2m11. 2564.3

Université de Montréal

Transfer of risk from seller to buyer in International commercial contracts as compared to three voices

par

Me. Neil Gary Oberman

Faculté de droit

Mémoire présenté à la Faculté des études supérieures

en vue de l'obtention du grade de

Maître en droit (LL.M.)

Juin 1997

©Neil Gary Oberman

AZBD
U54t
1998
V.002

Université de Montréal

Faculté des études supérieures

Ce thèse intitulé:

Transfer of risk from seller to buyer in International commercial contracts
as compared to three voices

présenté par:

Me. Neil Gary Oberman

a été évalué par un jury composé des personnes suivantes:

Monsieur Pierre-Paul Côté, président-rapporteur
Monsieur Guy Lefebvre, directeur de recherche
Monsieur Claude Samson, membre du jury

Mémoire accepté le: 20 janvier 1998

ENGLISH SUMMARY

Commercial trade over the course of history has been a fundamental operation of human nature. Peoples from different geographical positions sought to improve their financial worth via the establishment of trade networks. This work will examine risk allocation ("passage of risk") in international commercial contracts with special emphasis placed on a comparative analysis of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 11 April 1980), the International Chamber of Commerce ("Convention"), Rules for the Interpretation of Trade Terms ("Incoterms"), and the Uniform Commercial Code ("UCC").

This paper will expose the salient points by dividing the work into two main parts. The first part of the work is categorized as the descriptive, in that it will analyse the legislative roots of the subject matter. In the second part, the thesis will be examined by revewing in detail, the method of interaction between the Convention, Incoterms and the UCC concerning risk allocation.

The concept of risk allocation in international commercial contracts breaches the question of who will bear the ultimate responsibility for goods that are either damaged or lost in transit. It is feasible and customary, that transit losses be covered by a form of insurance. Moreover, loss of or damage to goods is generally revealed only at the end of the line; as a rule the buyer is usually in a superior position than the seller to determine the damage, undertake the appropriate steps for a claim with the insurance company and salvage the remaining goods. This issue breaches the question of payment and the responsibility of the buyer to support the goods irrespective of loss attributed to third parties. These issues will resinate throughout the document and form the basis of our examination.

Basically, risk allocation is dependant on the election of choice law by the contracting parties. The rules the parties elect will in advance provide solid answers to these and other difficult questions. What is conclusive subsequent to our examination, is that the risk allocation provisions under the above-mentioned documents are distinct entities in law.

Finally, it may be stated with some certainty, that employing the Convention supplemented with Incoterms or documents such as the UCC can if properly incorporated, provide a positive force in the determination of risk allocation in the construction of international commercial contracts.

Key Words: Transfer of risk-Incoterms-UCC-Convention

RÉSUMÉ

Au cours de l'histoire, les échanges commerciaux ont toujours été une opération fondamentale pour la nature humaine. Des gens de différents sites géographiques ont voulu améliorer leur situation financière en établissant des liens d'échange.

La présente étude traite du transfert du risque dans les contrats de commerce international. Une attention particulière sera portée sur une analyse comparative entre la Convention de l'Organisation des Nations-Unies sur le contrat de vente internationale de marchandises (Vienne, le 11 avril 1980), la Chambre de Commerce International ("Convention"), les Règles d'interprétation en matière d'échange ("Incoterms"), et le Uniform Commercial Code ("UCC").

Nous effectuerons, dans la première partie du travail, une analyse des origines du commerce international. En seconde partie, nous verrons en détail la méthode d'interaction entre la Convention, les Incoterms et le UCC relativement au transfert de risque.

Le concept de transfert du risque dans les contrats de commerce international amène l'épineuse question de savoir qui supportera l'ultime responsabilité pour les biens endommagés ou perdus en transit. Il est de coutume que les pertes subies lors du transport sont couvertes par une forme d'assurance. D'ailleurs, la perte ou les dommages aux biens se constate généralement en bout de ligne; selon l'usage, l'acheteur est placé dans une position supérieure au vendeur pour évaluer les dommages, entreprendre les mesures appropriées pour réclamer les indemnités à la compagnie d'assurance et sauver les biens restants. Ce dénouement amène à traiter du paiement et de la responsabilité de l'acheteur et de la responsabilité de l'acheteur face à la perte des biens due à une tierce partie. Ces constatations reviendront tout au long de l'exposé et serviront de base à notre analyse.

A la base, le transfert de risque est dépendant du choix des parties contractantes du régime de droit applicable. Le choix des règles applicables amènera des réponses judicieuses à ces constatations et autres difficultés.

C'est avec l'avènement incontournable de la réduction des barrières physiques face aux échanges et aux développements en communication et en transport, que la notion de l'interaction mondiale prend toute sa signification. Cette situation a multiplié la demande d'une réglementation de nature internationale qui puise sa source dans le droit commercial. L'harmonisation du droit simplifiera l'échange entre les gens résidant aux quatre coins du monde, et fera bénéficier non seulement les marchands, mais aussi les personnes qu'elles emploient et la communauté qui soutient leur commerce.

En regard de notre analyse des dispositions de la Convention, des Incoterms et du UCC, il apparaît évident que ces documents sont distincts en droit. La diversité de ces documents est amplement illustrée dans leur histoire. Malgré leurs différences, chacun peut jouer un rôle en prévenant les marchands du transfert de risque. Tout au long de cet essai, nous avons démontré comment ces

documents étaient inter-reliés en étant employés sous une forme ou une autre dans un effort conjoint à l'intérieur d'un cadre de travail en matière contractuelle. A titre d'exemple, un contrat de vente intervenu entre un acheteur allemand et un vendeur canadien pourrait logiquement incorporer la Convention pour les questions de forme, tout en choisissant judicieusement un terme provenant des Incoterms pour régler la question du transfert de risque.

Malgré la possibilité que ces documents puissent jouer un rôle majeur, il est nécessaire d'identifier les questions litigieuses. Un examen minutieux de la Convention peut, par exemple, révéler des lacunes dans les dispositions du transfert de risque. Plus particulièrement, les dispositions de la convention en regard du transfert de risque pour les ventes en gros sont très déficientes et sont plus nuisibles que constructives. Ceci est illustré par l'article 68 concernant le transfert de risque préalablement aux biens étant ventilés. Bien que la forme de cet article ait été calquée sur le système britannique, une récente législation en Angleterre a surmonté cette difficulté. D'un autre côté, les changements en droit anglais ne sont pas reflétés dans la Convention, quoi qu'il en soit, nous croyons que les juristes éviteraient la Convention à ce stade. Ceci explique la recommandation de l'auteur d'utiliser une clause "out-turn" dans ce genre de vente. Cette approche fait consensus dans la communauté juridique.

Réciproquement, la Convention comme document de droit international est assez impressionnante, en ce qu'elle a acquis une reconnaissance sans équivoque. Il est important de rappeler que dans sa conception, la Convention est en théorie censée être dépourvue de tendances nationales. Au fond, elle est construite comme une entité embryonnaire auto-suffisante, avec ses propres méthodes pour résoudre les problèmes, sans bénéficier de sources externes. Pour ces raisons, elle doit être reconnue pour ses accomplissements. Quoi qu'il en soit, un point important à considérer est le temps attribué à la discussion de ce document dans les classes et des corridors des facultés de droit et les cercles académiques. Il est vrai qu'il existe une tendance à agrandir la reconnaissance universelle. En dépit de sa plus grande reconnaissance, pour que du droit international de cette nature puisse s'épanouir, il a besoin d'une évolution constante pour que les étudiants puissent l'étudier et ainsi appliquer leurs connaissances à la pratique du droit. C'est en conservant ceci à l'esprit que l'auteur espère qu'un examen attentif des dispositions concernant le transfert de risque prouvera leur entité.

Subséquemment, il est aussi approprié de mentionner que, malgré l'utilisation fréquente des Incoterms, penser que ce document est générateur d'obligations est erroné. En employant les Incoterms il est possible de déterminer le transfert de risque et le prix coûtant. Cependant, se baser sur ce document afin d'expliquer d'autres issues ne sont pas recommandables. Il est à noter que les Incoterms vivent dans un vide créé par une autre forme de droit. Les parties devraient éviter de chercher leurs solutions dans l'existence d'Incoterms. Ceci étant dit, il est également clair que les dispositions sur le transfert de risque ont été mises à l'épreuve et sont largement utilisées. Leur popularité réside dans l'économie de temps que peuvent sauver la plupart des hommes d'affaires ne bénéficiant pas du luxe de pouvoir dépenser leur énergie à composer des clauses détaillées concernant le transfert de risque. L'emploi de termes d'échanges reconnus internationalement est d'un grand secours et permet aux gens du monde entier d'attribuer la même définition à un terme sans tenir compte de leur culture ni de leurs connaissances juridiques.

Il est important de noter que durant ce travail, nous avons examiné deux documents de nature internationale et un autre de nature purement locale. De ce point de vue, le but de l'examen du UCC n'est pas clairement illogique. Les dispositions sur le transfert de risque contenues dans le UCC ont été utilisées à titre de modèle d'espèce pour la Convention. Plus spécifiquement, les dispositions du UCC sur le transfert de risque sont cohérentes et claires dans leur construction et il n'existerait pas d'alternative acceptable pour la Convention. Comme pour sa contre-partie dans les Incoterms, les dispositions du UCC sont détaillées, évitant ainsi une rédaction longue et pénible. Il devrait être noté que les termes d'échange du UCC ne sont pas grandement unifiés dans leur interprétation comme le sont ceux des Incoterms. Quoi qu'il en soit, ils sont en vigueur dans 49 des 50 états des Etats-Unis.

La croissance dans le commerce peut être en partie attribuée à la Convention, aux Incoterms, et au UCC, parce que ces règles favorisent la sécurité dans le cadre de la Loi. Généralement, le vendeur est préoccupé par le paiement tandis que l'acheteur se soucie de recevoir sa marchandise en bon état. En utilisant ces règles, ceci donne aux marchands que les règles du jeu sont équitables et que les solutions sont déjà connues et abordables. Le transfert de risque préoccupe toutes les parties dans un contrat d'envergure internationale et doit être traité à l'avance par mesure d'efficacité. L'utilisation des documents précités amène l'établissement d'une stabilisation des opérations.

Finalement, l'on peut avancer avec certitude que l'utilisation de la Convention, avec l'ajout des Incoterms ou de documents tel que le UCC, peut, si proprement invoqués, apporter une force positive dans la détermination du transfert de risque. Ainsi, l'auteur espère avoir apporté au lecteur les informations adéquates pour une analyse plus complète du transfert de risque d'un vendeur à un acheteur lors des contrats de commerce international dans les traditions des anciennes lois marchandes.

Mots-clés: Transfert de risque - Incoterms - UCC - Convention.

TABLE OF CONTENTS

SUMMARY ENGLISH iii
SUMMARY FRENCH iv
TABLE OF CONTENTS vii
LIST OF ABBREVIATIONS ix

Introduction 1

PART I-Legislative Analysis
Chapter One-The Vienna Convention 10
I. General 10
A. Applicable Law 10
B. Scope of the Convention 12
C. General Provisions 13
D. Formation of the Contract 18
E. Rights and duties of the buyer and seller 21
F. Common Obligations of the Seller and the Buyer 26
II. Risk Allocation under the Convention 31
A. Passage of Risk 31
B. Payment of Price and Risk 32
C. Carriage of Goods 34
D. Goods Sold in Transit 37
E. Residual Clauses and Risk 45
F. Fundamental Breach and Risk 47
Chapter Two- International Chamber of Commerce Rules 49
I. General 49
A. Early History of Trade Terms 49
B. Modern development of Incoterms 53
C. The Incoterms Revision of 1990 56
II. Risk Allocation 58
A. Visual Representation of Risk Allocation 58
B. Defining risk 59
C. Risk allocation 59
Chapter Three: Uniform Commercial Code 62
I. General 62
A. Historical Overview 62
B. The First Code 63
II. Risk Allocation 65
A. Delivery and Risk of Loss 65
B. Reviewing the Modified Risk of Loss Provisions 69

PART II-Comparative Analysis

Chapter One- Comparing Risk Allocation under the Incoterms and the Convention 76
I. Departure Terms 76
A. Ex Works, Ex factory, Ex Warehouse-EXW 76
II. Main Carriage Unpaid Terms 79
A. Free Carrier-FCA 79
B. Free Alongside Ship-FAS 83
C. Free on Board-FOB 85
III. Main Carriage Paid Terms 88
A. Cost and Freight-CFR 88
B. Cost, Insurance and Freight-CIF 90
C. Carriage Paid To-CPT 92
D. Carriage and Insurance paid To-CIP 94
IV. Arrival Terms 96
A. Delivered at Frontier-DAF 96
B. Delivered Ex Ship- DES 98
C. Delivered Ex Quay-DEQ 99
D. Delivered Duty Unpaid- DDU 100
E. Delivered Duty Paid-DDP 101
V. Buying Goods Afloat and Goods in Transit 102
A. Goods Sold Afloat 102
B. Undivided shares of fungible goods 105
Chapter Two- Comparing Risk Allocation under the Convention and the UCC 106
I. Agreed Risk of Loss 106
II. Contracts that Involve Carriage 108
III. Contracts that Involve Bailment 113
IV. Residual Situations 116
V. Effects of Contractual Breach on the Passage of Risk 118
Chapter Three- Compatibility or Conflict Among the Three Voices 120
I. Incoterms and the Convention 120
A. Method of Interaction 120
B. Checklist 121
II. UCC and the Convention 125
A. Exposing the differences 125
B. Reviewing the Results 128
CONCLUSION 129
BIBLIOGRAPHY XI
A. Doctrine on the Vienna Convention XI
B. Doctrine on Incoterms XIII
C. Doctrine and Articles Maritime matters XIV
D. Treaties and Legislation XV
E. Articles on the Vienna Convention XVII
F. Articles on Incoterms XIX
G. Doctrine and Articles on Uniform Commercial Code XXI
CASE LAW XXIII
A. Foreign Judgements XXIII
B. Arbitral Awards XXIV
C. American Jurisprudence XXIV
D. Canadian Jurisprudence XXVI
E. English Decisions XXVI

ANNEX I XXVIII

LIST OF ABBREVIATIONS

Commission	United Nations Commission of International Trade Law (UNCITRAL).
Convention	United Nations Convention on Contracts for the International Sale of Goods (Vienna, April 11, 1980).
1983 Convention	Convention on Agency in the International Sale of Goods (Geneva, February 17 1983) in: Diplomatic Conference for the Adoption of the Unidroit Draft Convention on Agency in the International Sale of Goods (Geneva, January 31 - February 17, 1983), Acts and Proceedings in: Uniform Law Review 1983, I-II, 156-176.
First Committee	First Committee of the United Nations Conference on Contracts for the International Sale of Goods (Vienna March 10 - April 11, 1980), which prepared Articles 1-88.
1964 Hague Convention	Diplomatic Conference on the Unification of Law governing the International Sale of Goods (The Hague, April 2-25, 1964)
1964 Hague Conference	Records and Documents of the Diplomatic Conference on the Unification of Law governing the International Sale of Goods (The Hague, April 2-25, 1964), 2 vol., ed. by the Ministry of Justice of the Netherlands, the Hague, 1966.
Incoterms	International Rules for the Interpretation of Trade Terms, International Chamber of Commerce, Publ. No.460.
ICC	International Chamber of Commerce.
Official Records	United Nations Conference on Contracts for the International Sale of Goods (Vienna, March 10 - April 11, 1980), Official Records, New York, 1981.
1980 Rome Convention	Convention on the Law Applicable to Contractual Obligations (Rome, June 19 1980) in Official Journal of the European Communities, Luxembourg, European Communities Publications, 1. 266 of 19 June, 1980.
Sales Draft	Draft Convention on the International Sale of Goods, as approved by the United Nations Commission on International Trade Law at its tenth session, in Yearbook VIII (1977), New York, 1978, 5.
Second Committee	Second Committee of the United Nations Conference on Contracts for the International Sale of Goods (Vienna, 10 March - April 11, 1980), which prepared Articles 89-101.

Secretariat's Commentary	Commentary on the Draft Convention on Contracts for the International Sale of Goods, prepared by the United Nations Secretariat (in: Official Records, 14-66).
ULFC	Uniform Law in the Formation of Contracts for the International Sale of Goods, annexed to the Conventions Relating to a Uniform Law on the Formation of Contracts in the International Sale of Goods, adopted by the 1964 Hague Conference (in: 1964 Hague Conference Records, I, 349-354).
ULIS	Uniform Law on International Sale of Goods, annexed to the Convention Relating to a Uniform Law on the International Sale of Goods, adopted by the 1964 Hague Conference (in: 1964 Hague Conference Records, I, 333-348).
ULVC	Draft of Law for the Unification of Certain Rules Relating to Validity of Contracts of International Sale of Goods, approved by the Governing Council of Unidroit in 1972(in: Uniform Law Review, 1973, I, 61-69).
Uncitral	United Nations Commission on International Trade Law, established by the General Assembly of the United Nations with resolution 2205 (XXI) of 17 December 1966 (in: Yearbook I (1968-70), New York, 1971, 65-66).
Uncitral Draft Convention	Draft Convention on Contracts for the International Sale of Goods as approved by the United Nations commission on International Trade Law at its eleventh session (1978) (in: Yearbook IX (1978), New York, 1981, 14).
Unidroit	International Institute for the Unification of Private Law (Intergovernmental Organization founded in 1926 with headquarters in Rome and grouping together 52 Member States).
Vienna Conference	United Nations Conference on Contracts for the International Sale of Goods (Vienna, March 10 - April 11, 1980).
Working Group	Working Group on the International Sale of Goods, set up by Uncitral at its second session, on March 26, 1969 (in: Yearbook I (1968-70), New York, 1971, 189).
Yearbook	United Nations Commission on International Trade Law Yearbook, New York, United Nations Publication.

Introduction

Commercial trade over the course of time has been a fundamental operation of human nature. Peoples from different geographical positions sought to improve their financial worth via the establishment of trade networks.[1] Often, but not exclusively, shipping of goods from one country to another was a common occurrence. The development of commercial trade has given rise to many scholarly writings on a range of issues. This work will examine risk allocation ("passage of risk") in international commercial contracts with special emphasis placed on a comparative analysis of the *United Nations Convention on Contracts for the International Sale of Goods* (Vienna, April 11, 1980),[2] the *International Chamber of Commerce, Rules for the Interpretation of Trade Terms,* [3] and the *Uniform Commercial Code*.[4]

The unwritten rules of commerce dictated that with the progressive increase in trade, global merchants would be required to establish effective and efficient rules to govern their relations with their foreign brethren. Merchants concerned with issues such as passing of risk from seller to buyer, payment, loss and theft, sought to develop coherent rules.[5] These rules developed with time, experience and financial necessity of the milieu.

---

[1]Cheng, C.-J., ed., *Clive M. Schmitthoff's Select Essays on International Trade Law* (London: Graham and Trotman, 1988) as contained in the introduction.

[2]United Nations Convention on Contracts for the International Sale of Goods, Vienna, 11 April 1980, U.N. Doc. A/CONF.97/18, Annex 1 (1980), in the United Nations Conference on Contracts for the International Sale of Goods 178, U.N. Doc. A/CONF.97/19, U.N. sales No. e.81.IV.3 (1981) [Hereinafter "The Convention"].

[3]International Chamber of Commerce Publication No.460(6th ed.) [Hereinafter "Incoterms"].

[4]U.C.C. Uniform Commercial Code, prepared by the American Law Institute and the National Conference of Commissioners on Uniform State Laws (as Revised)[Hereinafter "UCC"].

[5]Risk of loss in commercial transactions is not a new issue of commercial law. In MacCormack, G., "Alfenus Varus and the law of Risk in Sale"(1985) 101 Law. Q. Rev. 573. The main points being that in early Roman Law risk of loss passed to buyer when the goods were delivered. While in late Roman Law risk passed to buyer when the contract was completed. Risk has been a crucial and inherently difficult issue for drafters. See *Diplomatic Conference on the Unification of Law Governing the International Sale of Goods*, the Hague, 2-25 April (1964), II Documents 43 (1966): "Report of the Special Commission 1956," para.6 as cited in Roth, P.M., "The Passing of Risk"(1979) 27 Am. J. Comp. L. at 291.

Uniform law for international sales has an extended history and must be examined to understand the present legal paradigm.[6] It would appear that international trade law has gone through three distinct stages. We may categorize the first stage as the *mediaeval lex mercatoria,* which is defined as "a period where universally they applied accepted rules."[7]

We have categorized the second successive stage as the fusion into municipal law of the various national states that came after the feudal construction of mediaeval society. This is amply illustrated via the adoption in the French Republic of the *Code de commerce in 1807,* [8] and the German adoption of the *Allgemeine Handelsgesetzbuch of 1861.* [9]

The third stage in this extended history is contemporary and requires some extended study as it provides the foundation for this work. This stage is categorized by the development of

---

[6]For more historical detail on the development of international trade law see Lacasse, N. et Perret, L., eds., *Actes du colloque sur la vente internationale:* Ottawa, 14 octobre 1987 (Montreal: Wilson & Lafleur, 1989), Castel, J.G. and De Mestral, A.L.C., *The Canadian Law and Practice of International Trade with Particular Emphasis on Export and Import of Goods and Services* (Toronto: Montgomery Publications, 1991)at 104., also Cheng, C.-J., ed., *Clive M. Schmitthoff's Select Essays on International Trade Law* (London: Graham and Trotman, 1988), and Cheng, C.-J., *Basic Documents on International Trade Law* (London: Martinus Nijhoff, 1990) Chapter One. For UNCITRAL historical background see the introduction to the Draft Convention on Contracts for the International Sale of Goods in Official Records of the United Nations Conference for the International Sale of Goods, Part 1, Section B (Published originally as the introduction to document A/CONF.97/5).

[7]See Cheng, C.-J., *Basic Documents on International Trade Law*(London: Martinus Nijhoff, 1990)at 9 references to Gerard de Malynes' *Lex Mercatoria,* First published in 1636; see also: Aleksander Goldstajn, in Volken, P., and Petar, S., *International Sale of Goods* (Dubrovnick Lectures)(New York: Oceana, 1986) at 99. The author details the hierarchical ranking of the sources of Lex Mercatoria:(1) The contract; (2) the practice established between the contracting parties; (3) general conditions or standard contract forms (if expressly or impliedly accepted by the contracting parties); (4) usages of trade (international and national); (V) the Convention (unless excluded by the contract); (VI) the general principles underlying the Convention; (VII) the national law applicable to the contract (if so provided by the contract, or failing an agreement of the parties, by virtue of the rules of private international law); (VIII) in all cases of the mandatory provisions of the applicable domestic law; (IX) judicial and international arbitration case law; (X) scholarly writing (indirectly).

[8]Ibid., Cheng, C.-J., *Basic Documents on International Trade Law* at 9, Preceded by the *Ordonnance sur le commerce* of Louis XIV of 1673 and Colbert's *Ordonnance de la marine* of 1861.

[9]Ibid. at 9, Preceded by the *Allgemeine Wechselordnung* of 1848. *The Allgemeine Handelsgesetzbuch* of 1861 is still in operation in Austria.

commercial custom, commercial credit and unification of trade law in areas such as transportation, arbitration and the like.

The modern introduction to this stage begins in 1930 with the International Institute for the Unification of Private Law.[10] This body undertook a prepatory work for the eventual drafting of a uniform law on the international sales of goods. The eminent German jurist Ernst Rabel would promulgate this prepatory work. He suggested that a comprehensive study be undertaken and as a result, the work was transferred to a committee for study.[11]

This body,[12] working under the auspices of the League of Nations,[13] undertook to draft a document that could serve as a uniform guide for the international merchant. Finally, some four years later in 1934 the committee submitted a draft version to the League of Nations for member states' commentary. Unfortunately, due to the outbreak of the Second World War, the committee was unable to finish its work.

After the war, in 1951, the Dutch called a diplomatic conference [14] to finish the work started by Unidroit. The goal of this conference was to decide the most appropriate method of finishing the work previously started and to see the work through to a successful conclusion. The conference decided to appoint a new committee to study previous works and draft a new document.

---

[10][Hereinafter Unidroit].

[11]For commentary on the development of early unification see namely: Bianca, C.M., and Bonell, M.J., eds., *Commentary on the International Sales Law* (Milan: Giuffre,1987) at 3, and Honnold, J., *Uniform Law for International Sales under the 1980 Vienna Convention* (Deventer: Kluwer law and Taxation,1991) at 5.

[12]Some of the members of the committee included the following: Ernst Rabel, A. Gragge, Henri Capitant, M. Fehr, H.C. Gutteridge and J. Hamel.

[13]The League of Nations affected the creation of uniform trade law. They strongly influenced bringing about unification in the areas of negotiable instruments and arbitration. For example: The Geneva Conventions on the Unification of law relating to bills of exchange(1930) and to cheques (1931)League of Nations, Treaty Series, Vol. CXLIII (1933-1934), No. 3313, p.257; No.3314, p.317.; No.3315, p.337; The Geneva Protocol on Arbitration Clauses of 1923, League of Nations, Treaty Series, Vol. XXVII(1924), No.678, p.157; The Geneva Convention on the Execution of Foreign Arbitral Awards of 1927, League of Nations, Treaty Series, Vol. XCII(1929-1930), No.2096, p.301.

[14]Some twenty nations were represented at the conference.

The committee produced two drafts. One in 1956[15] that was circulated to the various participants for commentary. Due to the numerous and diverse comments the committee produced another draft in 1963.[16] The 1963 draft was to form the basis for another diplomatic conference in 1964 at the Hague. Concurrently, Unidroit prepared a distinct draft uniform law for the formation of international sales contracts.[17]

The Hague Conference [18] was attended by twenty-eight states, with four other states sending members and six international organizations sending observers. On the conference table were two international documents ready for ratification. On one hand, there was the Uniform Law of International Sales, [19] and on the other, the Uniform Law on the Formation of Contracts for the International Sales of Goods.[20]

These two instruments were opened for signatures on July 1, 1964. The Hague Sales Convention entered force on August 18, 1972.[21] The Hague Formation of Contracts Convention entered force on August 23, 1972.

In 1966 [22] the United Nations General Assembly[23] created the *United Nations Commission on International Trade Law*.[24] UNCITRAL's task was to promote [. . .]

---

[15]The Hague Conference, II, 3 et seq.

[16]The Hague Conference, II, 213 et seq.

[17]Unification of law (1958), Unidroit, Rome 1959, 127 et seq.

[18]April 2-25, 1964.

[19][Hereinafter the ULIS].

[20][Hereinafter ULFC].

[21]It has been ratified, or acceded to, by Belgium, Gambia, the Federal Republic of Germany, Israel, Italy, Luxembourg, the Netherlands, San Marino, and the United Kingdom. Gambia and the United Kingdom made express reservations that law would only apply to parties who expressly desired its application (see Article V); Other parties such as the Netherlands and Luxembourg declared that they will apply the uniform laws only when the party's place of business is in the territory of a contracting state (see Article III).

[22]Honnold, J., *Supra Note* 11 at 7 and Farnsworth, E.A., "Review of Standard Forms or Terms Under The Vienna Convention" (1988) 21 Cornell Int'l L.J at 491.

[23]G.A. Res. 2205 (XXI), Yearbook (1968-1970), Part 1, Chap.II, Section E.

[24][Hereinafter UNCITRAL].

> "The progressive harmonization and the unification of the law of international trade by, among other ways, preparing or promoting the adoption of new international conventions, model laws and uniform laws and promoting the codification and wider acceptance of international trade terms, provisions, customs and practices."[25]

The first task of UNCITRAL was to learn the position of the various member states of the United Nations and other agencies which may be affected by the Hague Conventions of 1964. The General-Secretary through its offices, sent a questionnaire to the members states, they then submitted the replies and analysis to the second session of UNCITRAL in 1969. Because of the foregoing, UNCITRAL created a working group composed of fourteen member states, whose task was to determine [. . .]

> "Which modifications of the existing texts might render them capable of wider acceptance by countries of different legal, social and economic systems, or whether it will be necessary to elaborate a new text for the same purpose." [26]

Following a protracted examination of the ULIS and ULF, the working group concluded that as formulated the Hague Conventions could not be adequately enforced nor could they command wider acceptance. In part, the working group was concerned that the Hague Conference that adopted the ULIS and ULF was not attended by sufficient representatives composing a group of global ideas. More specifically, the developing nations and the socialist states were not widely represented.[27]

A second concern of the working group was the construction of the ULIS. It was their determination that the Convention was constructed in a complex and abstract fashion. This drafting method could result in incorrect application and render the document useless.

Thirdly, the ULIS seemed more of a document tailored for regional application than international trade. A clear example of this was the omission of the Convention to examine the

---

[25]See G.A. Res. 37/106, para.7, Yearbook (1982), Part 1, Section D and specifically G.A. Res.2205 (XXI), Section II, para.8, Yearbook (1968-1970), ibid.

[26]Official Records of the UN Conference on Contracts for the International Sale of Goods(A/CONF.97/19).

[27]Ibid., only Egypt and Yugoslavia participated.

overseas shipment of goods.

Finally, the application and breadth of the Convention were considered too large and omitted to take into account the conflict of laws rules in its construction.

In 1977 at UNCITRAL's tenth session, it adopted the Draft Convention on the International Sale of Goods after the alterations and modifications of the working group.[28] Likewise, in 1978 at the eleventh session, the Commission adopted the *Rules on the Formation of Contracts for the International Sale of Goods*. The Commission decided to blend as one the Convention emanating from the tenth session and the subsequent rules, into a unified draft document-*The Convention on Contracts for the International Sale of Goods*. This combined document would lay the foundation for the United Nations Sales Convention.

The *United Nations Conference on Contracts for the International Sale of Goods* was held in Vienna, Austria, from March 10 to April 11, 1980. The conference was held in the Hofburg and was attended by sixty-two nations and eight international organizations.[29] A marked departure from previous attempts, the Vienna Conference included nations from all levels of the political and economic spectrum. The Convention was drafted in six official languages[30] and carries the same legal force.

The crux of the work was prepared by two committees. The first committee prepared articles 1-88. The second committee prepared articles 89-101. At the end of the conference, the two texts prepared by the respective committees were voted on in a plenary article by article. Under the rules of the conference, each article needed to be approved by two-thirds majority. [31]Finally, the requisite

---

[28]G.A. Official Records, 32nd Session, Supp.17 (A/32/17).

[29]Honnold, J., *Supra note* 11 at 10.

[30]English, French, Russian, Chinese, Arabic and Spanish.

[31]Of the first 88 substantive articles 74 were approved unanimously and 8 articles received no more than two negative votes. All other articles were approved by majority, in two instances the majority requirement fell short and forced the plenary back into ad-hoc committees to draft a compromised version, that were then approved without dissent.

amount of member states adopted the Convention to be ratified.[32]

The Convention is concerned only with contracts for the sales of goods of an international nature. The Convention is limited in four aspects: First, as previously stated, it governs only international sales; secondly, it is applicable only to commercial sale of goods; thirdly, it does not apply to specific questions that are frequently discussed in sales transactions; finally, the parties may exclude the Convention at their desire.

The creation of global legislation is no simple task, and brings into question fundamental principals surrounding the nation-state. Clearly, having universal legislation that usurps local laws contravenes the mandate of the United Nations and that of the Commission. It is however suggested[33] that this Convention can aid states in improving their national law by ensuring that international law is better reflected in national legislation.

A key feature of the Convention is its multinational construction and wide international acceptance as a document of international trade. This is by far a great achievement in that the Convention could find common ground on the issue of international contracts. One aspect that eased this wider acceptance was the Convention's ability to draw on existing international customs and usages between the parties. Forthcoming sections will analyse at length the Convention and put things in perspective.

We may conclude that the Convention, despite many problems,[34] is in fact and in law revolutionary. This document is a comprehensive leap forward in the creation and stabilization of an international sales law. In the same light we should not neglect the importance of the UCC and the Incoterms as similar documents.

---

[32]The final vote on the Convention was 42 in favour and 9 abstentions. For example China abstained but endorsed the Convention. See A/CONF.97/SR.11 paras. 110, S.R.12.

[33]See for example Honnold, J., *Supra Note* 11 at 14.

[34]The problems surrounding the Convention shall be discussed later on in the text. One striking problem is the use of the Convention and Passing of Risk from Seller to Buyer.

The advent of the modern form of Incoterms and risk allocation has its roots in a long history and tradition of law. We may trace the origins of trade terms back to the later part of the eighteenth century. Historically, business persons sought to create coherent rules to govern their relations and help determine risk allocation in advance. The Incoterms are similar in purpose as the Convention in that they both attempt to provide some form of uniformity in law. The Incoterms by pass cultural indications by finding common ground to explain risk allocation and allow business persons to avoid the tedious task of drafting clauses regrading risk. The reliance of business on this document of international law is an added element in the formation of standardized trade law. These terms will be reviewed and examined later on in the larger context of this work to provide the clarity required to see the interaction between the Convention and Incoterms.

Finally, in the same regard as the explanation provided above, the UCC has a long tradition in the United States as a unifying document of law that helped to create a more stable legal system among the competing states. Like the Incoterms, but in a regional context, the UCC is what may be considered as an intra-national document of standardized trade law. Notwithstanding its origins and relevance as a document of national importance, this document through the years has been afforded a wider international acceptance. The UCC's repute is well understood as it is a logical document that facilitates trade because parties can avoid the time consuming task of preparing detailed oriented risk allocation clauses. Therefore, the relevant terms governing risk allocation will be examined in detail later on in this work.

The genesis of the merchant law spawned the development of what we have come to accept today in the legal community as international commercial law. This topic of law developed through foundations laid by merchants and would be passed to the legislative bodies of the respective merchants own governments. Many efforts have been made to promote greater uniformity in the international sales of goods via the implementation of standard rules for world merchants. It is with this in mind, that the author will continue in the ancient traditions of the global merchants and attempt to clarify the rules that presently govern the passage of risk from seller to buyer in international commercial contracts.

Passage of risk from seller to buyer in international commercial contracts breaches the question of who will bear the ultimate responsibility. It is feasible and customary that transit losses be covered by a form of insurance. Moreover, loss of or damage to goods is generally revealed only at the end of the line; as a rule the buyer is usually in a superior position than the seller to determine the damage, undertake the appropriate steps for a claim with the insurance company and salvage the remaining goods. This issue breaches the question of payment and the responsibility of the buyer to support the goods irrespective of loss attributed to third parties. Likewise, issues such as force majeure are important considerations that effect buyers and sellers when goods travel great distances. One need only imagine the negative results of a natural disaster on the goods being transported. For example perils of the sea are beyond the control of all parties but have a direct bearing on how the respective obligations of the parties will be carried out. It is these and similar situations that confuse and greatly accentuate the issue of risk allocation in international commercial contracts.

This work will focus on clarifying this issue by dividing the work into two main parts with various Chapters. The first part of the work may be categorized as the descriptive in that we will analyse the legislative roots of this subject matter. In this part the Convention will be examined, giving the reader a brief overview of the terms covered and a detailed examination of the relevant provisions related to the allocation of risk. Following this outlay, the origins of the Incoterms will be exposed and a cursory overview of their function detailed. Finally, this part will examine the origins of the UCC and specifically review the provisions regarding risk allocation.

In part two, the author will develop the main thesis by examining and comparing in detail, the method of interaction between the Convention, Incoterms and the UCC concerning risk allocation. As a result of the foregoing, the author will draw to a focus the elements discovered during the comparative analysis by exposing areas in which the Convention, Incoterms and the UCC may pose a risk of incompatibility in their use.

Finally, the author will conclude with closing remarks regarding this work and the prospects for the future.

PART I-Legislative Analysis

Chapter One-The Vienna Convention

I. General

A. Applicable Law [35]

This section will briefly examine the Convention and its various articles. Though it is not the focus of this work to examine every article of the Convention comprehensively, this section will nonetheless efficiently expose the workings of the Convention. This will be done by highlighting the salient features and areas of contention. Likewise, in subsequent sections, various articles will be examined in detail as they have a direct bearing on the thesis of this work.

Article one [36] of the Convention provides the basic rules for ascertaining if the Convention is applicable to a contract of sale of goods and to its formation.[37] The basic premise of this article is that the Buyer and the Seller must have their place of business in different states.[38] Likewise, if

---

[35]This Convention applies to contracts of sale of goods between parties whose places of business are in different states:

(a) When the states are Contracting States; or
(b) When the rules of private international law lead to the application of the law of a contracting state.

2. The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.

3. Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this convention.

[36]Farnsworth, E.A., *Supra Note* 22 at 518. This Article is substantially similar to Article One of the 1978 Draft.

[37]Official Records, I, 14-15.

[38]Official Records, I, 15.

a party to a contract has multiple places of business, the place of business with the closet ties to the contract and its performance will prevail.

When the sale of goods among the parties takes place in different states, the Convention will help reduce the search for a forum with the most convenient law. Second, it will reduce the need to resort to private international law, and third it will provide a modern international law for the parties.[39]

Further paragraphs (1)(a)(b)[40] stipulate that even if the parties have their place of business in different states,[41] the Convention will only apply if: (1) the states where the parties come from are contracting states and (2) the rules of private international law lead to the application of the law of a contracting state. [42]

---

[39]Kritzer, A.H., *Guide to Practical Applications of the United Nations Convention on Contracts for the Interactional Sale of Goods* (Deventer: Kluwer Law and Taxation, 1989) at 63.

[40]Volken, P., and Petar, S., *International Sale of Goods* (Dubrovnick Lectures)(New York: Oceana, 1986) at 27.

[41]For example seller X has its place of business in a contracting state. buyer Y is not in a contracting state. buyer Y brings an action against seller X in his state. Which rules apply? The rules on private international law will lead to the application of seller X law, hence the Convention.

[42]In a German decision published on June 13, 1991, the Court dealt with a French seller and German buyer who did not elect a governing law for their contract. The contract was concluded after the coming into force of the Convention in France. The tribunal elected to apply the Convention through the conflict of laws' rules, as the parties had not elected a governing law. See A/CN.9/SER.C/ABSTRACTS/1 English for a brief summary see *Uniform Law Review*, 1991, I, 372 also published in German, *Recht der Internationalen Wirtschaft*, 1991, 591.See also: ICC *Case Number 6653*(A/CN.9/SER.C/ABSTRACT/8 English at page 3, or for the French Abstract see *Journal de Droit International*, 1993, 1041.) the parties concluded a contract for the sale of goods. The Seller was German and the Buyer was Syrian. The Arbitral panel applied the Convention as the applicable law. The grounds for this decision was the parties had elected to use French law as the contract law, and since the Convention was in force in France at the time of the conclusion of the contract the Convention would apply. Likewise we should note that the tribunal took cognisance that the buyer was Syrian and that the Convention was in force in Syria at the time of the conclusion of the contract; and ICC *Case Number 7197* (See *Journal de Droit International*, 1993, 1028.) A dispute arose between a Bulgarian buyer and Austrian seller over payment. Here the parties failed to specify an applicable law for the contract, the application of the rules of private international law of Austria and Bulgaria led to the application of Austrian law. Since Austria had incorporated the Convention, the tribunal applied the Convention in conformity with article 1(1)(b).

At the Diplomatic Conference several representatives suggested that (1)(b)[43] be deleted. It was their opinion that this provision may lead to confusion. The rules of private international law may lead to the application of one state's national law for formation and another state's laws for performance. From these issues a compromise was struck and as a consequence, Article 95 was added: [...]

> "Any state may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph(1)(b) of article 1 of this Convention."

Ultimately this provision will, if enacted by the contracting state limit the Convention and make applicable the domestic law of that contracting state.

B. Scope of the Convention [44]

Article two enumerates six specific categories that do not fall within the scope of the Convention. These six categories are divided into two groups, paragraphs (a)-(c) are grounded in the type of transaction while, paragraphs (d)-(f) are grounded in the nature of the goods.[45]

This article has its legislative roots in Article 5 ULIS, in all actuality the fundamental change has been the elimination of instalment contracts in the Convention. Likewise, the Convention specifically excluded consumer sales from its application.

---

[43] For more cases regarding Article 1(1)(b) See A/CN.9/SER.C/ABSTRACT/1 English Cases 2-7 at pages 2-5.

[44]This Convention does not apply to sales:

(a) of goods bought for personal, family or household use, unless the seller, at any time before or at theconclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use;
(b) by auction;
(c) on execution or otherwise by authority of law;
(d) of stocks, shares, investments securities, negotiable instruments or money;
(e) of ships, vessels, hovercraft or aircraft;
(f) of electricity.

[45]Volken, P., and Petar, S., *Supra Note* 40 at 36.

The drafters of Article(2)(a) were aware of national legislation concerning consumer protection. It was therefore agreed that the Convention would steer away from this area. Likewise, due to the various definitions that could arise under different legal systems, it was deemed unnecessary to include this type of element in the Convention.

The main reason for excluding auction sales (2)(b) from the Convention is based on the complexity of the sale itself. This type of commercial sale is rarely straightforward and may involve many offers and acceptances. As such, the drafters elected to avoid basic application problems and leave this type of sale to national legislation.

Under Article (2)(c) the Convention specifically excludes sales on execution or by authority of law. The drafters excluded this type of sale from its application because of the nature of the sale. Conceivably, there may be the potential for conflict.

The 1964 Hague Conventions and UNCITRAL were of agreement that transactions of securities, shares, monies and the like should be excluded from the application of the Convention. Article (2)(d) is the present reflection of the previous legislation.

The 1964 Hague Conventions specifically excluded sales and registration of vessels, ships and aircraft from its application.[46] The Conventions Article (2)(e) also excludes electricity from its scope of application.

C. General Provisions

The Convention attempts to avoid its application when the object of the contract is the supply of labour or when the party who orders goods, supplies a substantial part of the materials necessary

---

[46]ULIS 5(1)(b) and ULIF (6).

for the manufacture of the contract's object.[47] This issue can be a problem and is well illustrated in the existing case law.

As an illustration of the latter, we refer to the *Supreme Court of Austria* [48] which was seized with a case involving an Austrian company who ordered brooms from a Yugoslavian manufacturer. According to the terms of the contract the Austrian company (buyer) was to provide materials to the Yugoslavian manufacturer (seller) for the production of the brooms. The Court concluded that in this situation the Convention could not apply, relying on article 3(1)(2) the Court believed the buyer had supplied a *substantial part of the materials necessary for the production of the goods.* In essence, the Yugoslavian seller was furnishing labour and services and not goods.

Article 7(1) states that interpretation of the Convention must take into consideration the international character and the need to promote uniformity in its application and the observance of good faith in international trade. The ULIS did not have a similar provision, therefore making the Convention unique in its construction.

The notion of good faith[49] is clearly a broad and a multi dimensional concept that may be reasonably difficult for a court to interpret while examining the Convention. Nonetheless, the good faith principle can help in many fashions. This provision is flexible in that it will allow a court to

---

[47] (1) Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.
(2) This Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consist in the supply of labour or other services.

[48] A/CN.9/SER.C/ABSTRACT/8 at page 4(Decision of 27 October 1994) also published in German in *Zeitschrift Fur Rechtsvergleichung*, 1995, 159. See also *Contra* A/CN.9/SER.C/ABSTRACT/1 at page 2 (Decision of 17 September 1991). Original in German and also published in *Uniform Law Review*, 1991, I, 382 in French and English, this case dealt with an Italian manufacturer and German buyer. The Court concluded that the nature of the contract was a contract of sale according to article 3(1) of the Convention.

[49] Samson, C., "L'harmonisation du droit de la vente: l'influence de la convention de Vienne sur l'evolution et L'harmonisation du droit des provinces canadiennes" (1991) 32 CdeD at 1017. Lefebvre, Guy., "La bonne foi dans la Convention des Nations Unies sur les contrats de vente internationale de marchandises", dans P-P., Cote et C Dubreuil (dir.), *La morale et le droit des affaires, Les journees Maximilien-Caron* 1993, Montreal, Editions Themis, 1994, pp.353-354 also cited as (1993) RJT.561.

enforce these rules under the guise of practicality.

Over rigidity can in all likelihood render ineffective a document of this scope and nature. This provision will enable the courts to avoid rigid interpretation that would ultimately result in inequitable decisions, and could lend to the move back to national law. [50] The drafters of the Convention also believed that this provision would help foster a better atmosphere for people to conduct their business affairs in an international setting.[51]

The Convention and the Uniform Laws are different in the way they resolve matters not expressly covered by their provisions. The ULIS at article 17 states as follows: "*questions concerning matters governed by it and which are not expressly settled therein shall be settled in conformity with the general principles on which it is based.*"

The Convention differs in that Article 7(2), adds that in absence of such principles, those questions are to be settled "*in conformity with the law applicable by virtue of the rules of private international law.*"[52] In essence, this allows courts to fill gaps in the Conventions with national laws.[53] This aspect has been dealt with by courts and serves to illustrate the need for a broad but comprehensive interpretation.

The method of determining the application and of the Convention is illustrated in *the*

---

[50]Ndulo, Muna, "The Vienna sales convention 1980, and the Hague uniform laws on international sale of goods 1964: a comparative analysis" (1989) 38. The International and Comparative Law Quarterly at 9.

[51]Some delegations supported this provision as it would allow the courts to avoid strict adherence to some articles. See U.N. Doc. A/CONF.97/9 at 67. The ICC was of the belief that this provision should be excluded See: U.N. Doc. A/CONF.97/8/Add.2.

[52]Depending on your legal background this provision can be interpreted in a variety of fashions. See for example Volken, P., and Petar, S., *Supra Note* 40 at 43 paragraphs 57 and 58. The author illustrates the different interpretation through the eyes of Ulrich Huber, a German Scholar, and John Honnold, an American professor.

[53]It is recommended to use Gap Filling legislation prior to the conclusion of the contract in order to avoid depending on the conflict of laws rules for its determination. This concept is also known as forum shopping.

Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft-Wien Court,[54] (June 15,1994). A German arbitrator was seized with a matter between an Austrian seller and German buyer, who concluded a contract for the sale of rolled metal sheets "F.O.B. Hamburg." The Arbitrator had to determine the method of determining a claim for damages made by the seller for lack of payment. The seller made a claim for interest and the Arbitrator had to determine the applicable interest rate. The Arbitrator held, that since interest rates were within the scope of the Convention but not expressly settled by the Convention, the issue should be settled in conformity with the general principles on which the Convention is based (hence Article 7(2)). The Arbitrator found that compensation was a matter found in the Convention, referring to Articles 74 and 78, and that general relations between merchants requires interest from the buyer due to delayed payment, because the seller would resort to bank credit to finance late payment at the interest rate commonly practised in their own country.

The Convention also contains provisions regarding the conduct of the parties. Article 8(1)(2) and (3) allows the past conduct of the parties to be a relevant focus for interpreting the contract. [55] In this sense Article 8 allows communications between the parties to be used in defining the obligations of the parties to a contract. This article is also applicable to questions of interpretation that stem from a contract when the contract gives rise following an exchange of communications.[56]

In *Beijing Metals & Minerals Import/Export Corporation v. American Business Center, Inc. et. al.*[57] a Chinese manufacturer and American importer contracted to develop the American market for the Chinese manufacturer's weight lifting equipment. After a dispute between the parties, they concluded a modified payment agreement evidenced in writing. The Appellate Court relied on article

---

[54]A/CN.9/SER.C/ABSTRACT/7 Original in German abstract in English also reported in English in [1995] UNILEX, D.94-12.

[55]See also *S.p.A. v. Chilewich International Corp.* 789 Federal Supplement 1229 (1992); 984 Federal Reports, 2d 58 (1993) or A/CN.9/SER.C/ABSTRACT/2 also commented on in English by Brand & Fletchner in *Journal of Law and Commerce,*(1993) 12, 239.

[56]Honnold. J., *Supra Note* 11 at 106.

[57]993 Federal Reports 2d, 1178 (1993), U.S. Court of Appeals for the Fifth Circuit (Decision of 15 June 1993) also reproduced in 1993 U.S. App. Lexis 14211.

8(3) of the Convention.

The Convention differs greatly from the ULIS in its treatment of usage among the parties. Article 9(1)and(2) of the ULIS states that parties [. . .]

> "Shall be bound by any usage which they have expressly or impliedly made applicable to their contract and by any practices which they have established between themselves; by usages which reasonable persons in the same situation as the parties usually consider to be applicable to their conduct."

The ULIS also provides that "where expressions, provisions or forms of contract commonly used in commercial practice are employed, they shall be interpreted according to the meaning usually given to them in trade concerned."

Article 9 of the ULIS has been criticised, for the provisions that the parties shall be bound by usages which reasonable persons in the same situation usually consider to be applicable.[58]

The Convention is different in that Article 9 has steered from the criticism of the ULIS, by binding parties to usage to which they have agreed either through their negotiations or by their dealings. Likewise, under the Convention's article 9, [59] parties will have impliedly made applicable to their contract or its formation any usage 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 area.

In the *Civil Court of Basel-Stadt Switzerland* [60] the Court was seized with an Austrian seller and Swiss buyer who concluded a contract for the sale of fibre. The Austrian argued, that the

---

[58]See: P. Winship, "International Sales Contracts Under the 1980 Vienna Convention" (1984)17(1) Uniform Commercial Code L.J. 55-71. The practical problem is that this provision has an unfair trade effect on developing nations, whose common practice differs from western trade.

[59]Kritzer, A.H., *Supra Note* 39 at 128.

[60]A/CN.9/SER.C/ABSTRACT/7 at page 6, (21 December 1992) Original in German .

contract was concluded based on an order sent by the Swiss buyer, which the Austrian confirmed in writing. The tribunal concluded, that the confirmation letter sent by the Austrian and the lack of response by the Swiss buyer, constituted a usage as to the formation of contracts in the sense of article 9(1) of the Convention. In other words, the parties had impliedly made that usage applicable to their contract since they knew or ought to have known the binding nature of the confirmation sent by the Austrian under their respective national laws. Likewise, at the time of the incident, there was no other rules or usage governing the sale of fibre. Finally, the tribunal concluded that the correspondence exchange, namely the confirmation, was a consistent practice that the parties had established among themselves and therefore, became binding pursuant to article 9(2) of the Convention.

D. Formation of the Contract

The Convention's Article 11 and the ULIS's Article 15 are both similar in that a contract need not be concluded or evidenced in writing and is not subject to any other form requirement. According to the Convention, parties may adduce any mode of proof for a contract of sale, this would necessarily include witnesses, writings or the like.

The Convention allows, through its Article 96, for contracting states to whose national laws require that contracts be evidenced in writing to make a declaration of reservation according to article 12, to the point that the provisions of Article 11, article 29, or Part II of the Convention that deal with the issue of contract not be in writing.[61]

The Hague Conventions are not dissimilar to the Convention concerning the concept of *an offer*. The Convention's Article 14(1) defines an offer as:

> "A proposal for concluding a contract, addressed to one or more specific persons, which is sufficiently definite and which indicates the intention of the offeror to be bound in case of acceptance."

---

[61]Honnold, J., *Supra Note* 11 at 127.

An offer is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provisions for determining the quantity or price.[62] Further, Article 14(2) is clear that a proposal other than one addressed to one or more specific persons is considered as an invitation to negotiate and not an offer.

In *United Technologies International inc. Pratt and Whitney Commercial Engine Business v. Magyar Legi Kozlekedesi Vallalat (Malev Hungarian Airlines)*[63], involved an American Plaintiff aircraft engines' manufacturer and a Hungarian manufacturer of Tupolev aircraft. The two parties entered into extensive negotiations, which resulted in the American manufacturer offering different types of engines without quoting a precise price. From the negotiations, the Hungarian manufacturer ordered a type of engine offered by the American during the negotiations.

The Court had to determine whether this transaction was considered a valid contract. In first instance, the Court believed a valid contract had been concluded, because the offer indicated the goods and made provisions for ascertaining price and quantity.[64]

The rules regarding revocation of an offer are contained in Articles 16(1) of the Convention and 5(2) of the ULF. These two documents both acknowledge the right to revoke an offer anytime, subject to certain terms. The ULF is clear in that article 5(2) does not allow an offer to be revoked if the revocation is not made in *good faith*. Likewise, an offer cannot be revoked if the offer has a fixed time for acceptance or there is a statement to the effect that the offer is not revocable.

---

[62]Commentary on Article 14(1), UN Conference on Contracts for the International Sale of Goods, Vienna, Mar. 10 - Apr. 11, 1980, UN Official Records(1981), p.20.

[63]A/CN.9/SER.C/ABSTRACT/4 at page 2 (Decision of September 25, 1992). Original in Hungarian, a summary published in Italian in *Diritto del commercio internazionale* 1993, 651.

[64]On appeal, the Supreme Court of Hungary concluded that the offer and the acceptance were vague, and therefore ineffective as they failed explicitly or impliedly to fix or enable the determination of the price of engines ordered. The Supreme Court relied on Article 14(1) of the Convention in its determination. Likewise, the Court interpreted the Hungarian acceptance as an expression of their intention to conclude a contract for the purchase of the engines, and the acceptance was not to be considered as a counteroffer. The Supreme Court overturned the lower Court and determined there was no valid contract.

The Convention's article 16(2)(a) and(b) states that an offer cannot be revoked if there is a fixed time for acceptance or otherwise, that the offer is irrevocable.[65] Furthermore, Article 17 of the Convention provides that an offer, even if it is irrevocable, is cancelled when rejection reaches the offerer.

Article 18(1) of the Convention defines the concept of acceptance *"a statement made by, or other conduct of, the offeree which indicates assent to an offer."* The ULF[66] does not define acceptance. However, it states that acceptance consists *"of a declaration communicated by any means whatsoever to the offeror."*

Article 18(2) of the Convention states that *"acceptance takes effect when it reaches the offeror."* Therefore, should an acceptance not reach the offeror, it will have no binding effect on the offeror if he does not reach it within the time allotted to respond, and if no time is set, then within a reasonable time. Under the Convention, an oral offer must be accepted immediately, unless stipulated otherwise. As such, where the acceptance is manifested in an act, said act must be performed within the same period. Article 18(3) provides that "such acts are effective even without notice to the offeror." Likewise, it is made explicit that the acceptance is effective at the moment the act is performed.[67]

Article 20 of the Convention governs the period of acceptance *"the date of the letter is the date shown on it; if no date is shown, it is the date on the envelope. In the case of an offer made by instantaneous means of communication, the period runs from the moment it reaches the offeree."* Further, Article 20(2) provides that an acceptance that cannot be delivered because the last day is a holiday or non-business day then, the period is extended to the next business day. Article 21(1) of the Convention provides that a late acceptance is not effective unless the offeror informs the offeree

---

[65]Kritzer, A.H., *Supra Note* 39 at 164-165.

[66]Article 6(1).

[67]Bianca, C.M., and Bonell, M.J., eds., *Commentary on the International Sales Law* (Milan: Giuffre,1987)at 166-168.

that it is effective.

The general rule both under the Convention[68] and the ULF is that an offeree must accept the offer as it stands. Therefore, if the offeree alters or adds to the offer, he is not accepting but rather *counter offering*. Under 19(2) of the Convention, requires offerer to respond to an acceptance that contains additional terms which do not materially alter the terms. If the offeror does not object, without undue delay to the discrepancy or gives notice to that effect the offer is considered accepted. Article 19(3) gives various examples of some types of changes that would amount to a material change.[69]

E. Rights and duties of the buyer and seller

The seller's obligations are covered by Article 30 of the Convention. The Convention is comprehensive as it covers all aspects of the Seller's obligation under a contract. The Seller is bound to deliver the goods, and relinquish any documents relating to the transfer of property.

Article 35(1) of the Convention requires the Seller to deliver the goods which are of the quantity, quality and description required pursuant to the contract. Likewise, the goods must be packaged in the manner specified by the contract. Except where otherwise agreed, the goods do not conform with the contract unless they are fit for the purpose for which the goods of the same description would ordinarily be used[70]; are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;[71] possess the qualities of the goods which the seller has held out to the buyer as a sample

---

[68]Article 19(1)

[69] Examples: different terms relating to the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are all considered materially altering.

[70]Article 35(2)(a).

[71]Article 35(2)(b).

or model;[72] and are contained or packaged in the manner, in a way to preserve adequately and protect the goods.[73] However, the seller is not liable for any lack of conformity if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.[74]

The Convention[75] stipulates that the buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it. This is mitigated by the saving that the buyer may still reduce the price according to article 50 of the Convention. Likewise, the buyer may claim damages, saving loss of profit, if he has a reasonable excuse for his failure to give the required notification. It must also be remembered that the buyer will lose his right to rely on the lack of conformity, if he does not give the seller notice at least within a period of two years from the date which the goods were handed over to the buyer, unless that time is contrary to a time contractually guaranteed upon.

Under the Convention the buyer may rely and avail himself of four remedies, namely: *specific performance, avoidance, damages and reduction of price*. One fundamental rule is that the buyer may require the seller to perform his obligations via specific performance.[76] Article 46(1) enumerates the terms for specific performance. Under this provision the buyer may not avail himself of specific performance where he has resorted to a remedy which is inconsistent with this requirement, such as avoidance or reduction of price. Likewise, the buyer may obtain damages in addition to specific performance to compensate him for any additional loss sustained from the sellers delay in performance.

Under the Convention the buyers right to claim substitution of defective goods and the right

---

[72]Article 35(2)(c).
[73]Article 35(2)(d).
[74]Article 35(3).
[75]Article 39(1).
[76]Bianca, C.M., and Bonell, M., *Supra Note* 67 at 333.

to declare avoidance in cases of a nonconformity have been restricted. The Convention does not recognize *ipso facto* avoidance but redefines the concept in light of *fundamental breach*. In essence the Convention recognises two types of breaches: breaches of contract by the buyer, and fundamental breach by the buyer.

Article 46(2) of the Convention states that if the goods do not conform with the contract the buyer may require delivery of substitute goods if the lack of conformity constitutes a fundamental breach and a request for substitute goods are made either with notice of a nonconformity under article 39 or within reasonable time afterwards. As well, the buyer may require the seller under Article 46(3) to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances, but request for repair must be made either with notice given under article 39 or within a reasonable time afterwards.

The application of specific performance is restricted by Article 28, which states that a court does not have to order specific performance if it would not do so in similar cases governed by domestic law.[77]

The convention allows the buyer under Article 49(1) to declare the contract avoided if the seller has committed a fundamental breach of contract or failed to deliver within a reasonable time. The Convention defines fundamental breach in Article 25 as one which "*results in substantial detriment to the other party unless the party in breach did not foresee and had no reason to foresee such result*."

In order to declare a contract avoided the Convention requires the availing party to follow a set procedure. Under Article 49(1), when the grounds established under 49(2)(a) and (b) are satisfied, and the buyer wishes the contract avoided, he must make a declaration of avoidance. Under the Convention the buyer loses his right to avoid the contract unless he makes his declaration within

[77]Kritzer, A.H., *Supra Note* 39 at 215.

a reasonable time after he has become aware that delivery has been made in cases where the seller has delivered the goods and in respect of any other than late delivery, within a reasonable time after he knew or ought to have known of the breach.

In a decision of the *Oberlandesgericht Frankfurt a.M.* the Defendant, a German Company, refused to pay for shoes purchased from the Italian Plaintiff. The buyer relied on the ground that the shoes were not delivered according to the contract and the goods did not conform to the contract. The Court concluded that the German buyer was not legally entitled to declare the contract avoided and refuse to pay the contract price, as it had failed to set a time limit within which the seller was bound to deliver and failed to establish that the seller had committed a fundamental breach (articles 49(1) and 81(1)). The defendant failed to specify if the shoes were just below the contract standard and hence the defendant could either have claimed reduction in price or claim damages, not avoidance or were the shoes unfit for sale and therefore a fundamental breach.[78]

In a decision of *the Austrian Court of Appeal at Innsbruck* [79] a Danish Exporter of flowers, contracted with an Austrian buyer for a shipment of garden flowers. The Austrian buyer refused to pay the price for part of the shipment arguing that the seller had breached his commitment resulting in a fundamental breach of contract since part of the shipped flowers did not bloom through the end of the summer.

The Court of first instance rejected the buyer's argument on the ground that they failed to prove that the seller had guaranteed that the flowers would bloom through the entire summer, or that a fundamental breach had been committed because of the situation (Articles 36 and 49(1)). The Court also concluded that even if the buyer had ample grounds to avoid they waived this recourse

---

[78]A/CN.9/SER.C/ABSTRACT/6 at page 2 (Decision of January 18, 1994). Published in German in *Recht der Internationalen Wirtschaft(RIW)* 1994, 240.The Court ordered the defendant to pay the purchase price and interest at the rate of 10%. This case aptly illustrated the need of the party relying on fundamental breach to insure that the letter and spirit of the Convention are respected. Failing which, they can order the parties to pay the purchase price and damages.

[79]A/CN.9/SER.C/ABSTRACT/8 at page 5 (Decision of 1 July 1994). Original in German unpublished.

by failing to provide the seller reasonable notice after discovering the defect (Article 39(1)).

On appeal the Court confirmed the lower Court decision and stated that the buyer failed to establish that the seller had breached a guarantee or committed a fundamental breach of contract.

Under the Convention[80] where the goods do not conform with the contract, the buyer may avail himself of a price reduction. This is not dependant on whether or not the price has already been paid. The buyer may reduce the price by the same proportion as the value of the goods delivered at the time of delivery bears to the value that conforming goods would have had then. Article 48 of the Convention, subject to Article 49, allow the seller after the delivery date a right to remedy his failure at his own expense if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer.

The buyer has two main obligations, he must pay the price and take delivery of the goods as required by the contract and the provisions of the Convention. These requirements are covered by Article 53 and 55 of the Convention. The buyer's obligation is limited in that he is not obliged to do all such acts as are necessary in order to enable the seller to hand over the goods.

The seller may under Article 64(1) of the Convention declare the contract avoided if the failure by the buyer to perform any of his obligations amounts to a fundamental breach. The seller may fix an additional, reasonable period for the buyer to perform his obligations. If the buyer does not within such additional periods perform his obligations to pay the price or take delivery of the goods, or if he declares that he will not do so within such period, the seller may declare the contract avoided.[81]

Under the Convention the contract is avoided because of the buyer's breach only if the seller

---

[80]Article 50 .

[81]Article 64(1)(b) .

declares the contract avoided.[82]

F. Common Obligations of the Seller and the Buyer.

Article 71(1)(a) and (b) of the Convention allows a party to suspend the performance of his obligations. This may be done, after the conclusion of the contract, if it becomes apparent that the other party will not perform a substantial part of his obligations because of a serious deficiency either in his ability to perform or in his creditworthiness, or his conduct in preparing to perform or in performing the contract.

The party wishing to suspend his performance must give notice immediately to the other party and must continue with performance if the other party provides adequate assurances of his performance.[83]

Article 74 of the Convention helps determine the calculation of damages. In the Convention loss is determined by a sum equal to the loss, including loss of profit, suffered by a party in consequence of breach.[84] Damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters which he then knew, or ought to have known, as a possible consequence of the breach of contract. The Convention uses the terms *foresaw* which could mean that the foreseeability test is both subjective and objective. All relevant circumstances must clearly be taken into consideration. The Convention provides where a breach consists of delay in payment of price. The seller will be entitled to interest without prejudice to any claim for damages.[85]

---

[82]United Nations Conference at page 54.
[83]Article 71(3).
[84]Honnold, J., *Supra Note* 11at 503.
[85]Article 78.

In *Delchi Carrier, SpA v. Rotorex Corp.* [86] involved an American manufacturer of compressors for air conditioners, who agreed to sell 10800 compressors to an Italian manufacturer of air conditioners. The terms of the contract called for three shipments of the compressors. The first shipment was made. While the second shipment was en route, the Italian buyer found that the first shipment of air compressors did not conform to the contract. As such, the buyer rejected the shipment, undertook to store the compressors at the port of entry and attempted to resolve the matter of the nonconformity with the seller. After attempts to resolve the matter was unsuccessful, the buyer sued demanding damages for breach of contract pursuant to article 74 of the Convention.[87]

In the case where a contract is avoided and a substitute transaction is carried out. Article 75 of the Convention allows a party claiming damages may obtain the difference between the contract price and the price under the substitute transaction and any further damages recoverable under the general principal. In the case where there is no substitute transaction, Article 76(1) of the Convention, establishes the rule that damages will be equal to the difference between the contract price and the current price and the current price at the time when the party obtaining damages first had the right to declare the contract avoided. Article 76(2) of the Convention defines current price as the price prevailing at the place where the delivery of the goods should have been made or, if there was no current price, at that place or another place which serves as a reasonable substitute, making the allowance for differences in the cost of transporting the goods.

The Convention requires the parties to mitigate their damages.[88] Should a party fail to do so the party in breach may claim a reduction in the damages of the amount by which the loss should

---

[86]A/CN.9/SER.C/ABSTRACT/6 at page 5 (Decision of September 9, 1994 of the US District Court for the Northern District of New York) also published in 1994 U.S.Dist. LEXIS 12820; and in 1994 WEST LAW 495787

[87]The Court found that the American seller had breached the contract and awarded the Italian buyer damages in the following manner. First it awarded damages sustained by the buyer to remedy the nonconformity in the compressors. Second, awarded damages for the costs incurred to replace compressors shipped from a third party in order to mitigate its loss. The Court did however reject the Plaintiff's claim for damages to cover expenses to the anticipated cost of producing air conditioners.

[88]Article 77, For an example see *Delchi Carrier, SpA v. Rotorex Corp, Supra Note* 86.

have been mitigated.

Article 79(1) of the Convention deals with the issue of when a party may be exempted from liability for failure to perform his obligations if he is unable to perform due to circumstances beyond his control.[89] The Convention allows a party to evade liability if he proves that the failure was due to any 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 or to have avoided or overcome it or its consequences.

Article 79(2) of the Convention states that if a failure to perform is due to the failure of a third person whom he engaged to perform the whole or a part of the contract, the defaulting party is exempt from liability only if two conditions are fulfilled: first, he must himself be exempt under the conditions mentioned above and, second, the third person must also be so exempt.

Further, these exemptions only apply for the duration of the impediment.[90] The Convention[91] provides that when a party who fails to perform because of an impediment, he must give notice to the other party of the impediment and its effect. If the notice is not received within a reasonable time after the party in default knew, or ought to have known, of the impediment, he is liable for damages resulting from such non-receipt. Further, the Convention[92] does not limit either party from exercising any other right other than to claim damages.

Article 81(1) of the Convention that avoidance of the contract releases the parties from their respective obligations under it, subject to any damages which may be due. This article provides that avoidance does not affect any provisions of the contract for the settling of disputes or governing respective rights and obligations of the parties upon avoidance of the contract. Likewise, Article

---

[89]Hudson, "Exemptions and Impossibility under the Vienna Convention" in McKendrick, E., *Force Majeure and Frustration of Contract* (London: Lloyd's of London Press, 1991) at 175.

[90]Article 79(3).

[91]Article 79(4).

[92]Article 79(5).

81(2) provides that a party that has performed the contract, either wholly or in part, may claim restitution of what he has supplied or paid; if both parties are bound to make restitution, they must do so concurrently.

Under Articles 81(1)[93] and (2) of the Convention, making restitution of the goods in the condition in which he received them is impossible for the buyer, he loses the right to declare the contract avoided. However, this does not apply if:

(A) the impossibility of making restitution of the goods or of making restitution of the goods substantially in the condition in which the buyer received them is not due to his act or omission;
(B) the goods or part of the goods have perished or deteriorated as a result of the examination provided for in Article 38 of the Convention; or
(C) the goods or part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in their normal use before he discovered or ought to have discovered due to the lack of conformity.

Article 85 of the Convention provides that if the buyer is in delay in taking delivery of the goods and the seller is in possession of them or otherwise able to control their disposition, the seller must take such steps as are reasonable in the circumstances to preserve them. As a result of the seller's conservatory acts, he is entitled to be reimbursed for any reasonable expenses resulting from steps taken to preserve the goods and he has a right to keep the goods until he is reimbursed.

In the case where a buyer receives goods but intends to reject them, Article 86(2) of the Convention provides that the buyer must take possession of them on behalf of the seller, if he can do so without unreasonable inconvenience and expense.

In the case where a party is obliged to preserve the goods pursuant to Article 87 of the

---

[93]See A/CN.9/SER.C/ABSTRACT/6 at page 2 (Decision of January 18, 1994). Published in German in *Recht der Internationalen Wirtschaft(RIW)* 1994, 240.

Convention, he may deposit them in a warehouse of a third person at the expense of the other party if the expense incurred is reasonable.

In a decision of *The Cantonal Court of Vaud* [94] a Swiss buyer of machinery applied for provisional measures requesting the seller, a German, to deposit in the warehouse of a third party a device retained by the German in its premises. This device was requisite for the operation of machinery delivered to the Swiss buyer but not fully paid for. In its defence, the seller invoked article 87 of the Convention, stating that the buyer should be responsible for the costs of the deposit in the third party warehouse of a said device. The Court applied the Convention, but held that since the cantonal rules of procedure applied it was not bound by the Convention on the matter of expenses of the deposit, since the Convention only applied to substantive law and not procedure.

Likewise, Article 88(1) states that a party who has an obligation to preserve the goods may sell them where there has been an unreasonable delay by the party in paying the cost of preservation. The preserving party must first give notice of his intention to sell the preserved goods. The obligation to resell stems from Article 88(2) where the goods are subject to loss or rapid deterioration and where their preservation would involve unreasonable expense. Once the goods are sold, Article 88(3) allows the seller of the preserved goods to retain out of the proceeds of the sale an amount equal to the reasonable expenses of preserving and selling of them, but he must account to the other party for the balance.

[94] A/CN.9/SER.C/ABSTRACT/7 at page 6 (Decision of May 17, 1994). Unpublished Original in French.

II. Risk Allocation under the Convention

A. Passage of Risk

Passage of risk is one classical topic of sales law.[95] It is by far one of the most pressing concerns of a party to an international sales contract. The Convention undertook a new and dynamic approach to the passing of risk that differed substantially from conventional wisdom.

The Convention in its construction does not define trade terms which generally enumerate when risk is passed from seller to buyer (i.e.: FOB, CIF & DDP). Normally, such terms are employed in order to delineate the responsible party for damage during transit. In other words they are used to ascribe responsibility.[96] This section will examine the relevant provisions of the Convention that deal with the transfer of risk in a contract. More specifically, this section will clarify the Conventions position vis a vis the passage of risk.

Damage to goods may happen in several settings, for example they may be destroyed on the seller's premises, during loading or upon arrival at the buyer's premises. One may find reference to the passage of risk in Chapter IV of the Convention entitled "Passing of Risk" which encompasses five distinct articles[97] that deal directly with this issue. The fundamental question is whether the buyer or the seller bears the risk of loss. It is conceivable that insurance will cover most losses that occur in international sales. It is however important to detect when risk has passed so that either the buyer or the seller may press the claim with the insurer.[98]

Even more striking and relevant is when the parties have not obtained any insurance for the

---

[95]de Vires, H., " The Passing of Risk in International Sales Under the Vienna Sales Convention of 1980 as Compared with Traditional Terms" (1982) 17 Eur. Transp. L. 495. Volken, P., and Petar, S., *International Sale of Goods* (Dubrovnick Lectures)(New York: Oceana, 1986) at 265.

[96] Berman, H.J., and Ladd, M.," Risk of Loss or Damage in Documentary Transactions Under the Convention on the International Sale of Goods" (1988) 21 Cornell Int'l L.J at 423.

[97]Articles 66-70.

[98]Kritzer, A.H., *Supra Note* 39 at 438.

international transaction. The issue of passing of risk then becomes crucial to determine which of the parties shall bear the cost of the loss of goods.

Often, during the normal course of business parties to an international contract, will in advance determine the allocation of risk by including in their agreement commonly used trade terms. These trade terms[99] will prevail over the Convention. Therefore, as will be shown, the time of delivery generally determines the passage of risk (For example Germany, Scandinavian countries and more specifically under the U.C.C.)[100]

In the following pages we shall examine how the Convention deals with the passage of risk in various scenarios. This examination will entail a detailed analysis of each of the provisions and a commentary.

B. Payment of Price and Risk

Article 66 [101] is based on Article 96 of the ULIS[102] and was not intended to alter the substance of the ULIS text. Due to the fact that risk can have several meanings, definitions are important. In the Convention, the word risk is employed in a narrower and conservative manner. It attempts to limit the scope by determining who is responsible for the casualty to the goods which is not from an act or omission of the other party.[103]

In essence this means that risk passes to the buyer at a certain moment during the transaction

---

[99]E.g.: Incoterms.

[100]Kritzer, A.H., *Supra Note* 39 at 437.

[101]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.

[102]Where the risk has passed to the buyer, he shall pay the price notwithstanding the loss or deterioration of the goods, unless this is due to the act of the seller or of some other person for whose conduct the seller is responsible.

[103]Nicholas in Bianca, C.M., and Bonell, M.J., eds., *Commentary on the International Sales Law* (Milan: Giuffre,1987) at 485.

and that the buyer must bear all the risk at that point. The Convention is clear that the buyer must perform his obligations pursuant to the contract even though the object of the contract is lost or damaged. Secondly, the buyer has no rights against the seller arising out of any non-performance by the seller, which is attributed to the loss or damage of the object of the contract. In reality, damage or destruction to the goods subsequent to a passage of risk does not relive the buyer from paying the price. This is consistent with the provisions of Article 58(1) of the Convention.[104]

In the case where during transit goods have been damaged or destroyed, the question most often asked is whether the rules governing excuses under the Convention apply? This may be responded to in two answers. First, the general provisions of Article 66 specifically excludes the use of excuses. The construction of Article 66 requires the buyer to pay the price except when the damage or loss is as a result of an act or omission of the seller. In this case, the seller is responsible for the loss or damage to the goods when they are as a result of his act or omission. The following illustration amply describes this scenario:

Illustration 1.A. Poorly packaged goods

> A contract of sale between seller X and buyer Y calls for the sale of 5,000 highly sensitive micro computer chips ("Chips"). According to the contract, seller X was obliged to package the chips in special anti-static plastic. During transit, 250 chips are damaged because seller X neglected to package these chips. Who is responsible?

There appears to be two distinct answers to this query. First employing the provisions of Article 70, it is plausible that damage to 250 chips is not necessarily fundamental and therefore, not a fundamental breach. However, using the provisions of Article 66 may provide a different answer. Under Article 66 the seller could very well be responsible for the damage as he failed to respect the terms of the contract. This act or omission would in essence relieve the buyer from paying the contract price.

In the second hypothesis, one may view the provisions governing excuse as found in Article 79. The practical implications of this type of risk allocation are that the buyer must (a) pay the price,

[104]That the buyer is not bound to pay the price until the seller places the goods at the buyer`s disposal is subject to the specific provisions of Article 66 on risk allocation.

(b) take delivery, and (c) is barred from asserting any remedy set out in the Convention for breach of contract in as far as it is connected to the loss in question. This provision only applies when the impediment is beyond the party's control. Therefore, when a party could have avoided the impediment the provision does not apply.

One key problem with this provision is what constitutes loss or damage arising after the risk has passed to the buyer? We may seek guidance on this issue by referring to Article 36 of the Convention, which states the opposite of article 66. In essence Article 36 holds the seller responsible for the lack of conformity that existed at the time the risk passed. This article also provides some guidance about what constitutes lack of conformity.

As an associated aspect of Article 66 the buyer is entitled to any benefit or increase which is accrued on the goods after risk has passed to him. This is consistent with the general rule that benefits should go with the burdens. [105]

Determining when risk passes is crucial for many reasons, it will determine which of the parties shall pursue an insurance claim or arrange for the salvage of the goods. These rules are further discussed in Articles 67 to 69.

C. Carriage of Goods [106]

The passage of risk is one of the areas in the Convention that differs from the ULIS. The

---

[105] *Supra Note* 103 at 486.

[106] (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 risk.

(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.

ULIS provisions on risk were predicated on risk passing when the seller has discharged his primary obligation and validates it by undertaking the technical concept of delivery.[107] Article 19(1) ULIS defined delivery as [. . .]

> "The handing over of goods which conform with the contract In consequence risk passed when delivery of the goods is effected in accordance with the provisions of the contract and the present law."[108]

The first rule concerning the passing of risk under the Convention is embodied in article 67(1)"If the contract of sale involves carriage of 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."[109] In turn this leads us to two fundamental questions: (1) when does a contract of sale involve the carriage of goods? (2) what constitutes the first carrier?

Nearly all international contracts involve to one degree or another the carriage of goods to the buyer.[110] The modern trend of container transport has revolutionized shipping of goods. It is also unreasonable to think that one statute can conclusively define when risk passes.

The concept of "contract of sale involving carriage of goods" is previously mentioned in article 31(a). It is clear from the Convention that the obligation to deliver the goods at a particular place is the exception which has to be specifically agreed upon by the parties in advance.

Let us suppose for the moment that the seller is obliged under the contract to deliver the goods to the buyer. Let us then suppose that the seller employs his own trucks to deliver the goods to the buyer inside another country. Can one assume that this contract of sale involves carriage? If so does the risk pass from the seller to the buyer when he loads his own trucks? The answer to both

---

[107] *Supra Note* 103 at 487.
[108] Article 97(1) ULIS.
[109] de Vires, H., *Supra Note* 95 at 500.
[110] Honnold, J., *Supra Note* 11 at 371.

situations is no. Article 67 makes it clear that the transfer of risk only occurs when the goods are handed over to a carrier.

The concept of a carrier in the Convention is consistent with the Incoterms (1990) Free Carrier. Under this term the seller's own facilities are excluded. Likewise, risk in the goods is transferred when the goods are delivered into the charge of the carrier which is defined as: [. . .]

> "Carrier means any person who, in a contract of carriage undertakes to perform or to procure the performance of carriage by rail, road, sea, air, inland waterway or by a combination of such modes."

The Convention's basic rule is that risk passes when the seller hands over the goods to the first carrier. Under traditional terms risk allocation usually takes place when goods pass the ship's rail or are delivered on board. [111] Under the Convention risk passes when the goods are handed over to the carrier for transmission to the buyer. This general rule is limited by the exception where the seller is "bound to hand them over at a particular place." In the Convention employing the word 'place' and not 'destination' is present because 'destination' usually refers to the locality at which the goods ended their journey. In turn 'place' is more general and could include intermediate localities. Therefore, if the seller is bound to hand over the goods to a specific carrier at a specific place, risk does not pass until the goods are handed over to that carrier in that place. [112]

The fact that the seller retains any document concerning the disposition of the goods does not affect the passing of risk. Under the Convention this rule becomes practical because it is in tune with the general accepted practices of commerce.

---

[111] For more elaborate detail please refer to Chapter Two.

[112] In *F.A.S. Italiana s.n.c.- Ti. Emme s.n.c.- Pres.Cons. Ministri(Avv.gen.Stato)* the Court was seized with a Constitutional challenge to article 1510 para. 2 of the Italian Civil Code, in that the seller transfers risk to the buyer when he hands the goods over to the carrier. That this provision was inconsistent with the equality clause enumerated in article 3 of the Italian Constitution. The Italian Civil Code of Procedure (article 1228) considers the carrier as the agent of the seller, hence maintaining the seller's liability for the carriage of the goods. The Court concluded by rejecting the argument put forward. The Court concluded that the Italian Civil Code was a reflection of the generally accepted international rules, and that in this respect the Court alluded to articles 31 and 67 of the Convention. *(*A/CN.9/SER.C/ABSTRACT/7 at 3(Decision of November 19, 1992). Original in Italian also published in English in [1995] UNILEX, D.92-27*)*.

Finally, passing of risk does not take place "*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*." This means that unmarked and undivided shares of fungible goods, cannot transfer risk from seller to buyer without meeting the specifications of the text. The identification process is designed to prevent a seller from claiming falsely, after goods have suffered casualty, that these were the goods purchased by the buyer. Hence any identification alleviates abuse. The logic behind this provision is, as was mentioned above, that the buyer is usually better placed to support a claim against the damaged goods as he is better able to salvage the remaining goods and make an insurance claim.

D. Goods Sold in Transit [113]

The issue of goods sold in transit was a point of controversy during its drafting.[114] The 1978 Draft stated: "*The risk in respect of goods sold in transit is assumed by the buyer from the time the goods were handed over to the carrier who issued the documents controlling their disposition. However, if at the time of the conclusion of the contract the seller knew or ought to have known that the goods had been lost or damaged and he has not disclosed such fact to the buyer, such loss or damage is at the risk of the seller.*" This Article [115] caused the delegates of the developing nations to voice their uneasiness with risk passing retroactively to the buyer.[116]

The First Committee approved an amended version in order to provide clarity and address

[113]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 issues the documents embodying the contract of carriage. Nevertheless, if at the time of the conclusion 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.

[114]See Yearbook, VIII (1977), 63; Official Records, II, 213-215; 403-406.

[115]Audit, B., *La vente internationale de marchandise de la Convention des Nations-Unies du 11 avril 1980* (Paris: L.G.D.J., 1990) at 136 and Bianca, C.M., and Bonell, M.J., eds., *Commentary on the International Sales Law* (Milan: Giuffre,1987) at 496. The 1978 Draft reproduced the substance of Article 99 of the ULIS.

[116]Official Records, p.213.

the concerns of developing nations.[117] On review by the Plenary, the requisite 2/3 vote was not obtained, and it voted to reconsider the article. Subsequent to this vote, a working group constructed a compromise article. This provision added the first sentence making risk pass from the time of the conclusion of the contract and then retained the preceding two sentences of the 1978 Draft for application when the circumstances so indicate. [118]

Notwithstanding changes to this provision, criticism of Article 68 has been widespread. A striking example of this criticism is the commentary of Mr. Rognlien, the delegate to the Vienna Conference from Norway: [. . .]

> "A provision on the passing of risk had to be based on purely practical considerations and, in particular, the passing of risk should not take place while goods were in transit. In such a case, the original seller would have to take out an insurance policy covering at least the period in which he himself bore the risk. The cost of such insurance would be included in the cost to the buyer in the form of a corresponding increase in the price of the goods. It would therefore fall to the buyer or successive buyers to take out additional insurance because the risk would in fact pass while the goods were in transit. In short, the buyer would pay the cost of insurance twice over." [119]

This provision deals with the situation where the goods are already in transit at the time of the contract of sale.[120] The first sentence of article 68 makes risk of goods sold in transit passes at the time of making the contract. The ordinary rule of article 67(1) does not apply, because at the time of the conclusion of the contract the goods where already handed over to another buyer and a carrier.

This provision eliminates the retroactive passing of risk and eliminates the added risk to the buyer. Unless, "*the circumstance so indicate*" the allocation of risk is not retroactive. A contract involving goods sold in transit is retroactive when the seller provides marine insurance against the loss of the goods. Otherwise, there are very few scenarios where a buyer of goods in transit would

---

[117]Official Records, p. 403-406, Docy. Hist 624-627. The First Committee deleted a confusing reference to documents controlling the goods. Official Records, p. 404, Docy. Hist.625.

[118]Honnold, J., *Supra Note* 11 at 468.

[119]Official Records, p.221.

[120] Shivbir. G., "Risk of loss in Goods sold during transit: A Comparative study of the U.N. Convention on Contracts for the International Sale of Goods, The U.C.C., and the British Sale of Goods Act." (1991) 14. Loy.L.A. Int'l & Comp.L.J.93.

assume retroactive responsibility.

What can be argued is that this provision does not require goods to be individualized before risk is allocated in transit sales. This may be adduced by the reading of the Convention itself. It is clear from article 67(2) and 69(3) that individualisation is required for risk allocation. However, clearly absent from article 68 is the requirement for individualisation. The loose construction of Article 68 creates some doubt as to its drafting, but suggests that had the drafters true intent. We may state with some authority that the drafting of Article 68 is consistent with the interpretation provided by the English Courts before 1992. Under section 1 of the *English Bill of Lading Act* of 1855,[121] rights under the contract of affreightment are transferred only to a person to whom the property in the goods passes upon or by reason of endorsement. The basic problem is that when there is a buyer of a parcel of undivided bulk, he does not obtain title until the goods are apportioned.[122] Hence, the buyer of undivided bulk is burdened with risk but not with the property in the goods. Clearly, this situation affects the right of the buyer take action against the carrier for recovery of loss of or damage to the goods.

To provide some further clarity on this issue, the bill of lading and its role in risk allocation must be examined. This approach will naturally leads to an explanation why there has been a legislative change in England as of September 1992. The role of the bill of lading ("bill") in the allocation of risk is relevant when ascertaining which party bears the loss of or the damage to the goods.[123]

It would be well advised to begin our inquiry with a definition: "*A bill of lading is a document which is signed by the shipowner or his agent acknowledging that goods have been*

---

[121](1855) 18 & 19 Vict., ch. 111.

[122]Goode, Roy and Cranston, Ross, Commercial and Consumer Law National and International Dimensions (London: Clarendon, 1993).

[123]Sassoon, David, *CIF and FOB Contracts* (Vol 5.) (London: Stevens & Sons, 1975) Part One Chapter 3 "Bill of Lading", Tetley, William, *International Conflict of Laws* (Montreal: Blais, 1994), Wilson, John, *Carriage of Goods by Sea* 2d (ed) (London: Pitman, 1993).

shipped on board a particular vessel which is bound for a particular destination and stating terms on which the goods so received are to be carried."[124] The ocean bill of lading may be considered the most common form of a marine contract. [125] The primary purpose of the bill is as a document of title. [126] This is confirmed by the case of *Biddell Brothers v. E. Clements Horst Co.,* which clearly enunciated that "*the bill of lading in law and in fact represents the goods" and that this instrument functions as a "symbolic delivery of the cargo.*"[127] Its inception may be traced to the fourteenth century where it was initially known as the bill of loading.

The bill is clearly a symbol of the goods during transit. When goods are loaded aboard a vessel, a bill is signed by one party and issued following the departure of the ship.[128] The bill is not the contract but rather a superior method of evidence. In other words the bill acts as a standard form contract which the parties may modify.[129]

---

[124]Scrutton, T.E. (Mocatta, Mustill & Boyd), *Scrutton on Charterparties & Bills of Lading, 19ed.,* (London: Sweet & Maxwell, 1984) at 2.

[125]Tetley, William, *Supra Note* 123 at 291.

[126]Wilson, John, *Supra Note* 123 at 147.

[127][1911] 1 K.B.934 (C.A.), Kennedy L.J. at 957, [1912] A.C. 18.

[128]Tetley, William, *Supra Note* 123 at 294.

[129]Bills of lading as a contract of carriage are governed by three international Conventions. First there is the Hague Rules. (Adopted in Brussels on August 25, 1924). These rules require the carrier to exercise due diligence, provide a seaworthy ship and properly load and stow the goods during transport(Articles III (1) and (2), IV (1)..) In return for following the rules the carrier is protected by a maximum limit for responsibility, which was set at 500.00$ CDN per package. (Article IV(5)). Further, under Article 3(8) and 10 the rules are mandatory and have force of law. This matter was specifically settled in *Vita Food Products Ltd v. Unus Shipping Co. Ltd* [1939] A.C. 277, (1939) 63 Ll. L. Rep.21, 1939 AMC 257, [1939] 2 D.L.R.1(P.C.). In this case, cargo being shipped from New York to Newfoundland was damaged off the coast of Nova Scotia. Legal proceedings were introduced in Nova Scotia against the carrier. The bill contained a clause referring to English law, however, the bill was outdated and did not include a reference to the Hague Rules and the paramount clause. The court concluded that English law was applicable and not the Hague rules. The Privy Council upheld the Canadian court and concluded that the Rules were not mandatory if the paramount clause was not present in the bill of lading. Ultimately, this decision has been rarely followed and often distinguished by other courts. (Examples of decisions ignoring *Vita Foods* : *Shackman v. Cunard White Star Ltd* (1939)63 Ll.L.Rep 28., *Dominion Glass Co. v. The Ship Anglo Indian* [1944] S.C.R.409, [1944] 4 D.L.R.721).

The second set of rules governing bills of lading is the Hague/Visby Rules. (The Visby Rules are a protocol to the Hague Rules and were adopted on February 23, 1968. See *Canadian Carriage of Goods by Sea Act*, S.C. 1993, c.21.) These rules focus on the responsibility of the carrier and liability. These rules are mandatory in their application and have force of law. In essence, these rules answer in express terms the

As was previously mentioned, the bill of lading is a document of title. This is consistent with Article 1(b) of the Hague Rules.[130] It is often suggested that the bill of lading is a negotiable instrument in that it may be transferred from person to person. This notion seems to be in tune with the notion that the bill is a document of title and may allow ownership in goods to be transferred as well.[131]

In all actuality, the endorsement of the bill does not transfer ownership in the goods nor by the delivery of the goods but by the contract of sale that governs the operation itself. This is consistent with the case of *Sewell v. Burdick*[132] in which Lord Bramwell clearly stated that: [...]

> "I take this opportunity of saying that I think there is some inaccuracy of expression in the statute [the UK Bills of Lading Act, 1855]. It recites that, "by custom of merchants a bill of lading being transferable by endorsement the property in the goods may thereby pass to the endorsee." Now the truth is that the property does not pass by the endorsement, but by the contract in pursuance of which the endorsement is made. If a cargo afloat is sold, the property would pass to the vendee, even though the bill of lading was not endorsed."

Prior to September 1992 as was mentioned above, the state of law on bills of lading was governed by *The Bills of Lading Act*, 1855.[133] This legislation was an attempt by the English legislature to bypass the problems arising from the doctrine of privity of contracts, by infusing a statutory form of assignment under section 1. of the Act. In essence, when they fulfilled all criteria

---

problems posed in the case of *Vita Food Products*. Hence, under Article 10 of these rules the paramount clause is not required.

Finally, the Hamburg Rules (Adopted on March 3, 1978 in Hamburg in force as of November 1, 1992.) which apply to all contracts of carriage by sea.(Article 2) Under the Hamburg Rules the plaintiff in a suit based on the bill of lading may choose the jurisdiction.(Article 21(1)) Suit may be instituted either: (a) the principal place of business of the defendant or the defendant's habitual residence, (b) the place where the contract is made as long as the defendant has a branch, office or agent in that place, (c) the port of discharge or loading, (d) any other place designated in the contract of carriage. Likewise, action may be instituted in a court where the carrying vessel or sister ships have been arrested (Article 21(1)(2)).

[130]Adopted in Brussels on August 25, 1924.

[131]Miller., N.I., "Bills of Lading and Factors in Nineteenth Century English Overseas Trade" (1957) 24 U. of Chicago L. Rev.257 at pp.267-297.

[132](1884) 10 App.Cas.74 (H.L.)

[133](1855) 18 & 19 Vict., ch. 111.

the endorsee was entitled to sue or be sued, on all terms, express or implied as though he had been an original party to the contract of carriage. The decision to connect transfer of contractual rights and liabilities to the passing of property led to some problems. For example where goods are shipped in bulk and are covered by several bills of lading, the act of endorsing one bill cannot transfer the ownership of a proportionate amount of cargo. This situation is well reflected in *Sterns, Limited v. Vickers, Limited*.[134]

In *Sterns and Vickers* 120,000 gallons of white spirit, being part of a larger quantity contained in a tank belonging to the storage company was handed over for delivery. After the quantity purchased being severed from the bulk, the spirit had deteriorated in quality. The Court was called upon to decide whether property in the undivided portion of the larger bulk had passed or not? In essence, the Court concluded that irrespective of whether the property in the undivided portion of the larger bulk had passed or not, when the delivery was accepted, the risk had passed to the buyer and as such the loss must be borne by him.

The basic problem in the above case law illustration, is that the buyer of undivided bulk must bear the responsibility of loss against the goods, but on the same hand he is not entitled to sue the carrier directly for such loss. The state of law was such, that the buyer needed the seller to either sue the carrier directly because property remained with him or assign the claim to the buyer. It is logical that the seller whom they have already paid need not concern himself with these situations. In the *Aliakmon* [135] the House of Lords concluded that the c.i.f. or c. and f. buyer, to whom the risk had passed, could not bring an action in negligence against the carrier.[136]

The *Aliakmon* case clearly enunciated that property in the goods is not relevant when dealing with risk allocation. However, the notion of ascertainment of goods is well reflected in the *British*

---

[134][1923] 1 K.B.79.

[135]The Times, April 26, 1986.

[136]Schmitthoff, C.M., Export Trade the Law and Practice of International Trade (London: Stevens and Sons, 1986) at 40.

Sales of Goods Act 1979, which requires ascertainment of the goods, prior to property in them can pass to the buyer. In undivided bulk sales, the ascertainment process usually does not take place until the goods arrive at the destination and the appropriate amount is separated from the bulk and delivered to the endorsee.[137] This interpretation is confirmed by *The Delfini*.[138] Here the Court suggested that in a similar scenario it was not necessary for property in the goods to pass simultaneously with the endorsement. However, it was necessary when it did pass on ascertainment that there is a casual link with the previous endorsement. Hence, when bulk goods were lost in transit, the endorsee would have no remedy under the contract, because he did not acquire property in the goods.

After almost a century, on September 16, 1992 *The Carriage of Goods by Sea Act,* 1992 [139] drafted by the Law Commission came into force. This new legislation was part and parcel of many years of trial and error and replaced the *Bills of Lading Act*, 1855.[140] This new English legislation states as follows: First, title to sue is now vested in the lawful holder of a bill of lading, the consignee identified in a sea waybill or the person entitled to delivery under a ship's delivery order, irrespective of whether or not they are owners of the goods covered by the document.[141] Second, they define the lawful holder of a bill of lading as a person in possession of the bill in good faith who is either: (a) identified in the bill as consignee, or (b) an endorsee of the bill, or (c) a person who would have fallen within categories a) or b) if he had come into possession of the bill before it ceased to be a document of title.[142]

In essence the bill of lading has the following results because of this *Act*: (a) the holder of a bill of lading controls the goods during transit. (b) The holder of the bill of lading according to section 2(1) the *Carriage of Goods by Sea Act* 1992, allows the 'lawful holder' of the bill of lading

[137]Wilson., John, *Supra Note* 123 at 148.
[138][1990] 1 Lloyd's rep. 252.
[139]U.K. 1992 c.50.
[140](1855) 18 & 19 Vict., ch. 111.
[141]S.2(1).
[142]S.5(2).

to sue, irrespective whether or not title to the goods has passed to him. As such the holder has standing to sue as if he were an original party. (c) The holder becomes subject to the liabilities pursuant to the contract when he demands delivery. (d) Finally, the holder is lawfully entitled to delivery of the goods upon presentation of the bill.[143] In essence this legislative situation reverses *Sterns v. Vickers* and the *Aliakmon* by the allowing the buyer to sue the carrier as if he were an original party to the contract of transport.

Like its English counterpart,[144] rules governing bills of lading may be found in *The Canadian Bills of lading Act.*[145] This Act details the rights and obligations of a holder of a bill of lading. Pursuant to Article 2 "*every consignee of goods named in a bill of lading, and every endorse of a bill of lading to whom the property in the goods therein mentioned passes on or by reason of the consignment or endorsement, has and is vested with all rights of action and is subject to all liabilities in respect of the goods as if the contract contained in the bill of lading had been made with himself.*" Therefore, a person who is not originally party to the contract of transport becomes an interested person and has available to him all legal recourses when the bill of lading has been assigned. One may deduce after reading Article 2 that ascertainment is not required for risk allocation. This is approach is consistent with the British interpretation and leads to the natural understanding that undivided bulk need not to be apportioned for risk allocation.

What is conclusive about the state of Canadian legislation is that Article 2 of *The Canadian Bills of Lading Act.*[146] requires property in the goods to sue the carrier. In essence, this situation is estoppel for the buyer, in that action against the carrier, for loss of or damage to goods without an assignment by the seller is legally impossible. What then is the future for this legal situation? Why has the law not changed? Unfortunately, there remain more questions than answers.

---

[143]Wilson., John, *Supra Note* 123 at 147.

[144]Braen, Andre, *Le droit maritime au Quebec* (Montreal: Wilson & Lafleur, 1991) at 265. The author suggests that the *Bill of Lading Act* (1855) 18 & 19 Vict., ch. 111. Forms part and parcel of the Canadian approach.

[145]R.S.C. (1985), ch. B-5.

[146]R.S.C. (1985), ch. B-5.

E. Residual Clauses and Risk [147]

We may amply describe article 69 as the residual rules regarding the passing of risk. Under paragraph (1) risk passes to the buyer when the goods are available for delivery but the buyer has failed to pick them up.[148] This situation envisions a contract that requires the buyer to arrange for the pick up of the goods from the seller's place of business.

Under paragraph (2) Convention qualifies the rule where the buyer is "bound to take over the goods at a place other than a place of business of the seller." This generally involves the buyer having to pick up the goods at a warehouse or other place designated by the seller. We illustrate this situation in the following scenario:

Illustration 2.A. An Accident on the Loading Dock

A contract of sale between seller X and buyer Y calls for Y to pick up 250 boxes of shoes from a third party's warehouse designated by the seller. All boxes are clearly marked to the buyer and are placed on the loading dock for pick up. After the loading and still on the grounds the buyer's truck is involved in an accident damaging the goods. Who is responsible?

Though this scenario is unique, the question remains how will the Convention apportion risk? In this illustration would the buyer be considered to have taken over the goods? Without the benefit of more detail stating that the buyer had partial control of the goods is plausible. Likewise, noting that the buyer or his agent has to take actual control over the goods which require the transfer of documents is relevant.

---

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

(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 contract 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.

[148]de Vires, H., *Supra Note* 95 at 501.

We know that article 69 requires good to be individualized before risk allocation occurs. This approach is consistent with the wording of article 67(2). However, undivided shares of fungible goods is poorly dealt within article 68 that deals with goods sold in transit. Textually it is possible that risk allocation may take place even when bulk goods are not apportioned. The Convention is vague, in that it provides no solution on the method of apportioning the loss between multiple buyers of undivided shares of fungible goods.

However, some authors suggest, that in a similar scenario loss may be divided on a prorated division to adduce the loss of each party. [149] Article 69(3) of the Convention makes it clear that "goods are considered not to be placed at the disposal of the buyer until they are clearly identified to the contract." It has also been put forward that where identification of the goods is for all intents and purposes inseparable from taking of delivery, the goods may be considered adequately identified when the seller simplifies the taking of delivery.[150]

The provisions of the Convention are deficient in dealing with sales of this nature. We recommend that buyers involved in this type of scenario undertake preventive measures. One solution is that buyers incorporate out-turn clauses in their contracts, which are generally employed in the oil trade. This type of clause makes the buyer responsible for only the goods that he actually receives at the end of the line.[151] Adding this clause, would alter the moment when risk passes from the seller to the buyer. When employing an out-turn clause in a contract, the CIF term should be considered incompatible as it would transfer the risk to the buyer.[152]

---

[149]Douglas E. Goodfriend: "After the Damage is Done: Risk of Loss Under the United Nations Convention on Contracts for the International Sale of Goods." (1984) 22 Colum.J. Transnat'l L. 589.

[150]Barry Nicholas, Goods Sold in Transit, in Commentary on the International Sales Law. The 1980 Vienna Sales Convention in (Bianca and Bonell eds., 1987) at 505.

[151]James J. Lightburn and Gawie M. Nienaber., "Out-Turn Clauses in CIF Contracts in the Oil Trade" (May 1987) 177 Lloyd's Mar. & Com. L.Q. at 178.

[152]Ibid. at 179.

F. Fundamental Breach and Risk [153]

Article 70 is applicable when during the contractual period "*the seller has committed a fundamental breach of contract.*" How does the seller's fundamental breach effect the risk of loss provisions? We shall examine this aspect in the following pages. However, prior to engaging the larger debate, one may ask the larger question as to the definition of *fundamental breach*? The idea of *fundamental breach* is aptly illustrated through the following situation:

Illustration 3.A.: Wet Wheat

Seller and buyer contract under which seller X from Canada agrees to sell 1000 bags of *high quality* wheat to buyer Y in Holland (The seller was not bound to assume the risk during transport). The wheat is shipped and upon arrival buyer Y discovers that 3 bags are not *high quality* wheat. May the buyer declare the contract avoided because of a fundamental breach? In all likelihood this type of situation would not constitute a fundamental breach pursuant to 49(1) of the Convention. However, during the transport of the wheat 300 bags were damaged by improper storage. May the buyer claim damages for the three bags of inferior wheat? Or may the buyer reject the whole shipment and declare the contract avoided for *fundamental breach* because of the 300 damaged bags?

Here Article 70 is not applicable for two reasons: (1) the shipment of three inferior quality bags of wheat was not fundamental; (2) The general rule of transfer of risk pursuant to Article 67 governs the case in that risk is transferred to the buyer when the goods are transmitted to the first carrier.

Illustration 3.B.: Wet Wheat

Conversely, if in the same example 900 of the 1000 bags where not *high quality* wheat the buyer would have the right to declare the contract avoided. Likewise, where the contract called for the seller to assume the risk in transport and 600 of the bags where destroyed because of improper storage, the buyer would have a right to avoid the contract for a fundamental breach.

What is conclusive, is that when there is a serious breach by the seller the buyer has a right

---

[153] If the seller had 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. Article 25 provides a definition of fundamental breach: a breach of contract committed by one of the parties 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.

to reject the goods and avoid the contract. In the above scenario, the buyer's right to avoid the contract is not based on the fact that the goods were damaged in transit, but rather because there was a fundamental breach. Likewise, the buyer may elect to declare a partial avoidance. Employing the provisions of Article 51 may do this, and therefore, avoid only the parts that were damaged.

Under this provision when the seller commits a fundamental breach, the buyer may also invoke his right to require the delivery of substitute goods. According to Article 46(2), in case of fundamental breach, the buyer can require delivery of substitute goods.

The purpose of examining latent defects with regards to risk allocation is only relevant when the defect is of quality and nature that could be considered a fundamental breach. Let us consider the following scenario:

Illustration 4.A. "Grade B" fabric

Seller X agrees to sell 1000 meters of "Grade A" fabric to buyer Y in Montreal. buyer Y arranges shipment from seller's country. During the overseas voyage goods are damaged. Buyer accepts shipment and risk over the goods. Remaining goods are manufactured into superior pants. During the manufacturing process by Y a discovery is made that the fabric is not "Grade A". How does this situation affect risk allocation?

In the above scenario according to Article 36(1) the seller is responsible for the lack of conformity at the time risk was allocated. This is so because the contract called for "Grade A" fabric while in fact they delivered a lower grade. For all intents and purposes the seller has breached the contract. We could put forward that the risk allocation should be nullified and remain with the seller because he committed a fundamental breach by providing a lower grade of fabric. Conversely, one may argue that the lower grade of fabric is not a fundamental breach and risk allocation remains with the buyer and that the buyer's remedy is reduction of price.

Chapter Two- International Chamber of Commerce Rules

I. General [154]

A. Early History of Trade Terms

This section will briefly review the origins of the International Chamber of Commerce, Rules for the Interpretation of Trade Terms.[155] It seems that to know where one is going one should have any idea where one came from. It is my belief that the same maxim holds true to the subject at hand. Therefore, it is appropriate that some pages are allocated to tracing the historical roots of trade terms. Consequently of the latter, the reader will gain greater appreciation of the workings of the Incoterms in subsequent sections of this work.

International trade terms are designed to define the method of delivery of goods sold. [156] The International Chamber of Commerce[157] has been a catalyst for the unification of terms used in contracts of foreign trade. In 1936 the ICC published a set of international rules for the interpretation of trade terms approved by the Congress of Berlin in 1935.

The origins of these commercial terms reflected commercial usage developed over time via abstract state practices that were progressively created to delineate the responsibilities of parties to a contract that involved the carriage of goods. [158] The harmonisation of trade terms was born out of

---

[154]Derains, Y., et Ghestin, J., *La Convention de Vienne sur la vente internationale et les incoterms* (Paris: L.G.D.J., 1989), Eisemann, F., et Derains, Y(3 eds) *La pratique des incoterms*(Paris: Jupiter, 1988), Eisemann, F., *Usage de la vente commerciale internationale(Incoterms)* (Paris: Jupiter, 1972), Evans, P., "FOB and CIF Contracts" (1993) 67 Australian Law Journal. 844, Putzeys, Jacques., *Les Ventes Internationales et les Transports* (Louvain: Louvain-la-Neuve, 1992), Ramberg, Jan., *Guides des incoterms 1990* (Paris: ICC Publishing, 1991).

[155]These terms will be examined in greater detail below.

[156]Cheng, C.-J., *Supra Note* 7 at 92.

[157][Hereinafter "ICC"].

[158]Derains, Y., et Ghestin, J., *Supra Note* 154 at 4.

the need to insure standard interpretation of commercial terms, which would be free of divergent national interpretation. This divergence was an obstacle to the development of international trade and explains why the ICC attempted to normalize trade terms through a unified code of commonly used terms.

The common trade terms of Free on Board ("FOB") and Cost Insurance and Freight ("CIF") helped regulate international commercial sales for well over a century.[159] It is unclear as to the exact origins of these terms however. I shall attempt to provide some historical background on the origins of two commonly used terms to show the evolution of the modern trade terms employed in international commerce.[160]

The FOB term is one of the very first [161] terms to regulate international sales, as previously mentioned. One may trace its origins through the annuls of case law to the nineteenth century.[162] To understand the development of the FOB term one need necessarily comprehend the shipping practices at the time of its inception.

In the period ending the late eighteenth century and early nineteenth centuries, before the creation of modern shipping techniques, the commercial milieu was lacking such items as the bill of lading or the telegraph in the commercial field.[163] During this period, merchants would charter vessels for individual adventures, and would assume all risks involved. It would be common for the merchant to accompany his vessel on many ports of call, and to supervise the purchase of various goods. The merchant would place orders for merchandise and have them delivered to his vessel for inspection and final approval. It is plausible that the FOB term had its origins in this type of activity.

---

[159]These terms can be judicially traced back to the nineteenth century See namely, *Wackerbarth v. Masson* (1812) 3 Camp. 270; and *Craven & Another v. Ryder* (1816) 6 Taunt. 433 for F.O.B. cases and *Tregelles v. Sewell* (1862) 7 H.&N. 574 or *Ireland v. Livingston* (1871) L.R. 5 H.L. 395 for cases involving C.I.F. terms.

[160]Sassoon, D.M., "The Origin of FOB and CIF Terms and the Factors Influencing their Choice," (1967)Journal of Business Law at 32.

[161]Evans, P., "FOB and CIF Contracts" (1993) 67 Australian Law Journal. 844.

[162]*Supra Note* 154.

[163]Sassoon, *D.M., Supra Note* 160 at 33.

Likewise, it seems coherent why under a FOB term the buyer is considered the shipper.

In the historical case of *Cowas-Jee v. Thompson* [164] we are left with the impression by Lord Brougham as to the true essence of the FOB contract. [. . .]

> "It is proved beyond all doubt, indeed it is not denied, that when goods are sold in London free on board, "the cost of shipping them falls on the seller, but the buyer is considered as the shipper."

This was confirmed some years later in *Perras v. Grace*[165] by Judge Caroll who clearly stated:

> "The contract of sale FOB appears to have had its origin in cases where the sold goods were to be sent to the buyer by water. In such cases it was understood that it was for the buyer to see that a ship was available to the seller."

With time and a modernisation of shipping, trade practices evolved in consequence thereof. The arrival of the telegraph, the postal system and the steamship had a positive impact on the development of international trade. During this period the *Bills of Lading Act of 1855*[166] was adopted. As commerce expanded and developed, the use of standardized trade terms became ever more prevalent in international sales.[167]

As previously mentioned above, the CIF term evolved in stride with commerce itself.[168] The term itself was initially "c.f.& i. "and meant that the buyer no longer had to act as shipper. In fact because of the buyers inability under this term to inspect the goods, payment too would be deferred to a later time.[169] This term required the seller to obtain insurance to protect his financial interests. As is logical under this term, the buyer was greatly advantaged, in that he was not required to arrange

---

[164](1845) 3 Moore Ind. App. 422, 429.

[165](1918) 27 B.R.343.

[166](1855) 18 & 19 Vict.,ch. 111. The modern Bill of Lading allowed the holder the right to sue on the contract of affreightment. This right did not previously exist. See: Sassoon, D.M. *Supra Note* 160 at 34.

[167]This aspect will be covered in the next section dealing with the history underlining the modern trade terms.

[168]Evans, P., *Supra Note* 161.

[169]Sassoon, D.M., *Supra Note* 160 at 34-35.

delivery and could simultaneously benefit from liberal forms of payment. It is conceivable why the CIF terms rapidly overtook the FOB term in popularity and usage.

In *Ross T. Smyth & Co. Ltd. V. T.B. Baily, Son & Co.*[170] Lord Wright clearly stated the predominance of the CIF contract: [. . .]

> "Which is more widely and more frequently in use than any other contract used for the purposes of seaborne commerce. An enormous number of transactions, in value amounting to untold sums, are carried out every year under c.i.f. contracts."

Before developing the modern history of trade terms, it is noteworthy that the historical development of these terms will in essence act as the foundation for the modern creation of commonly used trade terms.

---

[170] [1940] 3 All E.R. 60, 68.

B. Modern development of Incoterms

The origins of Incoterms can be divided into two distinct historical periods. The first period of 1920 to 1976 is dominated by the codification of existing trade terms. The second historical stage appears to have its beginning in 1977 with the creation of modern commercial terms. This second historical stage is presently in effect.

The development of Incoterms is traceable back to the days after the First World War.[171] This situation was predicated on the inability of the international community to delineate the respective duties of buyers and sellers in an international contract. At the first congress of the ICC held in Paris (1920) the members agreed to establish a working group to examine the situation. The working group, composed of member states, undertook an immense comparative research on the issues submitted by the congress. Sometime afterwards, a report was prepared for the congress to review and approve.

Following the creation of the initial terms in 1928, the ICC published the first commercial terms.[172] The commercial terms of 1928 were composed of six trade terms and consisted of an elaborate explanation of the various terms and their interpretation. These terms were explained in a way that clarified possible contradictions, as they were the sums of more than thirty countries input. These trade terms were unique in that for the first time by the establishment of international rules. The obligations of a buyer and seller were predetermined according to uniform commercial terms.

However, the ICC decided in 1936 to publish for the practitioner of international commerce a set of rules governing trade terms. These terms would be known as Incoterms[173] and would help

---

[171]See Bernd Von Hoffmann in Volken, P., and Petar, S., *International Sale of Goods* (Dubrovnick Lectures)(New York:Oceana, 1986) at 279.

[172]Derains, Y., et Ghestin, J., *Supra Note* 154 at 5.

[173]Incoterms is a combination of the first syllables of *I*nternational and *C*ommercial with the added word *Terms*.

standardize and create uniformity of international trade terms.

Some ten years after the first introduction of the Incoterms, the ICC updated their 1936 trade terms. They introduced this revision at the ICC congress held in Vienna in 1953.[174] This new text[175] was even more powerful than the original as it was adopted by most delegates to the congress, therefore, giving the Incoterms a form of international legitimacy. To avoid any possible confusion the congress agreed that the new citation of Incoterms should incorporate the year of the revision to avoid any possible confusion with the Incoterms of 1936(hence, the common used form Incoterms preceded by the year of publication i.e.: 1953 or 1990 etc.)

The official introduction of the Incoterms 1953 clearly defined the purpose of the Incoterms:

> "The purpose of the "Incoterms" is to provide a set of international rules for the interpretation of the chief terms used in foreign trade contracts, for the optional use of business men who prefer the certainty of uniform international rules to the uncertainty of the varied interpretations of the same terms in different countries."[176]

The Incoterms of 1953 attempted to normalize the rules governing the duties and obligations of the buyer and seller to an international contract. There appears to be three key results from the 1953 Incoterms. First, the Incoterms defined with the maximum amount of detail the obligations of the parties. Second, the new Incoterms were modified to reflect the most current practices of international commerce of the time, so that more parties to an international commercial contract would adopt them. Finally, in the case where current practices were notably divergent with the Incoterms, the main principal was retained that the stipulated price in a contract concluded pursuant to Incoterms 1953 would include the minimum obligation of the seller, and that the parties were free to stipulate in their contract, if they so desired, the obligations beyond the obligations established by the incorporation of the Incoterms 1953.

---

[174] Cheng, C.J., *Supra Note* 7 at 163.
[175] See ICC publication number 166.
[176] Ibid.

The 1953 Incoterms introduced nine of the most frequently used commercial terms,[177] in international commerce. Following the 1953 modification the ICC modified the terms again in 1967. This modification is categorized by the clarification of two trade terms initially discarded in 1953. Following this modification, in 1976 the Incoterms changed again by adapting the trade terms to modern international trade. This version of the Incoterms considered the development of air transport and added FOB Airport to its list of terms.

In 1977 there was an overwhelming cry to revise the Incoterms so that they could respond to the new techniques involved in the transportation of goods, namely, pallets, roll on and roll off and containers.

As a result, the ICC entrusted Professor Jan Ramberg [178] from the University of Stockholm, with the revision of the Incoterms. The main focus of the study was the effect of the new techniques in the transport of goods, the common practice of documentary exchange and the electronic transfer of documents. After an in depth examination and consultation with individuals and professionals in the milieu, Ramberg deposited his study in September of 1978. This document[179] was a lucid attempt of solving and adapting the Incoterms to modern aspects of transport.

One conclusion of the Ramberg report was that certain traditional commercial terms found in the Incoterms were not adapted to the recent changes in international sales.[180] A compelling example was the FOB point term's inability to ponder the inclusion of containers before on loading. Likewise, the use of roll on and roll off transport was not defined under the previous Incoterms.

It was also established that the use of Bills of Lading as an essential document under the

---

[177]Examples of the new terms: Ex Works (EXW), Free along side (FAS), Free on Board (FOB), Cost and Freight (C&F), Cost Insurance and Freight (CIF).

[178]Derains, Y., et Ghestin, J., *Supra Note* 154 at 6.

[179]ICC document number 460/234 of September 10, 1978.

[180]Putzeys, Jacques., *Les Ventes Internationales et les Transports* (Louvain: Louvain-la-Neuve, 1992) at 18.

term's C&F and CAF attested to the cargo being on loaded became useless. This was attributed to the fact that the cargo was not delivered directly on board but handed over to a transporter. There was also a common problem of cargo arriving at its port of destination with the relevant documentation arriving sometime afterwards because of slow postal service.

Consequently, the ICC published a revised set of Incoterms in 1980. These new Incoterms, reflected the modern trends in transport and changes to the international commercial community. The new Incoterms contained fourteen terms[181] and their purpose was to provide businessmen with uniform trade terms.[182]

C. The Incoterms Revision of 1990

Incoterms have been revised to take into consideration the modern techniques of transport and have consolidated certain terms while others have been rearranged. This has been done to ensure compatibility with the modern developments of electronic data interchange.[183]

The underlining reason for the 1990 Incoterms was the need to adapt terms to the common use of EDI.[184] The 1990 Incoterms allows this type of modern information transferral to take place in the vacuum of the Incoterms. Parties that need to provide documents such as commercial invoices, bills of lading, customs clearance documents, proof of delivery and the like, may do so through EDI.

The 1990 Incoterms take into consideration the changed techniques, particularly with respect to the use of container shipment, multi-modal transport and roll on and roll off traffic with vehicles

---

[181]Ex Works(EXW), Free on Rail and Free on Truck(FOR/FOT), Free Carrier(FRC), Free Alongside Ship(FAS), Free on Board(FOB), FOA Airport, Cost and Freight(CFR), Cost Insurance and Freight(CIF), Freight Carriage paid to(DCP), Freight Carriage and Insurance Paid to(CIP), Ex Ship(EXS), Ex Quay(EXQ), Delivered at Frontier(DRF), and Delivered Duty paid(DDP).

[182]Kritzer, A.H., *Supra Note* 39 at 253.

[183]Putzeys, Jacques., *Supra Note* 180 at 30.

[184]Nicoll, Christopher., "E.D.I. Evidence and the Vienna Convention" (1995) January Journal of Business Law at 21.

and railway wagons. For example in the 1990 Incoterms, the term Free Carrier (FCA) has been modified to include all types of transport despite the mode or combination of different modes. Consequently, as a result of this newly defined terms, the terms FOR, FOT and FOB Airport have been removed from the 1990 version of Incoterms.

The 1990 Incoterms have been grouped into four categories.[185] These groups have been divided into four basic categories that reflect the various obligations. In Ex Works, the seller makes the goods available to the buyer at his premises. In the F terms (FCA, FAS AND FOB)the seller is obliged to deliver the goods to a carrier designated by the buyer. The C terms (CFR, CIF, CPT AND CIP) the seller is obliged to contract for carriage, however, he does not have to assume the risk of loss of or damage to the goods or the supplemental cost associated due to events after the dispatch of shipment. Finally the D terms (DES, DEQ, DDU, AND DDP), the seller is obliged to bear all costs and risks needed to deliver the goods to the buyer at his country of destination.

[185]Group E departure, Group F main carriage unpaid, Group C main carriage paid, Group D arrival.

II. Risk Allocation

A. Visual Representation of Risk Allocation

Under some traditional trade terms such as the CIF and FOB contract, risk of loss passes to buyer when the goods either pass the ship's rail or are placed on board the vessel. The modern allocation of risk under the Incoterms takes place at precise moments during the physical movement of the goods. This section will examine when risk is passed from seller to buyer when an appropriate Incoterm term is employed. This being stated, we shall examine in greater detail in Part II how the process of risk allocation functions.

<u>Illustration 5.A. Risk Management.</u>[186]

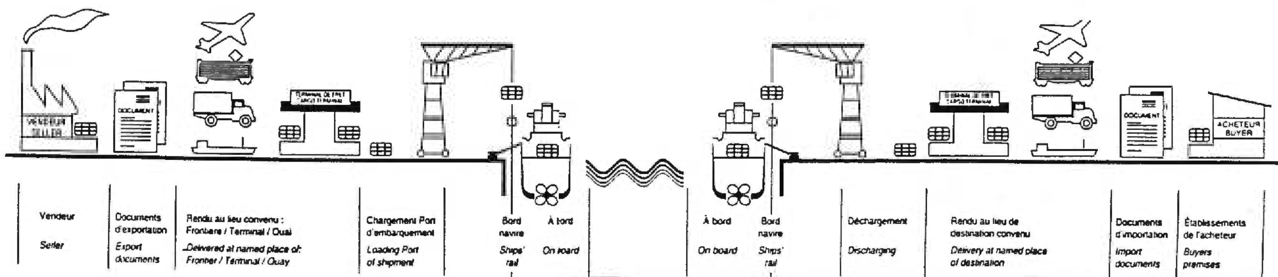

Illustration 5.A above, provides a visual representation of the normal flow of goods from seller to buyer. During the process of handing over the goods there exist many calculated and unforeseen impediments. We may pose the following question: When does the responsibility for risk of loss of or damage to the goods transfer from seller to buyer? This question must be answered with another question: Which Incoterm has the parties elected to govern their relationship?

---

[186] In order to understand the delicate balance of risk allocation, I have incorporated the diagram above to facilitate this examination.

B. Defining risk

When Incoterms refers to transfer of risk in A.5. and B.5., they use the expression 'bear all risks of loss of or damage to the goods'. This reference refers to material loss and not to other forms (i.e.: nonconformity or in-execution of contract).[187] Under the Incoterms, even though the buyer may not receive the goods because of loss or lack of conformity with the contract, he is required to pay the price. This is called 'price risk'. In reality, Incoterms is not the appropriate source of law for loss when it is not attributed to the delivery. Parties seeking remedy should verify the provisions of the contract (governing law).

In certain situations risk may be prematurely passed to the seller even before delivery. This may occur when the buyer does not respect the procedure in order for the seller to deliver the goods. It may also happen when the buyer does not take delivery when required. Therefore, to avoid this situation the Incoterms requires the seller to notify the buyer when delivery may take place (B.7.) Also under the 'F' terms, the buyer must give notice to the seller for transport. This is also found under the DDU term when the buyer must clear the goods for import. Failing timely action, the seller will not be able to deliver the goods to the destination. In these scenarios the buyer will support the risks for loss of or damage to the goods.

C. Risk allocation

Some authors suggest that risk allocation take place in two groups under the Incoterms.[188] There are direct deliveries and indirect deliveries. Direct delivery includes the following terms: EXW, DES, DEQ, DDP and DAF and are direct when the goods are handed to the buyer himself. Indirect delivery includes the following terms: FCA, FAS, FOB CFR, CIF, CPT, CIP, DDU and are indirect when the goods are handed to a person who will execute the obligation of delivery.

---

[187] Ramberg, Jan., *Guides des incoterms 1990* (Paris: ICC Publishing, 1991) at 35.

[188] Audit, B., *La vente internationale de marchandise de la Convention des Nations-Unies du 11 avril 1980* (Paris: L.G.D.J., 1990) at 130. See also ICC publication number 460 which refers to the four categories of delivery under the Incoterms.

I have considered the above, and elected to supplement the direct and indirect notion of risk allocation with a grouping of four basic forms. They may be categorized as follows: (1): Placed at the disposal of the buyer at a named place; (2): Delivered into the custody of a carrier; (3): Delivered alongside the named vessel; (4): Pass the ship's rail.

Incoterms envision several terms that allocate risk when the goods are placed at the disposal of the buyer at a named place. The first term to allocate risk in this manner is EXW. According to this term (B.5.) The seller must bear all risks until the goods have been placed at the disposal of the buyer. We find reference to this method of risk allocation in the DAF term (named place at frontier). According to this term risk of loss is transferred when the goods are placed at the disposal of the buyer at the named place at the frontier (A.4. B.5.). Unlike the EXW term, the DAF term requires the goods to be placed at the frontier in order for risk to pass to the buyer. Ensuing, the DES term requires the seller to place the goods at the disposal of the buyer on board a vessel at the named port of destination (A.4. B.5). Risk allocation under the DEQ term requires the seller to place the goods on the quay or wharf at the agreed port of destination (A.4. B.5.). Likewise under a DDU term the seller must contract for the carriage of the goods to the agreed point at the named place of destination (A.3(a)), risk is subsequently given to the buyer when the goods are at his disposal (B.5.) Finally risk allocation under a DDP term involves the most responsibility for the seller (A.4. B.5.)

The notion of delivery into the custody of a carrier is the pivotal point in risk allocation under the FCA, CPT and CIP terms. Essentially, under these terms, allocation of risk occurs when the seller hands the goods over to the carrier for transmission to the buyer. This is well illustrated in the FCA term (A.4.) Under this term there are multiple scenarios when risk is allocated. Without the benefit of an extensive examination, risk is allocated when the carrier takes possession of the goods. If there are subsequent carriers as with a CPT and CIP term, risk is allocated when the first carrier takes possession (A.4.)

The only term that allocates risk when the goods are delivered alongside the vessel is the

FAS term. According to this term (A.4.) The seller must deliver the goods alongside the vessel at the place named by the buyer. Risk of loss of or damage to the goods is transferred to the buyer when they have been so placed (B.5.).

The traditional barrier for risk allocation is the ship's rail. This is well represented in the FOB, CFR and CIF. According to these terms (A.4. B.5.) Risk is allocated to the buyer when the goods pass the ship's rail.

One may conclude that risk allocation under the Incoterms is practical as it provides specific moments in time when risk passes from seller to buyer. These terms apportion risk allocation in advance and allow the respective parties to understand their responsibilities and obligations. Detailed oriented terms diminish the possibility for misinterpretation and facilitate the execution of a contract that involves delivery of goods.

Chapter Three: Uniform Commercial Code [189]

I. General

A. Historical Overview

The relative importance of tracing historical development is only appreciated with the examination of the subject matters contemporary paradigm. It is the goal of the following pages to trace the development of the relevant legislation in the United States with regards to the allocation of risk in sales contracts. We should state in advance that the true scope and purpose will only be revealed in the section examining and comparing the topic in question.

There are presently two sales laws in effect in the United States: There is the Convention and Article two of the *Uniform Commercial Code.*[190] These two instruments function in harmony due to their sphere of application. The Convention applies only to international sales while Article two of the U.C.C. applies to domestic sales.[191] According to the law of the United States, the Convention has treaty status and therefore prevails against any local law that may conflict with it.[192]

---

[189]Gabriel, H., "The Battle of the Forms: A Comparison of the United Nations Convention for the International Sale of Goods and the Uniform Commercial Code" (1994) 49 Business Lawyer.1053. Hancock, S.F., "A Uniform Commercial Code for International Sales? We have it now." (1995) 67 New York State Bar Journal.20, Honnold, J., "The New Uniform Law of International Sales and the UCC: A Comparison" in Symposium on international sale of goods convention (1984) 18 The International Lawyer.21., Shivbir. G., "Risk of loss in Goods sold during transit: A Comparative study of the U.N. Convention on Contracts for the International Sale of Goods, The U.C.C., and the British Sale of Goods Act." (1991) 14. Loy.L.A. Int'l & Comp.L.J.93., Stocks, M., "Risk of Loss Under the Uniform Commercial Coda and the United Nations Convention on Contracts for the International Sale of Goods: A Comparative Analysis and Proposed Revision of UCC Sections 2-509 and 2-510" (1993) 87 Northwestern University Law Review.1415., Winship, P., "Domesticating International Commercial Law: Revising UCC Article 2 in light of the United Nations Sales Convention" (1991) 43 Loy.L.Rev. 45.

[190][hereinafter "U.C.C."].

[191]Winship, P., *Supra Note* 189 at 1.

[192]U.S. Constitution art.II, s2, cl.2 "The president shall have power, by and with the advice and consent of the senate to make treaties." The supremacy clause states as follows, art.VI,cl.2 "All treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land."

We must understand that before 1890 the Commercial law of the United States was predominantly state generated.[193] Historically states derived their commercial practice from the system of British Common Law. This system eventually moved toward a system of codified law.[194] Interesting enough, Article two of the UCC was conceived to replace the *Uniform Sales Act of* 1906, and this Act was itself a replacement for the *British Sales of Goods Act of 1893*. [195]

B. The First Code

Due to the political structure of the United States, the States had legislative sovereignty, this meant they could develop their own principles relating to commercial law. This situation, as one could imagine, caused a degree of disarray among the different states. To bring uniformity to this situation, a uniform commercial code was created in 1958. Forty-nine of the fifty states presently enforce this code, saving Louisiana. Louisiana's situation is unique both legally and politically as a former French colony, and explains why they have not adopted the U.C.C.

The purpose of the U.C.C. was to create a code in the structure and in the sense of the French and German codes. According to Karl Llewellyn, often regarded as the father of the U.C.C. saw the code as a combination of a case-law and code combined.[196] This explains why the U.C.C. is divided into nine articles, encompassing various aspects of commercial law. The sale of goods is contained in article two, commercial paper and bank deposits and collections in articles three and four, letters of credit in Article five, bulk transfers in article six, documents of title in article seven, investment securities in article eight, and finally secured transactions in article nine.

We should note that the U.C.C. is not considered a comprehensive codification of U.S.

---

[193]Bunn, C., Snead, H., and Speidel, R., *An Introduction to the Uniform Commercial Code* (Michie Company, Virginia:1964) at 1.

[194]Fox, W., *International Commercial Agreements* (Deventer: Kluwer Law and Taxation, 1988) at 23.

[195]Speidel, R.E., "The Revision of UCC Article 2, Sales in Light of the United Nations Convention on Contracts for the International Sale of Goods." (1995) Northwestern Journal of International Law and Business at 167.

[196]Bunn, C., Snead, H., and Speidel, R., *Supra Note* 193.

commercial law.[197] It is however considered a principal source for ascertaining the commercial law of the United States. The use and incorporation of the U.C.C. in choice law clauses of an international contract are common due to its ease of construction.

---

[197]Ibid. at 24.

II. Risk Allocation

A. Delivery and Risk of Loss

The risks of loss provisions contained in the U.C.C. are effective in forty-nine states and have not been changed since 1958. In November 1987 various academics[198] submitted to the Permanent Editorial Board of the Uniform Commercial Code [199] a proposal for a study of Article two. After this proposal a select group under the guide of Professor Speidel was mandated to [. . .]

> "consider whether Article 2 should be revised and, if so, to report on what revisions might be required."[200]

This group completed its study on March 1, 1990.[201] The group worked with the premise that uniformity in the realm of commercial law in the United States has always been considered an important objective for lawmakers.[202] It is therefore understandable why the U.C.C. needed to be re-examined because of the ratification of the Convention. After examining the data, the study group submitted a final report to the PEB on March 5, 1991. Its recommendation was to amend Article two and that it be redrafted to reflect the changing environment. Though the 1987 proposal does not allude to the Convention, the group's preliminary report makes various references.[203]

In essence the drafting committee position was apprehensive of the adaptation of the U.C.C.

---

[198]Speidel and C. Mooney Jr., Proposal for a Preliminary Study on a Possible Project for the Revision of Article 2, UCC (November 23, 1987).Published in the American Bar Association .

[199]Permanent Editorial Board for the Uniform Commercial Code [Hereinafter PEB].

[200]See Study Group Uniform Commercial Code, Article 2 Preliminary Report at 6 (March 1, 1990)[Hereinafter Preliminary Report].

[201] Ibid. Preliminary Report.

[202]Speidel, R.E., *Supra Note* 195 at 165.

[203]*Supra Note* 200, Preliminary Report makes reference to the Convention and its effect on future change in the UCC at the following points in the report: 51(cites Article 11); 59 n.21(cites the Convention's parol evidence rule); 116(urges the committee to take into consideration the Convention when reviewing the F.A.S. term); 146 n.23(citing the need to limit the definition of carrier).

considering the Convention.[204] They concluded that a vertical uniformity rather than a mirror image incorporation was necessary. It seems that there are seven basic reasons for this decision which will be enumerated in the conclusion of this work.

The study group suggested only minor alterations to this provision and during their analysis used the relevant commentary on the Convention.[205] The Convention and the U.C.C. examine the passage of risk in a comparable fashion.[206] The study group examined the provisions of 2-510 and "given the tenuous nature of the reallocation policy in section 2-510", recommended that it be repealed.[207]

The provisions covering risk of loss under the U.C.C. are found in sections 2-509 and 2-510. It is of interest to note that the Convention's provisions on risk are patterned after the U.C.C.[208]

The theory underlining Section 2-509 is the acceptance of the contractual approach rather than the arbitrary shifting of risk with the property in the goods.[209] In this provision the question of property or title is not relevant in ascertaining the bearer of risk.[210] This section is only applicable when the seller has committed no breach of contract. In cases of breach, the provisions of section 2-510 will apply. It will be relevant to examine each provision of Section 2-509.

---

[204]Ibid. at 171.

[205]*Supra Note* 200, Recommendation A2.5(6).

[206]Winship, P., "Domesticating International Commercial Law: Revising UCC Article 2 in light of the United Nations Sales Convention"(1991) 43 Loy.L.Rev. at 71.

[207]*Supra Note* 200, Recommendation A2.5(6).

[208]Winship P., "The New Uniform Law for International Sales and the UCC: A Comparison" (1984) 18 The International Lawyer at 27.

[209]Uniform Laws Annotated Volume 1A Uniform Commercial Code Sections 2-301 to 2-515 (West Publishing, St. Paul: 1989) at 777. Commentary 1.

[210]Shivbir. G., "Risk of loss in Goods sold during transit: A Comparative study of the U.N. Convention on Contracts for the International Sale of Goods, The U.C.C., and the British Sale of Goods Act."(1991) 14. Loy.L.A. Int'l&Comp.L.J.93.

Section 2-509 subsection (1) is applicable when the contract "requires or authorizes" the shipment of goods. The wording of this provision is supposed to function with the section on shipment by seller.[211] The subsection should be read in light of section 2-319 on FOB and FAS terms and 2-320 on CIF and C&F terms.[212]

Further, according to subsections (1)(a) risk passes when "goods are duly delivered to the carrier," in order for this to be accomplished a contract must be entered into with a carrier, this carrier must satisfy the requirements on the section on shipment by the seller. Likewise, the delivery must be made with the ability of enabling the seller to tender.[213]

Despite the fact that a contract involves delivery of the goods at the seller's place of business or the like, the seller cannot transfer risk to the buyer until the buyer is in actual receipt of the goods. Even if the buyer has paid for the goods and has received notice from the seller that the goods are ready, risk is not transferred until receipt occurs.[214] The premise of this provision is that the seller is better able to control the goods as they are in his possession.

When parties fail to specify the appropriate term for a contract of sale i.e.: CIF, FOB, there is a presumption created under the U.C.C. that the parties intended the seller to ship the goods to the buyer. However, this presumption does not require the goods to be delivered to a particular place, also, the seller does not retain the risk of loss during transit.[215]

Under Section 2-509(3) when the seller and buyer agree that the goods sold are to remain with a bailee, the provisions of tender of delivery apply on the point of transfer of risk.[216]

---

[211] *Supra Note* 209 at 777. Commentary 2.

[212] White, J.J., and Smith, R.S., Uniform Commercial Code (Fourth Edition) (West Publishing: St Paul, 1995) at 252.

[213] *Supra Note* 209 at 777. Commentary 2.

[214] *Supra Note* 209 at 777. Commentary 3.

[215] See for example: *Droukas v. Divers Training Academy*, Inc., 376 N.E.2d 548,553, 24 U.C.C. Rep.Serv.118,122(Mass. 1978).

[216] *Supra Note* 209 at 777. Commentary 4.

Subsections(2)(a) explains that risk passes when the bailee has received a negotiable instrument. We should note that subsection (2) does not frequently cause problems for the Courts.[217]

Simply stated, Section 2-509(3) acts as a residual clause which encompasses scenarios that fail to fit within the scope and application of the other terms. In essence, this subsection will apply when the other subsection, namely paragraphs (1) and (2) do not apply. Further, the residual clause establishes two sets of rules: one rule for the merchant seller and another for the non merchant sellers.[218]

Section 2-509(4) allows the provisions of this article to "be subject to contrary agreement of the parties." According to the commentary this should be interpreted as meaning "unless otherwise agreed."[219] It has been long accepted by the Courts that parties may derogate from these provisions. [220] However, any variation should be clearly stated and undertaken before the passage of risk.[221]

Conversely Section 2-510 [222] subsection (1) is present to insure that the seller does not attempt to pass risk to the buyer if he has not respected the terms of the contract. In other words, failing contractual compliance, the passage of risk is not passed to the buyer.[223] This subsection has produced little litigation.[224]Where a breach of contract has occurred by the one in control of the goods and he is the aggrieved party, whatever damage is uncovered it is the responsibility of the

---

[217]White, J.J., and Smith, R.S., *Supra Note* 212 at 256.

[218]Ibid. at 258..

[219]*Supra Note* 209 at 777. Commentary 5

[220]For example see: *A.M. Knitwear Corp. V. All America Export-Import Corp.,* 41 N.Y. 2d, 390 N.Y.S.2d 832, 359 N.E.2d 342, 20 UCC 581 (1976).

[221]For example see: *Hayward v. Postma,* 31 Mich.App. 720, 188 N.W.2d 31, 9 UCC 379 (1971).

[222](1) Where a tender or delivery of goods so fails to conform to the contract as to give right of rejection the risk of their loss remains on the seller until cure or acceptance.

(2)Where the buyer rightfully revokes acceptance he may to the extent of any deficiency in his effective insurance coverage treat the risk of loss as having rested on the seller from the beginning.

(3)Where the buyer, as to conforming goods already identified to the contract for sale, repudiates or is otherwise in breach before risk of their loss has passed to him, the seller may to the extent of any deficiency in his effective insurance coverage treat the risk of loss as resting on the buyer for a commercially reasonable time.

[223]*Supra Note* 209 at 788. Commentary 1.

[224]White, J.J., and Smith, R.S., *Supra Note* 212 at 261.

party in breach.[225]

B. Reviewing the Modified Risk of Loss Provisions

As enumerated above, the PEB suggested several modifications to the provisions regarding risk of loss. The arrival of the Convention, particularly Article Seventy displayed the obsolescence of section 2-510.[226] Article Seventy allowed the aggrieved party to avail himself of the remedy, no matter whether the injured party is in fact the buyer or the seller. In effect, this provision encompasses a wider range of commercial situations.[227]

The provision's Section 2-509 [228] has been modified in minor ways to comply with the

---

[225]*Supra Note* 209 at 777. Commentary 3.

[226]Stocks, M., "Risk of Loss Under the Uniform Commercial Coda and the United Nations Convention on Contracts for the International Sale of Goods: A Comparative Analysis and Proposed Revision of UCC Sections 2-509 and 2-510" (1993) 87 Northwestern University Law Review.1452.

[227]Ibid.

[228]2-509 Risk of Loss(in the absence of Breach)The text that appears in brackets with the double underline is the original text that has been removed subsequent to the PEB recommendation. The text that appears underlined is the new text added.

(1) Where the Contract requires or authorizes the seller to ship the goods by carrier

(a) if it does not require him to deliver them at a particular destination the risk of loss passes to the buyer when the goods are duly delivered to the first carrier even though the shipment is under reservation(section 2-505); but

(b) if it does require him to deliver them at a particular destination and the goods are there duly tendered while in the possession of the carrier, the risk of loss passes to the buyer when the goods are there duly so tendered as to enable the buyer to take delivery.

(2)Where the goods are held by a bailee to be delivered without being moved, from the bailee's possession, the risk of loss passes to the buyer

(a) on his receipt of a negotiable document of title covering the goods; or

(b) on acknowledgement by the bailee to the buyer of the buyer's right to possession of the goods; or

(c) after his receipt of a non-negotiable document of title or other written direction to deliver, as provided in subsection (4)(b) of section 2-503, except where goods are sold in transit, in which case the risk of loss passes retroactively to the buyer from the time the goods were duly delivered by the seller to the carrier on which the goods were located when sold.

(3)In any case not within subsection (1) or (2), the risk of loss passes to the buyer on his receipt of the goods (if the seller is a merchant; otherwise the risk of loss passes to the buyer on tender of delivery).

The provisions of this section are subject to contrary agreement of the parties and the provisions of this Article

recommendations of the PEB. The first change occurs in the title of the section itself. The caption is shortened to demonstrate that it is the only section dealing with the risk of loss.[229]

Likewise, Section 2-509(1)(a) is modified by adding the word First prior to the word carrier in subsections (1)(a). The addition of this word is to clarify when risk passes to buyer in a case of multi-modal transport domestically.[230]

In the new provision of 2-509, subsection (2) is enhanced by adding to without being moved the following without being removed from the bailee's physical possession. This addition covers goods sold in transit.

Also found in subsections (2)(b) the words to the buyer is included in order to clarify to whom the bailee must give its acknowledgement. The addition to subsections (2)(c) of except where goods are sold in transit, in which case the risk of loss passes retroactively to the buyer from the time the goods were duly delivered by the seller to the carrier on which the goods were located when sold. This treats the sale of goods sold in transit as the exception.

This is followed by the revised subsection (3) by removing the distinction between merchants and non merchants are removed, this is done to insure that this provision is consistent with code's underlining assumption of control.[231]

Finally the new subsection (4) removes (and on effect of breach on risk of loss (Section 2-510)), because the revised section 2-510 is substantially altered. The changes to Section 2-510 [232]

---

on sale on approval(Section 2-327) (and on effect of breach on risk of loss (Section 2-510)).

[229]Stocks, M., *Supra Note* 226 at 1454.

[230]Ibid.

[231]Ibid.

[232]2-510 (Effect of Breach on Risk of Loss)

(1) Where a tender or delivery of goods so fails to conform to the contract as to give right of rejection the risk of their loss remains on the seller until cure or acceptance.

creates a completely new section. In effect the new provision gives no new protection to the aggrieved party. The main provision of risk is contained in 2-509 and they allude to the remedies under 2-510.

---

(2) Where the buyer rightfully revokes acceptance he may to the extent of any deficiency in his effective insurance coverage treat the risk of loss as having rested on the seller from the beginning.
(3) Where the buyer as to conforming goods already identified to the contract for sale repudiates or is otherwise in breach before risk of their loss has passed to him, the seller may to the extent of any deficiency in his effective insurance coverage treat the risk of loss as resting on the buyer for a commercially reasonable time.)

If one party commits a breach of contract, Section 2-510 does not impair the nonbreaching party's remedies for breach contained in Part 7 of this Article.

PART II-Comparative Analysis

We may describe this part as the thesis and it will help fuse the previous subject matter. In the following pages, risk allocation will be examined in light of Incoterms, the Convention and the UCC. The direct examination of the UCC and the Incoterms will provide the reader with a precise understanding of how these two documents treat the issue of risk allocation. This in turn will result in a detailed examination of the Convention's approach to dealing with risk allocation. This comparative approach is predicated on the explanations and historical overview provided in part one of the work. Due to the relative complexity of the topic at hand, we clearly require a working methodology to ensure a logical and coherent transmission of information. Therefore, we will divide this part of the work into three significant Chapters.

Prior to engaging the protracted analysis, noting several basic rules regarding the risk of loss provisions under the Convention, are important. As was mentioned above, Chapter IV of the Convention covers risk of loss in Articles 66 to 70 inclusive.

There appears to be ten (10) basic rules governing the passage of risk subdivided into five categories.[233] Category One which outlines Rule (I) is contained in Article 67 (1) second sentence and Rule (II) is contained in Article 67(1) first sentence; Category Two which outlines Rule (III) is contained in Article 69 (1) and Rule (IV) is contained in Article 69(2); Category Three which outlines Rule (V) is contained in Article 68 first sentence and Rule (VI) is contained in Article 68 second sentence; Category Four which outlines Rule (VII) is contained in Article 67(2) and Article 69(3), Rule (VIII) is contained in Article 68, third sentence, and Rule (IX) is contained in Article 66; Category Five which outlines Rule (X) is contained in Article 70.

---

[233]For more detail please see Annex 'A' and consult de Vires, H., " The Passing of Risk in International Sales Under the Vienna Sales Convention of 1980 as Compared with Traditional terms" (1982) 17 Eur. Transp. L. at 500. In this work the author suggests that there are some basic rules that may be drawn from the text of the Convention itself.

In order to understand the meaning of these rules we will examine some reoccurring terms. For example, the use of "choice of Carrier" in Rule I and II, allude to Article 67(1) which employs the word "carrier" and links the passage of risk to the seller handing over the goods to a carrier. The Convention does not specify in its text which party to the contract is responsible for choosing the carrier. After examination of the first sentence of Article 67(1), there is no clear indication to whom the responsibility for arranging carriage falls upon. It is suggested,[234] that this sentence may be equated with a FOB type contract. Hence, holding the buyer responsible for arranging carriage. Conversely, Article 67(1) second sentence, seems to indicate a CIF type contract in that the seller is bound to hand over the goods to a carrier.

Employing the term "first Carrier" in Rule II is present to delineate the passage of risk. This raises a larger question of what constitutes the first carrier. Conceivably, in an international sales contract, goods may be shipped in part by sea and then transferred to a truck for the second part of a voyage. The issue is then raised, does the second transporter constitute the "first carrier?" The Convention appears to reject the approach that in a sales contract which requires a split in carriage, that risk does not pass until the goods are delivered to the second carrier.[235]

It is also apparent that the Convention definition of the words "handing over" does not mean the seller handing over the goods to himself for transport. [236] The Convention's approach as contained in Article 67(1) is parallel to the CPT term found in Incoterms (1990). This term defines carrier as: "any person who in a contract of carriage undertakes to perform or procure the carriage." Incoterms also note that carrier does not include the facilities of the owner.

What definition is one to ascribe to the term "at a particular place?" The obligation to hand

[234]Ibid. at 503.

[235]Honnold, J., *Supra Note* 11 at 463.

[236]Volken, P., and Petar, S., *International Sale of Goods*(Dubrovnick Lectures)(New York: Oceana, 1986)at 287. See also Audit, B., *La vente internationale de marchandise de la Convention des Nations-Unies du 11 avril 1980* (Paris: L.G.D.J., 1990), Bianca, C.M., and Bonell, M.J., eds., *Commentary on the International Sales Law* (Milan: Giuffre,1987) at 490.

over at a particular place, has a direct bearing on the passage of risk. We find this term in Article 67(1) and by implication and deduction in Article 69(1)(2). There are divergent opinions on its meaning, some believe that at a particular place depends on an act of the carrier.[237] Others suggest that these words have similar meaning to the Incoterms 1990 FCA term.[238]

Defining these terms will naturally lend to the understanding of when risk of loss in goods is transferred from seller to the buyer. This will also help facilitate one's comprehension of the next section on handing over of goods and delivery.

Understanding the nature of when risk is transferred, is predicated on our understanding of when goods are handed over. The Convention's Article 31 [239] applies when the contract does not state where the seller should deliver the goods.[240] This Article can be divided into Two parts: (I) Contracts Involving Carriage; and (II) Sales not Involving Carriage.

Most international sales contracts involve to some degree or another the transportation of the goods from the seller to the buyer.[241] Article 31(a) enumerates the rule which governs contracts that

---

[237]Volken, P., and Petar, S., *Supra Note* 236 at 289.

[238]Honnold, J., *Supra Note* 11 at 462.

[239]If the seller is not bound to deliver the goods at any particular place, his obligation to deliver consists:

(a) if the contract of sale involves carriage of the goods--in handing the goods over to the first carrier for transmission to the buyer.

(b) if, in cases not within the preceding subparagraph, the contract relates to specific goods, or unidentified goods to be drawn from a specific stock or to be manufactured or produced, and at the time of the conclusion of the contract the parties knew that the goods were at, or were to be manufactured or produced at a particular place--in placing the goods at the buyer's disposal at that place;

(c) in other cases--in placing the goods at the buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract.

[240]Erdem, E. H., *La livraison des marchandises selon la convention de Vienne* (Fribourg: Editions Universitaires, 1990)see § 326,345ss. For the seller to deliver the goods, in a situation where a contract calls for specific goods, the seller must deliver the exact goods called for in the contract. If the goods are not yet identified, the seller must deliver the goods which conform to the contract.

[241] Honnold, J., *Uniform Law for International Sales under the 1980 Vienna Convention* (Deventer: Kluwer Law and Taxation,1991) at 207 and Kritzer, A.H., *Guide to Practical Applications of the United Nations Convention on Contracts for the Interactional Sale of Goods* (Deventer: Kluwer Law and Taxation, 1989) at 230. In his commentary Kritzer is of the opinion that Articles 31-34 do not embody or define customary trade terms. Relying on Honnold, the Convention should be utilized with trade terms namely Incoterms.

involve carriage. In essence, the seller is obliged to hand over the goods to the first carrier.[242]

Situations that do not fall within the scope of Article 31(a) fall naturally into Article 31 (b) and (c) which apply when the sale does not involve the carriage of goods, and the seller is not bound to deliver the goods at any particular place. These contracts involve parties who are in proximity of each other.[243] If the contract of sale requires the buyer to come for the goods, the seller fulfils his obligations when he places the goods at the buyer's disposal.

Once it is determined who must ship the goods, specific rules then govern the transaction. For example Article 32(1)[244] enumerates the rules with respect to the seller who ships goods to the buyer. According to this provision the seller must give the buyer adequate notice of the shipment.[245]

Ensuing, Article 33(a)[246] the seller must respect the terms of the contract which adds credence to Articles 6 and 30. While subparagraph (b) is applicable when the contract of sale stipulates a period for delivery. Finally, failing stipulation, the seller must deliver the goods within a reasonable time after the conclusion of the contract.

---

[242]This Article must be read in conjunction with the risk of loss provisions contained in Article 67 .

[243]Honnold, J., *Supra Note* 241 at 289.

[244](1) If the seller, in accordance with the contract or this Convention, hands the goods over to a carrier and if the goods are not clearly identified to the contract by markings on the goods, by shipping documents or otherwise, the seller must give the buyer notice of the consignment specifying the goods.

(2) If the seller is bound to arrange for carriage of the goods, he must make such contracts as are necessay for carriage to the place fixed by means of transportation appropriate in the circumstances and according to the usual terms of transportation.

(3) If the seller is not bound to effect insurance in respect of the carriage of the goods, he must, at the buyer's request, provide him with all available information necessary to enable him to effect such insurance.

[245]Read with 67(2) and 69(3).

[246]The seller must deliver the goods:

(a) if a date is fixed by or determinable from the contract, on that date;

(b) if a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the buyer is to choose a date; or

(c) in any other case, within a reasonable time after the conclusion of the contract.

Chapter One- Comparing Risk Allocation under the Incoterms and the Convention

I. Departure Terms

A. Ex Works, Ex factory, Ex Warehouse-EXW

The *Ex terms* means that the seller fulfils his obligations to deliver when he has made the goods available at his premises to the buyer. In particular, the seller is not responsible for loading the goods on the buyer's vehicle or for clearing the goods for export, unless agreed. The buyer bears all costs and risks involved in the taking of the goods form the seller's premises to the desired destination.[247]

The term's Ex works, Ex Factory and Ex Warehouse are not found in the Convention or the UCC.[248] These terms define the obligations of the Seller, when the goods must be available from a designated point.

Under an Ex term sales contract the seller has the minimum risk and obligation.[249] The seller has the obligation to provide conforming goods and a conforming commercial invoice, similarly, he must place the goods at the disposal of the buyer on the date agreed upon or within a stipulated period.[250] Conversely, the buyer must at his own expense and risk obtains any export and import licence.[251]

---

[247]Incoterms, *Exw.*

[248]Murray, D.E., "Risk of Loss of Goods in Transit: A Comparison of the 1990 Incoterms with terms of other voices" (1991-92)23 University of Miami Inter-American Law Review at 95.

[249] Castel, J.G. and De Mestral, A.L.C., *The Canadian Law and Practice of International Trade with Particular Emphasis on Export and Import of Goods and Services* (Toronto: Montgomery Publications, 1991) at 83.

[250]Incoterms, *Supra Note* 3, EXW A.1 and A.4.

[251]Ibid. B.2.: [...] and carry out all customs formalities for the exportation and importation of the goods and, where necessary, for their transit through another country.

Under this term, the seller has no obligation to contract for the carriage of the goods[252] and logically does not have to procure any insurance for the goods.[253]

Under this term, the risk of loss of or damage to the goods passes to the buyer[254] when they have been placed at the disposal of the buyer.[255]

When a contract of sale under the Convention takes place and it does not involve shipment of goods, (Rules III and IV) hence the provisions of Article 69 [256] will apply.[257] Closer examination reveals that subsection (1) implicitly deals with the ex factory and ex store transactions. This involves a transaction where risk passes upon delivery from the store or when the buyer fails to take delivery after tender. It is plausible to read subsection (2) to encompass the delivery of warehoused goods by use of negotiable and nonnegotiable instruments of title.

The difference between the Convention and the Incoterms is more fully understood with a practical illustration:

---

[252]Ibid. A.3.(a).

[253]Ibid. A.3.(b).

[254]Ibid. B.5.: Bear all risks of loss of or damage to the goods from the time they have been placed at his disposal in accordance with A.4. Should he fail to give notice in accordance with B.7., bear all risks of loss of or damage to the goods from the agreed date or the expiry date of any period fixed for taking delivery provided, however, that the goods have been duly appropriated to the contract, that is to say clearly set aside or otherwise identified as the contract goods.

[255]Ibid. A.5.: [...] in accordance with A.4.: Place the goods at the disposal of the buyer at the named place of delivery on the date or within the period stipulated or, if no such place or time is stipulated, at the usual place and time for delivery of such goods.

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

(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 contract 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

[257]de Vires, H., *Supra Note* 233 at 516.

Illustration 6.A: *The Case of the Burned Soles*

A contract of sale between a German Seller and Italian Buyer calls for the sale of 1000 pairs of shoes. Pursuant to the contract, the Seller agrees to make available for pickup the goods at his factory during December. On December 23, 1996 a notice is sent by the seller to the buyer that the goods are ready to be picked up. However, on December 24, 1996, a fire destroys the goods. Who bears the risk for the loss of the goods?

According to the Convention: "Risk passes to the buyer when he takes over the goods or, if he does not do so in due time, from the time when the goods are placed at his disposal and he commits a breach of contract by failing to take delivery."[258] Therefore, in illustration 6A, above, the German seller would be liable for the loss of goods as the goods were not taken over by the buyer and the tender period was not over.

Under the relevant provision of the Incoterms, using illustration 6.A. above, the seller would be absolved of any responsibility as the goods had been placed at the buyer's disposal, therefore, risk passed even if physical possession had not, because notice was sent to the buyer.

[258] Article 69(1).

II. Main Carriage Unpaid Terms

A. Free Carrier-FCA

The *Free Carrier* (. . . named place) means that "the seller fulfils his obligation to deliver when he has handed over the goods, cleared for export, into the charge of the carrier named by the buyer at the named place or point. If no precise point is indicated by the buyer, the seller may choose within the place or range stipulated where the carrier shall take the goods into his charge."[259]

As a result of the new techniques in cargo handling, such as pallets, containers and multi-modal transport, the 1990 Incoterms developed the Free Carrier Term.[260] It would be questionable to hold the seller responsible for delivering cargo to a terminal prior to the ship's arrival and then holding him responsible until that cargo is placed on the ship.

This term is complicated in that it encompasses many possible scenarios involving delivery. The Incoterms provide further clarification.[261]

Under an FCA sales contract the seller is obliged to obtain at his own risk and expense any export licence or other official authorisation.[262] The buyer on the other hand must also at his own risk

---

[259]Incoterms, *Supra Note* 3, FCA at 24.

[260]Castel, J.G. and De Mestral, A.L.C., *Supra Note* 249 at 86.

[261]Delivery to the carrier is completed:

I) In the case of rail transport when the goods constitute a wagon load (or a container load carrier by rail) the seller has to load the wagon or container in the appropriate manner. Delivery is completed when the loaded wagon or container is taken over by the railway or by another person acting on his behalf.

When the goods do not constitute a wagon or container load, delivery is completed when the seller has handed over the goods at the railway receiving point or loaded them into a vehicle provided by the railway.

II) In the case of road transport when loading takes place at the seller's premises, delivery is completed when the goods have been loaded on the vehicle provided by the buyer, but when the goods are delivered to the carrier's premises, delivery is completed when they have been handed over to the road carrier or to another person acting on its behalf.

III) In the case of transport by inland waterway when loading takes place at the seller's premises, delivery is completed when the goods have been loaded on the carrying vessel provided by the buyer.

[262]Ibid. at A.2.: [...] and carry out all customs formalities necessary for the exportation of the goods.

and expense obtain any import licence and take care of any customs formalities.[263]

The seller is not obliged to contract for the carriage of the goods[264] and therefore, does not have to procure insurance.[265] While on the other hand, an FCA sales contract requires the buyer to contract for the carriage of the goods at his own expense.[266]

Risk of loss of or damage to the goods is transferred to the buyer[267] when the goods have been delivered into the custody of the carrier or another person.[268]

One can envision multiple scenarios where the transfer of risk is questioned during a transaction that involves the FCA term. The following illustration depicts a possible scenario under this term.

Illustration 7.A: *The Case of the Well-Done Bacon*

A contract of sale between a Canadian seller and Dutch buyer calls for the sale of 1000 tons of Canadian bacon. Pursuant to the contract, the seller and buyer agree on an FCA (Incoterms 1990) delivery. The seller containerizes the bacon and hands it over to a terminal transporter acting for the carrier for eventual on loading. While in the transporter's warehouse a fire destroys the goods. Who is responsible for the loss of the goods?

---

[263]Ibid. at B.2.

[264]Ibid. A.3 (a).: [...] However, if requested by the buyer or if it is commercial practice and the buyer does not give an instruction to the contrary in due time, the seller may contract for the carriage on usual terms at the buyer's risk and expense. The seller may decline to make the contract and, if he does, shall promptly notify the buyer accordingly.

[265]Ibid. A.3.(b).

[266]Ibid. A.4.

[267]Ibid. B.5.: Bear all risks of loss of or damage to the goods from the time they have been delivered in accordance with A.4.

[268]Ibid. at A.5. [...] subject to the provisions of A.4.: Deliver the goods into the custody of the carrier or another person (e.g.: a freight forwarder) named by the buyer, or chosen by the seller in accordance with A.3(a)., at the named place or point (e.g.: transport terminal or other receiving point) on the date or within the period agreed for delivery and in the manner agreed or customary at such point. [...] delivery to the carrier is completed.

According to the Incoterms,[269] the seller would be absolved of responsibility because the goods were handed over to the transporter, hence the passage of risk.[270]

According to the Convention (Rule II) using this illustration, who would be liable for the destroyed goods? In other words, when did risk pass? The text of Article 67(1) first sentence states "the seller is 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."

Article 67 enumerates the rules on the transfer of risk only in cases where the seller hands over the goods to a carrier.[271] Therefore, the first focal point in illustration 7.A. should be parties' election of the Incoterms to govern the passage of risk. As is well-understood parties to an international contract governed by the Convention are bound by usage.[272] The Incoterms are a clear and common example of parties making a usage applicable to a contract.[273] It is highly suggested that parties wishing to employ terms or forms state so expressly in their contract to avoid complications.[274]

Therefore, the Convention would not hold the seller in illustration 7.A. responsible for the

---

[269]Ibid. at A.4(IV) In the case of Sea Transport when the goods constitute a full container load (FCL), delivery is completed when the loaded container is taken over by sea carrier. When the loaded container has been carried to an operator of a transport terminal acting on behalf of the carrier, the goods shall be deemed to have been taken over when the container has entered into the premises of that terminal.

[270]Ibid. at A.5. Subject to the provisions of B.5., bear all risks of loss of or damage to the goods until such time as they been delivered in accordance with A.4.

[271]Honnold, J., *Uniform Law for International Sales under the 1980 Vienna Convention* (Deventer: Kluwer law and Taxation,1991) at 456.

[272] Article 9 of the Convention states:

(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 and involved in the particular trade concerned.

[273]Honnold, J., *Supra Note* 11 at 174.

[274]Bianca, C.M., and Bonell, M.J., eds., *Commentary on the International Sales Law* (Milan: Giuffre,1987) at 115.

destroyed goods. This is based on the wording of the text itself. Once the carrier's agent took possession of the goods, risk had passed.

B. Free Alongside Ship-FAS

Incoterms defines *Free Alongside Ship*(. . . named port of shipment) as meaning that "the seller fulfils his obligation to deliver when the goods have been placed alongside the vessel on the quay or in lighters at the named port of shipment. This means that the buyer has to bear all costs and risk of loss of or damage to the goods from that moment."[275]

Under a FAS sales contract, the seller is not obliged to arrange any exportation licence.[276] The buyer, must undertake at his expense and risk all formalities for the importation and exportation of the goods.[277]

This term does not require the seller to arrange carriage[278] or procure insurance for the goods.[279] In essence, the seller must deliver the goods alongside the named vessel[280] at the expense of the buyer.[281] The seller must give the buyer sufficient notice that the goods have been placed alongside the named vessel.[282]

Under this term risk is allocated to the buyer[283] when the goods have been placed alongside the named vessel.[284]

---

[275]Incoterms, *Supra Note* 3, FAS at 32.

[276]Ibid. A.2.: [...] render the buyer, at the latter's request, risk and expense, every assistance in obtaining any export licence.

[277]Ibid. B.2.

[278]Ibid. A.3.(a).

[279]Ibid. A.3.(b).

[280]Ibid. A.4. Deliver the goods alongside the named vessel at the loading place named by the buyer at the named port of shipment on the date or within the period stipulated and in the manner customary at the port.

[281]Ibid. B.6. Pay all costs relating to the goods from the time they have been delivered in accordance with A.4.

[282]Ibid. A.7.

[283]Ibid. B.5.

[284]Ibid. A.5.: Subject to the provisions of B.5., bear all risks of loss of or damage to the goods until such time as they have been delivered in accordance with A.4.

Illustration 8.A: *The Case of the Bent Steel*

A contract of sale between a Bulgarian seller and Mexican buyer calls for the sale of 1000 tons of rolled steel. Pursuant to the contract, the seller and buyer agree on a FAS (Sofia Incoterms 1990) delivery for November 25, 1996. While being on loaded the goods were dropped and damaged. Who is responsible for the damage to the goods?

Employing the Incoterms provides a simple solution. As previously mentioned,[285] the seller is responsible for delivering the goods alongside the vessel as was the case above. Once this took place, risk passed to the buyer.[286] Recourse, for these situation lies with the buyer and his contract of insurance if it be the case.

One may argue the premise of Rule I as contained in Article 67(1) second sentence of the Convention: "risk does not pass to the buyer unless and until the goods are handed over to the carrier at that place." Therefore, in illustration 8.A., the seller handed over the goods when they were placed alongside the vessel. In other words, when the seller brought the goods to the quay or alongside the vessel.

A question that arises during similar transactions is at what point during the *handing over* does risk pass? Accordingly, it is suggested that the risk bearing become effective at the end of the handing over process.[287]

---

[285]Ibid.

[286]Ibid. at B.5. Bear all risks of loss of or damage to the goods from the time they have been delivered in accordance with A.4.

[287]Enderlin, F. and Maskow, D., *International Sales law, United Nations Convention on Contracts for the International Sale of Goods* (New York: Oceana, 1992) at 266.

C. Free on Board-FOB

Incoterms defines *Free on Board* (. . . named port of shipment) as meaning "that the seller fulfils his obligation to deliver when then the goods have passed over the ship's rail at the named port of shipment. This means that the buyer has to bear all costs and risks of loss of or damage to the goods from that point."[288]

A FOB sales contract the obliges the seller to provide the buyer conforming commercial invoices or its equivalent electronic message.[289] Likewise, the seller must supply at his own risk and expense any export licence and carry out all required customs formalities.[290] Also the seller has no obligation to arrange carriage and/or procure marine insurance.[291] The seller must pay all costs relating to the goods until they pass the ship's rail, and pay all costs of customs formalities necessary for export and also all duties, taxes and other charges.[292]

Under this term the seller must notify the buyer that the goods have been delivered on board the named carrier.[293] Also when a FOB term is employed in a contract, the seller, if requested by the buyer, must help the buyer in obtaining shipping documents at the risk and expense of the buyer.[294] The Courts have concluded[295] that risk of loss of or damage to the goods passes to the buyer[296] when the goods pass the ship's rail at the named port of shipment.[297]

---

[288]Incoterms, *Supra Note* 3, FOB, at 38.
[289]Ibid. A.1.
[290]Ibid. A.2.
[291]Ibid. A.3.(a) (b).
[292]Ibid. A.6.
[293]Ibid. A.8.
[294]Ibid. A.7.
[295]ICC *Case Number 2288* (22 January 1975) at p.26.
[296]Ibid. B.5.
[297]Ibid. A.5.: Read with A.4. Deliver the goods on board the vessel named by the buyer at the named port of shipment on the date or within the period stipulated and in the manner customary at the port.

Illustration 9.A: *The Case of the Damaged Gold*

> A contract of sale between seller X and buyer Y calls for the sale of 1000 tons of gold. Pursuant to the contract, the seller and buyer agree on a FOB (seller X's country Incoterms 1990) delivery for November 1996. On November 12, 1996, the buyer gives the seller notice via telefax that Vessel "Chang-Fi" will arrive at the seller's port on November 30, 1996. On the date in question the seller began to on load the goods. While in the lighters but not yet over the ship's rail, the lighters broke and the goods fell to the quay sustaining significant damage. Who is responsible for the damage to the goods?

In this illustration, the seller is responsible for the damaged goods. This is so because the goods had not yet passed the ship's rail. However, in the case of *Falconbridge Nickel Ltd vs. Chimo Shipping Limited* [298] the Supreme Court of Canada on appeal from the Exchequer Court concluded that the obligation of a shipowner to load cargo onto barges and transport the goods to another boat was part of the contract of transport. As such, it may be argued that the traditional definition of a ship rail is no longer and that a ship's rail could also be defined as the lighters on a dock.

The Convention [299] in its construction does not provide for explicit shipping terms as found under the Incoterms or the UCC.[300] Some suggest that Article 67 sentence 2, should not be equated to a FOB contract, because Article 67, unlike Article 69 does not provide for the passage of risk where the buyer does not arrange for transportation. [301] However, it appears that Article 67 of the Convention envisions a contract that involves the carriage of goods.

> (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 risk.
>
> (2)Nevertheless, the risk does not pass to the buyer until the goods are clearly identified to the

---

[298] [1974] R.C.S.933. For more detail on Canadian interpretation of FOB term see: Pomerleau, Manon and Lapointe , Esther "Le Contrat FOB port d'embarquement au Canada, Etude comparative: doctrine jurisprudence et sentences arbitrales" (1987) 47 RduB.1007.

[299]A/CN.9/SER.C/ABSTRACT/3 at page 2 also published in Yearbook Commercial Arbitration, Vol.XV-1990, 70(FOB sales contract and article 38(1))

[300]Honnold, J., *Supra Note* 271 at 455.

[301]Enderlin, F. and *Maskow, Supra Note* 287 at 266-267.

contract, whether by markings on the goods, by shipping documents, by notice given to the buyer or otherwise.

Accordingly, using illustration 9.A. above, the Convention's Rule I would view risk in a similar fashion. First, according to Article 67(1) second sentence "where 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."

Therefore, being that the contract called for the use of Incoterms, the Convention would not apply in the first place with respect to the transfer of risk. However, in the case where the Convention applied, risk would pass only when the goods were handed over. As comparative point we may also compare subsection (1) of Article 67 with section 2-509(1)(a) of the UCC.[302] In both provisions' risk passes to the buyer when the seller delivers to the carrier.

[302]Murray, D., *Supra Note* 248 at 104.

III. Main Carriage Paid Terms

A. Cost and Freight-CFR

The Incoterms defines *Cost and Freight* (. . . named port of destination) as meaning "that the seller must pay the costs and the freight necessary to transport the goods to the named port of destination but the risk of loss of or damage to the goods, as well as any additional costs due to events occurring after the time the goods have been delivered on board the vessel, is transferred from the seller to the buyer when the goods pass the ship's rail in the port of shipment."[303]

The CFR term (Incoterms 1990) is different from the 1980 version. The 1980 Incoterms[304] employed the abbreviation "Cost and Freight" with the corresponding abbreviation of "C&F".[305] This abbreviation caused a variation in the United States, where instead of using the accredited version of "C&F" people began to substitute the "&" for "A", hence creating the abbreviation "CAF". This modification caused some Europeans to interpret the "A" as meaning "Assurance", hence obliging the seller to procure a policy.[306]

Pursuant to a CFR contract, the seller must provide conforming goods and the commercial invoice.[307] The seller must also obtain at his own risk and expense any export licence or other official authorisation and carry out all customs formalities necessary for the exportation of the goods.[308]

Under a CFR term, the seller must contract at his own expense contract for the carriage of

---

[303]Incoterms, *Supra Note* 3, CFR at 44.

[304]Incoterms, *Supra Note* 3, C&F at 40(1980).

[305]Kritzer, A.H., *Guide to Practical Applications of the United Nations Convention on Contracts for the Interactional Sale of Goods* (Deventer: Kluwer Law and Taxation, 1989) at 263. Author details the provisions of the 1980 Incoterms.

[306]Murray, D., *Supra Note* 248 at 108.

[307]*Supra Note* 303 at A.1.

[308]Ibid. A.2.

the goods.[309] The seller must pay the costs for loading and unloading[310] and inform the buyer when the goods have been delivered on board the vessel.[311]

Risk of loss of or damage to the goods passes to the buyer when they (goods) have passed the ship's rail at the port of shipment.[312]

The CFR term, [313] allocates risk in a precise manner, that differs in substance from the Convention's approach. How then does the Convention view the passage of risk? According to Rule II contained in Article 67(1) sentence one of the Convention "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." We should note that Article 67 states the rules in the situation where the seller hands over the goods to a carrier.[314] Under this term the seller selects the vessel and contracts for the carriage of the goods. Thus, when the seller is not bound to hand over the goods at a particular place, the Convention considers there to be a transfer of risk when the goods are handed over to the first carrier.[315]

---

[309]Ibid. A.3.(a). [...] to the named port of destination by the usual route in a seagoing vessel. However, he is not obliged to procure insurance A.3.(b).

[310]Ibid. A.6.

[311]Ibid. A.7.

[312]Ibid. A.5.: As an integral part A.4. requires that the seller deliver the goods on board the vessel at the port of shipment on the date or within the date stipulated.

[313]Ibid. A.5.

[314]Honnold, J., *Supra Note* 11 at 456.

[315]de Vires, H., *Supra Note* 233 at 521.

B. Cost, Insurance and Freight-CIF

The Incoterms defines *Cost, Insurance and Freight* (. . . named port of destination)as meaning "that the seller has the same obligations as under CFR but with the addition that he has to procure marine insurance against the buyer's risk of loss of or damage to the goods during the carriage. The seller contracts for insurance and pays the insurance premium."[316]

As discussed in Chapter two above, the CIF contract has an extended history in commerce. According to Clive M. Schmitthoff the CIF contract "is the most characteristic term which the custom of merchants has evolved."[317]

In essence the CFR and CIF term are the same except that under the CIF term the seller must arrange for the carriage of the goods,[318] and procure at his own expense cargo insurance as agreed in the contract, that the buyer, or any other person having an insurable interest in the goods, shall be entitled to claim directly from the insurer and provide the buyer with the insurance policy or other evidence of insurance cover.[319]

Under a CIF term, risk of loss of or damage to the goods is transferred to the buyer when the goods have passed the ship's rail at the port of shipment.[320]

---

[316]Incoterms, *Supra Note* 3, CIF at 50.

[317]Schmitthoff, C.M., *The Law and Practice of International Trade* (London: Stevens and Sons, 1986)at 29.

[318]*Supra Note* 316, A.3. (a).

[319]Incoterms, *Supra Note* 316, CIF A.3 .(b) [...] The insurance shall be contracted with underwriters or an insurance company of good repute and, failing express agreement to the contrary, be in accordance with minimum cover of the Institute Cargo Clauses (Institute of London Underwriters) or any similar set of clauses. The duration of insurance coverage shall be in accordance with B.5. and B.4. When required by the buyer, the seller shall provide at the buyer's expense war, strikes, riots and civil commotion risk insurance if procurable. The minimum insurance shall cover the price provided in the contract plus ten per cent (i.e.: 110%) and shall be provided in the currency of the contract.

[320]Ibid. A.5.

Illustration 10.A: *The Case of Cold Coffee*

Chilean Exporter sells coffee "CIF Philadelphia (Incoterms 1990)", to an American Importer. (Both parties are bound by the Convention).

The question one may ask in the above illustration, is who, must contract for the carriage goods? Pursuant, to Article 31(a), the exporter must "hand the goods over to the first carrier for transmission to [Importer]." The 1990 Incoterms requires the Exporter to "contract on usual terms at his own expense for the carriage of the goods to the agreed port of destination." By using the CIF term, the exporter and importer have agreed to the detailed oriented Incoterms in order to enhance the Convention. [321]

Closer examination of Rule II as contained in Article 67(1) second sentence would apply. Resulting in risk being transferred when the goods are handed over to the first carrier. For practical purposes this means at the port of shipment, because the seller is organizing and contracting for the shipment of the goods to the buyer.

---

[321] Winship. P., "Changing Contract Practices in the Light of the United Nations Sales Convention: A Guide for Practitioners" (1995) 29 International Lawyer at 546.

C. Carriage Paid To-CPT

Incoterms defines *Carriage Paid to* (. . . named place of destination) as meaning that "the seller pays the freight for the carriage of the goods to the named destination. The risk of loss of or damage to the goods, as well as any additional costs due to events occurring after the time the goods have been delivered to the carrier, is transferred from the seller to the buyer when the goods have been delivered into the custody of the carrier."[322]

The parties may use this term when the goods are transported by air, sea, rail, road, inland waterway, or by a combination of these methods in a multi-modal transport.[323]

Under a CPT sales contract the seller must obtain, at his own expense and risk, any licence or other official authorisation.[324] Conversely, the buyer must at his own expense and risk clear the goods for import.[325]

The seller under this term must contract for the carriage of goods at his own expense.[326] However, the seller is not obliged to procure insurance against the goods.[327] The seller must also give the buyer sufficient notice that the goods have been delivered.[328]

When employing the CPT term in a sales contract, delivery plays a key role in determining

---

[322]Incoterms, *Supra Note* 3, CPT at 56.

[323]Ibid.

[324]Ibid. A.2.: [...] and carry out all customs formalities necessary for the exportation of the goods.

[325]Ibid. B.2

[326]Ibid. A.3.(a).: [...] to the agreed point at the named place of destination by a usual route and in a customary manner. If a point is not agreed or is not determined by practice, the seller may select the point at the named place of destination which best suits his purpose.

[327]Ibid. A.3.(b).

[328]Ibid. A.7. [...] "as well as any other notice required in order to allow the buyer to take measures which are not normally necessary to enable him to take the goods." The buyer on the other hand according to B.7.: Must give notice "whenever he is entitled to determine the time for dispatching the goods and/or the destination, give the seller sufficient notice."

risk allocation. The use of this term, requires the seller to deliver the goods to the carrier or if there are subsequent carriers or to the first carrier, goods are considered delivered,[329] hence risk of loss of or damage to the goods is transferred.[330]

Accordingly the Convention's Rule II, as contained in Article 67(1), first sentence would provide a comparable solution to this problem, hence "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." [331]

---

[329]Ibid. A.4. Deliver the goods into the custody of the carrier or, if there are subsequent carriers, to the first carrier, for transportation to the named place of destination on the date or within the period stipulated.

[330]Ibid. A.5.

[331]Honnold, J., *Supra note* 11 at 462.

D. Carriage and Insurance paid To-CIP

The Incoterms defines *Carriage and Insurance paid to* (. . . named place of destination) as meaning that the "seller has the same obligations as under CPT but with the addition that the seller has to procure cargo insurance against the buyer's risk of loss of or damage to the goods during the carriage. The seller contracts for insurance and pays the insurance premium."[332]

Under a CIP sales contract, the seller has the same obligations as a CPT term, however he must at his own expense procure insurance to cover the goods.[333] As an integral aspect of procuring insurance, the seller must maintain a minimum coverage.[334]

Likewise, risk of loss of or damage to the goods passes to the buyer upon delivery to the first carrier.[335] Under this term, like CIF term, de facto risk passes, not when the goods are delivered to the carrier, but when they pass the ship's rail. In essence, this allocates risk to the seller even when he has no control over the goods.

Illustration 11.A: *The Case of the Missing Flowers*

A contract of sale between a Danish Exporter of flowers and Austrian buyer calls for the shipment of garden flowers. Pursuant to the contract, the seller and buyer agree on a CIP (Vienna, Incoterms 1990) delivery for June 1, 1996. The Danish seller arranges for delivery. The seller delivers the goods with his own trucks to the railway station for on loading. The goods arrive in good order in Bonn, where they are transferred to a trucking company who will deliver them to Vienna. During the transport, the truck is stolen on route to Vienna, the flowers are never delivered. Who is responsible for the stolen goods?

---

[332]Incoterms, *Supra Note* 3, CIP at 62.

[333]Ibid. A.3.(b).

[334]Ibid. A.4.(2) The insurance shall be contracted with underwriters or an insurance company of good repute and, failing express agreement to the contrary, be in accordance with minimum cover of the Institute Cargo Clauses (Institute of London Underwriters) or any similar set of clauses. The duration of insurance coverage shall be in accordance with B.5. and B.4. When required by the buyer, the seller shall provide at the buyer's expense war, strikes, riots and civil commotion risk insurance if procurable. The minimum insurance shall cover the price provided in the contract plus ten per cent (ie: 110%) and shall be provided in the currency of the contract.

[335]Ibid. A.5. Subject to the provisions of B.5., bear all risks of loss of or damage to the goods until such time as they have been delivered in accordance with A.4., A.4. states: Deliver the goods into custody of the carrier or, if there are subsequent carriers, to the first carrier, for transportation to the named place of destination on the date or within the period stipulated.

Given the use of the CIP term regarding the above illustration, who is responsible for the goods? According to the CIP term the seller must deliver the goods into the custody of the carrier or if there a subsequent carriers, to the first carrier.[336] As in the above illustration, the seller delivered the goods to the railway in good order. Subsequent, to transferring the goods to a second carrier the goods were stolen. The general rule is risk passes when they (goods) have been delivered.[337] Hence, in illustration 11A, the seller was absolved of any responsibility because the risk of loss occurred after delivery to the first carrier.

We may conclude that Rule II as contained in Article 67(1), first sentence of the Convention would be an applicable response to illustration 6.A. Under this rule, risk is passed when the goods are handed over to the first carrier for transmission to the buyer. In this illustration, once the goods were loaded at the place of expedition, risk was transferred.

---

[336]Ibid.

[337]Ibid. A.5.

IV. Arrival Terms

A. Delivered at Frontier-DAF

Incoterms defines *Delivered at Frontier* (. . . named place) as meaning that the seller "fulfils his obligation to deliver when the goods have been made available, cleared for export, at the named point and place at the frontier, but before the customs border of the adjoining country."[338]

Under a DAF sales contract, like other contracts, he (seller) must provide at his own expense any export licence or other official authorisation or document necessary for placing the goods at the buyer's disposal.[339] Under this type of sale, the seller must contract for the carriage of the goods at his own expense.[340] If a point at the named place of delivery is not agreed or is not determined by practice, the seller may select the point at he named place of delivery which best suits his purpose.[341] The seller is not responsible for procuring insurance. [342]

In essence risk of loss is passed to the buyer when the goods have been placed at the buyer's disposal.[343] Therefore, the buyer should procure insurance for the period between the goods being made available and the physical receipt of the goods.

If the parties elect to use the DAF term, the seller has a duty to have the goods carried up to a point from where the buyer has to take over the onward carriage. The Convention's Rule IV would appear to apply as contained in Article 69(2) which states that "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 other

---

[338]Incoterms, *Supra Note* 3, DAF at 68.
[339]Ibid. A.2.
[340]Ibid. A.3(a).
[341]Ibid. A.3. (a) (2).
[342]Ibid. A.3. (b).
[343]Ibid. A.5: Subject to the provisions of B.5., bear all risks of loss of or damage to the goods until such time as they have been delivered in accordance with A.4: Place the goods at the disposal of the buyer at the named place of delivery at the frontier on the date or within the period stipulated.

words, when the buyer is informed by notice and the goods are made available to him.

B. Delivered Ex Ship- DES

Pursuant to the Incoterms *Delivered Ex Ship* (. . . named port of destination) means that the seller "fulfils his obligation to deliver when the goods have been made available to the buyer on board the ship uncleared for import at the named port of destination. The seller has to bear all the costs and risks involved in bringing the goods to the named port of destination." [344]

Under a DES sales contract unlike DAF contract, the seller is not obligated to clear the goods for importation.[345] However, the seller is obligated to supply conforming goods,[346] a commercial invoice, and export licences or authorisations.[347] The seller must contract, at his own expense, for the carriage of the goods [348] but is not obligated to procure insurance against loss. [349]

Risk of loss passes to the buyer when the goods have been tendered for delivery while on board the vessel.[350] Hence, the buyer must bear the expense and risk of loss or damage to the goods while being unloaded.[351]

As mentioned above, A.2. of the Incoterms requires the seller to place the goods at the buyer's disposal at a particular place. The Convention's Rule IV as contained in article 69(2) would be applicable in this comparison. This term is similar to the DAF term enumerated above saving the lack of a requirement to clear the goods for import.

---

[344]Incoterms, *Supra Note* 3, DES at 74.

[345]Ibid. B.2: Obtain at his own risk and expense any import licence or other official authorisation and carry out all customs formalities necessary for <u>the importation of the goods.</u>

[346]Ibid. A.1.

[347]Ibid. A.2.

[348]Ibid. A.3. (a).

[349]Ibid. A.3. (b).

[350]This is deduced by the following: A.4.: Place the goods at the disposal of the buyer <u>on board the vessel at the usual unloading point in the named port of destination.</u> A.5.: Subject to the provisions of B.5., bear all risks of loss or damage to the goods <u>until such time as they have been delivered in accordance with A.4.</u>

[351]Ibid. B.5.: Bear <u>all risk of loss or damage to the goods from the time they have been placed at his disposal in accordance with A.4.</u>

C. Delivered Ex Quay-DEQ

According to the Incoterms *Delivered Ex Quay* (. . . named port of destination) means that the seller fulfils his obligation "to deliver when he has made the goods available to the buyer on the quay (wharf) at the named port of destination, cleared for importation. The seller has to bear all risks and costs including duties, taxes and other charges of delivering the goods thereto." [352]

As a precursor, this term should not be employed if the seller is unable, directly or indirectly, able to obtain an import licence.[353]

Under a DEQ sales contract, the seller is obligated to obtain, at his own expense, all import and export requirements.[354] The seller must also, at his own expense, contract for the carriage of the goods by a usual route and in a customary manner to the quay at the named port of destination.[355] The seller is not obliged to insure the goods.[356]

Risk of loss or damage to the goods is passed to the buyer[357] when the goods have been placed on the quay or the wharf at an agreed destination and time.[358]

The Convention's Rule IV likens to the DEQ term, we may find this similarity in the wording of Article 69(2) which states as follows " 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." This seems to be similar, in that under the DEQ term, the buyer must be made aware that the goods are available.

---

[352]Incoterms, *Supra Note* 3, DEQ at 80.

[353]Ibid.

[354]Ibid. A.2.: [...] and carry out all customs formalities for the exportation and importation of the goods and, where necessary, for their transit through another country.

[355]Ibid. A.3. (a) (1).

[356]Ibid. A.3. (b) (2).

[357]Ibid. B.5.: Bear all risks of loss of or damage to the goods from the time they have been placed at his disposal in accordance with A.4.

[358]Ibid. A.5.: Subject to the provisions of B.5., bear all risks of loss of or damage to the goods until such time as they have been delivered in accordance with A.4.: Place the goods at the disposal of the buyer on the quay or wharf at the agreed port of destination and on the date or within the period stipulated.

D. Delivered Duty Unpaid- DDU

Incoterms defines *Delivery Duty Unpaid* (. . . named place of destination) as meaning that the seller "fulfils his obligation to deliver when the goods have been made available at the named place in the country of importation. The seller has to bear the costs and risks involved in bringing the goods thereto (excluding duties, taxes and other official charges payable upon importation as well as the costs and risks of carrying out customs formalities.) The buyer has to pay any additional costs and to bear any risk caused by his failure to clear the goods for import in time." [359]

Under a DDU sales contract, the seller is obliged, at his own expense, to clear the goods for export.[360] The buyer, on the other hand, must at his own expense obtain any import licence and carry out all customs formalities.[361]

The seller under this term must contract for the carriage of the goods at his own expense to the agreed point at the named place of destination.[362] However, the seller is not obliged to procure insurance for the loss of or damage to the goods.[363] The seller must give sufficient notice to the buyer that the goods have been dispatched, and any other notice which will allow him to take the goods.[364]

Pursuant to this term risk of loss of or damage to the goods passes to the buyer[365] when the goods have been placed at the buyer's disposal.[366] Should the buyer fail to clear the goods for import he must bear all risks and costs related thereto.[367]

---

[359]Incoterms, *Supra Note* 3, DDU at 86.

[360]Ibid. A.2.: [...] and carry out all customs formalities for the exportation of the goods and, where necessary, for their transit through another country.

[361]Ibid. B.2.

[362]Ibid. A.3. (a).

[363]Ibid. A.3.(b).

[364]Ibid. A.7.

[365]Ibid. B.5.: Bear all risks of loss or damage to the goods from the time they have been placed at his disposal in accordance with A.4.

[366]Ibid. A.5.: Subject to the provisions of B.5., bear all risks of loss of or damage to the goods until such time as they have been delivered in accordance with A.4.: <u>Place the goods at the disposal of the buyer in accordance with A.3.</u> on the date or within the period stipulated.

[367]Ibid. introductory paragraph at 86.

E. Delivered Duty Paid-DDP

According to the Incoterms *Delivered Duty Paid* (. . . named place of destination) means that the seller fulfils "his obligation to deliver when the goods have been made available at the named place in the country of importation. The seller has to bear the risks and costs, including duties, taxes and other charges of delivering the goods thereto, cleared for importation. While the EXW term represents the minimum obligation for the seller, DDP represents the maximum obligation."[368]

Under a DDP sales contract the seller at his own expense has to clear the goods for importation and exportation.[369] Under this term, the seller must contract for the carriage of the goods at his own expense.[370] The seller is not obligated to procure insurance for the loss of or damage to the goods.[371]

Risk of loss of or damage to the goods passes to the buyer[372] when the goods have been placed at the buyer's disposal.[373] Hence, the buyer must take delivery when they are placed at his disposal.[374]We may look for guidance under Rule IV as contained in Article 69(2) in order to find some form of similarity in the Convention.

---

[368]Incoterms, *Supra Note* 3, DDP at 92.

[369]Ibid. A.2.: [...] and carry out all customs formalities for the exportation and importation of the goods and, where necessary, for their transit through another country.

[370]Ibid. A.3. (a).: [...] by a usual route and in a customary manner to the agreed point at the named place of destination. If a point is not agreed or is not determined by practice, the seller may select the point at the named place of destination which best suits his purpose.

[371]Ibid. A.3. (b).

[372]Ibid. B.5.: Bear all risks of loss of or damage to the goods from the time they have been placed at his disposal in accordance with A.4.

[373]Ibid. A.5.: Subject to the provisions of B.5., bear all risks of loss of or damage to the goods until such time as they have been delivered in accordance with A.4.: Place the goods at the disposal of the buyer in accordance with A.3. on the date or within the period stipulated.

[374]Ibid. B.4.

V. Buying Goods Afloat and Goods in Transit

A. Goods Sold Afloat

A common business transaction known as future delivery contracts, is more widely employed.[375] They generally encompass commodity trading such as oil or grain. Parties to these types of contracts are not present for delivery or payment of the goods. As well, parties in this type of contract neither inspect nor take possession of the goods. [376] The one seller one buyer contract transaction is today obscured by the situation where goods are sold to one buyer and in transit bought by another.

Despite the multitude of buyers and sellers in a modern commodity sale, a pressing question, still exist, who bears' the risk of loss for loss or damage to goods while afloat?

One may find reference to risk allocation of goods sold in transit at paragraph 14 of the Incoterms.[377] In essence the sale of goods in transit is seen as an extension of the Incoterms itself.

---

[375]Shivbir. G., "Risk of loss in Goods sold during transit: A Comparative study of the U.N. Convention on Contracts for the International Sale of Goods, The U.C.C., and the British Sale of Goods Act."(1991) 14. Loy.L.A. Int'l & Comp.L.J. at 94.

[376] Ibid.

[377]It happens in commodity trades that goods are bought while they are carried at sea and that, in such cases, the word "afloat" is added after the trade term. Since the risk of loss of or damage to the goods would then, under the CFR and CIF terms, have passed from the seller to the buyer, difficulties of interpretation might arise. One possibility would be to maintain the ordinary meaning of the CFR and CIF terms with respect to the divisions of risk between seller and buyer which would mean that the buyer might have to assume risks which have already occurred at the time when the contract of sale has entered into force. The other possibility would be to let the passing of the risk coincide with the time when the contract of sale is concluded. The former possibility might well be practical, since it is usually impossible to ascertain the condition of the goods while they are being carried. For this reason the 1980 U.N. Convention on Contracts for the International Sale of Goods Article 68 stipulates that "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." There is however, an exception to this rule when "the seller knew or ought to have known that the goods had been lost or damaged and did not disclose this to the buyer." Thus, the interpretation of a CFR or CIF term with the addition of the word "afloat" will depend upon the law applicable to the contract of sale. The parties are advised to ascertain the applicable law and any solution which might follow therefrom. In the case of doubt, the parties are advised to clarify the matter in their contract Incoterms, *Supra Note* 3 at 12.

However, under this specific type of transaction, some alterations take place to the standard trade terms. For example it is suggested to add the word 'afloat' be added to accurately describe the transaction. Conversely, Incoterms allows the parties to elect other legal form such as the Convention.

Illustration 12.A: *The Case of the Wet Cotton*

Seller A sells 1000 bails of cotton to buyer B. While in transit buyer B sells the goods to buyer C. Buyer C never inspected the goods. Upon arrival buyer C found that the goods had been damaged during transport. Who is responsible for the damage to the goods?

Incoterms provide two distinct methods of dealing with the passage of risk in transit sales:

> One possibility would be to maintain the ordinary meaning of the CFR and CIF terms with respect to the divisions of risk between seller and buyer which would mean that they buyer might have to assume risks which have already occurred at the time when the contract of sale has entered into force

Under the first option, the buyer would assume the division of risk as found under the CFR[378] and CIF terms. Hence, when the goods passed the ship's rail. In order to benefit from this approach, the contract must mention the trade term employed with the word "afloat" after it.

The second option states that:

> The other possibility would be to let the passing of the risk coincide with the time when the contract of sale is concluded. The former possibility might well be practical, since it is usually impossible to ascertain the condition of the goods while they are being carried. For this reason the 1980 U.N. Convention on Contracts for the International Sale of Goods Article 68 stipulates that "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." There is however, an exception to this rule when "the seller knew or ought to have known that the goods had been lost or damaged and did not disclose this to the buyer." Thus, the interpretation of a CFR or CIF term with the addition of the word "afloat" will depend upon the law applicable to the contract of sale. The parties are advised to ascertain the applicable law and any solution which might follow therefrom. In the case of doubt, the parties are advised to clarify the matter in their contract.

---

[378]Incoterms, *Supra Note* 3, CFR A.5. Subject to the provisions of B.5., bear all risks of loss of or damage to the goods until such time as they have passed the ship's rail at the port of shipment.

This option relies on the use of the Convention as an applicable law to the contract of sale. Failing clarity the parties should specify its application for passage of risk.

Article 68 of the Convention is applicable when goods are sold in transit:

> 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.

Under the terms of Article 68, the buyer at the end of the line will suffer the loss.[379] Rules V, VI and VIII govern these types of sales respectively.

In the above illustration 12.A who would be responsible for the damage to the goods? Using either Rule V or VI risk would have transferred risk to buyer C and he would be responsible for the damage to the goods. However, using the above illustration 12.A and taking as new fact that buyer B at the time of sale to buyer C new that the goods were already damaged would change the outcome significantly.

In the added fact pattern, buyer B would be liable for the loss of or damage to the goods. Relying on Rule VIII "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."

It is recommended that parties involved in similar contracts agree in advance to the point in which risk is to be passed. Relying on Article 6 of the Convention, this may be done. In other words parties should agree that risk passes either at the beginning of the contract or at the end of transit.

---

[379]Murray, D., *Supra Note* 248 at 126.

B. Undivided shares of fungible goods

An additional problem in which the Convention appears to be lacking is the scenario in which goods sold in transit are not clearly identified to the buyer. Let us examine the following scenario:

Illustration 13.A: *The Case of Undivided Bulk*

> Seller A sells bulk goods to buyer B, B then sells the goods to buyers C and D while the goods are still in transit. The goods sold are part of an undivided bulk. Part of the goods are damaged in transit. Who is responsible and how is the determination adduced?

This scenario is unique and was discussed in our examination of risk allocation in Chapter One. We know that articles 67(2) and 69(3) of the Convention allude to the need for the goods to be identified to the contract before risk may be passed to the buyer. However, Article 68 is devoid of this requirement and risk allocation is not dependant on the identification process. As such, buyers 'C' and 'D' would be responsible for the loss, despite the lack of identification.

Conversely, Incoterms approach appears to be consistent with the general notion that goods must be clearly identified to the contract. According to Jan Ramberg, [380] Incoterms requires that the goods be clearly identified to the contract failing which risk of loss may not be transferred. The process of individualising the goods normally takes place prior to transport. This is accomplished by clearly marking the name and destination of the goods. However, in the case of bulk sales (oil and grain) ability to clearly identify the portion of the bulk to one buyer or another is sometimes difficult if not impossible.

Acceptance of this definition provides some understanding why the Incoterms requires the goods be individualized. Hence, when bulk sales take place risk does not pass from seller to buyer until separate bills of lading are issued to each of the parties.

---

[380] Ramberg, Jan., *Guides des incoterms 1990* (Paris: ICC Publishing, 1991) at 35.

I. Agreed Risk of Loss

The rules governing the risk of loss under the UCC are contract default rules. Hence, in absence of another form of risk allocation these rules will be made applicable to the parties.

Accordingly, Section 2-509(4)[381] invites any lawyer or party who drafts a sales agreement to include a clause that allocates risk in a different fashion than the Code.[382] Any modification must respect imperative obligations of the Code.[383] Likewise, any modification should be clearly stated by the parties.[384] The Court's in absence of clarity, will elect to apply the provisions of the Code.[385] However, when the modifications to the risk of loss provisions are clear the Court will enforce them.[386]

---

[381](4) The provisions of this section are subject to contrary agreement of the parties and the provisions of this Article on sale on approval(Section 2-327) and on effect of breach on risk of loss (Section 2-510).

[382]White, J.J., and Smith, R.S., Uniform Commercial Code(Fourth Edition)(West Publishing: St Paul, 1995) at 246.

[383]Section 1-102(3) requires parties to respect the principles of "good faith, diligence, reasonableness and care." The concept of good faith is subject to a multitude of meanings see: *Servbest Foods Inc. V. Emmessee Industries, Inc.,* (82 Ill. App. 3d 662, 674, 403 N.E. 2d 1, 11(1980). In *Star Credit Co v. Molina,* (59 Misc. 2d 290, 293, 298 N.Y.S. 2d 570, 573 (N.Y. Civ. Ct. 1969). The Court noted that "good faith" means honesty and perhaps more.

[384]See namely: *Hayward v. Postma,* 31 Mich.App. 720, 188 N.W.2d 31, 9 UCC 379 (1971); *Caudle v. Sherrard Motor Co.,* 525 S.W. 2d 238, 17 UCC 754 (Tex.Civ.App. 1975).

[385]*Ron Read T.V. & Appliances v. Legendary Homes Inc.,* 746 P.2d 1163, 6 UCC 2d 117 (Okl.App.1987) In this case there was a failure on the part of the party to prove trade usage as a method of reallocating risk; *Lynch Imports, Ltd v. Frey*, 588 N.E.2d 484 (Ill. App. Ct. 1990) The Court concluded that a sales contract that required the buyer to procure insurance was not a contrary agreement; In *Phillips Puerto Rico Core, Inc. v. Tradax Petroleum Ltd.,* 782 F.2d 314, 41 UCC 1678 (2d Cir. 1985), The Court refused to find a contrary agreement when buyer's interpretation was inconsistent with the C&F terms of sale.; In *Commonwealth Propane Co., v. Petrosol Int'l Inc.,* 818 F.2d 522 (6th Cir. 1987). The Court concluded that express agreement shifting loss for different methods of delivery not applicable when none of these methods employed.

[386]See: *National Heater Co., v. Corrigan Co. Mechanical Contractors, Inc.,* 482 F.2d 87, 13 UCC 78 (8th Cir.1973); *Southland Mobile Home Corp. v. Chyrchel,* 255 Ark. 366, 500 S.W. 2d 778, 13 UCC 617, 620 (1973), agreement to deliver and attach mobile home considered contrary agreement; *Forest Nursery Co. v. I.W.S., INC.,* 534 N.Y.S.2d 86 (N.Y. Dist. Ct. 1988) The Court concluded that words "no risk to the supplier"

Like its American counterpart, the Convention's rules on risk allocation are applicable without contrary agreement. The Convention does however, allow the parties to vary the effect of any of the Convention's provisions.[387] It is also clear from the Convention that past practices,[388] and usages[389] will bind the parties. The parties need not designate a substitute law when the Convention is excluded, however, it is generally desirable to supplement the excluded provisions with a choice law.[390]

Both voices offer parties the ability to alter the risk of loss provisions. The substantial difference between the two voices is that the UCC requires the parties to respect the principles of "good faith, diligence, reasonableness and care.".[391] Even when they exclude the risk allocation provisions. The Convention on the other hand does not contain such a requirement.[392]

---

and added notations "All Shipments Travel at Risk and Cost of Purchaser" to be a contrary agreement.; In *Beal v. Griffin,* 123 Idaho 455, 849 P.2d 118, 21 UCC2d 244 (App.1993) the Court concluded there was a contrary agreement.

[387]Article 6: 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.

[388]Article 8(3): In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, <u>any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.</u>

[389]Article 9(1)(2)

[390]Honnold, J., *Uniform Law for International Sales under the 1980 Vienna Convention* (Deventer: Kluwer law and Taxation,1991) at 126; Kritzer, A.H., *Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods* (Deventer: Kluwer Law and Taxation, 1989) at 105.

[391]Dore, I., and Defranco, James E., "A Comparison of the Non-Substantive Provisions of the UNCITRAL Convention on the International Sale of Goods and the Uniform Commercial Code" (1982)23 Harvard International Law Journal. at 60-61 point out that there are several areas that may cause difficulty in applying the provisions of the Convention's good faith principles, due to its vagueness.

[392]At the Vienna Conference, the Canadian delegation wanted to amend Article 6 by adding to the second sentence: However, except where the parties have wholly excluded this Convention, the obligations of good faith, diligence and reasonable care prescribed by this Convention may not be excluded by agreement, but the parties may by agreement determine the standards by which the performance of such obligations are to be measured if such standards are not manifestly unreasonable...The amendment by Canada was orally amended by the deletion of ["by agreement" and words thereafter] and rejected by a vote of 4 in favour, and a greater number against (Official Records, p.86.). There was much opposition to the Canadian amendment. Mr. Kim (Republic of Korea) said that the Canadian Proposal was unacceptable as a matter of principle.

II. Contracts that Involve Carriage

Article 2-509(1)[393] governs risk allocation when a contract involves delivery by carrier. This is then subdivided into contracts that involve shipment[394] and destination.[395]

The Code does not define the term "carrier".[396] It is suggested that this term would necessarily include railroads, commercial air carriers, and truckers.[397] However, this terms does not include the seller's own vehicle.[398]

Under Section 2-509(1)(a) risk of loss in shipment contracts passes to the buyer when the goods are tendered to the carrier. The execution of a proper tender occurs when three items are satisfied.[399] Once risk passed to the buyer, he is responsible for the loss of or damage to the goods.[400]

Risk of loss in destination contracts passes to the buyer after meeting two requirements.[401]

---

[393](1) Where the Contract requires or authorizes the seller to ship the goods by carrier

(a) if it does not require him to deliver them at a particular destination the risk of loss passes to the buyer when the goods are duly delivered to the carrier even though the shipment is under reservation(section 2-505); but

(b) if it does require him to deliver them at a particular destination and the goods are there duly tendered while in the possession of the carrier, the risk of loss passes to the buyer when the goods are there duly so tendered as to enable the buyer to take delivery.

[394]§2-509(1)(a) Requires the seller to deliver the goods to the carrier.

[395]§ 2-509(1)(b) Requires the seller to ship the goods to a named point for tender of delivery.

[396]White, J.J., and Smith, R.S., *Supra Note* 391 at 265. They recommend viewing other definitions namely: The Interstate Commerce Act, Revised Interstate Commerce Act of 1978, Pub.L.No. 95-473 92 Stat.1338, 49 U.S.C.A. § 10102(4) (1979.Supp.)

[397]Ibid.

[398]Ibid. when the seller uses his own vehicle §2-509(3) should apply.

[399](A): puts the goods in possession of the carrier and makes a transportation contract that is reasonable given the nature of the goods and other circumstances; (B) obtains and promptly delivers any documents that the buyer may need to get possession of the goods or that are otherwise required; (C) gives the buyer prompt notice of the shipment.

[400]§ 2-709(1)(a) allows the seller to recover the purchase price for the goods once risk passed to the buyer, notwithstanding that the goods were lost or damage.

[401](A) the seller puts and holds conforming goods at the buyer's disposition and gives the buyer any notification reasonably necessary to enable him to take delivery (§2-503(1)); (B) if the contract requires, the seller tenders the specified documents of title in correct form(§2-503(5)(a)) for the Court's interpretation of

Hence, failing to satisfy these terms, the seller is liable for loss of or damage to the goods.

The UCC contains[402] standard trade terms. For example the UCC term FAS requires that the seller must "at his own expense and risk deliver the goods alongside the vessel in the manner usual in that port or on a dock designated and provided by the buyer." [403] This is comparable to the Incoterms provision which states that a seller must "deliver the goods alongside the named vessel at the loading place named by the buyer at the named port of shipment on the date or within the period stipulated and in the manner customary at the port (FAS A.4.). In essence, the UCC and the Incoterms, are analogous in that both recognize that the buyer is usually the charterer of the vessel and hence has the obligation to name the ship, the port and the dock.

As an illustration of the later, the case of *Southern Ry. System v. Leyden Shipping Corp.,*[404] *a shipment made pursuant to "FAS Vessel, Mobile Alabama"* term obliged the seller of the goods at his own expense and risk to deliver the goods in question alongside the vessel. Only at that point would the title of the goods pass to the buyer.

The UCC FOB term states "when the term is FOB the place of shipment, the seller must at that place ship the goods in the manner provided in this Article(Section 2-505) and bear the expense and risk of putting them into the possession of the carrier." [405]

Section 2-319 is complemented by section 2-504 which provides that the seller must put the goods in the possession of such carrier and enter a contract of carriage. In essence, the FOB term that is found in the UCC does not require the process of loading unless the term employed is FOB Vessel, and the seller bears the expense and risk of loading the goods on board.[406]

---

this provision see: *Pestana v. Karinol Corp.*, 367 So. 2d 1096 (Fla Dist. Ct. App. 1979).

[402]§2-319 to 2-322 incl.

[403]§2-319(2)(a).

[404]D.C.N.Y.1968,290 F.Supp.742.

[405]§2-319(1)(a).

[406]§2-319(1)(c).

The UCC in its construction provides for a FOB destination contract, under this term the seller must at his own expense and risk, transport the goods to the destination and there tender delivery of them as provided in Section 2-503(§ 2-509). Conversely, the Incoterms do not take a similar approach, as the UCC does in the FOB term. The Incoterms, in their construction, add the terms Delivery Duty Unpaid (DDU) as an alternative.

In the United States unlike in other countries,[407] the FOB term is distinguished between "FOB Vessel" and "FOB".[408] Generally, FOB is employed as a generic term which does not require the seller to load the goods on board a particular ship. The use of this term is employed to denote the place to which the seller is required to deliver the goods. In other words, it is employed only as a delivery term. The distinction between FOB and FOB Vessel emanate from section 2-319(1) of the UCC. Use of the FOB term in the United States is a conundrum of variant forms (e.g.: there is the FOB PLANT which means that seller simply delivers to the carrier. Likewise, there is the term FOB REFINERY, which means that the seller has the risk and must bear the cost of loading the oil into the buyer's trucks.) of the term found in section 2-319. A compelling example of this variation is the commonly used "Free on Board Stowed". This term means that the seller must prepare the cargo and the vessel's holds to ensure efficient safe loading. Damage sustained, if any under this term by the fault of the stevedores, are at the risk of the seller during the on loading, stowing, and trimming of said cargo.[409]

Accordingly, the UCC C&F term [410] does not oblige the seller to procure insurance for the goods. However, section 2-320(3) states, "Unless otherwise agreed the term C&F or its equivalent has the same effect and imposes upon the seller the same obligations and risks as a CIF term <u>except</u>

[407] For example in *President of India v. Metcalfe Shipping Co* [1970] 1 QB 289; and in *SpA v. Tradax Ocean Transportation* [1987] 2 Lloyd's Rep.342. It has been accepted in the United Kingdom and Australia that the Free on Board term is generally interpreted as meaning that the seller must deliver the goods to the nominated ship.

[408] See Evans, P., "FOB and CIF Contracts" (1993) 67 Australian Law Journal at 844.

[409] This aspect has been validated by the American Courts (*Camden Iron & Metal, Inc. V. Bomar Resources, Inc.*, 719 F.Supp. 297, 306-307, 12 U.C.C. Rep. Serv.2d 398, 412 (D.N.J. 1989).

[410]§2-320 governs the C&F term under the UCC.

the obligation as to insurance." Passage of risk under a C&F term contract, holds the seller responsible for getting the goods alongside, or on the ship free of damage and for paying for carrying the goods to the port of destination. Hence, once the goods have been delivered alongside or on board the buyer is responsible for loss afterwards.[411]

The UCC standard trade terms may be employed with the risk of loss provisions. Employing these terms greatly simplifies matters by determining in advance the allocation of risk between the buyer and the seller.

Generally, Article 67(1) first(Rule II) and second sentence[412](Rule I) governs the risk of loss provisions when delivery is involved. Hence, risk is allocated to the buyer either (A) when the goods are handed over to the first carrier for transmission[413] or (B) goods are handed over to the carrier at that place.[414] While destination contracts are governed by Article 69(2)[415](Rule IV) and (3).

The Convention unlike the UCC does not specifically use trade terms in its construction.

---

[411]See: *Continental Ore Corp. v. U.S.,* 1970, 423 F.2d 1248, 191 Ct.C1.100., and *Sumitomo Corp. Of America v. M/V Sie Kim,* S.D.N.Y.1985, 632 F.Supp.824.

[412](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 risk.

(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.

[413]When goods are handed over at a particular place.

[414]When goods are not required to be handed over at a particular place.

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

(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 contract 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.

Which is to say, that nowhere in the text are there direct references to standard trade terms(e.g.: FOB, FAS and CIF). However, the Convention is readily able to adapt to standard trade terms as found in the Incoterms.[416]

Both the Convention and the UCC entail provisions that govern risk of loss in shipment contracts. The Convention in its construction specifically entails multi-modal transport and successive carriers. Hence, risk is passed when delivery is made to the first carrier. However, the UCC is not as bold in its construction. Section 2-509(1)(a) does not contain the same express provisions as Article 67(1).

As for destination contracts, the Convention passes risk by requiring delivery be due before risk of loss passes to the buyer, Article 69(2), further requires the seller to await delivery before passage of risk occurs. The UCC's section 2-509(1)(b) passes risk to the buyer when goods are tendered as to enable the buyer to take delivery.

---

[416]For a more detailed examination see: Berman, H.J., and Ladd, M.," Risk of Loss or Damage in Documentary Transactions Under the Convention on the International Sale of Goods"(1988) 21 Cornell Int'l L.J at 423.: "That the Vienna Convention on Contracts for the International Sale of Goods does not attempt to define trade terms (CIF, C&F, FOB carrier at named point of shipment, FAS, FOB carrier at named point of destination, ex ship and the like) it entirely understandable." See also Farnsworth, E.A., "Review of Standard Forms or Terms Under The Vienna Convention"(1988) 21 Cornell Int'l L.J. 441*Also see: Commentary by the U.N. Secretary General on the Draft Convention on the International Sale of Goods*, U.N. Doc. A/Cn.9/116, Annex 1 (1978), reprinted in [1978] 9 Y.B. Comm'n Int'l Trade L.96, 139, U.N. Doc. A/CN.9/Ser.A/1978 ("Such trade terms as FOB, CIF and C&F may specify the moment when risk loss passes from the seller to buyer. Where the contract sets forth the rules for the determination of risk of loss by the use of trade terms or otherwise, those rules will prevail over the rules set forth in the present Convention.")

III. Contracts that Involve Bailment

Section 2-509(2)[417] regulates the transfer of risk when the goods are held by a bailee. This provisions, is not as problematic as subsection (1) and the Court's have had minor difficulty interpreting this provision.[418]

Risk of loss of or damage to the goods is passed to the buyer in a contract that involves bailment when four items occur. First, when the buyer receives a negotiable instrument of title to the goods.[419] Second, the bailee acknowledges the buyer's right to possess the goods.[420] Third, the buyer receives a non-negotiable document of title or other written direction to deliver.[421] Fourth, the buyer has had a reasonable time to present the documents and claim the goods.[422]

There appears to be two grey areas in section 2-509(2): (1) the interpretation of the word "bailee"[423] and (2) the method of interpreting (2)(c).[424] However, more recently, the Courts have

---

[417](2)Where the goods are held by a bailee to be delivered without being moved, the risk of loss passes to the buyer

(a) on his receipt of a negotiable document of title covering the goods; or

(b) on acknowledgement by the bailee of the buyer's right to possession of the goods; or

(c) after his receipt of a non-negotiable document of title or other written direction to deliver, as provided in subsection (4)(b) of section 2-503.

[418]See for example: *Whately v. Tetrault*, 29 Mass.App.Dec. 112, 5 UCC 838(1964)

[419]§2-509(2)(a)

[420]§2-509(2)(b).

[421]§2-509(2)(c).

[422]§2-503(4)(b).

[423]The question surrounding the word "bailee" was dealt with in *Courtin v. Sharpe*(280 F.2d 345 (5th Cir.1960), cert. Denied, 365 US 814, 81 S.Ct. 693, 5 L.Ed. 2d 692 (1961) a pre-code case. In essence the seller acted as the bailee, prior to transfer to the buyer the goods a "colt" was accidentally killed. The seller sued the buyer for payment. The main question that arose, was whether risk had passed to the buyer as he had acknowledged his right to take possession of the goods.

[424]Under (2)(c) risk of loss passes when he (buyer) is in receipt (physical possession) of a non-negotiable document. This subsection must be read with 2-501 that states that: "risk of loss of the goods and of any failure by the bailee to honour the non-negotiable document of title or to obey the direction remains on the seller until the buyer has had a reasonable time to present the document or direction..." See: *Jason's Foods v. Peter Eckrich & Sons, Inc.*,(774 F.2d 214, 41 UCC 1287 (7th Cir.1985): Court concluded that acknowledgement could only be made to the buyer.

concluded that only a commercial bailee can issue documents of title and acknowledge the buyer's right to possession to pass risk to the buyer.[425]

The Convention, in its construction, does not precisely refer to contracts of bailment. However, the Convention through Article 69[426] differentiates between the buyer who takes possession of the goods at the seller's place of business and otherwise. Risk of loss is passed to the buyer either when he takes over the goods or when the buyer fails to take delivery when they are placed at his disposal.[427] In the situation where the buyer is not required to take over the goods at the seller's place of business, risk passes when delivery is due and the buyer is aware.[428]

The first distinction that should be highlighted is the Convention's omission to specifically mention bailment contracts, though implicitly it is covered.

The Convention via Article 68 deals with risk allocation in contracts where goods are sold in transit. The Convention transfers risk to the buyer at the conclusion of the contract. However, the Convention establishes that when circumstances indicate, the Convention will retroactively transfer

---

[425]See: *Caudle v. Sherrard Motor Co.,* (525 S.W.2d 238, 17 UCC 754 (Tex.Civ. App.1975) at 240; *Ramos v. Wheel Sports Center*, (96 Misc.2d 646, 409 N.Y.S.2d 505, 25 UCC 156 (1978).

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

(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 contract 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.

[427]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 he does not do so in due time, from the time when the goods are placed at his disposal and he commits a breach of contract by failing to take delivery.

[428]Article 69(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.

risk to the buyer when the goods are handed over to the first carrier.

One major difference between the UCC and the Convention, is that the UCC requires the goods to be identified prior to risk being transferred.[429] The UCC treat's goods sold in transit as a sort of bailment contract, in that risk is passed when the buyer has received a negotiable document. The UCC does not retroactively pass risk to the buyer as found in the Convention.[430]

---

[429] See UCC § 2-509 Cmt.2
[430] Ibid.

IV. Residual Situations

If a contract is not one of carriage or bailment, section 2-509 (3) applies. [431] Generally, this section covers sales that require the seller to deliver the goods in his own vehicle or the buyer has agreed to come to seller's place of business, or the buyer has agreed to pick the goods up at the seller's place of business.

This subsection goes further by distinguishing between merchants[432] and non merchants.[433] With a merchant, risk remains with the seller until the buyer receives the goods.[434] Hence, in a case[435] where a merchant simply leaves the goods in an unlocked garage without the buyer taking possession of them, risk did not pass. In a case of non merchants, risk of loss[436] of or damage passes to the buyer upon tender of delivery.[437]

---

[431]In any case not within subsection (1) or (2), the risk of loss passes to the buyer on his receipt of the goods if the seller is a merchant; otherwise the risk passes to the buyer on tender of delivery.

[432]§2-104 defines merchant: (1) 'Merchant' means any person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

[433]§2-503.

[434]§2-103(c) defines taking physical possession. Hence, if the seller retains physical possession he may bear the risk long after title has passed.

[435]See: *Ron Mead T.V. & Appliances v. Legendary Homes Inc.,*(746 P.2d 1163, 1164 (Okla. Ct. App. 1987) in this case because the buyer did not know that the goods where delivered, the mere fact that the goods where on the buyer's property did not constitute taking physical possession; In *Ellis v. Bell Aerospace Corp.,*(315 F.Supp. 21, 7 UCC 918 (D.Or.1970) the Court concluded that buyer had not taken possession of the goods for there to be a transfer of risk; In *National Plumbing Supply Corp., v. Castellano,*(118 Misc.2d 150, 460 N.Y.S.2d 248, 36 UCC 814 (1983)) the Court found that a unknown individual who signed for the goods, but was not on the property of the buyer could not be considered adequate to transfer risk as there was no delivery.

[436]See: *Martin v. Melland's Inc.,* (283 N.W.2d 76, 27 UCC 94 (N.D.1979)) the Court concluded that notwithstanding that seller had given the buyer certificate of title, risk of loss was not passed to the buyer because he (seller) had not tendered delivery.

[437]This requires three elements: (1) the goods be conforming, (2) the seller put and hold the goods at the buyer's disposition and (3) the seller give the buyer any notification reasonably necessary to enable it to take delivery.

Article 69(2)[438] is considered the residual clause of the Convention and covers situation not encompassed in Articles 67 and 68. In essence Article 69(2) involves the seller delivering the goods to the buyer in his own vehicle. Risk of loss is passed to the buyer when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal at that place.

The striking difference between the Convention and the UCC is that the latter contains a provision that distinguishes between a merchant and non merchant. The Convention does not make this distinction.[439]

---

[438](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.

[439]The Convention does not distinguish between the civil or commercial character of the parties or of the contract. Article 2(a) states: This Convention does not apply to sales: (a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use. The general opinion is that most contracts that invoke the Convention are among international merchants and exclude consumer-type contracts (See Honnold §50), hence removal from the realm of the non-merchant.

V. Effects of Contractual Breach on the Passage of Risk

Section 2-510 [440] established the legal parameters for risk allocation when either party is in breach of their contractual obligations.[441] Hence, if a party is in breach of their contractual obligations risk of loss does not pass.

If the seller is in breach then sections 2-510(1) and (2) govern the situation. In essence when the seller tenders goods that do not conform[442], the buyer would then have a right to revocation,[443] and the risk of loss would remain with the seller until he cures his default or the buyer accepts[444] the goods. The Code is clear, if the goods fail in any respect, the buyer at his sole option may reject the whole, accept the whole or accept any units, while rejecting the rest.[445]

---

[440](1) Where a tender or delivery of goods so fails to conform to the contract as to give right of rejection the risk of their loss remains on the seller until cure or acceptance.

(2)Where the buyer rightfully revokes acceptance he may to the extent of any deficiency in his effective insurance coverage treat the risk of loss as having rested on the seller from the beginning.

(3)Where the buyer as to conforming goods already identified to the contract for sale repudiates or is otherwise in breach before risk of their loss has passed to him, the seller may to the extent of any deficiency in his effective insurance coverage treat the risk of loss as resting on the buyer for a commercially reasonable time.

[441]The commentary to § 2-509 states that: "where there has been no breach by seller." 2-509 will apply.

[442]§2-510(1).: In *re Empire Pacific Indus.,Inc.*(71 B.R.500, 3 UCC2d 1337(Bankr.D.Or.1987). The Court decided that a seller of non-conforming doors, rejected by the buyer, retained risk of loss.

[443]§2-510(2).: Allows the buyer to rightfully revoke acceptance, this must be done according to §2-608(2) "before any substantial change in condition of the goods which is not caused by the defect." In *Design data Corp. v. Maryland Cas. Co.,*(243 Neb. 945, 503, N.W.2d 522, 21 UCC 2d 230(1993)) The Court concluded that buyer's rejection of the goods damaged in transit after several days in receipt of goods, shifted risk back to the seller. *Contra.: Meat Requirements Coordination, Inc v. GGO, Inc.,*(673 F.2d 229, 33 UCC 917 (8th Cir.1982). The Court concluded that the buyer had a duty to inspect the goods within a reasonable time period "to discover defects in the product and to revoke acceptance before a substantial change in the condition of the goods occurs."

[444]§2-510(1)a buyer may accept non conforming goods: see for example: *Wall Corp. v. Ampat Midwest Corp.,*(17 Ohio App.3d 59, 477 N.E.2d 1206, 41 UCC 377 (1984). The Court concluded that the twenty-five days that buyer had to inspect the goods was reasonable and sufficient to detect the non conformity. Hence, buyer lost the right to reject the goods.

[445]§2-601. Likewise, instalment contracts are an exception to the perfect tender rule, §2-612(2):, the buyer may reject any instalment only if the "non-conformity substantially impairs the value of that instalment and cannot be cured".

When the buyer is in breach,[446] risk of loss will jump to the buyer who repudiates,[447] or is otherwise in breach.

Article 70[448] or Rule V governs the risk of loss when there has been a fundamental breach[449] by either party. Unlike the UCC, the Convention uses its normal remedies[450] for breach rather than reinterpret the risk of loss provisions. Likewise, provisions of the Convention detail buyers obligations and effect on risk.[451]

As mentioned above, one clear distinction between the two voices, is that the Convention does not alter the passage of risk rules in light of a contractual breach of the parties. It attempts to work within the given framework to solve the issues. The UCC on the other hand, seeks to respond to contractual breach by redefining when risk passes.

---

[446]§2-510(3).

[447]Four conditions must be satisfied: (A) goods are conforming, (B) they are already identified to the contract, (C) to the extent that the loss is not covered by seller's insurance, and (D) loss occurs within a commercially reasonable time period. These rules are difficult to interpret, In *Multiplastics, Inc. v. Arch Indus., Inc.,* (166 Conn.280, 348 A.2d 618, 14 UCC 573 (1974). In this case the Court concluded that buyer was in breach of contract because he did not take delivery during the agreed time. That as a result of a fire, given the fact that the fire was not commercially unreasonable and that the seller could forego procuring insurance, the buyer had to bear all risk of loss.

[448]If the seller had 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.

[449]Fundamental breach is contained in Article 25.: "A breach of contract committed by one of the parties 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".

[450]If the seller commits a breach the buyer may avail himself of the following remedies.:(A): Article 46(2) require delivery of replacement goods, (B): Article 46(3) require repair of non-conforming goods, (C) Article 49(1)(a) avoid the contract, (D): Article 51(1) avoid the contract in part, (E): Article 50 reduce the contract price in relation to the non-conforming goods and (F): Articles 74-77 make a claim for damages.

[451]Article 66 obliges the buyer to pay the price of the goods when risk of loss has passed to him, Further, Article 69(1) states that when buyer is in breach of contract by failing to take delivery of the goods from the seller in due time, risk passes to the buyer.

Chapter Three- Compatibility or Conflict Among the Three Voices

I. Incoterms and the Convention

A. Method of Interaction

Being that the Incoterms are the most widely used trade terms,[452] it seems natural that they should operate with a document of similar repute. Honnold best describes the interaction between the Convention and Incoterms as a workable relationship. In the day to day operations of a business, where routine transactions take place, drafting specific contract terms such as passing of risk, delivery and transfer would delay the making and consummation of the contract. The use of detailed terms may be included in the parties sale and purchase forms. However, problems generally occur when the terms employed in either parties forms often fail to coincide and generate the intractable problem known as the "Battle of the Forms". Employing the Incoterms can significantly expedite an agreement and deter the problem of divergent contract provisions.

Incoterms and the Convention are two very district documents of international law. The first fact that should be pointed out is that the Convention unlike Incoterms is a document that in its construction is devoid on national interpretation. In essence, this means that it is truly in theory a document of international law. Conversely, Incoterms is a document constructed in the form of Anglo-Saxon traditions. Notwithstanding, each has a very specific role to play in the development of standardized trade law. Despite their different roles, they can support each other by being employed jointly in contract formation. For example, when the drafter of an international contract properly invokes the Incoterms and incorporates them into a contract that has a governing law based on the Convention, they can be very useful to precisely enumerate the key steps that the parties should take for risk allocation. On the other hand using the Convention provides answers to questions that the parties have not answered by contract provisions or by using the Incoterms.

---

[452]Winship. P., "Changing Contract Practices in the Light of the United Nations Sales Convention: A Guide for Practitioners" (1995) 29 International Lawyer at 545.

Further, answers to questions not settled by the Convention or Incoterms, may be found by verifying the gap filling law. Finally, the Convention provides a legal method to avoid or to resolve disputes among the parties in a wide range of situations, not covered in Incoterms, when a party fails to perform his duties under the contract. [453] For example, Incoterms does not provide any solutions to a scenario where goods are delivered but the goods are not of the quality ordered by the buyer. One must view the Incoterms as a document capable of handling issues of transport, risk and payment, however, it fails in providing the legal infrastructure to deal with those issues not within its restrictive scope. Undoubtedly, the two documents can work nicely together if employed appropriately.

Others, supplement this position by suggesting that Incoterms and the Convention have little to do with each other, unless the contract refers to its incorporation.[454] Ultimately, for the Convention and Incoterms to work in tandem, the parties would be wise to use the following Checklist:[455]

B. Checklist

1)☐ **Ascertain the applicability of the Convention and verify reservations**;

This is necessary to establish in advance, if in law, the Convention applies to the transaction in question. For example, if the nature of the contract is employment, it would not fall within the scope of the Convention.

Subsequent to establishing the application of the Convention, one should verify if either of the contracting parties states have made any reservations. For example, a reservation pursuant to article 96, requiring no oral modifications (Argentina, China, Hungary, Byelorussian and Ukraine have made reservations under this article).

---

[453]See Honnold, "Uniform Law and Uniform Trade Terms-Two Approaches to a Common Goal" in "The Transnational Law of International Commercial Transactions", Horn & Schmitthoff eds, (Kluwer 1982),pp. 170-171.

[454]Erdem, E. H., *La livraison des marchandises selon la convention de Vienne* (Fribourg: Editions Universitaires, 1990) at 54-55.

[455]The practical effect of the terms mentioned below are relevant in ascertaining the efficiency of the interaction of the Incoterms to the Convention in that any of these issues may effect how risk is passed.

2)☐ **Ascertain if there are any trade usages in the milieu;**

Establishing in advance trade usages in the milieu, will help avoid conflict rules, especially under the Convention's article 9. The Convention's approach to usage, is significant in that the established practices may bind the parties to pre-existing rules. We understand that the Convention, would most probably interpret a notation 'FOB' as being a term within the realm of the ICC provisions.

3)☐ **Ascertain if the parties have any past practices that may affect the interpretation of passage of risk;**

Despite the previous explanation of usage, parties may have specific practices when dealing with risk allocation. For example, the parties generally employ the term C&F as meaning 'Cost Assurance Freight' despite its normal interpretation as 'Cost and Freight'. Ascertaining in advance these issues avoids confusion.

Once this checklist is reviewed, and the parties are not hindered by any exterior matter, should they elect to supplement the Convention with the Incoterms this should be undertaken with the most explicit of terms.

4)☐ **Include a specific clause to exclude the provisions of the Convention that apply to risk allocation;**

Including a specific clause to exclude provisions of the Convention that deal with risk allocation. As illustrated during this work, risk allocation under the Convention is at times slanted. By specifically excluding the Convention, parties are free to elect choice law clause dealing with risk allocation. This is not obligatory, however, when dealing with matters that are not clearly settled by the Convention it is recommended (e.g.: transit sales)

5)☐ **Include a specific clause that Incoterms (with appropriate version) applies to the contract only with respect to delivery and passage of risk.**

It is recommended by the ICC to include in the contract a specific reference to

Incoterms and the version employed. The reason, is that a mere mention of a trade term, such as 'FOB' could be problematic. For example, an American may interpret this as meaning and FOB under the UCC while a European as an FOB under the ICC rules. Therefore, to avoid clashing interpretations be clear in your initial steps.

Mention of Incoterms should always be associated with the version the parties wish to employ. It is possible that the notation 'Free Carrier' could be interpreted in light of the 1980 version versus the 1990 version. As such, we recommend that the parties clearly select the version and make a clear note of it in their contract.

6)☐ **Parties to a contract may wish to employ specific provisions with regards to goods sold in transit and undivided share of fungible goods (Parties should note that risk allocation in transit sales of undivided bulk takes place prior to apportionment)**

As was discussed in Part One above, the Convention's method of dealing with bulk sales in transit is somewhat questionable. Without the benefit of reviewing the details of that Chapter, it is clear that parties to bulk sales in transit should go to all lengths to avoid using the provisions contained in article 68. We know that risk allocation takes place prior to property in the goods being transferred to the buyer. This affects the party at the end of the line.

It is recommend that parties avoid this scenario and undertake preventative measures by employing an out-turn clause in their contract.

6a)☐ **If the parties elect to employ an out-turn clause in the contract in a sale of undivided shares of fungible goods they must:**

Use an out-turn clause in bulk sales during transit. This is the best method of dealing with unknown perils during transit sales. This approach allows the party at the end of the line to pay for only the goods he receives. For example, the last party who purchases two tons of grain will only pay for what he receives at the end of the line.

☐ **When employing an out-turn clause take note that the CIF term should be considered incompatible as it would transfer the risk to the buyer.**

Under a CIF term, risk is allocated to the buyer when the goods pass the

ship's rail. Clearly, in a transit sale, this would be incompatible. It is recommended that employing terms that allocate risk to the buyer in similar terms be avoided when using an out-turn clause.

The Convention can function in harmony with Incoterms, if the parties understand that the Incoterms cover only issue of delivery and risk.[456] Hence, any issue that does not fall within the provisions of Incoterms, must fall to the Convention. Practically, the use of Incoterms is a cost saving technique that alleviates undue and tedious descriptive work for the drafter of an international contract. In essence, using the two voices together can be a positive force in international trade, by allowing uniform law to flourish in its use.

[456] Feltham, J.D.,"C.I.F. and F.O.B. Contracts and the Vienna Convention on Contracts for International Sale of Goods" (1991) Journal of Business Law.413. Jacobs. E.J., "The Battle of the Forms: Standard Term Contracts in Comparative Perspective" (April 1985) 34 International and Comparative Law Quarterly. 297.

II. UCC and the Convention

A. Exposing the differences

Clearly, the UCC has had a great influence on the Convention.[457] However, Article 7(1) of the Convention blocks the notion that one can equate the two documents. Article 7(1) requires that the Convention be interpreted in light of its international character and the need to promote uniformity in its application.[458] This means that attempting to solve issues that fall within the scope of the Convention, by analogy with domestic law, is incorrect.[459] Therefore, unlike the Incoterms, the UCC cannot be legitimately incorporated into a contract that is based on the Convention. Excluding provisions of the Convention, as stated in Article 6 is possible. However, by mixing a document of international repute with a document strictly grounded in a nationally based law, would detract from the notion of uniform law. [460]

When certain authors suggest that there exits a "degree of similarity between the two

---

[457]Ferrari, F., "The Relationship Between the UCC and the CISG and the Construction of Uniform Law." (1996) 29 Loyola of Los Angeles Law Review at 1023. The author suggest that the Convention and UCC should not be considered similar or that they are "sufficiently compatible to support claims of overall consistency."

[458]Gaston, N., and Smit H., eds., *International Sales: The United Nations Convention on Contracts for International sale of Goods* (New York: Mathew Bender, 1984) s.203, at 2-5 "a considerable merit of the paragraph lies in the fact that it proclaims an up to date legal policy in harmony with the exigencies of world trade which postulates that 'no recourse to national law should be admitted'."

[459]As a personal anecdote, the author participated in the Willem C. Vis Moot Competition held in Vienna, Austria, March 1994. In the final hearing between Colombia University and Laval University (for which I was a member), Colombia attempted to interpret provisions of Article 79(1) namely: "reasonably expected" by using the analogy of the Civil Law concept of "bonne pere du famille". I found this to be strange, considering that Article 7(1) explicitly requires the Convention to be interpreted in light of international law, hence said analogy being impermissible. Notwithstanding, I do not recall the Arbitration Panel consisting of eminent jurists opposing this analogy.

[460]Kritzer,A.H., *Supra Note* 39 at 108. National rules on the law of sales of goods are subject to sharp divergencies in approach and concept. Thus, it is especially important to avoid differing constructions of the provisions of this Convention by national courts, each dependant upon concepts used in the legal system of that country or forum.

documents",[461] I am not sure if this is accurate. In support of this position here are my reasons.

The first element that needs to be examined to understand why the Convention should not be incorporated as a mirror image is the absence of compatible background law. This is so, because the U.C.C. is contextualized, in other words it has its "background" in the common law of the United States, which was meshed into the Code. Unlike the U.C.C., the Convention is not grounded in an archetype system of law. The Convention, if at all, has it roots in lex mercatoria. Without the benefit of an extensive study of the concept of lex mercatoria, it is arguable that this concept is somewhat elusive.[462]

Further consideration is that Article two is part of an integrated commercial code and therefore, covers aspects that differ from the Convention (i.e.: letters of credit, commercial paper etc.) In that sense, we must view the U.C.C. as an integral document with definitions and policies carried over from article to article. The Convention on the other hand, is not a comprehensive document. The implications of a mirror incorporation could result in a disjointed U.C.C.[463]

It must also be recognized that the very nature of the code is in itself different. The U.C.C.'s Article two is drafted in the common law tradition.[464] Conversely, the Convention is drafted in a Civil Code structure. Answers are to be searched for in the context of the article. This is validated by Article 7(2).[465]

---

[461]Dore, I., and Defranco, James E., "A Comparison of the Non-Substantive Provisions of the UNCITRAL Convention on the International Sale of Goods and the Uniform Commercial Code" (1982) 23 Harvard International Law Journal, at 51, 56. The authors suggest that the Convention's definition of trade usages is similar to the UCC's provisions.

[462]Speidel, R.E., *Supra Note* 195 at 172.

[463]Ibid.

[464]*Supra Note* 195. See also Ferrari, F., "The Relationship Between the UCC and the CISG and the Construction of Uniform Law." (1996) 29 Loyola of Los Angeles Law Review at 1027. The author suggests that article 2 of the UCC and the Convention cannot be considered the same and that there are significant differences.

[465]Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

One must not overlook that each document is limited in scope. This aspect is evident in that both voices do not cover all aspects of sales transactions. The Convention fails to cover a diverse range of aspects of a contract.[466] The U.C.C., like the Convention, leaves validity to other rules of law. The U.C.C. does however, serve as the governing law for parties whether they are commercial or consumer parties. In essence, the substantial difference between the U.C.C. and the Convention is that the U.C.C. is not restricted to a two-party commercial contract in its construction;

Differences may also be found in the drafting process as evidenced in that the U.C.C. is a national law drafted in the Anglo-American tradition, while the Convention is a document of international construction.[467] The Convention was drafted in a vacuum of international law and represents different legal and economic traditions. Deducing that as a result of this obvious cultural difference that the method of drafting would also be different is reasonable.

One may also find differences in substance between the Convention and the U.C.C.. However, several examples will be provided. One obvious example of a difference between the U.C.C. and the Convention, is the absence of the parol evidence rule, in the Convention.[468] Likewise, the Convention does not cover delivery terms in contracts that involve carriage.[469] Another striking difference between the U.C.C. and the Convention is that the Convention does not allow a buyer to reject goods and avoid a contract unless there is a fundamental breach by the seller.[470]

Finally, it is evident that there are both technological and transactional problems in both documents reflected by their inability to respond to the development in modern business practices

---

[466]For example: The Convention is not concerned with validity of contracts or of any of its provisions or of usage , nor does it cover goods purchased by article 2(b) or 2(d)auction or securities. Likewise, the Convention is not concerned with rights of third parties. In essence the Convention covers two-party contracts of a commercial nature.

[467]*Supra Note* 198 at 174.

[468]Flechtner, H.M., "More US Decisions on the UN Sales Convention: Scope Parol Evidence, "Validity" and the Reduction of Price under Article 50." (1995) 14 Journal of Law and Commerce.153.

[469]*Supra Note* 198 at 175.

[470]Articles 25 and 49(1) of the Convention.

(i.e.: computers).[471] A compelling example is the use of EDI, according to some authors the Convention has relaxed impediments to the use of EDI to conclude international sales contracts. [472]

B. Reviewing the Results

A logical deduction is that the UCC and the Convention are unique in their own way. It is understandable why, after examining the risk of loss provisions and taking into consideration the above-mentioned points that the two documents must be viewed in significantly different perspectives. However, this being stated, one must not rush to rule out their ability to work together in certain limited contexts (i.e.: election of a choice law clause).

---

[471]*Supra Note* 198 at 177.

[472]Nicoll, Christopher., "E.D.I. Evidence and the Vienna Convention" (1995) January Journal of Business Law at 23.

CONCLUSION

With the ever increasing reduction of physical trade barriers and associated developments in communication and transportation, the notion of the 'world next door' has greater significance. This situation has spawned the need for rules of an international nature that can unify commercial law. Harmonization of rules will help facilitate trade among peoples from the four corners of the earth and benefit not simply the merchants, but the persons they employ and the community that sustains their commerce.

Subsequent to our examination of the risk allocation provisions under the Convention, Incoterms and the UCC, it is clear that these documents are distinct in law. The diversity of these documents is amply illustrated in their history. Despite their difference, each may play a role in helping merchants detail in advance the rules governing risk allocation. During this work, we have illustrated how each of these documents can be supportive of one another by being employed in one form or another in a joint capacity within the frame work of a contract. For example, a contract of sale between a German buyer and Canadian seller could logically incorporate the Convention to deal with matters of form, while leaving risk allocation provisions to a term wisely selected under the Incoterms.

Despite the possible supportive role these documents may play, it is necessary to point out areas of contention. Closer examination of the Convention for example, reveals that the risk allocation provisions are deficient. More specifically, the Convention's provisions of risk allocation of bulk sales is horribly lacking and is more detrimental than constructive. This is illustrated by article 68 allocation of risk prior to goods being apportioned. Though, this article is constructed in form from the British system, recent legislative changes in England have dealt with this matter. On the other hand, the changes to English law are not reflected in the Convention, however, I believe that most persons in the legal community would avoid the Convention at this level nonetheless. This explains the author's recommendation in using an out-turn clause in these types of sales. This approach has support in the legal community at large.

Conversely, the Convention as a document of international law is quite impressive, in that it has obtained wide acceptance. It is important to remember, that the Convention in its construction is in theory suppose to be devoid of national leanings. In essence, it is constructed as a self contained embryonic entity with its own method of solving problems without the benefit of outsourcing. In this regard, it must be recognized for its achievements. However, one pressing concern that comes to mind is the talk time this document will obtain in the classes and hallways of law schools and academic circles. It is true that there is a move to wider and universal acceptance. In spite of its wider acceptance, for international law of this nature to flourish it requires continued movement so that students learn it and take their knowledge forward into the practice of law. It is with this in mind that the author hopes that a detailed examination of the risk allocation provisions will prove to be helpful in this regard.

Ensuing, it is also appropriate to mention, that despite the Incoterms frequent use, reliance on this document as a generator of obligations is faulty. Employing the Incoterms to determine risk allocation and payment price is sound, however, relying on this document to explain other issues is lacking. It should be noted that the Incoterms lives in a vacuum of some other form of law. Parties, must avoid looking for all their solutions with the guise of the Incoterms. This being stated, it is also clear that the risk allocation provisions are well tested and widely employed. Their popularity is based on time being a commodity, and most businessmen not having the luxury to spend time on drafting detail oriented clauses with regard to risk allocation. Employing internationally accepted trade terms with regards to risk allocation is a great commodity and allows persons from across the globe to ascribe the same definition to terms regardless of their cultural and legal backgrounds.

It is interesting to note that during this work we have examined two documents of an international nature and one of a purely local nature. The purpose of examining the UCC was clearly not illogical in this regard. The risk allocation provisions contained in the UCC have been used as a model in sort for the Convention. More specifically, the UCC's provisions on risk allocation are coherent and lucid in their construction and would be an acceptable alternative to the risk allocation provisions under the Convention. Like its counterpart in the Incoterms, the UCC provisions are detail

oriented and help avoid tedious drafting. It should also be noted that the UCC trade terms are not as widely standardized in their interpretation as are the Incoterms. However, overall they are effective in forty-nine out of fifty American States.

Growth in trade may be partially attributed to the Convention, Incoterms and the UCC because these rules foster safety and security through law. Generally, the seller is concerned about payment and the buyer about receiving what he has ordered in a good state. Using these rules give the merchants as sense of knowledge that the rules of the game are equitable and solutions are readily available. Risk allocation is a concern for all parties to an international contract and must be dealt with in advance as a measure of good business. The use of the documents herein described are lending their support to the stabilization process.

After establishing the state of affairs regarding risk allocation, I am left with the tedious obligation of concluding a work that has no true conclusion. Though it is the aspiration of all authors to conclude an academic writing with a sweeping statement or conclusion, it is abundantly clear that the very nature of this thesis subject matter does not facilitate such an ending. This work is lacking a firm conclusion, because the nature of law itself is inconclusive. This characterization is so because law must be fluid so that it develops with the changing environment, this is the case regarding the notion of risk allocation. Risk allocation as described in this work was an attempt to set down the framework for future study for which I hope to continue.

Finally, what may be stated with some certainty is that the use of the Convention supplemented with the Incoterms or documents such as the UCC can if properly invoked provide a positive force in the determination of risk allocation. As such, the author hopes he has given the reader adequate information to further explore the subject of passage of risk from seller to buyer in international commercial contracts in the traditions of the ancient law merchants.

BIBLIOGRAPHY

A. Doctrine on the Vienna Convention

Audit, B., *La vente internationale de marchandise de la Convention des Nations-Unies du 11 avril 1980* (Paris: L.G.D.J., 1990)

Bianca, C.M., and Bonell, M.J., eds., *Commentary on the International Sales Law* (Milan: Giuffre,1987)

Castel, J.G. and De Mestral, A.L.C., *The Canadian Law and Practice of International Trade with Particular Emphasis on Export and Import of Goods and Services* (Toronto: Montgomery Publications, 1991)

Cheng, C.-J., ed., *Clive M. Schmitthoff's Select Essays on International Trade Law* (London: Graham and Trotman, 1988)

Cheng, C.-J., *Basic Documents on International Trade Law* (London: Martinus Nijhoff, 1990)

Dessmontet, F., *Les contrats de vente internationale de marchandises* (Lausanne: CEDIDAC Publication, 1991)

Enderlin, F. and Maskow,D., *International Sales Law, United Nations Convention on Contracts for the International Sale of Goods* (New York: Oceana, 1992)

Erdem, E. H., *La livraison des marchandises selon la convention de Vienne* (Fribourg: Editions Universitaires, 1990)

Fox, W., *International Commercial Agreements* (Deventer: Kluwer Law and Taxation, 1988)

Gaston, N., and Smit H., eds., *International Sales: The United Nations Convention on Contracts for International Sale of Goods*(New York: Mathew Bender, 1984)

Hancock, W., ed., Guide to the International Sale of Goods Convention (Chesterland, Ohio: Business Laws, 1987)

Honnold, J., *Uniform Law for International Sales under the 1980 Vienna Convention* (Deventer: Kluwer law and Taxation,1991)

Hudson, "Exemptions and Impossibility under the Vienna Convention" in McKendrick, E., *Force*

Majeure and Frustration of Contract (London: Lloyd's of London Press, 1991) at 175.

Honnold, "Uniform Law and Uniform Trade Terms-Two Approaches to a Common Goal" in "The Transnational Law of International Commercial Transactions", Horn & Schmitthoff eds, (Kluwer 1982),pp. 170-171.

Kritzer, A.H., *Guide to Practical Applications of the United Nations Convention on Contracts for the Interactional Sale of Goods* (Deventer: Kluwer Law and Taxation, 1989).

Lacasse, N. et Perret, L., eds., *Actes du colloque sur la vente internationale:* Ottawa, 14 octobre 1987(Montreal: Wilson&Lafleur, 1989)

Neumayer, K.H et Ming, C., *Convention de Vienne sur les contrats de vente internationale de marchandise* (Lausanne: CEDIDAC, 1993)

Prujiner, A., *Treaties and Interactional Documents used in International Trade Law* (Montreal: Wilson & Lafleur, 1992).

Schlechtriem, P., *Uniform sales Law: The UN-Convention on Contracts for the International Sale of Goods* (Vienna: Manzsche Berlags und Universitasbuchhandlung, 1986)

Schmitthoff, C.M., *The Law and Practice of International Trade* (London: Stevens and Sons, 1990)

Schmitthoff, C.M., *Export Trade the Law and Practice of International Trade* (London: Stevens and Sons, 1986)

Volken, P., and Petar, S., *International Sale of Goods*(Dubrovnick Lectures) (New York: Oceana, 1986)

Ziegel. S., and Graham. W.C., *New Dimensions in International Trade Law: A Canadian Perspective* (Toronto: Buttersworth, 1980)

B. Doctrine on Incoterms

Derains, Y., et Ghestin, J., *La Convention de Vienne sur la vente internationale et les incoterms* (Paris: L.G.D.J., 1989)

Eisemann, F., et Derains, Y(3 eds) *La pratique des incoterms* (Paris: Jupiter, 1988)

Eisemann, F.,*Usage de la vente commerciale internationale(Incoterms)* (Paris: Jupiter, 1972)

Putzeys, Jacques., *Les Ventes Internationales et les Transports* (Louvain: Louvain-la-Neuve, 1992)

Ramberg, Jan., *Guides des incoterms 1990* (Paris: ICC Publishing, 1991)

Sassoon., David, *CIF and FOB Contracts* (Vol 5.) (London: Stevens & Sons , 1975)

C. Doctrine and Articles Maritime matters

Braen, Andre, *Le droit maritime au Quebec* (Montreal: Wilson & Lafleur, 1991)

Goode, Roy and Cranston, Ross, Commercial and Consumer Law National and International Dimensions (London: Clarendon, 1993)

Kindred., H.M., "Goodbye to the Hague Rules: Will the New carriage of Goods by Water Act make a difference" (1994-95) 24 Canadian Business Law Journal.404.

Scrutton., T.E. (Mocatta, Mustill & Boyd), *Scrutton on Charter parties & Bills of Lading, 19ed.,*(London: Sweet & Maxwell, 1984)

Tetley., William, *International Conflict of Laws* (Montreal: Blais, 1994)

Wilson., John, *Carriage of Goods by Sea* 2d(ed) (London: Pitman, 1993)

D. Treaties and Legislation

Draft of Law for the Unification of Certain Rules Relating to Validity of Contracts of International Sale of Goods, approved by the Governing Council of Unidroit in 1972(in: Uniform Law Review, 1973, I, 61-69

EC Convention on the Law Applicable to Contractual Obligations, Rome, June 19, 1980, O.J. Legislation(1980) No. L 266

Bills of Lading Act, 1885 (1855) 18 & 19 Vict., ch. 111.

Canadian Bills of lading Act. R.S.C. (1985), ch. B-5.

Carriage of Goods by Water Act, S.C. 1993, c.21.

Carriage of Goods by Sea Act, 1992 U.K. 1992 c.50

The Geneva Conventions on the Unification of law relating to bills of exchange(1930) and to cheques (1931)League of Nations, Treaty Series, Vol. CXLIII (1933-1934),No. 3313, p.257; No.3314, p.317.; No.3315, p.337;

The Geneva Protocol on Arbitration Clauses of 1923, League of Nations, Treaty Series, Vol. XXVII (1924), No.678, p.157.

The Geneva Convention on the Execution of Foreign Arbitral Awards of 1927, League of Nations, Treaty Series, Vol. XCII (1929-1930), No.2096, p.301.

Uniform Law on International Sale of Goods, annexed to the Convention Relating to a Uniform Law on the International Sale of Goods, adopted by the 1964 Hague Conference (in: 1964 Hague Conference Records, I, 333-348)

Uniform Commercial Code, prepared by the American Law Institute as reproduced in Uniform Laws Annotated Volume 1A Uniform Commercial Code Sections 2-301 to 2-515(West Publishing, St. Paul: 1989)

Uniform Law in the Formation of Contracts for the International Sale of Goods, annexed to the Conventions Relating to a Uniform Law on the Formation of Contracts in the International Sale of Goods, adopted by the 1964 Hague Conference (in: 1964 Hague Conference Records, I, 349-354)

Uniform Law on the International Sale of Goods (1964), Annexed to the Hague Sales Convention (1964).

United Nations Conference on Contracts for the International Sale of Goods, Vienna, March 10 - April 11, 1980. Official Records, Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committees, United Nations, New York, 1981, P.191.

United Nations Convention on Contracts for the International Sale of Goods, Vienna, April 11, 1980, U.N. Doc. A/CONF.97/19.

E. Articles on the Vienna Convention

Berman and Kaufman, "The Law of International Commercial Transactions (Lex Mercatoria) (1978) 1 Harv. Int'l. L.J.247.

Bainbridge, S., "Trade Usages in International sales of Goods: An Analysis of the 1964 and 1980 sales Conventions" (Spring 1984) 24(3) Virginia Journal of International Law.619.

Flechtner, H.M., "More US Decisions on the UN Sales Convention: Scope Parol Evidence, "Validity" and the Reduction of Price under Article 50." (1995) 14 Journal of Law and Commerce.153.

Douglas E. Goodfriend: "After the Damage is Done: Risk of Loss Under the United Nations Convention on Contracts for the International Sale of Goods." (1984) 22 Colum.J. Transnat'l L. 575.

Honnold, J., "The Draft Convention on Contracts for the International Sale of Goods: An Overview" (1979) 27 Am. J. Comp. L. 291, 298

Kastley," The Right to Require Performance in International Sales: Towards an International Interpretation of the Vienna Convention" (1988) 63 Wash. L. Rev. 607.

Khan, Philippe,"Convention de Vienne du 11 avril 1990: Caractères et domaine d'application" (1989) 15 D.P.C.I.385.

Lefebvre, Guy., "La bonne foi dans la Convention des Nations Unies sur les contrats de vente internationale de marchandises", dans P-P., Cote et C Dubreuil (dir.), *La morale et le droit des affaires, Les journees Maximilien-Caron* 1993, Montreal, Editions Themis, 1994, pp.353-354.

MacCormack, G.,"Alfenus Varus and the law of Risk in Sale" (1985) 101 Law.Q. Rev. 573.

Mouly, C., "La conclusion du contrat selon la convention de vienne sur la vente internationale de marchandise" (1989)15 D.P.C.I.400.

Nicoll, Christopher., "E.D.I. Evidence and the Vienna Convention"(1995)January Journal of Business Law.21.

Ndulo, Muna, "The Vienna sales convention 1980 and the Hague uniform laws on international sale of goods 1964: a comparative analysis" (1989) 38 The International and Comparative law Quarterly.1.

Samson, C., "L'harmonisation du droit de la vente: l'influence de la convention de Vienne sur l'evolution et l'harmonisation du droit des provinces canadiennes" (1991) 32 CdeD.1001.

Shivbir. G., "Risk of loss in Goods sold during transit: A Comparative study of the U.N. Convention on Contracts for the International Sale of Goods, The U.C.C., and the British Sale of Goods Act." (1991) 14. Loy.L.A. Int'l&Comp.L.J.93.

Thierry, Jean.,"Les nouvelles règles de la vente internationale" (1989)15 D.P.C.I.369.

Winship. P., "The U.N. Sales Convention: a Bibliography of English Language Publications" (Summer 1994) 28(2) The International Lawyer.401.

Winship. P., "Formation of International Sales Contracts Under the 1980 Vienna Convention" (1983) 17 The International lawyer.1.

Winship. P., "Private International Law and the U.N. Sales Convention" (1988) 21 Cornell Int'l LJ 487.

Winship. P., "Changing Contract Practices in the Light of the United Nations Sales Convention: A Guide for Practitioners" (1995) 29 International Lawyer.525.

F. Articles on Incoterms

Berman, H.J., and Ladd, M.," Risk of Loss or Damage in Documentary Transactions Under the Convention on the International Sale of Goods" (1988) 21 Cornell Int'l L.J 423.

Eisemann, F., "Incoterms and the British Export Trade" (1965) Journal of Business Law.114.

Evans, P., "FOB and CIF Contracts" (1993) 67 Australian Law Journal.844.

Farnsworth, E.A., "Review of Standard Forms or Terms Under The Vienna Convention" (1988) 21 Cornell Int'l L.J. 441.

Feltham, J.D.,"C.I.F. and F.O.B. Contracts and the Vienna Convention on Contracts for International Sale of Goods" (1991) Journal of Business Law.413.

Jacobs. E.J., "The Battle of the Forms: Standard Term Contracts in Comparative Perspective" (April 1985) 34 International and Comparative Law Quarterly. 297.

Kelso, J.C., "The United Nations Convention on Contracts for the International Sale of Goods: Contract Formation and the Battle of the Forms" (1983) 21 Columbia Journal of Trans-national Law .529.

James J. Lightburn and Gawie M. Nienaber., “Out-Turn Clauses in CIF Contracts in the Oil Trade” (May 1987) 177 Lloyd’s Mar. & Com. L.Q. .177.

Miller., N.I., “Bills of Lading and Factors in Nineteenth Century English Overseas Trade” (1957) 24 U. of Chicago L. Rev.257.

Murray, D.E., "Risk of Loss of Goods in Transit: A Comparison of the 1990 Incoterms with terms of other voices"(1991-92)23 University of Miami Inter-American Law Review.93.

Roth, P.M., "The Passing of Risk" (1979) 27 Am. J. Comp. L. 291, 298

Vishny, P.H., D’Ancona and Pflaum., “Going International: International Trade for the Nonspecialist Sponsored with the co-operation of the ABA International law and Practice Section’s Committee on International Commercial Transactions” (1989) C395 ALI-ABA 1.

Pomerleau, Manon and Lapointe , Esther., “Le Contrat FOB port d’embarquement au Canada, Etude comparative: doctrine jurisprudence et sentences arbitrales”(1987) 47 RduB.1007.

Sassoon, "The Origin of FOB and CIF Terms and the Factors Influencing their Choice," (1967) Journal of Business Law.32.

Vergne, F., "The Battle of the Forms Under the 1980 United Nations Convention on Contracts for the International Sale of Goods" (1985) 33 Am. J. Comp. L. 233

de Vires, H., " The Passing of Risk in International Sales Under the Vienna Sales Convention of 1980 as Compared with Traditional terms" (1982) 17 Eur. Transp. L. 495.

G. Doctrine and Articles on Uniform Commercial Code

Bunn, C., Snead, H., and Speidel, R., *An Introduction to the Uniform Commercial Code* (Michie Company, Virginia:1964)

Braucher, "The Legislative History of the Uniform Commercial Code" (1958) 58 Colum.L.Rev.798

Dore, I., and Defranco, James E., "A Comparison of the Non-Substantive Provisions of the UNCITRAL Convention on the International Sale of Goods and the Uniform Commercial Code" (1982) 23 Harvard International Law Journal.49.

Ferrari, F., "The Relationship Between the UCC and the CISG and the Construction of Uniform Law." (1996) 29 Loyola of Los Angeles Law Review.1021.

Gabriel, H., "The Battle of the forms: A Comparison of the United Nations Convention for the International Sale of Goods and the Uniform Commercial Code" (1994) 49 Business Lawyer.1053.

Hancock, S.F., "A Uniform Commercial Code for International Sales? We have it now." (1995) 67 New York State Bar Journal.20.

Honnold, J., "The New Uniform Law of International Sales and the UCC: A Comparison" in Symposium on international sale of goods convention (1984)18 The International Lawyer.21.

Schander, "A Short History of the Preparation and Enactment of The Uniform Commercial Code" (1967) 22 U.Miami.L.Rev.1.

Shivbir. G., "Risk of loss in Goods sold during transit: A Comparative study of the U.N. Convention on Contracts for the International Sale of Goods, The U.C.C., and the British Sale of Goods Act." (1991) 14. Loy.L.A. Int'l&Comp.L.J.93.

Speidel, R.E., "The Revision of UCC Article 2, sales in Light of the United Nations Convention on Contracts for the International Sale of Goods." (1995) Northwestern Journal of International Law and Business.165.

Stocks, M., "Risk of Loss Under the Uniform Commercial Coda and the United Nations Convention on Contracts for the International sale of Goods: A Comparative Analysis and Proposed Revision of UCC Sections 2-509 and 2-510" (1993) 87 Northwestern University Law Review.1415.

White, J.J., and Smith, R.S., Uniform Commercial Code (Fourth Edition) (West Publishing: St Paul, 1995)

Winship, P., "Domesticating International Commercial Law: Revising UCC Article 2 in light of the United Nations Sales Convention" (1991) 43 Loy.L.Rev. 45

Winship. P., “The New Uniform Law for International Sales and the UCC: A Comparison” (1984) 18 The International Lawyer at 21.

CASE LAW

A. Foreign Judgements

F.A.S. Italiana s.n.c.- Ti. Emme s.n.c.- Pres.Cons. Ministri(Avv.gen.Stato). *(*A/CN.9/SER.C/ABSTRACT/7(Decision of November 19, 1992) Original in Italian also published in English in [1995] UNILEX, D.92-27*)*

A/CN.9/SER.C/ABSTRACT/6 (Decision of January 18, 1994) Published in German in *Recht der Internationalen Wirtschaft(RIW)* 1994, 240.

Austrian Court of Appeal at Innsbruck A/CN.9/SER.C/ABSTRACT/8 (Decision of July 1, 1994)Original in German unpublished.

Civil Court of Basel-Stadt Switzerland A/CN.9/SER.C/ABSTRACT/7,(December 21, 1992) Original in German .

Decision of June 13, 1991 A/CN.9/SER.C/ABSTRACTS/1 English for a brief summary see *Uniform Law Review*, 1991, I, 372 also published in German, *Recht der Internationalen Wirtschaft*, 1991, 591

In *the Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft-Wien Court,* (June 15, 1994) A/CN.9/SER.C/ABSTRACT/7 Original in German, abstract in English also reported in English in [1995] UNILEX, D.94-12.

Oberlandesgericht Frankfurt A.m.a/CN.9/SER.C/ABSTRACT/6 (Decision of January 18, 1994) Published in German in *Recht der Internationalen Wirtschaft(RIW)* 1994, 240.

The Cantonal Court of Vaud A/CN.9/SER.C/ABSTRACT/7 (Decision of May 17, 1994) Unpublished Original in French.

United Technologies International inc. Pratt and Whitney Commercial Engine Business v. Magyar Legi Kozlekedesi Vallalat(Malev Hungarian Airlines) A/CN.9/SER.C/ABSTRACT/4 (Decision of September 25, 1992) Original in Hungarian, a summary published in Italian in Diritto del commercio internazionale 1993, 651

B. Arbitral Awards

ICC *Case Number 7197* (See *Journal de Droit International*, 1993, 1028.)

ICC *Case Number 6653* (See *Journal de Droit International*, 1993, 1041.)

ICC *Case Number 2288* (January 22, 1975)

C. American Jurisprudence

A.M. Knitwear Corp. V. All America Export - Import Corp., 41 N.Y. 2d, 390 N.Y.S.2d 832, 359 N.E.2d 342, 20 UCC 581 (1976).

Beal v. Griffin, 123 Idaho 455, 849 P.2d 118, 21 UCC2d 244 (App.1993)

Beijing Metals & Minerals Import/Export Corporation v. American Business Center, Inc. et. al. 993 Federal Reports 2d, 1178 (1993), U.S. Court of Appeals for the Fifth Circuit (Decision of June 15, 1993) also reproduced in 1993 U.S. App. Lexis 14211.

Camden Iron & Metal, Inc. V. Bomar Resources, Inc., 719 F.Supp. 297, 306-307, 12 U.C.C. Rep. Serv.2d 398, 412 (D.N.J. 1989).

Caudle v. Sherrard Motor Co., (525 S.W.2d 238, 17 UCC 754 (Tex.Civ. App.1975);

Commonwealth Propane Co., v. Petrosol Int'l Inc., 818 F.2d 522 (6th Cir. 1987).

Continental Ore Corp. v. U.S., 1970, 423 F.2d 1248, 191 Ct.C1.100.,

Courtin v. Sharpe (280 F.2d 345 (5th Cir.1960), cert. Denied, 365 US 814, 81 S.Ct. 693, 5 L.Ed. 2d 692 (1961)

Delchi Carrier, SpA v. Rotorex Corp.(Decision of September 9, 1994 of the US District Court for the Northern District of New York) also published in 1994 U.S.Dist. LEXIS 12820; and in 1994 WESTLAW 495787.

Design data Corp. v. Maryland Cas. Co.,(243 Neb. 945, 503, N.W.2d 522, 21 UCC 2d 230(1993)

Droukas v. Divers Training Academy, Inc. 76 N.E.2d 548,553, 24 U.C.C. Rep.Serv.118,122(Mass.1978)

Ellis v. Bell Aerospace Corp.,(315 F.Supp. 21, 7 UCC 918 (D.Or.1970)

Forest Nursery Co. v. I.W.S., Inc., 534 N.Y.S.2d 86 (N.Y. Dist. Ct. 1988)

Hayward v. Postma, 31 Mich.App. 720, 188 N.W.2d 31, 9 UCC 379 (1971);

Jason's Foods v. Peter Eckrich & Sons, Inc.,(774 F.2d 214, 41 UCC 1287 (7th Cir.1985)

Lynch Imports, Ltd v. Frey, 588 N.E.2d 484 (Ill. App. Ct. 1990);

Multiplastics, Inc. v. Arch Indus., Inc., (166 Conn.280, 348 A.2d 618, 14 UCC 573 (1974).

Martin v. Melland's Inc., (283 N.W.2d 76, 27 UCC 94 (N.D.1979)

Meat Requirements Coordination, Inc v. GGO, Inc.,(673 F.2d 229, 33 UCC 917 (8th Cir.1982).

National Heater Co., v. Corrigan Co. Mechanical Contractors, Inc., 482 F.2d 87, 13 UCC 78 (8th Cir.1973).

National Plumbing Supply Corp., v. Castellano,(118 Misc.2d 150, 460 N.Y.S.2d 248, 36 UCC 814 (1983))

Pestana v. Karinol Corp., 367 So. 2d 1096 (Fla Dist. Ct. App. 1979).

Phillips Puerto Rico Core, Inc. v. Tradax Petroleum Ltd., 782 F.2d 314, 41 UCC 1678 (2d Cir. 1985),

Ramos v. Wheel Sports Center , (96 Misc.2d 646, 409 N.Y.S.2d 505, 25 UCC 156 (1978)

Re Empire Pacific Indus.,Inc (71 B.R.500, 3 UCC2d 1337(Bankr.D.Or.1987)

Ron Read T.V. & Appliances v. Legendary Homes Inc., 746 P.2d 1163, 6 UCC 2d 117 (Okl.App.1987)

Ron Mead T.V. & Appliances v. Legendary Homes Inc.,(746 P.2d 1163, 1164 (Okla. Ct. App

Servbest Foods Inc. V. Emmessee Industries, Inc., (82 Ill. App. 3d 662, 674, 403 N.E. 2d 1, 11(1980)

Southern Ry. System v. Leyden Shipping Corp D.C.N.Y.1968,290 F.Supp.742.

Southland Mobile Home Corp. v. Chyrchel, 255 Ark. 366, 500 S.W. 2d 778, 13 UCC 617, 620 (1973),

Star Credit Co v. Molina, (59 Misc. 2d 290, 293, 298 N.Y.S. 2d 570, 573 (N.Y. Civ. Ct. 1969).

Wall Corp. v. Ampat Midwest Corp.(17 Ohio App.3d 59, 477 N.E.2d 1206, 41 UCC 377 (1984)

Whately v. Tetrault, 29 Mass.App.Dec. 112, 5 UCC 838(1964)

Sumitomo Corp. Of America v. M/V Sie Kim, S.D.N.Y.1985, 632 F.Supp.824.

D. Canadian Jurisprudence

Dominion Glass Co. v. The Ship Anglo Indian [1944] S.C.R.409, [1944] 4 D.L.R.721.

Falconbridge Nickel Ltd vs. Chimo Shipping Limited [1974] R.C.S.933

E. English Decisions

Aliakmon, The Times, April 26, 1986

Biddell Brothers v. E. Clements Horst Co.[1911] 1 K.B. 934 (C.A.), [1912] A.C. 18.

Craven & Another v. Ryder (1816) 6 Taunt. 433.

Cowas-Jee v. Thompson (1845) 3 Moore Ind.App. 422.

Ireland v. Livingston (1871) L.R. 5 H.L. 395.

Perras v. Grace (1918) 27 B.R.343.

President of India v. Metcalfe Shipping Co [1970] 1 QB 289;

Ross T. Smyth & Co. Ltd. V. T.B. Baily, Son & Co [1940] 3 All E.R. 60.

Sewell v. Burdick (1884) 10 App.Cas.74 (H.L.)

Shackman v. Cunard White Star Ltd(1939)63 Ll.L.Rep 28.

SpA v. Tradax Ocean Transportation [1987] 2 Lloyd's Rep 342.

Sterns, Limited v. Vickers, Limited [1923] 1 K.B. 79.

The Delfini [1990] 1 Lloyd's rep. 252.

Tregelles v. Sewell (1862) 7 H.&N. 574.

Vita Food Products Ltd v. Unus Shipping Co. Ltd [1939] A.C. 277, (1939) 63 Ll. L. Rep.21, 1939 AMC 257, [1939] 2 D.L.R.1(P.C.)

Wackerbarth v. Masson (1812) 3 Camp. 270.

ANNEX I
TEN RULES GOVERNING TRANSFER OF RISK UNDER THE CONVENTION

Category One: Handing over the Goods at a Particular Place

Rule I:
Article 67(1)
Sentence: Second
Incoterms Comparison: FOB, FAS, FOB, CPT

I Where "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."

Rule II:
Article 67(2)
Sentence: One
Incoterms Comparison: CFR, CIF

II Where however, "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."

Category two: No Delivery Required

Rule III:
Article 69(1)
Incoterms Comparison: Ex Works, Ex Ship, Ex Quay

III "The risks pass to the buyer when he takes over the goods or, if he does not do so in due time, from the time when the goods are placed at his disposal and he commits a breach of contract by failing to take delivery."

Rule IV:
Article 69(2)
Incoterms Comparison: Ex Ship and Ex Quay, D-Terms

IV "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."(the place where he is bound to take over the goods)

Category three: Goods Sold in Transit "Afloat"

Rule V:
Article 68
Sentence: One
Incoterms Comparison: Paragraph 14 only

V "The risk in respect of goods sold in transit passes to the buyer from the time of the conclusion of the contract."

Rule VI:
Article 68
Sentence: Two
Incoterms Comparison: Paragraph 14 only

VI "However, if the circumstances so indicate, the risk is assumed by the buyer from the time the goods are were handed over to the carrier who issued the documents embodying the contract of carriage."

Category Four: Extending Seller's Risk

Rule VII: Goods not Identified
Article:(a)67(2) and (b)Article 69(3)
Incoterms Comparison:

VII (a)"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."

(b) "If the contract 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."

Rule VIII: Damage to Goods while Afloat
Article 68
Sentence: Third
Incoterms Comparison: Paragraph 14 only

VIII "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."

Rule IX: Duty to Pay the Price
Article 66
Incoterms Comparison:

IX "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."

Category Five: Fundamental Breach and Risk of Loss

Rule X: Fundamental Breach
Article: 70
Comparison: UCC 2-510

X "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."