik Lectures, 293.
until the time the contract was made. Supporters in favour of the rule that creates retroactive passing of risk argued on the other hand that it represented usual practice in international trade and that the rule was there to avoid controversy over the time when transit damage occurred. The result of this discussion is reflected in the present version of article 68 of the Convention under which risk basically passes to the buyer only upon conclusion of the contract, but retroactive assumption of risk applies if the circumstances so indicate. This was approved with a majority of votes although some delegations preferred to have no provision at all.

4.5.2 Article 68 in detail

A Overview

Article 68 CISG allocates the risk where goods are sold while they are already in transit and they are found damaged upon arrival or they are lost during transit. In these situations, article 67(1) of the Vienna Convention can not apply since the goods upon handing over to the first carrier, were not handed over for transmission to the buyer; since at the time of handing over to the carrier the buyer was not known and a contract of sale was not concluded. Article 68 CISG states:

*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.*

---

244 B. Nicholas in C. M. Bianca and M. J. Bonell, *Commentary*, 497.


B The basics

The basic rule of article 68 is expressed in the first sentence and makes the risk pass from seller to buyer when the contract of sale for the goods in transit is concluded. According to this major rule, the risk will be split; a situation that, as seen in part 4.4.3, supra, should be avoided since it has the feature of being dispute creating.\(^{245}\) When the damage is the result of an identifiable event, \textit{e.g.} a storm or a collision, there won’t be a difficulty since the moment when the damage to or loss of the goods occurred can clearly be identified.\(^{246}\) In situations, however, where it cannot be ascertained when the damage or loss occurred, the one who has the burden of proof concerning the conformity of the goods will be the one bearing the risk of loss of the goods.\(^{247}\)

In a case between two Chinese companies – the Chinese law referred to the CISG to solve the case – the seller shipped fishmeal from Chicama, Peru to Quindoa, China.\(^{248}\) The load arrived too late since the ship was blocked in Los Angeles for twenty-four days because it was considered unseaworthy by the US coast guard. The arbitral court stated that according to article 68 CISG, the risk passed to the buyer when the contract was established. In this case, however, the court added that the un-seaworthiness of the ship and unreasonable delay of the ship are risks that do not fall under the risk in article 68 since they do not refer to damages by accidents.

Parties can avoid this dispute-inducing situation by an express agreement on allocation of risk.\(^{249}\) They can agree that risk passes either at the beginning or the end of the transit (art. 6 CISG). One way of doing this is by including an Incoterm in the contract. In addition, article 68 refers, in its second sentence, to circumstances that indicate that the risk is assumed from the time the goods are handed over to the carrier.\(^{250}\)

C The second sentence: retroactive assumption

Article 68 CISG provides us in its second sentence with an exception to the general rule of risk passing upon conclusion of the contract of sale of goods in transit. According to


\(^{247}\) See 4.4.3 ; G. HAGER and M. SCHMIDT-KESSEL in P. SCHLECHTRIEM and I. SCHWENZER, \textit{Commentary}, 934.


this second sentence the risk passes retroactively from seller to buyer from the time the goods were handed over to the carrier who issued the documents embodying the contract of carriage.\textsuperscript{251} This rule, however, is only applicable if the circumstances so indicate.\textsuperscript{252}

\textbf{i The circumstances}

If the circumstances so indicate, the buyer assumes the risk for the whole voyage. The applicability of the retroactive assumption of risk therefore, depends upon the satisfaction of a vague precondition.\textsuperscript{253} HAGER states that there is a general agreement that the existence of transportation insurance for the whole transit period, including the period of carriage already completed, is a particularly relevant circumstance.\textsuperscript{254} To understand this thoroughly, we will assume the next situation. A load of cacao that is in transit from Ecuador to Belgium is subject of a contract of sale concluded between an Ecuadorian exporter and a Belgian chocolate producer. Upon arrival in the port of Antwerp, inspection of the cacao shows that the load of cacao had been seriously damaged by seawater during the period of transit.

According to article 68, first sentence of the Vienna Convention, the risk has passed upon conclusion of the contract, somewhere during the period of shipping from Ecuador to the Belgium. Since the damage is caused by water seepage it is difficult to determine whether this damage was caused before or after conclusion of the contract – most likely the events leading to this damage will have been in occurrence during the whole, or a large part of the, period of transit. Suppose that in the sale agreed upon between both parties, the standard package of documents covering the shipment, including a policy of insurance payable ‘to the order of the assured’, is transferred to the buyer.\textsuperscript{255} Because of this, the buyer would be the only person who could claim under the policy of insurance therefore providing evidence for an intention to transfer the risk to the buyer when first handed over to the carrier.\textsuperscript{256} Since article 68 refers to circumstances and thus does not require express agreement, the conclusion that risk passes at the start of the voyage is made easy.\textsuperscript{257} Contracts of sale of goods that are concluded while the goods are already

\textsuperscript{251} G. HAGER and M. SCHMIDT-KESSEL in P. SCHLECHTRIEM and I. SCHWENZER, \textit{Commentary}, 934.
\textsuperscript{252} Ibid.
\textsuperscript{253} Ibid.
\textsuperscript{254} Ibid.
\textsuperscript{256} Ibid.
in transit typically require the seller to transfer an insurance policy to the buyer and, therefore, this makes the second sentence of article 68 widely applicable.\footnote{258}{B. NICHOLAS in C. M. BIANCA and M. J. BONELL, \textit{Commentary}, 498.}

It has been suggested that in situations where it is not known when the damage to the goods occurred, the circumstances always lead to buyer’s retroactive assumption of the risk.\footnote{259}{G. HAGER and M. SCHMIDT-KESSEL in P. SCHLECHTRIEM and I. SCHWENZER, \textit{Commentary}, 934.} This might create a dispute-avoiding climate but it does not reconcile with the legislative history of article 68, particularly the compromise that was reached at the Conference in Vienna and expressed in the first sentence of article 68 C\textit{ISG}.\footnote{260}{\textit{Ibid.}} What if the seller sold uninsured goods? Should it not be the seller who carries the burden of risk on these uninsured goods during the risky period of transit?\footnote{261}{\textit{Ibid.}} Not following the \textit{ratio legis} of article 68 might foster the temptation to sell goods after they have been damages, leading to unfair outcomes.

It is clear that this second sentence, ‘\textit{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},’ is too vague. Therefore, parties should specify in their contract a clear and practical rule placing the risk on the buyer, provided that the buyer can look to an insurer in the event of loss.\footnote{262}{J. ERAUW, ”Delivery terms and the passing of risk: drafting clauses related to C\textit{ISG} articles 66-70”, in H. M. FLECHTNER, R. A. BRAND and M. S. WALTER (Eds.), \textit{Drafting Contracts under the C\textit{ISG}}, New York, Oxford University Press, 2008, 405.}

\textbf{ii The carrier who issued the documents embodying the contract of carriage}

According to article 68 of the Vienna Convention, in order to apply the retroactive assumption of risk by the buyer, the goods must have been ‘\textit{handed over to a carrier who issued the documents embodying the contract of carriage},’\footnote{263}{B. NICHOLAS in C. M. BIANCA and M. J. BONELL, \textit{Commentary}, 498; G. HAGER and M. SCHMIDT-KESSEL in P. SCHLECHTRIEM and I. SCHWENZER, \textit{Commentary}, 935.} There is no reference to the category used in article 67(1), namely ‘\textit{documents controlling the disposition of the goods}’.\footnote{264}{B. NICHOLAS in C. M. BIANCA and M. J. BONELL, \textit{Commentary}, 499.} In an earlier version of article 68, the expression ‘\textit{documents controlling the disposition of goods}’ was used.\footnote{265}{J. O. HONNOLD, \textit{Documentary History}, 625.} An amendment proposed by the United States delegation changed this into the present wording, ‘\textit{the documents embodying the contract}'}
of carriage." The reason behind this was that the old wording was likely to be understood as being limited to negotiable bills of lading, whereas the rule in article 68 should be applicable whether the document was negotiable or not and whether the buyer was covered by insurance or not. This means that unlike article 58 CISG and article 67(1) CISG, the application of retroactive assumption of risk does therefore not depend upon whether the documents control the disposition of the goods but instead whether they can proof the existence of the contract of carriage; this gives article 68 a wider field of application.

If no documents were issued, the rule does not apply and the risk will pass upon conclusion of the contract. In multimodal transport where land and sea transport is combined, the handing over to the carrier who issued the relevant documents decides the moment of passing of risk. The Conference did not succeed in providing for a possibility that in the future there might not be any documents issued at all and that these documents will be recorded and transmitted electronically.

D The third sentence: non-disclosure by the seller

The last sentence of article 68 states that '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.' The wording of this last sentence presents us with a problem of interpretation; there are namely two difficulties relating to the interpretation.

---

266 J. O. Honnold, *Documentary History*, 626.
267 A negotiable bill of lading is a bill of lading that is transferable and gives the consignee of the bill of lading the opportunity to further pass on the title over the goods to a third party by transferring the bill of lading. If article 68 would only refer to documents controlling the disposition of the goods, only negotiable bills of lading might be included since they give the consignee the right to transfer the bill of lading to a third person (D. Holloway, C. Murray and D. Timson-Hunt, *Schmitthoff’s Export Trade*, London, Sweet and Maxwell, 2007, 310.)
268 J. O. Honnold, *Documentary History*, 626.
Firstly, there is a problem with the application of this sentence to damages occurred before and after the conclusion of the contract. Does this sentence refer to the loss or damage of which the seller knew or ought to have known at the time of the conclusion of the contract, or does it also include damages which occurred after the moment of conclusion but which are connected with the damage present at the conclusion of the contract? 

The second difficulty that might arise is the relationship of this third sentence with the two first sentences of article 68 CISG. Is the third sentence of article 68 an exception created on the ‘exception’ of sentence 2, namely the retroactive assumption of the risk, or does it also apply to the first sentence, which states the general rule?

### i Loss or damage under the third sentence

The first situation is best explained with an illustration so lets go back to the cacao example. The seller ships the cargo of cacao on April 3 and sells the entire load of cacao on April 8. On the date of the conclusion of the contract (April 8), the seller has reason to believe that one-fifth of the load is damaged by seawater but he does not disclose this to the buyer. In fact two-fifth of the cacao had been damaged. During the rest of the voyage the seawater also damages the rest of the load.

The question here is whether or not the seller is liable for the damages which had already occurred at the moment of conclusion of the contract and of which he knew or ought to have known (one-fifth of the cacao), or whether he is also liable for the damages occurred after the conclusion (the whole load of cacao) or which already existed at the conclusion but of which the seller neither knew nor ought to have known (two-fifth of the cacao).

Article 80 of the Draft refers to ‘such loss or damage is at the risk of the seller.’ This wording seems to restrict the loss or damage borne by the seller to the actual damage that was present at the time the risk passed. The formulation was, however, changed to the present ‘loss or damage’; this seems to place the loss of the whole cargo on the seller, including the subsequent damage, which is causally connected with the original

---

274 G. HAGER and M. SCHMIDT-KESSEL in P. SCHLECHTRIEM and I. SCHWENZER, Commentary, 935.
275 B. NICHOLAS in C. M. BIANCA and M. J. BONELL, Commentary, 499.
276 Ibid.
277 Ibid.
278 G. HAGER and M. SCHMIDT-KESSEL in P. SCHLECHTRIEM and I. SCHWENZER, Commentary, 935.
279 B. NICHOLAS in C. M. BIANCA and M. J. BONELL, Commentary, 500; X., Secretariat's Commentary, 65.
Nicholas states that when the seller fails to disclose loss or damage that had occurred before the conclusion of the contract the seller would be liable not only for the loss or damage that the seller knew or should have known but also for all that the damage that had occurred when the contract was made and for all the subsequent damage ‘which is causally connected with the original damage.’²⁸¹ If we apply this to the example given above, the seller will be liable for the whole load of cacao. Both Honnold and Nicholas support this interpretation as it has the advantage of avoiding the splitting of the transit risk, a situation that creates disputes, see 4.4.3 and 4.2, supra.²⁸² Honnold, nevertheless, supports this approach in so far as it supports holding transit loss on the seller but he doubts Nicholas’ limitation based on ‘causal connection.’²⁸³

Hager, however, follows the opinion that the seller is only liable for loss or damage that has already occurred at the time of the conclusion of the contract and of which he knew or ought to have known.²⁸⁴ He underpins this opinion by referring to the change of wording from the Geneva Draft to the Vienna Draft. The Geneva Draft stated: ‘where the seller is not acting in good faith, the risk or loss of goods sold in transit does not pass to the buyer’, which was changed in the Vienna Draft into ‘... such loss or damage is at the risk of the seller.’²⁸⁵ Which again was amended in the final version of the Convention back to: ‘the loss or damage’, since there was a discrepancy between the French and English version.²⁸⁶ According to Hager, the change from the wording in the Geneva Draft to the one in the Vienna Draft indicates the intention to make the seller liable only for loss, which had already occurred at the time of conclusion of the contract of sale and of which he knew or ought to have known.²⁸⁷ This was only changed to the more general ‘loss or damage’ to end the discrepancy. He does, however, point out that this has the adverse effect of splitting the risk leading to practical disadvantages.²⁸⁸ If we apply this view to the above example the seller will be liable for the loss of the cacao that already occurred

²⁸⁰ B. Nicholas in C. M. Bianca and M. J. Bonell, Commentary, 500.
²⁸¹ Ibid.
²⁸⁵ Ibid.
²⁸⁸ Ibid.
upon conclusion, namely two-fifth of the load of sugar. The majority opinion at this time leans toward the opinion expressed by HAGER.\textsuperscript{289}

I support the opinion expressed by NICHOLAS and partly supported by HONNOLD since this opinion has the advantage of avoiding disputes and costly litigation. I do see the reasoning behind the opinion of HAGER and that one must follow the intention of the drafting parties for the sake of it, nonetheless, I think the view of NICHOLAS and HONNOLD is a better way of dealing with this ambiguous sentence.

\textbf{ii Appropriation of goods and non-disclosure}

The provision of article 68 is clear when it comes to non-disclosure by the seller of loss or damage to the goods that occurred prior to the conclusion of the contract; the risk remains on the seller who knows or ought to have known of that loss or damage.\textsuperscript{290} Article 68 is however not so clear when it comes to situations in which the seller becomes aware of damage to or loss of the goods after the conclusion of the contract but before the goods are appropriated.\textsuperscript{291} In a case like this BRIDGE argues that 'the knowing seller should be allowed to appropriate the goods after the loss occurred because if the seller were not allowed to appropriate the goods and thus transfer the risk, that seller might be exposed to a damages action for non-delivery by the buyer.'\textsuperscript{292} This is an approach that has gained great support.\textsuperscript{293}

\textbf{iii The relationship with the first two sentences}

The second difficulty surrounding the third sentence of article 68 is its relationship with the two first sentences of article 68 of the Convention. In the original formulation, the (now) third sentence was a part of the second sentence.\textsuperscript{294} At the 9\textsuperscript{th} Plenary Meeting, the delegations had a discussion about the wordings of this second phrase and what it means.\textsuperscript{295} It was intended that the exception should apply only to the second sentence. Mr. KRISPI of the Greek delegation correctly pointed out that the second sentence stated an exception, followed by an exception to the exception, which meant a return to the rule in the first sentence.\textsuperscript{296} The Drafting Committee amended this original formulation and

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{289} A. RAYMOND in S. KRÖLL, L. MISTELIS and M. DEL PILAR PERALES VISCACILLAS, \textit{Commentary}, 903.
  \item \textsuperscript{290} A. RAYMOND in S. KRÖLL, L. MISTELIS and M. DEL PILAR PERALES VISCACILLAS, \textit{Commentary}, 902.
  \item \textsuperscript{291} \textit{Ibid.}
  \item \textsuperscript{292} M. BRIDGE, \textit{Festschrift for Albert H. Kritzer}, 81.
  \item \textsuperscript{293} A. RAYMOND in S. KRÖLL, L. MISTELIS and M. DEL PILAR PERALES VISCACILLAS, \textit{Commentary}, 902.
  \item \textsuperscript{294} B. NICHOLAS in C. M. BIANCA and M. J. BONELL, \textit{Commentary}, 500.
  \item \textsuperscript{296} J. O. HONNOLD, \textit{Documentary History}, 217.
\end{itemize}
\end{footnotesize}
made it into three separated sentences, the last sentence starting with the wording ‘Nevertheless…’; the purpose behind this was to make it even clearer that the last sentence of article 68 relates to the exceptions envisaged by the second sentence of article 68 of the Convention, namely the situation of retroactive assumption of risk by the buyer. Only the seller who acts in good faith gets the advantage of the retroactive effect of the transfer of risk.

This interpretation is consistent with the relationship between risk and liability for non-conformity; a relationship already handled in this dissertation at 4.3.2, supra. Article 36 of the Vienna Convention expresses the basic rule that the seller is liable for non-conformity of the goods till the risk passes. Article 68 CISG lets the risk pass upon conclusion of the contract (unless circumstances indicate differently...) If damage to the goods occurs before the time of conclusion, it falls under the rule of non-conformity; if the damage occurs after the conclusion of the contract, the question that is raised is one concerning risk. If the third sentence would also be an exception to the first sentence of article 68, this fundamental distinction contained in the Vienna Convention would be lost.

E The goods under article 68

Article 68 of the Convention is directed at sale of specific goods and should be interpreted as to require goods to be identified based on the same requirements as under article 67(2) CISG, 4.4.2 F, supra. However, it sometimes happens that that a seller sells an undivided bulk to several buyers, called a ‘collective consignment’; article 68 can also be applicable in such a situation. If the contract or a trade usage between the parties allows the delivery of a collective consignment, the risk will pass to buyers at the time according to article 68. In this situation the buyers will bear the risk pro rata,

298 P. Schlechtriem, Uniform Sales Law, 90.
299 B. Nicholas in C. M. Bianca and M. J. Bonell, Commentary, 500.
300 Ibid.
301 Ibid.
304 Ibid.
meaning they will be liable for loss or damage according to their share in the bulk.\textsuperscript{305} If the seller, however, is not entitled to deliver the goods in a collective consignment, the risk will pass based on the same requirements as under article 67(2), meaning that the risk will pass only when the goods have been clearly identified to the contract.\textsuperscript{306} The buyer should not be held to have agreed to a regime of loss sharing in an identified bulk unless this is clearly indicated by the contract governing the sale of the bulk.\textsuperscript{307}

### 4.5.3 Conclusion

The specific regime applicable on passing of risk in international sale of goods in transit is set out in article 68 of the CISG. The article was subject to a lot of discussion during the conference to find a compromise that was acceptable for all parties. The delegations chose a general rule of risk passing that splits up the risk between buyer and seller during the period of transit. The choice for this dispute-creating regime is understandable taking into consideration the difficult negotiations to find a compromise. However, from a legal point of view it is a situation that should have better been avoided in the treaty. The vague second sentence of article 68, which provides an exception that lets the risk pass when handed over to the carrier, tries to remedy this. In international sales of goods, most contracts will require the seller to transfer an insurance policy to the buyer and thus making the second sentence of article 68 widely applicable, creating a clear allocation of risk between seller and buyer.

I believe that the second sentence to a certain degree saves us from a lot of legal uncertainty, due to the fact that transfer of insurance papers will often make this sentence come into play. However, a better situation would have been created if this were the sole rule (under the condition expressed in the third sentence of article 68.)

\textsuperscript{305} Ibid.
\textsuperscript{306} Ibid.
4.6 Article 69 CISG: the residual rule

Both article 67 and 68 provide a set of rules applicable to sales of goods that also involve carriage of the goods.\textsuperscript{308} Article 69 of the Vienna Convention provides us with the general rule for non-carriage cases. All contracts that are not concerned with the issue of carriage of the goods by a carrier fall under the application of article 69.\textsuperscript{309} In cases governed by article 69 of the Vienna Convention, the buyer will take possession of the goods and arrange for any necessary transport himself.\textsuperscript{310}

4.6.1 History

The UN Convention on International Sale of Goods abandoned the approach of the Uniform Law of Sales of 1964, in which the passage of the risk was linked to the concept of delivery.\textsuperscript{311} Although the linkage to this concept was abandoned, the Convention still places the risk upon the person who has custody over the goods.\textsuperscript{312} This is a logical decision since it is the person who has the physical custody over the goods who is in the best position to protect the goods from loss or damage and, if loss or damage occurs, to present claims against those who might have caused loss or damage to the goods or against the insurance company if insurance is involved.\textsuperscript{313}

Since the risk is linked to the person having the custody over the goods, the risk will pass from seller to buyer when the buyer takes over the goods from the seller.\textsuperscript{314} This basic rule is expressed in the first paragraph of article 69. Paragraph two of article 69 adds the specific rule covering cases in which the buyer is bound to take over the goods of the seller at a place different than the seller’s place of business.\textsuperscript{315} This second paragraph is an initiative of the Norwegian delegation aiming at covering the contracts of sale of goods where a bailee or a warehouseman holds the goods.\textsuperscript{316}

\textsuperscript{308} J. Lookofsky, \textit{Understanding the CISG}, 103.
\textsuperscript{310} X., \textit{Secretariat’s Commentary}, 65.
\textsuperscript{312} Ibid.
\textsuperscript{313} X., \textit{Secretariat’s Commentary}, 65.
4.6.2 Article 69 in detail

A Overview

Article 69 is called the ‘residual rule’ on passing of the risk in the CISG. Contracts of international sale of goods that do not fall within the scope of article 67, involving carriage, and article 68, sale of goods in transit, will be governed by article 69:

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

(2) However, if the buyer is bound to take over the goods at a place other than a place of business of the seller, the risk passes when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal at that place.

(3) If the contracts relates to goods not then identified, the goods are considered not to be placed at the disposal of the buyer until they are clearly identified to the contract.

The first paragraph of article 69 is concerned with contracts in which the buyer needs to take over the goods at the seller’s place of business.317 In the German pizza carton case,318 already referred to in 4.4.2 D, supra, the court clearly stated that ‘art 69(1) applies to cases in which the goods are placed at the disposal of the buyer at the seller’s place of business. The court follows this opinion because article 69(2) CISG contains a special rule for cases in which the goods are not taken over by the buyer at the seller’s place of business.’ In situations in which the contract is silent on the issue of the carriage of the goods but the buyer arranges for transportation of the goods by a third party, the passing of risk will be governed by article 69 CISG rather than by article 67.319 The decision on which article parties will apply on the passage of risk depends upon the interpretation of their contract.

All the other situations not governed by this first paragraph will be governed by article 69(2), making this second paragraph the ‘catch-all’ provision of the residual risk rule.320 In a case before a court in the State of Colorado, a Mexican buyer claimed relief for

317 G. HAGER and M. SCHMIDT-KESSEL in P. SCHLECHTRIEM and I. SCHWENZER, Commentary, 938.
318 Amtsgericht Duisburg (Germany) 13 April 2000, Pizza Carton case, Clout case no. 360, http://cisgw3.law.pace.edu/cases/000413g1.html.
delivery of non-conforming goods (coal mining equipment) by the United States seller.\textsuperscript{321} In referring to article 36(1) of the CISG, which provides that the seller is liable for any lack of conformity which exists at the time when the risk passes to the buyer, the court stated that ‘article 69(2) CISG governs passing of risk if the buyer is bound to take over the goods at a place other than a place of business of the seller. It provides that the risk passes when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal at that place.’ In a Danish case between a Danish seller and a German buyer, the court referred to article 69 of the Vienna Convention in general, without indicating whether paragraph one or two is applicable in the case.\textsuperscript{322} In casu, a mobile grain dryer got damaged after the buyer took control at this own premises in Germany making paragraph two of article 69 applicable, since the buyer was bound to take over the goods at a place other than the seller’s place of business.

For the goods to be considered as ‘placed at the buyer’s disposal’, they must be identified to the contract.\textsuperscript{323} Thus in order to let the risk pass, article 69 presupposes identification of the goods.\textsuperscript{324} This is a logical requirement that is expressly included in paragraph 3 of article 69.

\textbf{B \quad The basics: taking over at the seller’s place of business}

The first paragraph of article 69 is concerned with contracts in which the buyer needs to take over the goods that have been placed at his disposal at the seller’s place of business.\textsuperscript{325} Because most international sales of goods also include an agreement concerning carriage of the goods, this article will have a limited importance in practice.\textsuperscript{326} In cases that are governed by article 69 CISG, the seller will have to place the goods at the disposal of the buyer.\textsuperscript{327} The buyer will take possession of the goods and arrange for any necessary transport himself, either in his own vehicles or in public carriers.\textsuperscript{328} Article 69 does not express requirements the buyer needs to fulfil in order to

\textsuperscript{321} U.S. District Court (Colorado, USA) 6 July 2010, Alpha Prime Development Corporation/Holland Loader, http://cisgw3.law.pace.edu/cases/100706u1.html.
\textsuperscript{322} Randers Byret (Denmark) 8 July 2004, Clout case no 995, http://cisgw3.law.pace.edu/cases/040708d1.html.
\textsuperscript{323} M. Bridge, Festschrift for Albert H. Kritzer, 97.
\textsuperscript{324} J. Lookofsky, Understanding the CISG, 105.
\textsuperscript{325} A. Raymond in S. Kröll, L. Mistelis and M. del Pilar Perales Viscacillas, Commentary, 906.
\textsuperscript{327} A. Raymond in S. Kröll, L. Mistelis and M. del Pilar Perales Viscacillas, Commentary, 906.
\textsuperscript{328} X., Secretariat’s Commentary, 65.
place the goods at the seller's disposal. The drafters didn't intend to include an obligation on the seller to notify the buyer; the mere fact that the buyer is aware that the goods are placed at his disposal is sufficient.\textsuperscript{329} If the buyer needs to take over the goods at the seller's place of business, the risk will pass at the moment when the buyer takes over the goods, this being the moment when he takes over the control of the goods.\textsuperscript{330}

Thus, in cases where the buyer is obliged to take over the goods at the seller's place, the risk will generally pass when the buyer actually takes over the goods.\textsuperscript{331} The fact that the buyer uses a carrier to take over the goods, does not prevent the risk from passing in cases where it was agreed that the buyer himself would take over the goods.\textsuperscript{332} This was clearly stated in the Stallion case,\textsuperscript{333} see 4.4.2 B, \textit{supra}, where the court said that 'the risk passed when the horse was handed over to the buyer, or was take by the buyer. The stallion was handed over at the time the buyer had the carrier he assigned collect the horse at the stud farm. Although it was agreed that the horse would be collected by the buyer, the fact that he made use of the services of a carrier, and, therefore, only obtained indirect possession, accorded with the agreement of the parties and therefore did not prevent the passing of risk.'

The mere fact that the seller has placed the goods at the buyer's disposal is not sufficient to let the risk pass; the buyer needs to take actual control over the goods.\textsuperscript{334} If the contract permits the buyer to collect the goods within a given period, the risk will only pass after the buyer has taken over the goods, or if the buyer failed to take delivery before the period expired, leading to a breach of contract.\textsuperscript{335}

The obligation of the seller to place the goods at the disposal of the buyer is also expressed in article 31(c) of the Vienna Convention. Article 31 is the article explaining the main obligation the buyer has to deliver. Placing the goods at the buyer's disposal according to article 31(c) means that the seller has done what is necessary for the buyer to be able to take possession.\textsuperscript{336} This includes the identification of the goods, the

\textsuperscript{329} A. \textsc{Raymond} in S. \textsc{Kröll}, L. \textsc{Mistelis} and M. \textsc{del Pilar Perales Viscacillas}, \textit{Commentary}, 906.
\textsuperscript{330} G. \textsc{Hager} and M. \textsc{Schmidt-Kessel} in P. \textsc{Schlechtriem} and I. \textsc{Schwenzer}, \textit{Commentary}, 939.; P. \textsc{Schlechtriem}, \textit{Uniform Sales Law}, 90.
\textsuperscript{331} J. \textsc{Lookofsky} in R. \textsc{Blanpain} and J. \textsc{Herbots}, \textit{International Encyclopaedia of Laws – Contracts}, 145.
\textsuperscript{333} Oberlandsgericht Schleswig-Holstein (Germany) 29 October 2002, Stallion case, http://cisgw3.law.edu/cases/021029g1.html.
\textsuperscript{334} G. \textsc{Hager} and M. \textsc{Schmidt-Kessel} in P. \textsc{Schlechtriem} and I. \textsc{Schwenzer}, \textit{Commentary}, 939.
\textsuperscript{335} J. \textsc{Lookofsky} in R. \textsc{Blanpain} and J. \textsc{Herbots}, \textit{International Encyclopaedia of Laws – Contracts}, 146.
\textsuperscript{336} X., \textit{Secretariat’s Commentary}, 30 and 65.
completion of pre-delivery preparation such as packing and the giving of such notification to the buyer as would be necessary to enable him to take possession.\textsuperscript{337}

\section*{C Breach of contract by the buyer}

\textbf{i} Failure to take delivery

The Vienna Convention assumes that the initiative for triggering performance lies with the seller and, in the absence of any provision concerning time of delivery in the contract, the seller will be required to deliver the goods in a reasonable time.\textsuperscript{338} Failure of the buyer to take over the goods that are placed at his disposal will be considered to be a breach of contract if the agreed time for taking delivery has passed or, if no time was agreed upon by the parties, after a reasonable period has expired after the buyer received the seller's notice that the goods are placed at his disposal in accordance with article 31(c) of the Vienna Convention.\textsuperscript{339} The term ‘reasonable time’ is not necessarily the same for both parties; the interpretation of it will depend upon the nature of the goods and the circumstances of the case.\textsuperscript{340} The last part of article 69(1) lets the risk pass from seller to buyer in situations where the buyer commits a breach of contract by failing to take delivery. In a German case, the court found that the seller didn't place the goods at the disposal of the buyer when he stored the goods in a manufacturer's warehouse, instead of storing them at the seller's warehouse where the delivery to the buyer was to be made (\textit{die Möbel befanden sich also nicht im Gewahrsam der Beklagten, sondern im Gewahrsam des Herstellerwerks, und waren demnach noch nicht von der Beklagten übernommen.})\textsuperscript{341}

\textbf{ii} Other breaches by the buyer

Article 69(1) does not expressly cover situations in which the buyer commits a breach other than refusing to take delivery of the goods; situations such as failure to pay the price when this is due before delivery.\textsuperscript{342} In a situation where the buyer refuses to make

\begin{flushright}
\footnotesize
\begin{itemize}
\item \textsuperscript{337} \textit{Ibid.}
\item \textsuperscript{338} M. Bridge, \textit{Festschrift for Albert H. Kritzer}, 99.
\item \textsuperscript{339} G. Hager and M. Schmidt-Kessel in P. Schlechtriem and I. Schwenzer, \textit{Commentary}, 939.
\item \textsuperscript{340} A. Raymond in S. Kröll, L. Mistelis and M. del Pilar Perales Viscagillas, \textit{Commentary}, 907.
\item \textsuperscript{342} B. von Hoffmann, \textit{Dubrovnik Lectures}, 295.
\end{itemize}
\end{flushright}
payment the seller can refuse to deliver to the buyer.\textsuperscript{343} In this situation, it is not the buyer who fails to take delivery but it is the unpaid seller who refuses to deliver to the buyer.\textsuperscript{344} HAGER is of the opinion that the situation in which the seller retains the goods after the buyer’s refusal to pay the price is also seen as the buyer ‘committing a breach of contract by failing to take delivery’ as in article 69(1) of the Convention.\textsuperscript{345} Similarly, according to SCHLECHTRIEM, article 69(1) should also be interpreted to include situations in which the goods could not be delivered because of other breaches of the contract by the buyer. He gives the example of the situation in which the buyer needs to obtain a required import license but he fails to do this in time.\textsuperscript{346} Also BERND VON HOFFMANN is of this opinion, he clearly states that although a proposal by the German delegation to make the risk pass to the buyer in all cases in which the buyer prevents delivery by breaching the contract was not accepted, he believes that ‘systematic coherence demands that delivery prevented by a breach of contract on the part of the buyer lets the risk of loss pass to the buyer. This argument is supported by the policy consideration that passing of risk is one of the elements that may encourage the buyer to meet his contractual obligations.’\textsuperscript{347}

The proposal by the German delegation to make the risk pass to the buyer in all cases in which the buyer prevents delivery by breaching the contract was not accepted.\textsuperscript{348} The reason for this can be found in the drafting parties’ assumption that those cases covered by this German proposal were already included in the text.\textsuperscript{349}

On the other hand we have NICHOLAS who clearly states that other breaches do not affect the passing of the risk. NICHOLAS says that article 70 of the Convention is not applicable to breaches by the buyer and, therefore, a breach which does not make it impossible for the seller to hand over the goods, but merely removes or suspends his obligation to do so, is not sufficient.\textsuperscript{350}

In my opinion, although not clearly expressed by the wording of the Convention, the risk should pass to the buyer in situations where the buyer breaches contractual obligations and therefore fails to take delivery when it is due. Most authors follow this opinion and it is consistent with the policy consideration that the passing of risk may encourage the

\textsuperscript{343} Ibid.
\textsuperscript{344} Ibid.
\textsuperscript{345} G. HAGER and M. SCHMIDT-KESSEL in P. SCHLECHTRIEM and I. SCHWENZER, Commentary, 939.
\textsuperscript{346} P. SCHLECHTRIEM, Uniform Sales Law, 91.
\textsuperscript{347} B. VON HOFFMANN, Dubrovnik Lectures, 295.
\textsuperscript{348} Ibid.; P. SCHLECHTRIEM, Uniform Sales Law, 91.
\textsuperscript{349} P. SCHLECHTRIEM, Uniform Sales Law, 91.
\textsuperscript{350} B. NICHOLAS in C. M. BIANCA and M. J. BONELL, Commentary, 507.
buyer to meet his contractual obligations. The general obligation expressed in article 85 till 88 of the Convention makes the seller preserve the goods if the buyer is in delay in taking over, so this rule of risk passing will not induce any adverse effects.

Article 79 of the Convention makes a party not liable for non-performance of his obligation if he can prove that the failure to perform was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract. Article 79 only prevents a party from exercising its right to claim damages (article 79(5)). The possibility of the buyer to claim exemption under this *force majeure* provision of the CISG will not prevent the risk from passing to the buyer.351

Because of the provision laid down at the end of article 69(1), the risk of loss of or damage to the goods can pass from seller to buyer, even though the seller is still in control of the goods.352 Since the risk is with the buyer but the seller is still in control of the goods, article 85-88 CISG contains the obligation of the seller to preserve the goods, and if they are subject to rapid deterioration or if their preservation would involve unreasonable expense, the seller, who is bound to preserve them, must take reasonable measures to sell them.

### D Taking over at a different place

We have seen that in contracts where the buyer is obliged to take over the goods at the seller’s place of business, the risk passes when the buyer takes over the goods, *i.e.* at the moment when there is a change of control over the goods. Paragraph two of article 69 adds the specific rule covering cases in which the buyer is bound to take over the goods from the seller at a place different than the seller’s place of business.353

In the Uniform Law on the International Sale of Goods of 1964, no such provision appeared.354 The second paragraph was an initiative of the Norwegian delegation aiming at covering the contracts of sale of goods where a bailee or a warehouseman holds the goods.355 The proposition to add the second paragraph of article 69 CISG was based on

---

352 Ibid.
the assumption that handing over in the first paragraph of article 69 is limited to ‘physical possession.’\textsuperscript{356} In situations where a third party needs to take over the goods it was suggested that the risk would pass when an appropriate act occurred after which that third party would become responsible for the goods.\textsuperscript{357} Such acts could be handing over of a negotiable document of title (such as a warehouse receipt) or the acknowledgement of the third party that he holds the goods for the buyer. This would mean that the risk could pass even when the buyer has not yet committed a breach of contract by failing to take over the goods ‘physically.’\textsuperscript{358} Because this interpretation would bring uncertainties into the interpretation of ‘taking over’ under article 69, the present second paragraph was introduced:

‘When the buyer is bound to take over the goods at a place other than the place of business of the seller, the risk passes when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal at that place.’

Paragraph two introduces a separate situation in which ‘the buyer is bound to take over the goods at a place other than the seller’s place of business.’\textsuperscript{359} According to the first paragraph of article 69, the risk passes when the buyer takes over the goods at the seller’s place of business. By virtue of the second paragraph of article 69 the risk will pass at an earlier point in time, namely at the moment when delivery is due and the buyer is aware that the goods are placed at his disposal at the place designated by the contract.\textsuperscript{360} As said before, the rule was made for situations in which the sold goods are stored in a warehouse or another place of custody, e.g. sales ‘Ex Warehouse’, ‘Ex Works’ or ‘Ex Quay.’\textsuperscript{361} The considerations that led to determining the appropriate time of passing of risk are different when the goods are at a place other than the seller’s place of business.\textsuperscript{362} When the goods are in the physical possession of the seller, and the last day of the period during which the buyer was obliged to take over the goods has not yet passed, the seller is in the best position to protect the goods from loss or damage and hence he should bear the risk.\textsuperscript{363} If, however, the goods are in the hands of a third party, the seller is not in a better position than the buyer to take the necessary precautions to

\textsuperscript{356} Ibid.
\textsuperscript{357} Ibid.
\textsuperscript{358} Ibid.
\textsuperscript{359} J. O. Honnold and H. M. Flechtnner, Uniform Law for International Sales, 536.
\textsuperscript{360} J. O. Honnold and H. M. Flechtnner, Uniform Law for International Sales, 536.
\textsuperscript{361} G. Hager and M. Schmidt-Kessel in P. Schlechtrie, and I. Schwenzer, Commentary, 939.
\textsuperscript{362} X., Secretariat’s Commentary, 65.
\textsuperscript{363} Ibid.
protect the goods from deterioration or loss.\textsuperscript{364} The CISG, therefore, chose to put the risk at the buyer from the time he is in a position to withdraw the goods from the control of that third party. From that moment he is in a better position to limit damage loss.\textsuperscript{365}

To understand this thoroughly we will apply this situation to the commerce of our earlier mentioned Belgian chocolate producer. The chocolate producer sells boxes of chocolate to a Norwegian buyer. The goods are stored in a warehouse operated by a third party; a situation known by both parties. When the Belgian seller deposited the chocolate in the warehouse, he received a warehouse receipt stating that the goods would be released to any person who held a delivery order executed by the Belgian seller. On August 5, when the contract was concluded, the Belgian seller gave the Norwegian buyer a delivery order that directs the warehouseman to deliver the goods to the buyer. On August 6, a fire hits the warehouse and all the goods got destroyed.

Following paragraph two of article 69 the risk passed the fifth of August, being the moment when delivery was due and when the buyer received notice that the goods were at his disposal at the warehouse.\textsuperscript{366} Unlike article 69(1), the passing of risk does not depend upon the buyer’s willingness (to a certain extent) to take over the goods at the seller’s place; it is the seller’s unilateral action of placing the goods at the buyer’s disposal that makes the risk pass.\textsuperscript{367} If we apply this to our example this means that the Norwegian buyer will have to pay the price even though the goods got destroyed in the fire.

In a dispute between a Norwegian seller and a German buyer of fish, the Norwegian seller had to deliver raw salmon to a Danish company that processed it into smoked salmon.\textsuperscript{368} The Danish Company got into financial difficulties and the Norwegian company sent a confirmation order to the buyer that accepted this. According to this confirmation order the Norwegian seller could deliver DDP (Delivery Duty Paid, \textit{infra}) to a place different than the buyer’s place of business. The seller then delivered a load of raw salmon at the Danish Company’s place of business that due to bankruptcy never reached the German buyer. The German court decided that ‘the seller complied with its

\textsuperscript{364} \textit{Ibid.}
\textsuperscript{365} \textit{Ibid.}
\textsuperscript{368} Oberlandesgericht Oldenburg (Germany) 22 September 1998, \textit{Clout case} no 340, http://cisgw3.law.pace.edu/cases/980922g1.html.
obligations and the risk had passed to buyer following article 69(2) CISG. Hence, the buyer is obliged to pay the purchase price (article 66 CISG), even if it didn’t receive the salmon.’

On the contrary, in another case between two Austrian sellers and a German buyer, the court decided that the risk didn’t pass from seller to buyer since the agreement stated that delivery was only due on the buyer’s demand and the buyer had not yet made such demand.369 In this case the goods were produced and stored in a Hungarian warehouse, the place of delivery according to the contract.

Yet in another dispute before an ICC arbitral tribunal between a Bulgarian buyer and an Austrian seller, the contract provided that the buyer needed to open documentary credit and delivery had to follow four weeks after the opening.370 The contract ordered the buyer to deliver DAF (meaning Delivery at Frontier, in Incoterms 2000 replaced by DAP, see 5.7, infra) at the border between Austria and Hungary. The buyer didn’t open the credit in time, which led to the seller depositing the goods in a warehouse and initiating legal action against the buyer. The tribunal held that the seller was entitled to reimbursement for expenses made to preserve the goods. But, the tribunal said, the seller had neither delivered the goods nor placed the goods at the buyer’s disposal pursuant to article 69. So there had been no transfer of risk. Because of this the buyer was not held liable for injury to the goods due to prolonged deposit in the warehouse.

We have seen that article 69 is used when the buyer needs to take over the goods at the seller’s place, and in situations where the buyer needs to take over the goods at a place other than seller’s place of business, namely at a warehouse where the goods are stored.

In cases where the seller has to deliver the goods to the buyer at the buyer’s place article 69(2) of the Convention will apply as well.371 We have seen (see 4.4.2 Ci, supra) that only an independent carrier (being a third party) can be the first carrier referred to in article 67(1) CISG. When the sellers transports the goods with his own trucks or other means of transport, the goods stay in the physical possession of the seller, making him the party that should bear the risk of loss or damage. In these cases the risk will pass from seller to buyer when the goods are at the buyer’s disposal at his place of business.

369 Oberlandesgericht Hamm (Germany) 22 September 1998, Clout case no 338, [http://cisgw3.law.pace.edu/cases/980623g1.html.
371 G. HAGER and M. SCHMIDT-KESSEL in P. SCHLECHTRIEM and I. SCHWENZER, Commentary, 938.
and once that buyer is aware that the goods are placed at his disposal.\footnote{G. Hager and M. Schmidt-Kessel in P. Schlechtriem and I. Schwenzer, Commentary, 939.} This transfer of risk is, of course, under the condition that delivery was due and that parties didn’t agree otherwise, \textit{e.g.} by including a trade term. This is logical since as long as the goods are in the custody of a carrier connected to the seller, he is in a better position to prevent the loss or damage.

\textbf{E Identification of the goods}

Article 69 specifies in its third paragraph the requirement for goods to be ‘\textit{clearly identified to the contract}’ before risk can pass to the buyer.\footnote{J. O. Honnold and H. M. Flechtner, \textit{Uniform Law for International Sales}, 537.} The same regime concerning identification of the goods that applied to article 67 (see 4.4.2 F, \textit{supra}) also applies to article 69 of the Convention. This rule has practical significance, particularly in cases where the goods have not been clearly identified at the seller’s place of business and the buyer fails to take delivery.\footnote{G. Hager and M. Schmidt-Kessel in P. Schlechtriem and I. Schwenzer, Commentary, 940.} In order to let the risk pass, the seller will need to make the goods objectively recognisable and he will need to link them to the contract.\footnote{Ibid.} The goods must be identified in accordance with the rights and obligations determined by the parties in the contract.\footnote{A. Raymond in S. Kröll, L. Mistelis and M. del Pilar Perales Viscacillas, Commentary, 907.}

In the sale of goods where the seller needs to deliver the goods at a place different than his place of business, the goods are necessarily identified to the contract since the seller needs to bring the goods to that particular place.\footnote{G. Hager and M. Schmidt-Kessel in P. Schlechtriem and I. Schwenzer, Commentary, 940.} If the goods that are sold are lying in a warehouse there will be a need to identify them since either the warehouseman will have to acknowledge the buyer’s right of possession or the seller will have to deliver documents to the buyer containing a promise by the warehouse keeper to deliver up the goods.\footnote{Ibid.}
4.6.3 Conclusion

Article 69 is the residual rule of the Convention, handling cases not falling within the scope of article 67 and 68. In cases falling under article 69(1), the risk will pass at the moment the buyer takes over the goods or if he does not do so in due time, from the time the goods were placed at his disposal and he fails to take delivery. Article 69, second paragraph, is concerned with cases in which the buyer is obliged to take over the goods at a place different than the place of business of the seller. In those situations, the risk passes when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal at that place. Delivery to the buyer’s place of business also falls within the scope of this article. In this latter situation, risk will pass according to article 67 of the Convention, if carriage is arranged by the agreement and if the carrier is an independent party.

Since most contracts in international sale of goods will also arrange for transport from seller to buyer, the application of this article in practice is quite limited.

4.7 Article 70 CISG: fundamental breach

The last article to handle the passing of risk in the 1980 Convention on the International Sale of Goods is article 70, which governs the relationship between the CISG rules concerning the passing of risk and those concerning remedies for breach of contract. We have seen in article 69 of the Convention that a buyer, who commits a breach of contract by failing to take over the goods when this is due, most likely makes the risk pass because of his breach of contract. The issue that is addressed by article 70 is whether a breach of contract by the seller, e.g. by handing over ten footballs instead of ten volleyballs, will prevent the risk from passing from the seller to the buyer.

4.7.1 History

Article 97(2) of the Uniform Law of Sales of 1964, that departed from the principle that risk passes upon delivery of the goods, provided that, in cases of handling over of goods...

---

379 J. O. HONNOLD and H. M. FLECHTNER, Uniform Law for International Sales, 539.
that are not in conformity with the contract, the risk passes to the buyer where he has neither declared the contract avoided nor required goods in replacement.\(^{381}\) This article stated:

\begin{quote}
(1) 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.
(2) In the case of the handing over of goods which are not in conformity with the contract, the risk shall pass to the buyer from the moment when the handing over has, apart from the lack of conformity, been effected in accordance with the provisions of the contract and of the present Law, where the buyer has neither declared the contract avoided nor required goods in replacement.
\end{quote}

This provision was (and is) seen as being unnecessarily complicated, leading to the will of the drafting parties to break the link between the passing of the risk and the delivery of the goods.\(^{382}\) Under this article, where a buyer avoided the contract or required replacement of the non-conforming goods, if we assume both situations presuppose a fundamental breach of contract, the risk of loss was never transferred to the buyer.\(^{383}\) At the moment the risk would normally pass under ULIS, one could not know how the buyer might react in the future after receiving a non-conforming delivery of goods.\(^{384}\) This would create a situation in which it is not clear which party bears the risk and so, BRIDGE stated, ‘there would always be something fictitious about article 97.’\(^{385}\)

Article 70 of the Convention expresses, therefore, a new rule on passing of risk dealing with delivery of non-conforming goods without departing from the rule under ULIS.\(^{386}\)

### 4.7.2 Article 70 in detail

#### A Overview

As I have mentioned above, article 70 of the Vienna Convention handles the relationship between the rules on passing of the risk and the rules concerning breach of contract by

\(^{384}\) *Ibid.*
the seller. It answers the question whether the risk can be transferred back from the buyer to the seller when that seller is in breach of the contract.\textsuperscript{387} Article 70 CISG:

\textit{‘If the seller has committed a fundamental breach of contract, articles 67, 68 and 69 do not impair the remedies available to the buyer on account of the breach.’}

\section*{B The basics}

Article 70 of the Convention governs the cases in which the seller’s breach of contract and the loss of the goods are \textit{‘unconnected’}.\textsuperscript{388} This means that article 70 is concerned with cases where, despite the breach of contract by the seller, the loss of goods is accidental.\textsuperscript{389} Article 70 says that the fact that the seller has committed a fundamental breach of contract does not impair the remedies available to the buyer on account of that breach.\textsuperscript{390} Consequently, the buyer can pursue the remedies provided by the Convention in case of seller’s breach, namely, the right to declare the contract avoided (art. 49(1)), to require substitute goods (art. 46(2)), to require repair of the goods (art. 46(3)), to reduce the price (art. 50) and to claim damages (art. 74).\textsuperscript{391} The remedies the drafting parties of the Vienna Convention had in mind were probably mainly the right to require delivery of substitute goods and the right to avoid the contract; these remedies only apply in situations where the contract is breached in a fundamental way, see i., \textit{infra}.\textsuperscript{392}

This means that, although the risk has passed from seller to buyer, the buyer will be able to require replacement goods or he will have the right to avoid the contract.\textsuperscript{393} The fact that the buyer is unable to make restitution will not be a bar to avoidance in cases where the goods got lost due to an accident.\textsuperscript{394} The rules that provide the buyer with remedies in case of breach of contract by the seller will take priority over the rules, which regulate the passing of risk.\textsuperscript{395}

\begin{flushleft}
\begin{footnotesize}
\textsuperscript{387} M. Bridge, \textit{Festschrift for Albert H. Kritzer}, 101.
\textsuperscript{389} Ibid.
\textsuperscript{395} J. Lookofsky, \textit{Understanding the CISG}, 105.
\end{footnotesize}
\end{flushleft}
In cases in which the buyer receives goods that are non-conforming and this is a fundamental breach of the contract, the buyer may require substitute goods, even though the goods were lost.\textsuperscript{396} Another situation addressed by article 70 is when the seller needs to dispatch goods to the buyer but is in delay in doing this.\textsuperscript{397} If this amounts to a fundamental breach of contract, the buyer has the right to avoid the contract according to article 49(1)(a) of the Convention even though the goods got lost in transit.\textsuperscript{398} Thus, the seller will not be able to use article 66 of the Convention and bring an action for the price for the goods that were lost.\textsuperscript{399} If the price is already paid, the buyer will be able to recover it under article 81(2) of the Convention.\textsuperscript{400} The effect article 70 has is therefore that it brings the risk back from buyer to seller. NICHOLAS: ‘the risk’s having passed to the buyer under articles 67, 68 or 69 is not obstacle to its being retrospectively passed back by the remedy of avoidance.’\textsuperscript{401}

**i Fundamental breach**

Fundamental breach is defined by article 25 CISG that states that breach is fundamental if it ‘results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.’ Fundamental breach of contract has different functions.\textsuperscript{402} Firstly, if the party who is affected by a breach of contract wants to avoid it, the breach of contract will have to be fundamental.\textsuperscript{403} Secondly, if a fundamental breach exists, the party effected by it can claim substitute goods in accordance with article 46(2) CISG.\textsuperscript{404} And thirdly, a fundamental breach of contract by the seller will make the buyer be able to use all his remedies, despite the fact that the risk passed to him.\textsuperscript{405}

\textsuperscript{396}G. HAGER and M. SCHMIDT-KESSEL in P. SCHLECHTRIEM and I. SCHWENZER, *Commentary*, 944.
\textsuperscript{397}Ibid.
\textsuperscript{398}Ibid.
\textsuperscript{399}Ibid.
\textsuperscript{400}M. BRIDGE, *Festschrift for Albert H. Kritzer*, 103.
\textsuperscript{401}B. NICHOLAS in C. M. BIANCA and M. J. BONELL, *Commentary*, 510.
\textsuperscript{403}U. G. SCHROETER in P. SCHLECHTRIEM, and I. SCHWENZER, *Commentary*, 402.
\textsuperscript{404}Ibid.
\textsuperscript{405}Ibid.
Not all deliveries that are non-conforming will qualify as ‘fundamental’ under the standard expressed in article 25 of the Convention.\textsuperscript{406} Since ‘fundamental breach’ is an issue that falls outside of the scope of this dissertation, I will not make an inquiry into its nature. To show what constitutes a fundamental breach, we will briefly discuss some cases where the court did or did not find a breach to be fundamental. In a case between a Greek seller and an American Buyer, the Greek seller was required to deliver ‘thermoforming lining equipment’ for the manufacture of plastic gardening pots.\textsuperscript{407} Later the buyer sued the seller for breach of warranty with respect to the equipment supplied. The US court held that this did not amount to a fundamental breach of contract by the seller since the buyer had successfully operated the equipment and did not complain about the conformity of the products till after the seller made formal inquiries to make the buyer pay the price agreed.

In a case before a French court a French buyer sued a Portuguese seller of pressure cookers.\textsuperscript{408} The buyer demanded avoidance of the contract due to the seller’s fundamental breach, since the cookers had a defect making them dangerous to use. The court decided that, although the seller was under the obligation to supply pressure cookers that were entirely safe, he supplied the buyer with cookers that became, according to testing, a danger to their user, thus breaching the contract fundamentally.

The seller who delivered a second hand machine that was completely rusted but was sold as being ‘as-good-as-new’ committed a fundamental breach.\textsuperscript{409} As we can see, a seller under the Convention can commit a fundamental breach in many different ways.\textsuperscript{410}

\begin{center}
\textbf{C Article 82: conditional right to avoidance or to require substitute goods}
\end{center}

Article 82 of the Convention limits the power to avoid the contract or to require substitute goods by providing that a buyer loses his right to avoid a contract if he is unable to make restitution of the goods, with the exception of situations in which this

\begin{itemize}
\item \textsuperscript{406} J. LOOKOFSKY, \textit{Understanding the CISG}, 115.
\item \textsuperscript{408} Cour d’Appel de Paris (France) 4 June 2004, http://cisgw3.law.pace.edu/cases/040604fi.html.
\item \textsuperscript{409} Kantonsgericht Valais (Switzerland) 21 February 2005, http://cisgw3.law.pace.edu/cases/050221s1.html.
\item \textsuperscript{410} J. LOOKOFSKY, \textit{Understanding the CISG}, 116.
\end{itemize}
restitution is impossible and this is not due to an act or omission of the buyer.\textsuperscript{411} This also applies to cases where the buyer uses his right to require substitute goods. Thus, if we read article 70 in conjunction with article 82(2), the buyer will be able to shift any losses occurring after the passing of the risk and that are not due to an act or omission by that buyer back onto the seller, this of course under the condition that the seller committed a fundamental breach of the contract.\textsuperscript{412}

\section*{D Avoidance in case of non-delivery within the additional period of time}

The buyer will be able to avoid the contract not only when the seller commits a fundamental breach of contract (49(1)(a) CISG) but also in situations falling under article 49(1)(b) of the Convention.\textsuperscript{413} This provision of the Convention addresses situations in which the seller fails to deliver within an additional period of time fixed by the buyer. The wording of article 70 seems to only shift the risk back to the seller in situations in which the seller committed a fundamental breach of contract and the formulation of article 49(1) makes a distinction between avoiding after fundamental breach and avoiding in case of failing to deliver in the additional period of time.\textsuperscript{414} This means that when the seller fails to deliver in the additional period of time and the buyer uses his right given by article 49(1)(b) to avoid the contract, the risk will not shift back. Consequently, the risk will be borne by the buyer. According to Erauw, this is a correct interpretation ‘\textit{as the seller’s inability to perform within the additional period of time gives rise to the buyer being able to avoid the contract, but the text does not technically classify this as a fundamental breach}.’\textsuperscript{415} According to Hager, however, this is merely a drafting error and the risk should be shifted back on to the seller in situations falling under article 49(1)(b) of the Convention. This was clearly stated by the drafting committee: ‘\textit{the operation of article 67 should be extended to all cases where the buyer has the right to avoid the contract rather than restrict it to cases where the seller committed a fundamental breach of contract}.’\textsuperscript{417} The committee adopted this but the text remained

\textsuperscript{411} M. Bridge, \textit{Festschrift for Albert H. Kritzer}, 102.


\textsuperscript{413} Ibid.


\textsuperscript{415} J. Erauw in S. Kröll, L. Mistelis and M. del Pilar Perales Viscailllas, \textit{Commentary}, 910.

\textsuperscript{416} Refers to article 67 in the Geneva draft, now article 70.

\textsuperscript{417} X, UNCITRAL Yearbook VIII (1977), 310 p.
unchanged for an unknown reason. Article 82(2)(a) of the Convention, which is an exception to the general rule that the buyer loses the right to declare the contract avoided if it is impossible for him to make restitution of the goods, makes it clear that avoidance of the contract on the basis of expiry of the additional period of time also causes the risk to shift back to the seller.

I think it was indeed the purpose of the drafting parties to also include situations in which the seller fails to deliver the goods within the period of additional time fixed by the buyer, since, in my opinion, the fact that the drafting parties gave the buyer the right to avoid the contract in those situations ipse facto means that it is a fundamental breach. On top of that, article 82(2)(a) gives the buyer the right to avoid the contract, even in situations in which he is not capable of making restitution, thus, placing the risk of loss or damage in all cases in which the buyer has the right to avoid back on the seller.

If we keep in mind all the above we can formulate the general regime that is expressed in article 70 of the Vienna Convention. In situations in which the buyer is entitled to avoid the contract or if he can use article 46 to require delivery of substitute goods on account of the seller’s breach of contract, the risk will shift back to the seller. This is a consequence of the rule that the buyer is permitted to exercise those rights irrespective of the loss of or damage to the goods. There is one exception to this rule, namely, that in cases where the loss of or damage to the goods is due to the buyer’s act or omission, the risk will stay on the buyer (article 82(2)(a)).

The wording of article 70 is confusing since it only refers to fundamental breach and this is not in accordance with article 49 that gives the buyer the right to avoid in case of fundamental breach and in case of late delivery in the additional time. Furthermore article 82 gives the buyer the right to avoid even if the goods got lost or damaged. Thus, article 70 on one hand and article 49 in conjunction with article 82 on the other hand are contradictory.

E Specific cases

In cases where the seller delivers non-conforming goods and this is seen as a fundamental breach, the buyer can shift the risk back to the seller by using his remedies

---

418 B. Nicholas in C. M. Bianca and M. J. Bonell, Commentary, 511.
419 G. Hager and M. Schmidt-Kessel in P. Schlechtriem and I. Schwenzer, Commentary, 945.
420 Ibid.
of avoiding the contract (art. 49(1)(a) and art. 82(2)(a)) or requiring substitute goods (art. 46(2) and art. 82(2)(a)), leading to the seller bearing the risk over goods under control of the buyer. \(^{421}\) Article 70 of the Convention must be read in connection with articles 39, 46(2) and 49(2)(b) that provide us with the rule that the buyer loses his right to declare the contract avoided or to require substitute goods if he did not exercise these rights within certain time-limits. \(^{422}\)

Concluding, when the buyer has the right to avoid the contract due to serious breach of contact by the seller and he exercises his right in a reasonable time, this right is not ‘lost’ because of damage to the goods while in transit. \(^{423}\) This results in the breaching seller ending up with damaged goods without a right to bring an action for the price. \(^{424}\)

**i Casualty after receipt by the buyer**

Article 70 is not limited to situations in which the goods are lost or damaged while they are in transit. \(^{425}\) If the non-conforming goods get lost while they are already in possession of the buyer and the non-conformity amounts to a fundamental breach of contract, the buyer can still avoid the contract thus shifting the risk back to the seller. \(^{426}\)

Imagine a situation in which the buyer takes control over goods in order to perform an inspection. \(^{427}\) The inspection shows that the goods are non-conforming, not amounting to a fundamental breach of contract and the buyer disclosed this to the seller. What if the goods get lost in a fire the day after the inspection?

On one hand, the buyer will be able to claim damages for the non-conformity of the goods. \(^{428}\) On the other hand, he won’t have the possibility to declare the contract avoided since the non-conformity did not amount to a fundamental breach of contract. In cases where the buyer does not declare the contract avoided, the risk will pass to the buyer when he takes over the goods.

If the non-conformity of the goods amounts to a fundamental breach, and the buyer declared the contract avoided, then he will be able to shift the risk to the seller. By

\(^{421}\) G. HAGER and M. SCHMIDT-KESSEL in P. SCHLECHTRIEM and I. SCHWENZER, *Commentary*, 945.

\(^{422}\) X., *Secretariat’s Commentary*, 66.


\(^{424}\) Ibid.

\(^{425}\) J. ERAUW in S. KRÖLL, L. MISTELS and M. DEL PILAR PERALES VISCACILLAS, *Commentary*, 911.


\(^{428}\) Ibid.
avoiding the contract, the seller will be liable for the initial serious non-conformity and for the damage caused by the fire.429

**ii Partial avoidance**

Article 51 of the Convention provides that if the seller delivers only a part of the goods or if only a part of the goods is in conformity with the contract, the remedies for non-conformity only apply in respect to the non-conforming part. In cases of fundamental breach the buyer has the right to declare the contract avoided in its entirety. Consequently, the buyer has the right to declare a part of the contract avoided, including the part that got lost during transit.430 The language of article 51 might make you believe that its goal is to limit partial avoidance to the goods that were defective when shipped but its overall purpose is to allow the buyer to limit avoidance of the contract.431 Partial avoidance of the contract will shift the risk back to the seller in relation to the goods that were non-conforming but the goods that were conforming will remain in possession of the buyer and thus the risk will remain with the buyer in relation to the conforming goods.432

**4.7.3 Conclusion**

Article 70 of the Convention on International Sale of Goods handles the relationship between, on the one hand, the rules on passing of risk and, on the other hand, the rules providing the buyer with remedies for fundamental breach by the seller. The article provides that the rules concerning transfer of risk do not impair the remedies available to a buyer against a seller who committed a fundamental breach of contract. Consequently, the buyer can pursue the remedies provided by the Convention in case of seller’s breach, namely, the right to declare the contract avoided, to require substitute goods, to require repair of the goods, to reduce the price and to claim damages.433 The wording of article 70 leads to the application in cases of fundamental breach of contract by the seller but if the breach of contract is non-fundamental, the rule should apply by analogy, not depriving the buyer of the right to claim damages or price reduction.434

432 J. ERAUW in S. KRÖLL, L. MISTELIS and M. DEL PILAR PERALES VISCAILLAS, *Commentary*, 911.
In cases where the buyer can avoid the contract due to seller’s fundamental breach or ask substitute goods, the risk will shift back from seller to buyer.

The drafting parties decided to make an ‘easy topic’ into a vague article leading to differing opinions concerning its interpretation. Needless to say an easier formulation would have been better to create certainty. The drafters could have used a formulation that makes it clear that in cases where the buyer can avoid the contract or ask for substitute goods, the risk stays with the seller. Fortunately, the cases in which article 70 would apply are very rare and no decisions have been registered.

4.8 Overall conclusion on the passing of risk under the CISG

Articles 66 till 70 of the CISG provide us with the rules concerning the passing of risk in the international sale of goods. The drafting parties wanted the CISG to be in accordance with commercial practice. By focusing the rules on the passing of risk on contracts that also include carriage they partly succeeded in this mission. If we look into the different provisions of the part on the passing of risk, we can find ambiguities that could have been avoided. No definition is given to concepts such as ‘handing over’, ‘the first carrier’ and ‘circumstances leading to retroactive risk passing.’ The lack of defining this leads to different opinions by different scholars, which does not support the goal of the drafters to create a uniform law of sales. Furthermore, the drafting parties should have fixed the contradiction of article 70, although the practical implications of this contradiction are rare.

The compromise that was reached in article 68 is understandable taking into consideration the difficulties encountered when negotiating. The choice of the drafters to add this dispute-creating regime could and should have been avoided. The second sentence will however remedy this in most situations; nevertheless I think that the Convention should have better provided us with the circumstances for when retroactive risk passing occurs, for example the transfer of insurance policy, instead of using the vague wording it contains now.

435 A drafting error according to HAGER, an opinion that I follow, see 4.7.2 Bi, supra.
Chapter 5: Passing of risk under the Incoterms 2010

5.1 Overview

We have seen how the 1980 Vienna Convention on the International Sale of Goods arranges the passing of risk and that this convention provides us with a set of rules focused on different ways of delivery. The parties of a contract of sale can, however, choose to deviate from the provisions of the contract and they can draft their own rules. Article 6 of the Convention, which is based on the principle of freedom of contract, provides us with this basic rule. One way the parties can deviate from the Convention on International Sale of Goods is by referring to an ICC Incoterm in their contract. Contracting parties cannot solely rely on the Convention to arrange the modalities of delivery; they will have to agree on where, when and how the goods should be delivered and parties will often do so by using standardised terms, in modern times often reflected by the ICC Incoterms.436

The latest version of the ICC Incoterms rules contains eleven trade terms divided in two groups, one group contains Incoterms that can be used for all modes of transport and one contains terms that are limited to transport by sea or waterway. The ICC’s Incoterms rules reflect commercial practice that is most commonly used in international trade but parties are free to change these basic trade terms provided by the ICC and adjust them to their own needs.437

Every Incoterm provided in the ICC’s 2010 Incoterms Rules stipulates ten different types of obligations in mirror fashion. The a-side reflects the seller's obligation and the b-side expresses the buyer’s obligation.438 Going from one to ten, the obligations handled by the Incoterms 2010 rules are: general obligations of the seller/buyer; licences, authorizations, security clearances, and other formalities; contracts of carriage and insurance; delivery/taking delivery; transfer of risks; allocation of costs; notices to the buyer/seller; delivery document/proof of delivery; checking – packaging – marking/inspection of the goods; assistance with information and related costs.439 Since

the subject of this dissertation is the passing of risk in international sale of goods, we will focus on obligation A5 and B5 of the Incoterms.

The transfer of risk in Incoterms is linked to the delivery obligation of the seller. The main rule expressed in Incoterms is that the seller bears all risks of loss of or damage to the goods until they have been delivered in accordance with the Incoterm, and that the buyer bears all risks of loss of or damage to the goods from the time they have been delivered as envisaged in the Incoterm.

In this chapter we will look into the different Incoterms 2010 rules provided by the International Chamber of Commerce and we will analyse how the risk is transferred if parties agree to include a trade term of the ICC in their contract.

5.2 Division

5.2.1 Division under Incoterms 2010

In its official Rules for the Use of Domestic and International Trade Terms, the ICC divides the Incoterms 2010 rules into two groups. The ICC starts of with providing all the Incoterms that can be used for any mode or modes of transport. This is the biggest group containing seven Incoterms rules. Following this group, a smaller group of four Incoterms is provided, all having the same characteristic that they are created for sea and inland waterway transport. The ICC chose to start its Incoterms 2010 rules presenting trade terms that can be used by any mode of transport in order to promote the use of these general trade terms since merchants still too often use maritime trade terms for non-maritime transport.\footnote{J. Ramberg, \textit{ICC Guide to Incoterms 2010}, 9.}

The first group consists of Incoterms EXW (Ex Works), FCA (Free Carrier), CPT (Carriage Paid To), CIP (Carriage and Insurance Paid To), DAT (Delivered At Terminal), DAP (Delivered At Place) and DDP (Delivered Duty Paid).\footnote{X, \textit{Incoterms 2010}, Berlin, ICC Publication no. 715 ED, 2.} The group fit for transport by sea and inland waterway consists of Incoterms FAS (Free Alongside Ship), FOB (Free On Board), CFR (Cost And Freight) and CIF (Cost, Insurance and Freight).
5.2.2 Division under the older versions

In the older versions of the ICC Incoterms rules, the Incoterms were classified in four categories, namely, the C-terms, the D-terms, the F-terms and one single E-term.\textsuperscript{442} The Incoterms were organised by delivery obligation the seller has to fulfil.\textsuperscript{443} The first letter of the trade terms is used as an indication of the category in which they belong.\textsuperscript{444}

Although I understand the goal of the ICC to create a world in which merchants use the right trade term for the right mode of transport, I prefer the division used in the older versions of the Incoterms since I think it is better to organise the trade terms according to obligations of the parties than to organise them according to mode of transport. For this dissertation, I have to say, it is also more convenient to treat the Incoterms by its old classification since the manner of risk passing is similar for trade terms in the same letter-group.

5.3 Incoterms’ relationship with the CISG

5.3.1 In general

International contracts of sale often use trade terms in order to clearly denote the obligations of both parties typical in export business.\textsuperscript{445} As we have seen above, the International Chamber of Commerce provides merchants with easy-to-use and internationally recognised trade terms, the Incoterms. Under article 6 of the Vienna Convention, parties have the freedom to deviate from the passing-of-risk provisions of the CISG; consequently, they can create their own set of rules.\textsuperscript{446} Article 6 of the Vienna Convention states:

\textit{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.}

\begin{footnotesize}
\textsuperscript{442} H. Van Houtte, \textit{International Trade}, 173.
\textsuperscript{443} L. Railas, “Incoterms for the New Millennium. How problems relating to Incoterms 1990 have been solved and how the experience of the earlier version could still help us?”, \textit{Eur. Vervoer}. 2000, 11.
\end{footnotesize}
According to article 9 of the Convention the parties are bound by usages to which they have agreed and by practices, which they have established between themselves. In its article 9, the Convention distinguishes two methods of making usages or practices binding on the parties:

1. The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.

2. The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

Due to the above provisions, the Incoterms 2010 rules can be applicable to the parties’ contractual relation either by the explicit inclusion of an ICC Incoterm in the contract or implicitly, by establishing a practice between the parties or agreeing on a usage. To invoke article 9(2) it is sufficient to determine a common usage in referring to the application of the Incoterms Rules in order to interpret a certain trade term as being an ICC Incoterm.

A reference in the contract to a certain Incoterm (or any other trade term) or an Incoterm being applicable by established practice between the parties does not exclude the application of the Convention. The Incoterms alter and supplement the Vienna Convention by expressing the obligations of the parties on issues such as transport, loading of the goods, risk of loss and related matters. Consequently, the Incoterms override the Convention for what the issues they govern is concerned. In a case between a French seller and a German buyer, the seller delivered goods according to its general business conditions ‘free delivery, duty-paid, untaxed’ and handed the goods over

---

450 J. Erauw in S. Kröll, L. Mistlelis and M. del Pilar Perales Viscacillas, Commentary, 895; B. Piltz, Review of the CISG.
452 J. O. Honnold and H. M. Flechtner, Uniform Law for International Sales, 105; B. Piltz, Review of the CISG.
to a carrier. The seller couldn’t provide sufficient proof of the handing over and buyer denied that delivery had taken place. The court decided that the seller couldn’t prove the fact that the goods had been handed over. Furthermore, the court said that the buyer had no obligation to pay the price, as the risk did not pass the moment the goods were handed over to the carrier. Since the parties used the trade term ‘free delivery...’ the seller was bound to deliver the goods at the buyer’s place of business (article 31 CISG in conjunction with article 6 CISG) at its own risk. The court found that the trade term had to be interpreted under German Law (frei haus), as the parties used a common German term, drafted in German and with a German buyer.

The Incoterms stay silent on matters such as formation of the contract, transfer of property and consequences of breach. Thus, if the contract only mentions a certain Incoterm and is silent on other matters, one will have to look at the private international law and if this leads to the Vienna Convention as the law applicable on the case, the CISG will be the ‘back-up legal system’ to deal with unanticipated problems.

5.4 E-term: EXW

There is only one term in the E-term group, namely the Incoterm Ex Works (EXW). Under this Incoterm the seller makes the goods available for the buyer at the seller’s own place of business or at another named place (i.e. works, factory, warehouse, etc.) Since the seller only has to place the goods at the disposal of the buyer, the Incoterm EXW expresses seller’s minimum obligation. The delivery obligation of the seller consists of placing the goods at the disposal of the seller at the agreed point, not loaded on any collecting vehicle. The seller must deliver at the agreed time or within the agreed period. The buyer must take delivery of the goods when the seller has placed them at the buyer’s disposal and notified the buyer of the fact the goods are placed at his disposal. The risk is transferred from seller to buyer at the moment the seller placed the

---

455 H. VAN HOUTTE, International Trade, 175.
456 Note that the CISG does not stipulate rules on the transfer of property so one will have to look at applicable national law to answer questions concerning this matter; J. O. HONNOLD and H. M. FLECHTNER, Uniform Law for International Sales, 105; H. VAN HOUTTE, International Trade, 167.
goods at buyer’s disposal; provided that the goods have been clearly identified to the contract.461

5.4.1 EXW and the CISG

According to article 31 of the Convention the seller fulfils his obligation to deliver either by handing over to the first carrier when the contract involves carriage (article 31(a)), or by placing the goods at the buyer’s disposal at the seller’s place (article 31(c)), or at the buyer’s disposal at a particular place (article 31(b)).462 These last two cases are situations that are also included in the Incoterm EXW.463 In situations where the seller has to place the goods at the disposal of the buyer at his own place of business or at a place other than the place of business of the seller, the risk will pass according to article 69 of the Convention, supra 4.6.

If we compare the rules on the passing of risk expressed in article 69 with the passing of risk rules in EXW clause A5 and B5, we see that the risk will transfer at a different stage.464 The Incoterms EXW will let the risk pass the moment the seller places the goods at the buyer’s disposal, either at his place of business or at another named place (i.e. works, factory, warehouse, etc.) while the Vienna Convention will let the risk pass when the buyer takes over the goods at the seller’s premises (or if he commits a breach of contract by failing to take delivery) or when the buyer is aware the goods are placed at his disposal at the place other than seller’s place of business. The Incoterm EXW lets the risk pass as soon as the goods have been made available to the buyer at the delivery point (seller’s place or another named place), without any requirement such as the buyer’s awareness of the goods being placed at his disposal or the buyer’s failure to take delivery constituting a breach of contract.465 Back to the chocolate example: let us assume that the Belgian seller and the Norwegian buyer agree on the sale of 5000 boxes of chocolate under the Incoterms 2010 rule EXW. The contract states that the goods are available for the buyer to pick up at the seller’s place of business from the 1st of August till the 14th of August. On the 1st of August the buyer is informed that the load of

463 Ibid.
chocolate is ready, but on the 5th of August the chocolate melts by a malfunctioning cooling system, caused by an ‘act of god’. Under EXW, the buyer will have to bear the loss of the goods since the risk passes the moments the goods are placed at his disposal, ready to be picked up. The Convention, however, lets the risk pass to the buyer the 14th of August, when the buyer commits a breach of contract by his failure to take delivery of the goods; consequently, the seller will bear the risk of loss under the Convention.

The EXW-seller has the obligation to notify the buyer that the goods are placed at his disposal but unlike under article 69 of the Vienna Convention, the fact that the buyer is unaware that the goods are placed at his disposal won’t affect the passing of the risk.\footnote{J. \textsc{R}amberg, \textit{ICC Guide to Incoterms 2010}, 90.} The seller might be liable for damages according to the CISG but the risk will have passed since the seller’s failure to notify the buyer does not constitute a fundamental breach. Article 70 of the CISG only allows the risk to shift back to the seller in cases where the seller committed a fundamental breach, \textit{supra} 4.7.2 \footnote{J. \textsc{R}amberg, “To what extend do Incoterms 2000 vary articles 67(2), 68 and 69?”, \textit{Journal of Law and Commerce} 2005-06, 221.}. If the buyer is entitled to determine the time within an agreed period or the point of taking over within the named place, he has to give the seller sufficient notice.\footnote{X, \textit{Incoterms 2010}, Berlin, ICC Publication no. 715 ED, 21.} The failure of the buyer to notify the seller of the time when the goods are to be made available or of the place of delivery will result in a premature passing of risk. The risk will pass from the agreed date or the expiry date of any period fixed for taking delivery.\footnote{J. \textsc{R}amberg, \textit{ICC Guide to Incoterms 2010}, 93.}

The risk only passes when goods are clearly identified to the contract.\footnote{X, \textit{Incoterms 2010}, Berlin, ICC Publication no. 715 ED, 25-33.} This is a basic condition present in all ICC Incoterms.

### 5.5 F-terms

This group consists of three trade terms namely, FCA\footnote{X, \textit{Incoterms 2010}, Berlin, ICC Publication no. 715 ED, 25-33.} (Free Carrier), FAS\footnote{X, \textit{Incoterms 2010}, Berlin, ICC Publication no. 715 ED, 83-89.} (Free Alongside Ship) and FOB\footnote{X, \textit{Incoterms 2010}, Berlin, ICC Publication no. 715 ED, 91-99.} (Free On Board). Under the F-terms the seller is obliged to deliver the goods to a carrier appointed and paid by the buyer.\footnote{H. \textsc{V}an \textsc{H}outte, \textit{International Trade}, 173.} The ‘carrier’ was a
much-debated concept. However, it is now generally accepted that the ‘carrier’ applicable in the F trade terms is ‘any person who, in a contract of carriage, undertakes to perform or to procure the performance of transport by rail, road, air, sea, inland waterway or by a combination of such modes.’ This is the same ‘carrier’ as the one referred to in the CISG. Therefore, a carrier is not only the company that in practice will perform the transport but it can be any person who undertakes to perform or to procure the performance of transport, thus, also an enterprise that contracts to perform or arrange the transport of the goods.

5.5.1 FCA

FCA is distinguished from the terms FAS and FOB since it does not refer to a specific mode of transport and, therefore, parties can use this trade term for any type of transport, including multimodal transport. Under the Incoterm FCA, the seller has to deliver the goods to the carrier at the seller’s premises or another named place. According to the general passing or risk rule of the Incoterms this means that the risk will pass upon handing over of the goods to the carrier, assigned by the buyer. The delivery will be completed when, if the place is the seller’s premises, the goods are loaded on the means of transport provided by the buyer (in contrast to EXW, where the risk passes before loading onto the means of transport.) In cases where the named place is another place, the delivery will be completed when the goods are placed at the disposal of the carrier, ready to be unloaded from the seller’s means of transport.

From the time delivery is completed, the buyer will bear all risks of loss or damage to the goods. If, however, the buyer fails to notify the seller of his nomination of a certain carrier or if that carrier fails to take control over the goods, then the buyer bears all risk from the agreed date. If no date was agreed, from the time the seller gave notice to the buyer that the carrier failed to take over the goods. If no such date has been notified,

---

476 Ibid.
483 Ibid.
484 Ibid.
from the expiry date of any agreed period for delivery. The risk will only pass if the goods have been clearly identified to the contract. FCA is the most suitable term in contracts where the buyer should arrange and pay for carriage and therefore he should bear the risk in situations in which transport is unavailable.

5.5.2 FAS

Free Alongside Ship is used for sea and inland waterway transport and it means that the seller will deliver the goods by placing the goods at the ship’s side or by procuring goods already so delivered for shipment. This latter situation is used in so called string sales of commodity goods where goods are sold multiple times down a chain. It is up to the buyer to nominate the vessel that will be used for transport. In the old versions of the Incoterms it was the ship’s rail that acted as the border between the seller and buyer’s obligations, hence also functioning as a customs border with respect to clearance for export in international trade. For the Incoterm FAS, this was changed in the 2000 version of the Incoterms rules and in the 2010 version the concept of the ‘ship’s rail’ has been deleted as line for the FOB trade term, thus, the Incoterms no longer refer to ‘the ship’s rail’.

The seller fulfils his obligations by placing the goods alongside the ship and it is his obligation to clear the goods for export. The risk will, therefore, pass from seller to buyer when the seller placed the goods alongside the ship. The buyer’s failure to nominate the ship and notify the seller of the name, loading place and delivery time may result in a premature passing of risk. Thus, the failure to notify the seller will cause the risk to pass ‘from the agreed date or expiry date of the agreed period for delivery.’

485 Ibid.
490 Ibid.
491 Ibid.
492 Ibid.
If the vessel fails to arrive in time or in cases in which the vessel is unable to take over the goods a premature passing of risk will occur and the risk will pass to the buyer.\textsuperscript{495} The risk will only pass if the goods have been clearly identified to the contract.

5.5.3 FOB

Being one of the oldest trade terms used in international trade, it established a dominant position. In the older versions of the ICC’s Incoterms rules, this term used the ship’s rail as decisive border for obligations and allocation of costs and risk.\textsuperscript{496} In an English case the possible adverse effects of this border was expressed in quite a lyrical way: ‘Only the most enthusiastic lawyer could watch with satisfaction the spectacles of liabilities shifting uneasily as the cargo sways at the end of a derrick across a notional perpendicular projecting from the ship’s rail.’\textsuperscript{497} In the 2010 version the ship’s rail as risk transfer point was replaced by placing the goods on board of the ship.\textsuperscript{498} The same rules as in Incoterm FAS and FCA apply here but, instead of placing the goods alongside the ship, the seller will deliver the goods by placing them on board the ship, at which time the risk also passes.\textsuperscript{499} Premature transfer of risk is possible under the same conditions as in FAS, \textit{supra.}\textsuperscript{500}

Under the FOB trade term, the risk of placing the goods on board the ship is on the seller. The term ‘\textit{placing on board}’ was used instead of the term ‘\textit{loading}’ since this would imply stowage and under FOB the risk for stowage on board (\textit{i.e.} trimming, securing and lashing) is on the buyer.\textsuperscript{501} The customs of the port named following the Incoterm (\textit{e.g.} FOB Antwerp) will have priority over the rules in the Incoterms rule FOB, thus, the actual border can still be the ship’s rail.\textsuperscript{502} This priority was, under the older versions of Incoterms, stated in the introduction.\textsuperscript{503} Since the 2000 version, the priority rule became

\textsuperscript{495} \textit{X, Incoterms 2010}, Berlin, ICC Publication no. 715 ED, 87.
\textsuperscript{496} J. \textsc{Ramberg}, \textit{International Commercial Transactions}, 109.
\textsuperscript{498} \textit{Ibid.}
\textsuperscript{499} \textit{X, Incoterms 2010}, Berlin, ICC Publication no. 715 ED, 94-95.
\textsuperscript{500} \textit{Ibid.}
\textsuperscript{501} J. \textsc{Erauw} in S. \textsc{Kröll}, L. \textsc{Mistelis} and M. \textsc{del Pilar Perales Viscaglias}, \textit{Commentary}, 897.
\textsuperscript{503} K. \textsc{Vanheusden}, \textit{Leveringsvoorwaarden in Internationale Overeenkomsten. Van Trade Terms en Incoterms}, Antwerpen-Apeldoorn, Malku, 2005, 45.
part of the FOB rule. This means that the parties will have to take a look at the customs of the port to know when risk will actually pass.

5.5.4 F-terms and the CISG

Under the F-terms the seller is obliged to deliver the goods to a carrier appointed by the buyer and paid by that buyer. When delivery has to be made FCA at the seller's premises, delivery will be completed when the goods are loaded on the means of transport; consequently the risk will pass when loading is completed. This corresponds to the rule expressed in article 67(1) of the CISG, where the Convention states that risk passes from seller to buyer when the goods are handed over to the first carrier. It was also the intention of the International Chamber of Commerce to match the Incoterm FCA with the basic rule in article 67 of the CISG. Courts will frequently cite the article if the trade term agreed among the parties is consistent with article 67.

In cases in which delivery is due FCA at a place different than the seller's premises, the risk will pass when the goods are placed at the disposal of the carrier, meaning that the unloading of the goods from the seller's means of transport will be conducted at the seller's risk. Situations envisaged by the second sentence of 67(1) correspond to the situation of incoterm FCA, where the place of delivery is a place other than the seller's place of business, and Incoterm FOB and FAS, where the goods need to be placed on board of a ship or alongside a ship. In a case between a Yugoslavian seller and a Hungarian buyer of caviar, the term for delivery was 'FOB Kladovo' (the seller's city in today's Serbia; wrongly used Incoterm since no waterway transport was intended.) The buyer couldn't pay due to UN sanctions. The Arbitral court correctly found that the Incoterm 'FOB Kladovo' places the risk on the buyer from the moment the goods were delivered in Kladovo, thus the risk for possible embargoes was placed on the Hungarian

504 J. ERAUW in S. KRÖLL, L. MISTELIS and M. DEL PILAR PERALES VISACILLAS, Commentary, 897.
505 H. VAN HOUTTE, International Trade, 173.
507 J. ERAUW in S. KRÖLL, L. MISTELIS and M. DEL PILAR PERALES VISACILLAS, Commentary, 896.
buyer. The court pointed out that article 67 provides that the risk of freight had to be born by the buyer, unless the contract provided otherwise, which it did not.

A difference between 67(1) CISG and Incoterms FAS and FCA (in cases where delivery has to be made at a place different than seller’s place of business) is that under the rules of the CISG the seller will have to hand over the goods to the carrier at that place (article 67(1), second sentence), where the Incoterm FCA merely requires the seller to place the goods at the carrier’s disposal or under the Incoterms FAS the seller delivers by placing the goods alongside the ship.\textsuperscript{511} We assume that our Belgian seller of chocolate needs to deliver FCA Antwerp at a warehouse of the carrier, contracted by the Norwegian buyer. The contract gives the Antwerp warehouse ten hours to empty the container placed at its disposal by the Belgian seller. Under the Incoterm FCA, the risk will pass when the goods are placed at the disposal of the carrier (the warehouse) thus, if, during those ten hours, the cooling system of the container stops working by an act of god, the Norwegian buyer will bear the risk of the damaged chocolate. Under the CISG, however, the risk passes when the goods are taken over by the carrier, making the delivery into a bilateral act, hence keeping the risk at the seller till the chocolate is unloaded from the seller’s container.\textsuperscript{512}

‘Handing over’ according to article 67 means that the goods are delivered into the ‘custody’ or ‘charge’ of the carrier.\textsuperscript{513} In some cases, the seller will have to load the goods on the carrier’s mean of transport (see 4.4.2 Cii, the Swiss case where the court decided that the damage to a machine that fell of a forklift while loading onto the truck of the first carrier was still at the seller’s risk)\textsuperscript{514}, in other cases (sea transport) it is sufficient to place the goods alongside the ship.\textsuperscript{515} The Convention does not clearly express the exact moment the goods are handed over to the carrier. The F-terms are clearer on that part and unmistakably express the exact moment of risk passing since they clearly state when the delivery is completed, hence when the risk passes. It is therefore advised that the parties explicitly refer to an ICC Incoterm avoiding any complication arising out of the sometimes unclear provision of the Convention.


\textsuperscript{512} Ibid.

\textsuperscript{513} J. O. HONNOLD and H. M. FLECHTLER, Uniform Law for International Sales, 536, 519.


\textsuperscript{515} G. HAGER and M. SCHMIDT-KESSEL in P. SCHLECHTRIEM and I. SCHWENZER, Commentary, 929.
5.6 C-terms

In the group of C-terms we can find the Incoterms starting with the letter C, being CPT (Carriage Paid To), CIP (Carriage and Insurance Paid To), CFR (Cost and Freight) and CIF (Cost, Insurance and Freight). Under the C-terms, the seller is obliged to conclude the contract of carriage and pay for it.\textsuperscript{516} The risk of loss of or damage to the goods after the moment of loading will, however, be borne by the buyer.\textsuperscript{517} The letters behind the C of each C-term determine the exact allocation of cost of transport.\textsuperscript{518} It is important to note that the place mentioned following this type of Incoterms is, unlike the mentioned place with FCA, the place of ‘destination’ and not the place of ‘delivery’. This means that, \textit{e.g.} in the case between the Belgian chocolate seller and the Norwegian buyer, although the Incoterm states for example CFR Bergen, the seller will fulfil his delivery obligation the moment he places the goods on board of the ship at the port in Antwerp (CFR and CIF).\textsuperscript{519} In the situation, \textit{e.g.} between the Belgian seller and a Danish buyer, where the Incoterm used is CPT Aarhus, the seller will fulfil his obligation the moment he hands over the goods to a carrier in Belgium (CPT and CIP).\textsuperscript{520} Premature transfer of risk is possible under the same conditions as under the F- and E-terms.

5.6.1 CPT and CIP

The CPT trade term is built around the main obligation of the seller to hand over the goods to a carrier and arrange and pay for that carriage to the agreed destination point, which will be stated after the Incoterm.\textsuperscript{521} As with all C-terms, the transfer of risk will take place the moment the goods are handed over to the carrier.\textsuperscript{522} The relevant point of transfer of risk under CPT will be where the goods are handed over to the first carrier.\textsuperscript{523} This is different from the regime in the ‘maritime’ C-terms CFR and CIF where risk will pass the moment the seller delivers the goods on board of the ship.\textsuperscript{524}

\textsuperscript{516} H. VAN HOUTTE, \textit{International Trade}, 173.
\textsuperscript{517} Ibid.
\textsuperscript{518} Ibid.
\textsuperscript{520} Ibid.
\textsuperscript{522} J. RAMBERG, \textit{International Commercial Transactions}, 106.
\textsuperscript{523} Ibid.
\textsuperscript{524} J. RAMBERG, \textit{International Commercial Transactions}, 106.
The Incoterm CIP is virtually identical to the Incoterm CPT with the only difference that under CIP the seller will be obliged to arrange and pay for insurance.\footnote{Ibid.; X, \textit{Incoterms 2010}, Berlin, ICC Publication no. 715 ED, 18.}

\subsection*{5.6.2 CFR and CIF}

The C-terms CFR and CIF are terms created specifically for the trade over sea and inland waterway.\footnote{J. \textsc{Ramberg}, \textit{ICC Guide to Incoterms 2010}, 52.} The rules concerning these terms are similar to the rules governing CPT and CIF with the difference that the seller fulfils his delivery obligation the moment he places the goods on board of the ship.\footnote{X, \textit{Incoterms 2010}, Berlin, ICC Publication no. 715 ED, 106-107 and 116-117.}

If the buyer wishes to make the seller responsible for the arrival of the goods at the destination at particular time, D-terms should be used instead of C-terms.

\subsection*{5.6.3 C-terms and the CISG}

\subsubsection*{A C-terms and article 67}

The C-terms are, on the issue of passing of risk, similar to the F-terms. According to the C-terms, the risk will pass either at the moment the seller hands over the goods to the carrier, or, by virtue of the maritime C-terms CFR and CIF, upon the placement of the goods on board of the vessel. As we have seen while discussing the F-terms, these C-terms also correspond to the situation governed by article 67. Like with certain F-terms, courts will frequently cite the article if the trade term agreed among the parties is consistent with article 67.\footnote{X, UN\textsc{CITRAL Digest of case law on the United Nations Convention on Contracts for the International Sale of Goods}, New York, United Nations, 2012, 321; cases where courts found CIF and CFR to be consistent with article 67: respectively Cantone del Ticino Tribunale d’Appello (Switzerland) 15 January 1998, \textit{Clout case} no. 253, http://cисgw3.law.pace.edu/cases/980115s1.html and China International Economic and Trade Arbitration Commission (People’s Republic of China) 25 June 1997, \textit{Clout case} no. 864, http://cисgw3.law.pace.edu/cases/970625c1.html.} The F-term that can be used for any mode of transport, FCA, expressly states when delivery is completed and risk passes, namely when the good are loaded on the means of transport provided by the buyer at the seller’s premises or by placing the goods at the disposal of the carrier, ready to be unloaded, at the place other than seller’s place of business.\footnote{X, \textit{Incoterms 2010}, Berlin, ICC Publication no. 715 ED, 28.} The C-terms that can be used for any mode of transport, CPT and CIP, however, use the same wording as provided in the Vienna Convention and state that the seller’s delivery obligation is fulfilled when he seller ‘\textit{hands over}’ the goods to the carrier.
The reason for this different wording is probably that the Incoterm FCA was introduced for transport of containers with all means of transport; therefore, the risk passes the moment the container is loaded (and in practice sealed after collecting proof of the properly weighed, checked, measured and packed goods for delivery)\textsuperscript{530} at the seller’s premises, where the seller has full control over the stowing of the container. In comparison we have the Incoterms CPT and CIP, which can be used for any technique of transport with all means of transport. The Incoterms CPT and CIP let the risk pass when the goods are handed over to the carrier. CPT and CIP are terms that are fit for container-use as well, nevertheless, parties will need to clearly stipulate the exact moment the risk passes, since the risk passes when the goods are handed over to the carrier and the terms are silent on the issue of loading of the container. This is also clearly expressed in the guidance note of the Incoterms rules CPT and CIP. Parties are advised to identify as precisely as possible both the place of delivery where the risk passes and the named place of destination to which the seller must contract for carriage.\textsuperscript{531}

In a Chinese arbitral award, already referred to in 4.3, the tribunal found the seller of a chemical substance liable for the loss of the goods by melting\textsuperscript{532} The contract between the Chinese seller and US buyer was concluded CIF New York making the risk pass after the goods passed the ship’s rail at the Chinese port (under Incoterms 2010 the risk passes when placed on board of the ship.) The tribunal found that the trade term CIF would normally let the risk pass from seller to buyer, but ‘the communication between the parties regarding the appropriate temperature constituted a special agreement’, leading to the seller being liable for the loss of the chemical substance. Prof. ERAUW correctly points out that the tribunal could also apply the last phrase of article 66, which leaves the risk on the seller due to his act or omission.\textsuperscript{533}

\section*{B C-terms and article 68}

Article 68 of the Convention is the article concerned with the passing of risk in cases where goods are sold afloat; see 4.5, \textit{supra}. The general rule stipulated in article 68 lets the risk pass at the time of conclusion of the contract. However, if the circumstances so indicate (\textit{i.e.} where there is an insurance cover) the risk is assumed by the buyer from

\begin{itemize}
\item \textsuperscript{531} X, \textit{Incoterms 2010}, Berlin, ICC Publication no. 715 ED, 45.
\item \textsuperscript{533} J. ERAUW in S. KRÖLL, L. MISTELIS and M. DEL PILAR PERALES VISCAGILAS, \textit{Commentary}, 898.
\end{itemize}
the time the goods were handed over to the carrier who issued the documents embodying the contract of carriage. Thus, the risk will pass retrospectively from the time the goods were handed over to the carrier. If the contract involves a chain of carriers, like in multimodal transport, the handling over to the carrier who issued the documents will be the relevant moment for retrospective risk passing.\textsuperscript{534}

The Incoterms 2000 rules did not refer explicitly to the sale of goods afloat and it was suggested that in cases of sale of goods during transit, the CIF and CFR terms usually apply by adding the words ‘afloat’ after them.\textsuperscript{535} By doing this, the risk will pass to the buyer when the goods pass the ship’s rail at the port of shipment.\textsuperscript{536} The use of Incoterms CFR and CIF is seen as a circumstance reflected in the second sentence of article 68, leading to the risk to transfer the moment the goods were handed over to the first carrier.\textsuperscript{537} In the 2010 version of the Incoterms the wording of CFR and CIF was changed and the seller now undertakes to ‘procure’ goods delivered for the destination agreed in the contract of sale.\textsuperscript{538} This clarifies what happens when multiple sales down a chain are intended leading to the risk passing the moment the goods are placed on board of the ship.\textsuperscript{539} The wording of the Incoterm FOB was also changed this way, thus making FOB, CIF and CFR most frequently used in contracts of sale of goods afloat; under these terms the risk passes when the goods are placed on board of the vessel.\textsuperscript{540}

\subsection*{5.7 D-terms}

The Incoterms 2010 rules provide us with three D-terms that should be used in situations where the seller has the obligation to carry the goods at his own cost and risk to the named destination.\textsuperscript{541} The trade terms in the D-group are: DAT (Delivery At

\begin{thebibliography}{99}
\footnotesize
\item \textsuperscript{534} A. Raymond in S. Kröll, L. Mistelis and M. del Pilar Perales Viscacillas, Commentary, 901.
\item \textsuperscript{537} J. Ramberg, “To what extend do Incoterms 2000 vary articles 67(2), 68 and 69?”, Journal of Law and Commerce 2005-06, 221.
\item \textsuperscript{538} J. Ramberg, ICC Guide to Incoterms 2010, 31.
\item \textsuperscript{539} Ibid.
\item \textsuperscript{540} Raymond wrongly still refers to the ship’s rail as boundary see A. Raymond in S. Kröll, L. Mistelis and M. del Pilar Perales Viscacillas, Commentary, 903.
\item \textsuperscript{541} H. Van Houtte, International Trade, 173; J. Ramberg, International Commercial Transactions, 95.
\end{thebibliography}
Terminal), DAP (Delivery At Place), and DDP (Delivery Duty Paid). In the Incoterms 2000 version this group consisted of five trade terms but the maritime terms DES (Delivery Ex Ship) and DEQ (Delivery Ex Quay) have been replaced, respectively, by the terms DAP and DAT. All D-terms require the seller to deliver the goods at the named point, to pay for them to get there and to assume all risks concerning the goods in transit.

### 5.7.1 DAT

According to the rules of Incoterm DAT, the seller delivers the goods by placing them at the named terminal, unloaded by the seller. The term ‘terminal’ refers to ‘any place, whether covered or not, such as quay, warehouse, container yard, container freight station, road, rail or air cargo terminal.’ In situations in which the term DAT is applicable to the contract, the seller will fulfill his duty to deliver by bringing the goods to the named place and unloading them from the used means of transport, thus risk will pass when the goods are unloaded from the means of transport at the named place.

### 5.7.2 DAP and DDP

Under the Incoterm DAP, the seller bears the risk till the moment he makes the goods available for the buyer to unload them from the arriving means of transport. The seller will have to pay for the carriage of the goods to the place mentioned following the Incoterm; the buyer will have to unload them.

We can find the same rule concerning passing of risk in the Incoterm DDP. The difference between DAP and DDP is one governing the obligation to clear the goods for import and to pay taxes levied on the import of the goods. Under all the D-terms except DDP, the importer (buyer) will normally be obliged to clear the goods for import and to pay the taxes on that import. The trade term DDP however, places those obligations on the

---

seller, making DDP the incoterm representing the seller’s maximum obligation.\textsuperscript{552} If the seller fails to fulfil his obligation to clear the goods for import, he will bear the resulting risk of loss or damage to the goods.\textsuperscript{553}

\textbf{5.7.3 D-terms and the CISG}

The D-terms are destination trade terms (also called arrival contracts) where the seller fulfils his obligations by delivering the goods at the destination. These D-terms can best be compared with the rules expressed in article 69(2) of the Convention, which stipulates that ‘if the buyer is bound to take over the goods at a place other than a place of business of the seller, the risk passes when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal at that place’.\textsuperscript{554} In the above-mentioned dispute between an Austrian seller and a Bulgarian buyer, the seller had to deliver by placing the goods at the Austrian-Hungarian border according to Incoterm DAF (Delivery At Frontier, today subsumed by Incoterm DAP).\textsuperscript{555} The tribunal referred to article 69 of the Convention to conclude that the seller had neither delivered the goods nor placed the goods at the buyer’s disposal thus not leading to the risk to pass. Because of this the buyer was not held liable for injury to the goods due to prolonged deposit in the warehouse.

Under the Incoterms DAT, DAP and DDP, the seller is required to deliver the goods at the point of destination thus bearing the risk during transit. The Incoterm DAT leaves the risk with the seller until he unloads the goods from the arriving means of transport. Contrary, the risk under DAP and DDP will pass earlier, when the goods are placed at the buyer’s disposal at the place of destination, ready for him to unload.

According to the wording of the Incoterms, the mere fact that the seller places the goods at the buyer’s disposal, either ready to be unloaded or unloaded (if the applicable D-term is DAT), is enough to let the risk pass from seller to buyer. Article 69(2) of the Convention requires the buyer to be aware that the goods are placed at that place. The considerations that led to determining the appropriate time of passing of risk are

\begin{flushright}
\end{flushright}
different when the goods are at a place other than the seller’s place of business. When the goods are in the physical possession of the seller, and the last day of the period during which the buyer was obliged to take over the goods has not yet passed, the seller is in the best position to protect the goods from loss or damage, hence he should bear the risk. If, however, the goods are in the hands of a third party (the warehouse), the seller is not in a better position than the buyer to take the necessary precautions to protect the goods from deterioration or loss. The risks passes when the buyer is aware of this situation thus being capable of taking full control over the goods himself. The D-terms do not require this awareness of the buyer and thus the risk passes when the goods are placed at the disposal of the buyer at the agreed terminal or place.

556 X., Secretariat’s Commentary, 65.
557 Ibid.
Chapter 6: Conclusion

We have seen that the Vienna Convention on the International Sale of Goods and the ICC Incoterms are important instruments that arrange for the legal aspects of international commerce. Both regimes give the parties to a contract freedom to adjust the terms applicable. This is a good thing since international trade is constantly evolving and the best way to avoid legal disputes is to respond quickly to problems arising out of new technology or practices in the international sale of goods.

The CISG will be applicable to the contract if the parties have their place of business in different contracting States or if the private international law leads to the application of the Convention and the parties did not use the possibility to contract out the application of the CISG. Thus, the CISG has the status of supplementary law.

The ICC Incoterms, on the other hand will be applicable if the parties explicitly refer to an ICC Incoterm or if the rules of the Incoterms are found to be a usage or a practice established between the parties. The Incoterms will then replace the rules of the CISG. However, subjects not settled by the Incoterms will still be settled by the rules of the CISG. As we have seen, the use of one regime does not exclude the use of the other. Courts and tribunals around the world use Incoterms and the CISG as complementary sources to solve disputes arising out of contracts for the sale of goods.

The Convention arranges the passing of risk in article 66-70. While applying these rules, one must at all times stay focused not to lose sight of the different articles and their modalities of application. During the drafting, the parties had some difficulties in finding appropriate compromises that both common law and civil law, developed and developing countries all felt comfortable with. These compromises are reflected in the somewhat ambiguously drafted articles that sometimes lead to discussion concerning their interpretation. An example of this is the last sentence of article 68 that refers to damage not disclosed by the seller in a sale of goods in transit. Scholars have different opinions on the interpretation of this last sentence and its connection with the sentence before it. Another example is article 70 that only refers to fundamental breach of contract and the possibility of avoiding the contract or requiring substitute goods. The Convention has also failed in defining terms that are important for the passing of risk, e.g. ‘first carrier’, ‘handing over’ and ‘circumstances’. This leads to conflicting views of scholars on the interpretation. These discussions however are mostly held at
universities and conferences around the world rather than in court. This is due to the fact that in practice there is not much dispute concerning the passing of risk since the parties will in most contracts use trade terms that allocate the risk in the international sale of goods in a clear way. Incoterms reflect commercial practice and are therefore more effective in tackling problems that might arise in international trade.

The ICC Incoterms link the passing of risk to the delivery. Consequently, if the seller fulfils his obligation to deliver, the risk will pass from seller to buyer. The Incoterm stipulates the exact moment of delivery in a very clear way. The drafting parties of the CISG did not want to link the passing of the risk with the delivery of the goods and decided to use a more typological moment of passing, hence being the change of physical control. In practice however, this will often occur at the same time. In contrary to the CISG, the Incoterms (except for CIP and CPT) also allocate the risk for (un)loading, avoiding any dispute concerning goods that got damaged during this operation.

All in all we see that the passing-of-risk-rules in the Vienna Convention and the ICC Incoterms complement each other. This symbiotic relationship leads to a set of rules that is functioning fairly well and creates a good legal fundament for the international trade of goods.
Dutch summary

Inleiding

Deze thesis behandelt de overgang van het risico in de internationale verkoop van goederen. Eerst worden de regels van het Weens Koopverdrag bekeken erna de overgang in de Incoterms.

Het Weens Koopverdrag biedt een geheel van regels aan die de internationale verkoop van goederen regelt. Dit Verdrag is van toepassing indien de partijen in verschillende verdragsstaten gevestigd zijn en indien ze in hun contract niet afwijken van de regels van het Verdrag. Het principe van de wilsautonomie der partijen geeft immers voorrang aan de partijen hun eigen uitgewerkte regels. Het de toepassing van het een sluit echter de ander niet uit.

De International Chamber of Commerce (ICC) codificeerde op basis van gangbare handelspraktijken een reeks van trade terms. Deze Incoterms kunnen door de partijen vermeld worden in de overeenkomst en aldus van toepassing worden op de koopovereenkomst.


Hoofdstuk 1 Het Weens Koopverdrag

In hoofdstuk 1 wordt de geschiedenis en het toepassingsgebied van het Weens Koopverdrag besproken. Het Weens Koopverdrag werd in 1980 geratificeerd door elf Staten. Ondertussen is het een van de succesvolste verdragen van de Verenigde Naties met 78 Staten die het verdrag hebben aangenomen.
Het Verdrag is van toepassing indien de handelaars hun vestiging hebben in verschillende Staten. Het verdrag kan ook van toepassing zijn indien slechts één of geen van de partijen gevestigd is in een verdragsluitende Staat. Dit kan indien het internationaal privaatrecht het Verdrag als toepasselijk recht aanwijst. De contractvrijheid is in het Verdrag bevestigd en de partijen kunnen aldus een afwijkende regeling bedingen. Dit kan expliciet in de overeenkomst (vb. verwijzen naar Incoterms) maar ook door een gewoonte of praktijk die de partijen hebben opgebouwd.

**Hoofdstuk 2 De Incoterms 2010**

Hoofdstuk 2 behandelt het ontstaan en de evolutie van de ICC Incoterms. Incoterms zijn *trade terms* waar de partijen naar kunnen verwijzen. Het zijn simpele drie letterige afkortingen. De eerst versie werd gecodificeerd in 1936, erna volgende verschillende vernieuwde versies; de meest recente is de versie van 2010. De Incoterms bevatten regels omtrent levering, overgang van het risico, documenten, verzekering, ... Ze regelen echter niet alle elementen van de koopovereenkomst. Vragen die niet door de Incoterms beantwoord worden kunnen steeds aan de hand van het Verdrag een antwoord krijgen.

De Incoterms worden van toepassing indien de partijen in het contract er naar verwijzen. De Incoterms kunnen ook toepassing krijgen als gewoonte die of gebruik dat tussen de partijen is ontstaan. Ze geven algemeen erkende principes en gebruiken weer maar zijn geen onderdeel van het internationaal gewoonterecht.

**Hoofdstuk 3 Risico**

Het begrip wordt in hoofdstuk 3 geanalyseerd en gedefinieerd. Noch de Incoterms, noch het Weens Koopverdrag definiëren het begrip. In het algemeen kan worden aangenomen dat risico het prijsrisico is. De regels over het risico bepalen immers of de koper al dan niet dient te betalen indien de goederen teniet gegaan zijn door een ongeval. Het gaat om situaties waarin de goederen teniet gaan buiten de wil van de partijen. Indien het risico is overgegaan, zal de koper, de prijs moeten betalen. Ook het risico op daden van de overheid (zoals confiscatie, verbod op het gebruik) vallen hieronder. Het risico op het verlies van de documenten valt ook onder het verlies maar het valt te betwijfelen of dit risico samen overgaat. ERAUW meent dat dit samen gebeurt maar aan de hand van een voorbeeld toont deze masterproef dat dit eventueel nare gevolgen kan hebben. In de praktijk is dit echter een uitzondering.
**Hoofdstuk 4 De overgang van het risico in het Weens Koopverdrag**

Hoofdstuk 4 van deze masterproef behandelt de overgang van het risico zoals dit wordt geregeld in het Verdrag. Dit wordt artikelsgewijs gedaan startend bij artikel 66 en eindigend bij artikel 70.

**Artikel 66** herhaalt de algemene verbintenis die de koper heeft, namelijk het betalen van de prijs. Het artikel bepaalt dat het schade aan of verlies van de goederen nadat het risico is overgegaan niets afdoet aan de verbintenis van de koper tot het betalen van de prijs. Dit met uitzondering van de situatie waarbij die schade of dat verlies werd veroorzaakt door een handeling of een verzuim van de verkoper. Dit betekent dat de koper zich niet zal kunnen beroepen op andere bepalingen van het Verdrag om het contract te beëindigen of een lagere prijs te vragen.

Indien de schade of het verlies echter veroorzaakt werd door de verkoper dan zal de koper niet moeten betalen. De vraag is echte welke daad of verzuim in dit artikel bedoeld wordt. Uit de geschiedenis van het Verdrag blijkt dat dit niet enkel een wanprestatie is maar ook een onrechtmatige daad van de verkoper.

Er wordt ook kort stilgestaan bij artikel 28 van het Verdrag. Dit geeft de rechter de mogelijkheid om af te zien van verplichte uitvoering van de overeenkomst indien de rechter dit ook niet zou doen in dezelfde situatie onder het eigen recht. Dit kan leiden tot een situatie waarin de prijs voor teniet gegane goederen niet meer dient betaald te worden, ook al was het risico reeds overgegaan naar de koper. Deze regel was een compromis tussen Common en Civil Law landen, en biedt de mogelijkheid tot het toepassen van het eigen recht. Dit artikel staat aldus haaks op de doelstelling van het Verdrag, namelijk het uniform maken van het internationaal kooprecht. Toch kent dit artikel weinig of geen toepassing in de praktijk aangezien het in eigen recht vaak voorzien zal worden in de mogelijkheid tot uitvoering van de overeenkomst.

**Artikel 67** bevat de algemene regel indien het contract ook het transport van de goederen regelt. Aangezien dat dit meestal het geval zal zijn is dit veruit de meest toegepaste regel. Volgens deze regel gaat het risico over bij de overhandiging van de goederen aan de eerste vervoerder. Dit houdt in dat het risico tijdens de reis op de koper ligt. Dit lijkt onrechtvaardig maar is logisch aangezien de koper in de beste positie zal zijn om de schade vast te stellen en aldus aangifte te doen bij de verzekeraar.
Het bijhouden van documenten die bij de goederen horen zal deze risico overgang niet tegenhouden. De overgang van het risico gebeurt immers onafhankelijk van de overgang van titel en eigendom, zaken die niet door het Verdrag worden geregeld.

Een definitie van ‘de eerste vervoerder’ wordt niet gegeven. Uit de rechtspraak en rechtsleer blijkt echter dat dit een onafhankelijk vervoerder dient te zijn. Indien de verkoper zelf instaat voor het vervoer, dan zal het risico niet overgaan. Als de verkoper voor een deel van de reis zijn eigen vervoersmiddelen gebruikt zal het risico overgaan wanneer de goederen worden overhandigd aan de eerste onafhankelijke vervoerder. Dit is een situatie die best vermoeid wordt aangezien het transitrisico wordt verdeeld. Dit werkt disputueel. Partijen lossen dit best op door een duidelijke risicoallocatie in het contract, bijvoorbeeld via een Incoterm.

Ook laat het Verdrag na om ‘overhandigen’ te definieeren. Uit rechtspraak en rechtsleer blijkt dat de goederen overhandigd zijn als ze overgegeven worden aan de vervoerder. Bij een vrachtwagen is dit na het laden van de vrachtwagen. Echter, bij een schip kan het volstaan om de goederen naast het schip te plaatsen, dit op voorwaarde dat de schipper de goederen onder zijn hoede krijgt. De partijen lossen deze onduidelijkheid in het Verdrag best op door via een Incoterm te bepalen wie het risico tijdens het laden draagt.

Als de overeenkomst eist dat de verkoper de goederen overhandigt op een specifieke plaats, dan zal het risico daar overgaan. Ook dit leidt tot een verdeling van het transitrisico.

Het risico gaat enkel over indien de goederen geïndividualiseerd zijn. Dit kan door markeringen op de verpakking maar ook via de begeleidende documenten. Als de goederen niet kunnen worden geïdentificeerd, blijft het risico op de verkoper tot ze geïdentificeerd zijn. Dit kan ook leiden tot een verdeling van het transitrisico, wat best vermeden wordt.

**Artikel 68** van het Verdrag behandelt de risico overgang bij de verkoop van goederen in transit. De basisregel is hier dat het risico overgaat op het moment van het sluiten van de overeenkomst. Als de omstandigheden zulks uitwijzen zal het risico echter retroactief overgaan vanop het moment dat de goederen werden overhandigd aan de vervoerder die de documenten waarin de vervoersovereenkomst is neergelegd, heeft uitgegeven. Dit op voorwaarde dat de verkoper te goeder trouw is. Een voorbeeld van zo’n omstandigheid is de overdraagbare verzekeringpolis waarbij de koper aangifte kan doen bij de verzekeraar indien er schade is. Aangezien dit in de internationale koop vaak wordt gedaan is dit eigenlijk de regel. De laatste zin bepaalt dat de de risico voor schade
die de verkoper wist of behoorde te weten niet overgaat. Er is discussie over de precieze interpretatie van deze regel. Volgens één strekking is de verkoper enkel aansprakelijk voor de schade die zich al had voorgedaan op het ogenblik van de sluiting. Volgens een andere strekking, die de schrijver van deze masterproof ook aanhangt, dient de verkoper ook aansprakelijk te zijn voor de later, na de sluiting, ontwikkelde schade aangezien dit het voordeel heeft dat het risico niet wordt gesplitst. Artikel 68 is het gevolg van een compromis gesloten tussen ontwikkelingslanden en geïndustrialiseerde landen tijdens het opstellen van het Verdrag. Dit leidde tot dit verwarrend opgesteld artikel. Wederom dienen de goederen geïndividualiseerd te zijn om het risico te laten overgaan.

**Artikel 69** bevat de restregel. Dit is de regel die van toepassing zal zijn indien artikelen 67 en 68 niet van toepassing zijn. Indien de koper de goederen dient over te nemen op de vestiging van de verkoper zal het risico overgaan op het moment dat de koper de goederen overneemt, of indien hij de goederen te laat overneemt, wat een wanprestatie uitmaakt. Niet enkel het nalaten om de goederen over te nemen zal het risico doen overgaan. Ook andere wanprestaties kunnen tot overgang van het risico leiden, wat positief is aangezien het nakoming van de overeenkomst stimuleert.

Indien de koper de goederen dient over te nemen op een andere plaats dan de vestiging van de verkoper, zal het risico overgaan als de verkoper de goederen ter beschikking van de koper heeft geplaatst en de koper hiervan op de hoogte is. Dit werd geïntroduceerd voor de situatie waarin de goederen worden gestockeerd in een magazijn van een derde waar de koper ze dan dient over te nemen. Deze zin slaat echter even goed op de situatie waarin de goederen geleverd worden op het adres van de koper.

**Artikel 70** is het laatste artikel dat de overgang van het risico regelt. Artikel 70 bepaalt dat in geval van fundamentele tekortkoming, artikelen 67, 68 en 69 de koper niet verhinderen gebruik te maken van de rechten die het Verdrag hem geeft. Het artikel regelt de situaties waarin het toevallig verlies van de goederen niet verbonden is met de tekortkoming van de verkoper. De koper kan dan het contract opzeggen of vervanggoederen vragen. Dit zal ertoe leiden dat het risico retroactief wordt teruggebracht bij de verkoper. Dit is enkel mogelijk bij een fundamentele wanprestatie van de verkoper. Uit artikel 49 blijkt echter dat de koper ook bij laattijdige niet-levering in de door de koper aan de verkoper gegeven bijkomende periode het contract kan opzeggen. Als we dit lezen in samenhang met artikel 82, dat opzegging en vragen van vervanggoederen toelaat zelfs indien de goederen verloren zijn gegaan, blijkt dat ook deze situatie onder artikel 70 valt. Wat een contradictie in het Verdrag uitmaakt. Deze situatie is echter heel uitzonderlijk.
De regels met betrekking tot de overgang van het risico in het Weens Koopverdrag zijn vrij goed opgesteld aangezien ze aangepast zijn aan de economische realiteit. Koopovereenkomsten regelen immers in de meeste gevallen ook het vervoer van de goederen. Het is echter wel spijtig dat het verdrag termen zoals 'overhandigen' en 'eerste vervoerder' niet definieert. Dit leidt tot discussie, wat niet in overeenstemming is met het doel van het Verdrag, namelijk uniformiteit in het recht op de internationale koop creëren. Ook zien we dat in het verdrag compromissen werden gesloten, wat soms heeft geleid tot vaag opgestelde regels. In praktijk worden deze onvolmaaktheden door handelaars echter deels opgevangen door te verwijzen naar onder andere Incoterms.

**Hoofdstuk 5 De overgang van het risico in de Incoterms**

De Incoterms versie 2010, uitgegeven door de International Kamer van Koophandel, bevat elf *trade terms*. In deze masterproef worden deze Incoterms behandeld in vier groepen: één E-term, vier C-terms, drie F-terms and drie D-terms.

Partijen kunnen expliciet een Incoterm over de handelsrelatie van toepassing verklaren. Dit door een verwijzing in de overeenkomst naar de desbetreffende Incoterm. De Incoterms kunnen ook toepassing vinden via artikel 9 van de Conventie. Dit geeft gebruiken van de partijen voorrang op de regels van het verdrag. Incoterms regelen echter niet alles en in het geval van onenigheid kan, indien het Verdrag van toepassing is, het Weens Koopverdrag steeds soelaas brengen. Incoterms laten het risico overgaan op het moment van de levering.

Onder de *E-term* EXW (Ex-Works) dient de verkoper de goederen ter beschikking te stellen van de koper aan de verkopers eigen vestiging of een ander genoemde locatie. Dit komt overeen met de regeling van artikel 69 uit het Weens Koopverdrag. Het risico zal echter op een ander moment overgaan. Volgens het Verdrag gaat het risico immers slechts over indien de koper de goederen aan de verkopers vestiging heeft overgenomen of, indien levering plaatsvindt op een andere locatie, indien de koper op de hoogte is van het feit dat de goederen te zijner beschikking staan. EXW laat het risico aldus vroeger overgaan, namelijk op het moment dat de goederen ter beschikking staan van de koper, zonder de nood van diens kennis hiervan.

De groep *F-terms* bevat drie Incoterms: FCA (Free Carrier), FAS (Free Alongside Ship) en FOB (Free on Board). De ‘vervoerder’ onder de Incoterms verwijst naar een persoon die in een vervoerscontract de verbintenis op zich neemt om uitvoering van het vervoer te
voorzien. Onder de F-terms moet de verkoper de goederen leveren aan een vervoerder aangeduid door de koper. Het risico bij FCA gaat over op het moment dat het laden is voltooid (wanneer de levering dient te gebeuren aan de verkopers vestiging) of wanneer de goederen ter beschikking van de vervoerder, klaar om te lossen, worden gesteld (indien de levering dient te gebeuren op een andere plaats.) Bij FOB zal het risico overgaan nadat de goederen aan boord van het schip werden gebracht en bij FAS nadat ze naast het schip werden geplaatst. Aldus komen de F-terms overeen met artikel 67 van het Verdrag. De F-terms zullen echter steeds het exacte moment van overgang bepalen waarbij luidens artikel 67 slechts melding wordt gemaakt van het vagere ‘overhandigen’.


De D-terms zijn DAT (Delivery at Terminal), DDP (Delivery Duty Paid) en DAP (Delivery at Place). Bij DAT zal het risico overgaan wanneer de verkoper de goederen geplaatst heeft aan de genoemde terminal, waarbij hij zelf instaat voor het lossen. DAP en DDP laten het risico overgaan op het moment dat de verkoper de goederen ter beschikking stelt van de koper, klaar om gelost te worden. Deze D-terms kunnen het best vergeleken worden met artikel 69(2) van het Verdrag waarbij de koper de goederen dient over te nemen op een andere plaats dan de vestiging van de verkoper. De verkoper zal het risico tijdens het vervoer dragen. In tegenstelling tot het Weens Koopverdrag gaat het risico over vanaf het moment dat de goederen gelost zijn of klaar zijn om te gelost te worden door de koper en is geen bewustzijn van de ter beschikking stelling vereist in hoofde van de koper.
**Hoofdstuk 6 Conclusie**

Het Weens Koopverdrag en de Incoterms zijn beiden belangrijke instrumenten in de internationale handel. Beide regimes geven de partijen de vrijheid om van de ter beschikking gestelde regels af te wijken. Dit is goed aangezien internationale handel continu evolueert.

De partijen kunnen opteren om de Incoterms van toepassing te verklaren op hun overeenkomst. De Incoterms zullen dan de regels van het Weens Koopverdrag vervangen. Zaken die niet geregeld worden door de Incoterms zullen echter nog steeds geregeld worden door het Verdrag. Aldus sluiten beiden elkaar niet uit.


We kunnen concluderen dat de regels met betrekking tot overgang van het risico in het Weens Koopverdrag en in de Incoterms elkaar mooi aanvullen. Deze symbiotische relatie leidt tot een geheel van regels die een mooie fundering vormen voor de internationale handel van goederen.
Bibliography

Primary Sources


Case Law


Oberlandesgericht Koblenz (Germany) 14 December 2006, Clout case no. 724, http://cisgw3.law.pace.edu/cases/061214g1.html.
Landgericht Bamberg (Germany) 23 October 2006, Plants case, http://cisgw3.law.pace.edu/cases/061023g1.html.


Amtsgericht Duisburg (Germany) 13 April 2000, Pizza Carton case, Clout case no. 360, http://cisgw3.law.pace.edu/cases/000413g1.html.


**Books**


Articles


