

## Passing of Risk in International Sale Contracts under the CISG

Rungnapa Adisornmongkon<sup>1</sup>

### Abstract

The passing of risk is significant for sale contract in particular an international sale contract that is governed by the CISG. The point of time, that risk passes, will vary since the CISG's provision allocates risk in different circumstances which rather complex. It further allows the parties of contract deviate its rules of risk allocation by agreeing to bind any practices or trade usage which may give a different outcome. As for trade usage, that is widely known such an Incoterm, will be applied to a contract even though the parties have not expressly agreed. To protect economic loss and certainly acknowledge in advance that the financial responsibility is giving to whom; subsequently, the parties should deliberate which rule will be governed to the contract.

**Keywords:** CISG / International sale of goods / Passing of risk

### บทคัดย่อ

การโอนความเสี่ยงภัยถือว่ามีผลสำคัญอย่างยิ่งกับสัญญาซื้อขาย โดยเฉพาะในสัญญาซื้อขายระหว่างประเทศที่อยู่ภายใต้การบังคับใช้ของอนุสัญญาซื้อขายระหว่างประเทศ บทบัญญัติในอนุสัญญาซื้อขายระหว่างประเทศได้กำหนดเวลาที่ความเสี่ยงโอนในจุดที่แตกต่างกันออกไปขึ้นอยู่กับกรณีที่เป็นบทบัญญัติ

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<sup>1</sup> Department of Law, Faculty of Social Sciences, Kasetsart University,

กำหนดซึ่งค่อนข้างมีความซับซ้อน นอกจากนี้อนุสัญญาฯ เองอนุญาตให้คู่สัญญาตกลงกันที่จะไม่ใช้บังคับตามหลักการโอนความเสี่ยงภัยที่อนุสัญญากำหนด โดยคู่สัญญาอาจตกลงบังคับกันตามหลักที่เคยปฏิบัติ หรือธรรมเนียมทางการค้าอื่นๆ ซึ่งจะทำให้ผลการกำหนดจุดที่โอนความเสี่ยงภัยแตกต่างจากของอนุสัญญายิ่งถ้าเป็นธรรมเนียมทางการค้าที่เป็นที่รู้จักกันโดยทั่วไปอย่าง ช้อตกลงการค้าระหว่างประเทศ ก็ย่อมนำมาใช้บังคับกับสัญญาได้แม้คู่สัญญาไม่ได้ตกลงกันอย่างชัดแจ้งในสัญญาก็ตาม ทั้งนี้เพื่อป้องกันความเสียหายในเชิงเศรษฐกิจและจะได้รับการบ่งชี้ล่วงหน้าอย่างแน่ชัดว่าฝ่ายใดจะเป็นผู้รับผิดชอบในความเสียหาย ดังนั้น คู่สัญญาควรไตร่ตรองให้ดีว่าจะนำหลักการโอนความเสี่ยงของกฎหมายใดมาใช้บังคับกับสัญญา

**คำสำคัญ:** อนุสัญญาซื้อขายระหว่างประเทศ / สัญญาซื้อขายระหว่างประเทศ / การโอนความเสี่ยงภัย

## Introduction

In the scenario of an international sale contract; for example, a seller at one country sells machines CIF to a buyer at another country. Cargos will ship from Liverpool port to Hamburg port, on the way to port of shipment by rail the goods damaged accidentally caused by a truck driver at a crossing. The question arises that the financial responsibility or that known as the risk of loss would be to whom; the seller or the buyer. According to the United Nation Convention on Contracts for the International Sale of Goods 1980 (CISG) the risk of loss or damage is at the buyer due to it passes to the buyer when goods are handed over to the first carrier. In contrast, the risk is still with the seller because of INCOTERMS rule. Under the CIF clause, risk will pass to the buyer

at the moment goods are on board the vessel at Liverpool port, so the example shows that goods damaged before they arrived at the port of loading the damage remains to the seller. Consequently, the risk may pass at a different point depending on which rule will be applied to the contract. Some circumstances CISG was applied to the contract, or sometimes Incoterm will be used either parties of contract expressly incorporate trade term into their contract, or they had not agreed but the trade usage is broadly known. To clarify the issue a case should be taken into account. *St Paul Guardian Insurance v Neuromed Medical Systems & Support*,<sup>2</sup> a German seller sold a magnetic resonance imaging (MRI) machine to an American buyer in a “CIF New York Seaport”. The machine was on board the vessel in good condition; however, at the destination port it was found that the machine had damaged and need to be repaired. The buyer sued the seller in a US Court in order to recover for the damage. He argued on the ground that the title to the goods would be passed to the buyer when the final payment had been made, thus the risk of damage belongs to the seller up to the moment goods were delivered at the destination port -New York. On the other hand, the seller argued that the risk had passed at the port of loading according to CIF Incoterms. The buyer further supported that since the parties had not expressly referred to Incoterms in their contract so the CIF term would be inapplicable. The court decided that the CISG governed the contract and dismissed the buyer’s claims that the CIF Incoterms did not apply because the parties had not referred to them; however, country of the parties were contracting state that was governed under CISG.

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<sup>2</sup> WL465312 (S.D.N.Y. Mar 26, 2002), *aff’d*, 53 Fed. Appx. 173 (2d Cir. 2002).

Subsequently, the article 9(2) CISG was applicable and the Incoterms formed “usage” widely known and used in international trade.<sup>3</sup> Consequently, Incoterms could be regarded as usages established between the parties even though they had not made a reference to them in the contract.<sup>4</sup> Therefore, the buyer has to oblige a payment.

The allocation of risk is variable when determine to a domestic law the point of time, that risk passes, is different from those stipulations in an international law. Which point of time is decisive as to whether the risk has passed to the buyer, it is complicated in particular international sale contracts. The United Nations Convention on Contracts for the International Sale of Goods (CISG) regulates the passage of risk in various ways depends on the circumstance. 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 at the time that goods are handed over to the first carrier;<sup>5</sup> however, the risk never pass to the buyer if delivered goods are lack of conformity.<sup>6</sup> Some situation the risk passes to the buyer from the time when goods are

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<sup>3</sup> CISG 1980, art. 9(2) states that “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...”.

<sup>4</sup> Feltham, J. D. (1991), CIF and FOB contracts and the Vienna convention for the international sales of goods, *Journal of Business Law*, pp. 413, 416.

<sup>5</sup> Feltham, J. D., C. I. F. and F.O.B. contracts and the Vienna convention on contracts for the international sale of goods, *Journal of Business Law*, (1991), art. 67(1).

<sup>6</sup> *Ibid*, art. 36(1).

placed at his disposal.<sup>7</sup> In case that goods are sold in transit, the risk transfers to the buyer from the time of the conclusion of the contract.<sup>8</sup> Whenever the risk passes it will be retroactive and return to the seller when the seller has committed a fundamental breach of contract.<sup>9</sup> Furthermore, it would be in other ways if the parties of the contract opted out the provisions under the CISG or they may be bound by any usages either which they have agreed or which widely known to them as international trade term even though they have not expressly incorporated into their contract but it has considered as an implied term.<sup>10</sup>

It is undeniable that we are not doing only domestic sale contracts but do much of international sale contracts also. It thus is inevitable to comply with the unification rules under the CISG. According to demands of the market worldwide international sales have developed significantly. To harmonise and unify law of international trade for a same standard and acceptable in international commerce the CISG was adopted and concerned. If considers in international sale of goods the passing of risk must be regarded. It has been typically accepted that the passing of risk rules have played an important role in international sale contracts as they are helpful for determining the allocation of risk under a sale process. Especially, international sale contract has to concern a long distance of transportation which may have unexpected incidents

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<sup>7</sup> Feltham, J. D., C. I. F. and F.O.B. contracts and the Vienna convention on contracts for the international sale of goods, art. 69.

<sup>8</sup> Ibid, art. 68.

<sup>9</sup> Ibid, art. 70

<sup>10</sup> Ibid, art. 9.

throughout the voyage. The allocation of risk stipulates the financial responsibility or so called “economics risk”. At the moment that risk transfers to the buyer and the goods were destroyed or damaged afterward he has paid for the price, even though he did not receive the goods or receive in poor conditions.

To enhance understanding of the passing of risk in international sale contract under the CISG, which is rather complex, is the main object of this studying. Furthermore, parties of a contract would deliberate whether the provisions of this issue, which are in the CISG, should be applied to their contract or not. Hereafter, the article will examine the issue of the passing of risk in international sale contracts and analyses the rules pertaining to the risk allocation under the CISG. It will begin with clarifying the term of risk, following by theories on the passing of risk; lastly, the passing of risk under the CISG will be discussed.

### **Term of risk**

When goods were accidentally lost or damaged between conclusion and fulfillment of the contract, a common question must be determined that who was going to bear this loss; the seller or the buyer. The rule on the passing of risk determine the moment in which the risk passes. This means that when the risk passes to the buyer the financial responsibility is on him. He is not discharge his obligation to pay the price even though he has never received the goods. On the contrary, if goods of the contract were lost or destroyed before they transferred to the buyer, the loss still remains to the seller.

The meaning of risk in a sales contract can cover various situations like physical loss, deterioration or damage of the goods sold.<sup>11</sup> The common characteristic in all these cases is that the loss or damage should be accidental, that is not caused by an act or omission of one of the parties.<sup>12</sup> Furthermore, risk can be included situation like theft, seawater or overheating affecting the quality of the goods. The risk of loss rules under the CISG are included cases where goods cannot be found,<sup>13</sup> have been stolen, or have been transferred to another.<sup>14</sup> Damaged goods are included to total destruction, physical damage,<sup>15</sup> and shrinkage of goods during carriage or storage.<sup>16</sup> Scholars opined that risks covered under the CISG were not included either legal risk such as government confiscation, or economic risk such fluctuation in market price.<sup>17</sup> Apparently, the risk from acts of state should not

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<sup>11</sup> CLOUT case No. 360 (13 April 2000), Amtsgericht Duisburg, Germany; CLOUT case No. 377 (24 March 1999), Landgericht Flensburg, Germany. [On line], Available: <http://www.cisg.law.pace.edu> [25 May 2016]

<sup>12</sup> Enderlein, F. & Maskow, D., *International sales law: United Nations convention on contracts for the international sale of goods: Convention on the limitation period in the international sale of goods: Commentary*, (New York: Oceana, 1992), p. 261.

<sup>13</sup> Furniture case. (1998), *Appellate Court Hamm, Germany*. [On line], Available: <http://www.cisg.law.pace.edu> [25 May 2016]

<sup>14</sup> Raw salmon case. (1998), *Appellate Court Oldenburge, Germany*. [On line], Available: <http://www.cisg.law.pace.edu> [25 May 2016]

<sup>15</sup> CLOUT case (n10).

<sup>16</sup> Miller, F. H., Harris, L. S., Patchel, K. & Lynn, G. (2016), *Risk of loss: Basic rules, 10B Hawklnd UCC Series § 10:84*, [Online], Available: Westlaw [20 May 2016].

<sup>17</sup> Ibid.

be concerned such a confiscation that is a measure-penalty against the person who owns goods but it is not object at the goods themselves. However, the economic risk should be included due to article 70 of the CISG stipulates that a risk from the buyer returns to the seller and is retroactive to the beginning if the seller commits a fundamental breach and the buyer voids the contract. It illustrates that when goods handed over to the carrier at the port of loading and that moment assumes that the risk passes to the buyer. The value of goods is in some degree at the port of loading and when the seller breach a contract fatally the risk would be return to the seller. If there are some situations that affect the value of goods, or some merchandise which may have flexible price the value of goods in the market would be changed at the port of destination. If the latter fluctuation of market price does not bring the advantage to the seller the reducing value would be a risk that means the seller has economic loss in some degree. Hence, it could be argued that the economic risk should be concerned in an international sale contract.

Further, there may have other financial consequences to delivery of non-conforming goods such as cost of transportation, cost of handling and storage both the carriage from a seller to a buyer and the way goods reroute back to the seller when the buyer voids contract due to a fundamental breach.<sup>18</sup> It could be stated that those costs are economic loss which shall be a risk because the risk is an unexpected incident. To avoid an economic waste

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<sup>18</sup> Erauw, J., CISG Article 66-70: The risk of loss and passing it, *Journal of Law and Commerce*, 25(2005), 206.



problem the seller should keep a contract in conformity. However, it is beyond the scope of the CISG.

### Theories on the passing of risks

The passing of risk has been a problematic area due to the time of passage of risk will be diverse between domestic law on sale contract and international sale contract under the international rules. Subject to the legal structures, social circumstances and background, three main theories have developed and been adopted regarding the time of passing of risk.<sup>19</sup>

The first theory links the passage of risk at the time of conclusion of the contract of sale. This theory is used by domestic sale contract of Swiss law, Dutch law and Spanish law.<sup>20</sup> However, it is not practical because at the moment when the contract is concluded goods are still in possession of the seller. A circumstance where the seller has the control of goods, but the loss or damage of goods is the financial responsibility of the buyer. Bearing of risk under this theory is hardly desirable in particular international sales.

The second theory links the time of the passing of risk is the time of passing of ownership. This theory is used in French and English law.<sup>21</sup> It is likely the party who owns the goods at the time of loss or destruction should bear the

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<sup>19</sup> Romein, A. (1999) *The passing of risk a comparison between the passing of risk under the CISG and German law*, [Online], Available: <http://www.cisg.law.pace.edu/cisg/giglio/romein.html> [20 May 2016].

<sup>20</sup> Swiss Civil Code Amendment, art. 185 (1); Spanish Civil Code, art.1452; Dutch BW, art.1496.

<sup>21</sup> French Civil Code: art.1624; The Sale of Goods Act, 1893: s. 20(1); The Sale of Goods Act 1979: s. 20 sec. 18 rule 1.

loss. The ownership is not at all connected or related to the notion of risk especially international trade since most of international sale contracts the seller will deliver goods to the carrier before transferring the title through the system of the letter of credit. Further, the moment of passing to ownership is regulated differently in every country.<sup>22</sup> It thus is impractical as according to article 4(b) of the CISG the risk passes without taking into account whether the seller or the buyer owns the goods.

The third theory connects the passing of risk with the time that goods are delivered. This theory is used in German law.<sup>23</sup> The party who has physical control over the goods will bear the risk. It is reasonable that the one who possesses the goods is in a better position to guard them and take the necessary precautions for their safety.<sup>24</sup> Cases involve carriage of goods the seller cannot hand goods over the buyer directly but to the carrier who will then deliver them to the buyer. It should be assumed that the risk passes from the time that the goods are delivered to the carrier. Under a contract of affreightment when the goods are involved the carriage the carrier normally issues the bill of lading which has functions as a receipt for the goods shipped

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<sup>22</sup> Romein, A., *The passing of risk a comparison between the passing of risk under the CISG and German law.*

<sup>23</sup> German Civil Code: sec. 446.

<sup>24</sup> Valiotti, Z. (2003). *Passing of risk in international sale contracts: A comparative examination of the rules on risk under the United Nations Convention on Contract for the International Sale of Goods (Vienna 1980) and INCOTERMS 2000.* [On line], Available: <http://www.cisg.law.pace.edu/cisg/biblio/valiotti1.html> [20 May 2016], p. 7.

and a document of title.<sup>25</sup> It regards to one who has a document as possession of the goods covered by it, also the holder can take delivery of goods at the port of destination or sell the goods while in transit by endorsing the bill of lading. Consequently, even though the buyer does not literally have the physical control the goods but the holding of the bill of lading means the goods are under his disposal.<sup>26</sup>

### The Passing of Risk under the CISG

The Convention's provisions on the passage of risk will apply only the parties had not made any previous express or implied arrangement on the issue. The CISG regulates passing of risk from the seller to the buyer in articles 66-70.

#### 1. Consequence of the passing of risk –Article 66

*“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.”<sup>27</sup>*

As for an article 66 clearly states that the buyer is not discharge the obligation to pay the price although he does not receive the goods if they loss or damage after the risk has passed to the buyer, unless the loss or damage is

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<sup>25</sup> Wilson, J. F., *Carriage of goods by sea*, 4<sup>th</sup> ed. (Harlow: Longman, 2001), p. 122.

<sup>26</sup> Valiotti, Z., *Passing of risk in international sale contracts: A comparative examination of the rules on risk under the United Nations Convention on Contract for the International Sale of Goods (Vienna 1980) and INCOTERMS 2000*, p. 8.

<sup>27</sup> CISG 1980, art.66.

due to an act or omission of the seller. Even the risk has passed to the buyer if the loss or damage was caused by an act or neglect of the seller, he could not have payment. It was clearly in decision of a Chinese arbitration panel in *St. Paul Guardian v. Neuromed Medical Systems & Support*.<sup>28</sup> The seller agreed to sell the buyer 10,000 kilograms of jasmine aldehyde, "CIF New York". The buyer warned the seller that the cargos could deteriorate at high temperature. On arrival it found that a large part of cargo was melted and leaked because of excessive heat during the voyage. Even though, the risk has passed to the buyer when goods are on board the vessel due to the clause of CIF but the damage caused by an omission of the seller had not complied with his obligation under the special instruction. The arbitrators decided that the buyer did not oblige to pay the purchase price. Consequently, if the damage was caused by the seller's act or omission as provided under article 66 the risk had not passed to the buyer. Another category is that the risk has passed to the buyer but he does not carry the risk price; according to article 36(1) CISG when the risk passes to the buyer and that time damage exists due to any lack of conformity which becomes apparent after that time the seller is liable for it. As a result, the risk remains with the seller.

On the other hand, Incoterms do not regulate the situation where the loss or damage, that occurred after the risk had passed, was caused by the act or omission on the part of the seller like article 66 CISG. Incoterms will not cover the situation of the goods deteriorate due to the seller's failure to instruct the carrier to keep at a specific temperature. They deal only with the risk of

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<sup>28</sup> WL465312 (S.D.N.Y. Mar 26, 2002), *aff'd*, 53 Fed. Appx. 173 (2d Cir. 2002).

incidental loss or damage. Subsequently, the buyer will still be obliged the payment under the Incoterms. The rule of passage of risk between the CISG and Incoterms has been differed. Therefore, if parties incorporate usage such Incoterms the outcome in the allocation of risk will be different.

## 2. Passing of risk in cases involving carriage of goods - Article 67

Article 67 contains two qualifications when the sale contract involve transportation: a) If the parties did not agree for the goods to be handed over at a particular place, then the risk passes to the buyer when goods are handed over to the first carrier, b) If the parties agreed on the handing over of the goods to the carriers in a particular place, the risk passes when they are handed over to the carrier at that particular place. Nonetheless, the risk does not pass to the buyer until the goods are clearly identified to the contract, whether by marking on the cargo, by the shipping document, or by notice given to the buyer. On the other words, the risk passes to the buyer when distinction is made if not the seller shall be responsible for the risk of loss or damage.<sup>29</sup>

What a sale of goods that involves carriage means they will be loaded on any transportations; truck, rail, ship or airplane. It should additionally mean that the seller would be the one who will have the decision or the duty to arrange for carriage of the goods and will take the necessary actions for their transmission to the buyer.<sup>30</sup> The first carrier refers to an independent third person, whether this party is covering a domestic or international

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<sup>29</sup> CISG 1980, art. 67(2).

<sup>30</sup> Enderlein, F. *International sales law: United Nations Convention on Contracts for the International Sale of Goods: Convention on the Limitation Period in the International Sale of Goods: commentary*, p. 262.

transportation.<sup>31</sup> The first carrier is included freight forwarder since he forms an independent entity that takes control over the goods.<sup>32</sup> It is a reasonable concept that the risk passes to the buyer at the moment delivering goods to the first carrier. Since most of international sale contracts involve carriage, as well as, when the seller hands over the goods to the carrier they are out of the seller's control and possession. He thus should not bear the risk. Under article 67(1) the risk passes regardless of whether the buyer or the seller has title to the goods. Moreover, the seller retains documents controlling the disposition of the goods does not affect the passing of risk.<sup>33</sup>

On the other hand, Incoterms as CIF and CFR clauses which are involved carriage of goods stipulates that the risk passes to the buyer when goods are on board the ship.<sup>34</sup> For example, a sale contract with CIF or CFR trade term between a seller in country A to a buyer in country B, the risk passes to the buyer at the moment goods are on board the vessel at the port of loading in country A. However, if goods are perished during the way from the seller's premise to the port of shipment the risk of loss or damage is still with the seller. On the contrary, under the CISG if goods are transferred to the first carrier from seller's premise the risk passes to the buyer at that moment. This will be varied

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<sup>31</sup> Schwenger, I., Fountoulakis, C. & Dimsey, M., International sales law: A guide to the CISG. (Oxford: Hart Publishing, 2012), 492.

<sup>32</sup> Ibid.

<sup>33</sup> Miller, F. H. & Lynn, G. (2016). 10B Hawkland UCC Series § 10:87. [On line], Available: Westlaw [20 May 2016], p. 1.

<sup>34</sup> Romein, A., *The passing of risk a comparison between the passing of risk under the CISG and German law.*

if the contract is under the CISG. As a result, parties should contemplate in choosing the choice of forum to apply a contract.

### 3. Passing of risk with goods sold in transit -Article 68

*“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”.*<sup>35</sup>

Goods sold in transit means they are sold while they kept in a ship, train or truck. In particular where the seller has bought large cargos of oil, wheat and metals in advance and without the buyer, or goods are sometimes resale during the voyage. The sale contract will be then concluded during goods are in transit. Thus, article 68 contains 3 sentences; the first sentence states the general rule that the risk passes to the buyer from the moment that the contract is concluded. This sentence can cause serious practical problems, since it is a difficulty to find out the exact time in which the damage occurred and it is quite problematic when proofing due to loss or damage can occur accidentally in every moment the cargos take their journey. Hence, article 68 further states a retroactive passing of risk in the second sentence. It means that in case of goods are sold in transit and only a special circumstance the risk should pass

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<sup>35</sup> CISG 1980, art. 68.

retroactive at the moment the goods are loaded on ship. Some scholar gave a view that “if the circumstances so indicate” is rather ambiguous and inapplicable,<sup>36</sup> it would be a case that the parties have implied intent transferring the risk retroactive, or the buyer is entitled to an insurance claim directly from the insurer where the insurance contract covers all risks from the moment the goods are loaded on ship. If so when goods are handed over to the carrier who issued the document which control over the goods the buyer shall bear the risk since that time. However, this rule is not become practically under the last sentence of article 68. When the seller knew or was supposed to know at the moment when the contract was concluded, the goods had destroyed or loss and the seller did not inform to the buyer, therefore the risk of loss or damage was still with the seller. Let taking into account an interesting question under the application of article 68 is that if the loss or deterioration occurred after goods were delivered to the carrier but before the contract had concluded and all were unknown to the seller with his/her good faith. The question is that whether the buyer has to bear the risk and responsibility of the payment. The risk would belong to the buyer if the circumstance indicates that the risk passes retroactive since the time goods are on board the vessel. Scholars opined that article 68 has been seldom used in practices because it will be superseded by an Incoterm or an individual contract clause since a

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<sup>36</sup> Schwenger, I., *International sales law: A guide to the CISG*, p. 498; Valiotti, Z., *Passing of risk in international sale contracts: A comparative examination of the rules on risk under the United Nations convention on contract for the international sale of goods (Vienna 1980) and INCOTERMS 2000*, p. 13.



prudent buyer would not leave the question of allocation of risk to mere vague inference.<sup>37</sup>

#### 4. Passing of risk in residual cases - Article 69

Article 69 deals with residual cases such as taking goods at the seller's place but the buyer fails to take delivery.<sup>38</sup> Some cases the buyer was bound to take over the goods at a place other than the seller's premise, at another person's premises, or public warehouse.<sup>39</sup>

When the buyer is supposed to pick up the goods from the seller's place, the risk passes to the buyer from the time he takes over the goods which are already put at his disposal.<sup>40</sup> The seller has made all the necessary actions in order to enable the buyer to take goods over means the goods are already at his disposal. Subsequently, if the cargos are placed at the buyer's disposal and he delays or fails to take delivery in due time he thus breaches a contract by not taking them over; however, the risk passes to him at that moment.<sup>41</sup>

If the place of delivery is other than the seller's premises the article 69(2) is taken into account. Where handing over the goods a) to the buyer's premises, or b) to a specified place or to a specified carrier the risk passes when met the following conditions: (1) Delivery must be due; (2) The goods

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<sup>37</sup> Valiotti, Z., *Passing of risk in international sale contracts: A comparative examination of the rules on risk under the United Nations convention on contract for the international sale of goods (Vienna 1980) and INCOTERMS 2000*, p. 497.

<sup>38</sup> CISG 1980, art. 69(1).

<sup>39</sup> Ibid, art. 69(2).

<sup>40</sup> Ibid, art. 69(1).

<sup>41</sup> CISG 1980.

must be placed at the buyer's disposal; for example, if the goods are in a warehouse the seller should give a notice to the warehouse keeper or give the buyer an effective delivery order. The seller should do all necessaries to enable the buyer take delivery such providing a document in which the warehouse keeper premises to deliver up the goods. (3) The buyer should be aware that the goods are at his disposal. The seller should give a note with fixed time for the collection of the goods to the buyer. A *furniture* case;<sup>42</sup> for instance, a sale contract between an Austrian seller and a German buyer for a sale of furniture and was stored in a warehouse in Hungary. The seller sent the buyer storage invoices also the goods loaded either on wagons or on the buyer's trucks for transportation to the buyer. The seller issued several invoices to the buyer; nevertheless, the buyer is not receive the listed furniture and then refused to pay the price. The warehouse in Hungary went bankrupt and the furniture disappeared. The seller sued the buyer for the purchase price. The circumstance is considered under the article 69(2) since the parties had agreed that the buyer was bound to take over the goods at a place other than the seller's premise. The court concerned that the buyer was not aware of the fact that the furniture were placed at his disposal. The risk; thus, was not passed to the buyer. Merely issuing the invoices do not suffice but the seller must give the buyer a notice for collecting the goods. It is clear that those of

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<sup>42</sup> CLOUT case No. 338 (23 June 1998), *Oberlandesgericht Hamm, Germany*.

[On line], Available: <http://www.cisg.law.pace.edu> [25 May 2016]

three conditions are prerequisite for the risk to pass to the buyer under article 69(2).

### 5. Passing of risk in non-accidental cases - Article 70

According to article 70, if the seller has committed a fundamental breach of contract, article 67, 68 and 69 do not impair the remedies available to the buyer. This means that the buyer will have all remedies that provided in case of a fundamental breach, despite the passage of risk and its consequence to him. A breach is fundamental if it substantially deprive the buyer of his expectancy and was both foreseen by the party in breach and foreseeably by a reasonable person.<sup>43</sup> For example, the seller concluded a contract for sell 2000 computer sets to the buyer in another country. At the destination port the buyer found that 1,200 computer sets were defective due to lack of a microchip. Delivering 1,200 defective cargos held that a fundamental breach of contract. Hence, the buyer can take remedies that provided in the Convention: (1) The buyer can declare the contract avoided; subsequently, the risk will be rerouted back to the seller; (2) The buyer can ask for delivery of substitute goods, so the risk is at the buyer and he still has to pay the price; (3) The buyer can claim to fix the goods; or (4) He asked for a reduction in the price of the defective goods.

The CISG concerns the risk of loss or damage when the seller sends non-conforming goods pursuant to article 36 if the seller shipped imperfect goods risk of loss would never pass to the buyer; thus, the responsibility remains with the seller even if it was a FOB original contract. This is similar to

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<sup>43</sup> CISG 1980, art. 25.

article 70 which states that “*if the seller has committed a fundamental breach of contract, Article 67, 68, and 69 do not impair the remedies available to the buyer on account of the breach.*” Hence, in case the lack of conformity of goods seriously the buyer shall terminate the contract the risk then go back to the seller retroactively. When the original delivery are returned to the seller the risk of loss or damage will pass back to the seller at the moment the buyer hands over the goods to a carrier at the buyer’s premise,<sup>44</sup> or he places them at the seller’s disposal.<sup>45</sup> It is remarkably that there are not any provisions in Incoterms that are similar to those of article 70 CISG. This is because the Convention deals with a sale contract; on the other hand, Incoterms usually involve transportation rather than the contract.

The result of the article 70 is not mean the risk has not been passed to the buyer, absolutely it has transferred but on the ground of a fundamental breach punishes the seller to have loss or damage. It will be then shift to the seller.

However, the foregoing rules of risk allocation will not regard if the parties of contract derogate the provisions of the CISG. According to the provision of article 6 CISG “*The parties may exclude the application of this Convention or derogate from or vary the effect of any of its provisions.*” In case that the parties derogate from the effect of a particular provision such article 67, 68, and 69 and incorporate trade usage as Incoterms into their

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<sup>44</sup> CLOUT case No. 422 (29 June 1999), *Oberster Gerichtshof, Austria*. [On line], Available: <http://www.cisg.law.pace.edu> [25 May 2016]

<sup>45</sup> CLOUT case No. 594 (19 December 2002), *Oberlandesgericht Karlsruhe, Germany*. [On line], Available: <http://www.cisg.law.pace.edu> [25 May 2016]

contract the rule of the allocation of risk under Incoterms will be enforced. The other aspects that are not cover by Incoterms such as formational of contract, breach and impediment against performance will be governed by the CISG.<sup>46</sup>

Furthermore, article 9(1) provides that parties are bound by any practices, including those allocations of risk that they have established in a contract. Whether international or local usage will be adopted to the contract as the parties expressly agreed. However, article 9(2) provides that the parties are considered to have impliedly made applicable to their contract or its formation a practice of which they knew or should have known, also which in international trade is broadly known, unless parties otherwise agreed. As *St. Paul Guardian v. Neuromed Medical System & Support GmbH* that mentioned before the court takes into consider that ICC's Incoterms are applied to the dispute; even though, parties did not expressly incorporate an Incoterm into their contract, but the ICC's trade terms are so widely used. Courts; subsequently, enforce Incoterms even absent express incorporation in the contract.<sup>47</sup>

The point of time that the risk of loss or damage passes is significant to sale contract since it will stipulate that who would bear the financial

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<sup>46</sup> Coetzec, J., The interplay between INCOTERMS and the CISG. *Journal of Law and Commerce*, 32, 1(2013), 6.

<sup>47</sup> CLOUT case No. 447 (26 March 2002), Federal Southern District Court of New York, United State; CLOUT case No. 253 (15 January 1998), Cantone del Ticino Tribunale d'appello, Switzerland; CLOUT case No. 340 (22 September 1998), Oberlandesgericht Oldenburg, Germany. [On line], Available: <http://www.cisg.law.pace.edu> [25 May 2016]

responsibility. When the risk passes to the buyer the purchase price has to be paid even though the buyer has never received the goods. Conversely, if the risk remains to the seller and the goods will be then destroyed or disappeared the seller could not take the payment. As aforesaid it is apparently the moment of risk allocation vary between the Convention and Incoterms.

### **Conclusion**

According to the provision in article 6 and 9 it is not a default for parties in particular are in a contracting state to apply risk allocation providing in the Convention. As the aforesaid, the allocation of risk is significant since at the point of time the risk of loss passes it is determined that the buyer will bear the risk and its consequences. Rules of passing of risk that fall under the CISG are complicated. The risk normally passes to a buyer when goods have delivered to the first carrier if the sale contract involves the carriage of goods pursuant to article 67(1). The risk will be passed in another point of time if the sale contract conclude during goods are in transit pursuant to article 68. Nevertheless, the point of time of passage of risk will be different when the circumstance is under the article 69, or another trade usage that the parties have agreed. Also the CISG's provision covers the risk of loss allocation in case of a breach of contract. This distinction has been comprehensively criticized. Therefore, parties could deliberate which rule should be applied to the contract in particular the parties are in contracting state of the CISG may derogate the provision of the Convention as per article 6 also the effect of article 9.

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