Article 68

The risk in respect of goods sold in transit passes to the buyer from the time of the conclusion of the contract. However, if the circumstances so indicate, the risk is assumed by the buyer from the time the goods were handed over to the carrier who issued the documents embodying the contract of carriage. Nevertheless, if at the time of the conclusion of the contract of sale the seller knew or ought to have known that the goods had been lost or damaged and did not disclose this to the buyer, the loss or damage is at the risk of the seller.

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I. Importance and Role of the Provision

Art. 68 states the general rule to be applied when goods are sold afloat. In these situations risk passes at the time of conclusion of the contract. However, an exception exists 'if the circumstance so indicate' that provides that the risk shall pass 'retrospectively' from the time the goods were handed over to the carrier. Art. 68 continues by providing that the risk remains with the seller if at the conclusion of the contract the seller knew or ought to have known that loss or damage had already occurred to the goods and this fact was not disclosed to the buyer.

II. Commentary

1. Terminology

Examination must be given to the basic terminology used within the article. As specified in Art. 7, "in the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application", as such terms such as 'sold' and 'goods' should not be interpreted within domestic guidelines. Instead, the terminology that may have a particular domestic meaning should be considered within the international framework. Consequently, 'sold' should not be interpreted to imply the passing of property,[1] nor should 'goods' be interpreted to include anything other than the traditional understanding of international sales in which goods can be identified before or after the risk transfers to the buyer.[2]

2. Carrier and Documents

[1] See *Bridge*, The Transfer of Risk under the UN Sales Convention 1980 (CISG), FS Krizter (2008), p. 77 (95).
[2] See *id* at 95.

Under the second sentence of Art. 68, the risk is borne by the buyer "from the time the goods were handed over to the carrier who issued the documents embodying the contract of carriage." It must be noted that there is no reference, as in Art. 67(1), to "documents controlling the disposition of the goods."[3] Instead it is sufficient that the documents prove the existence of the contract of carriage. Absent such documents, the rule does not apply. If the transport involves a chain of carriers, as is the case with multimodal transport, it is the handing over to the carrier who issued the documents in question that is relevant.[4]

3. Retroactive Allocation of risk

The second sentence of Art. 68 concerns the retroactive allocation of risk that occurs 'if the circumstances so indicate'. The language of Art. 68 has been criticized specifically in relation to the allocation of risk in international sales. This has occurred simply from the phrase 'if the circumstances so indicate' as the language does little to assist the determination of when circumstances indicate the parties desire a different risk allocation than that found in the general rule. Moreover, while CIF contracts traditionally include retroactive risk allocation[5] because of the transferability of insurance that traditionally contains detailed provisions specific to the risk allocation,[6] this is not necessarily the case in contracts that contain an FOB designation as the insurance is often not transferable.[7] Consequently, the "transfer of the insurance policy implies that the buyer takes over responsibility for the entire shipment, including unknown transit damage that occurred before the sale."[8]

4. Loss or Damage to the Goods

Art. 68 has been criticized as the article fails to provide clear resolution on some of the more common issues within international transport. For example, Art. 68 is clear in resolving issues that arise when the seller knows or should have known of the loss or damage to the goods prior to the conclusion of the contract. In these situations, risk

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[3] This omission was a deliberate on the part of the drafters. See *Schlechtriem*, Uniform Sales Law: The UN Convention on Contracts for the International Sales of Goods (1986) (PACE). As such, it is irrelevant that documents are negotiable instruments or otherwise allow for the goods to be disposed of upon receipt of the documents. Instead, the contract fro carriage- without additional documents, is all that is needed.

[4] See *Hager*, in: Schlechtriem/Schwenzer, Commentary (2005), Art. 68 at 506.

[5] But note that a Chinese tribunal did not backdate the risk in a case involving a CIF sale of fishmeal, where the contract was concluded some 12 days after the goods were loaded on board the ship; however, one should note it is not clear from the translation that the Incoterms were incorporated: *Arbitral Award*, CIETAC, 1 April 1997 (PACE).

[6] See *Honnold*, Uniform Law for International Sales (1982), p. 372; *von Hoffmann*, Passing of Risk in International Sales, in: Sarcevic/Volken (eds), International Sale of Goods: Dubrovnik Lectures (1986), p. 265 (294).

[7] See *Bridg*e, The Transfer of Risk under the UN Sales Convention 1980 (CISG), FS Krizter (2008) p. 77 (96).

[8] See *Honnold*, Risk of Loss, in: Galston/Smit (eds), International Sales: The United Nations Convention on Contracts for the International Sale of Goods (1984), Ch. 8, pp. 8-1 to 8-15.

remains with the seller if he has failed to disclose this information to the buyer.[9] However, the resolution is far from clear in situations where the seller becomes aware of the loss or damage to the goods after the contract has been concluded but before the goods are appropriated to the contract. In these situations Art. 68 and corresponding articles are silent concerning the use of retrospective risk allocation. Some commentators argue the phrase 'if the circumstances so indicate' can be extended to resolve this issue, however, it is reasonably clear that the drafters did not intended such an extension.[10] As such, commentators are split as to the ability of a seller to appropriate goods that have been lost or damaged where the seller 'knows or should know' of the loss.

Bridge argues that "even the knowing seller should be allowed in CIF contracts to appropriate the goods after the loss has occurred."[11] He makes this argument asserting a practical approach, stating "if the seller were not allowed to appropriate and thus transfer the risk to a particular buyer, that seller, depending upon the relevant law, might be exposed to a damages action for non-delivery by the buyer."[12] Of course, this is correct law and is most likely the correct interpretation if one bases the primary argument on a practical and economic understanding in the international commercial world. As traders participating in this industry consider the buying and selling of cargo as a financial contract and not really from a contract that results in obtaining goods. While this is the generally accepted approach, which has gained a slight majority of support, it is also clear from the Legislative History that alternative views exist which are followed in some regions of the world.[13]

Controversy also surrounds the terminology and phrasing within the last sentence of Art. 68 stating, if the seller fails to disclose the loss or damage "the loss or damage is at the risk of the seller". This phrasing could be interpreted as the seller bearing only the loss or damage it failed to disclose. However, the full extent of the seller's exposure in these situations remains unclear. Some authorities argue that when the seller fails to disclose loss or damage that had occurred before the making of the contract the seller would be liable not only for the loss or damage that the seller knew or should have known but also for all subsequent damage "which is causally connected with the original damage"[14] In contrast, Honnold "supports holding transit loss on the seller but is doubtful about the basis and advisability of a 'causally connected' limitation." At the current time the majority opinion leans toward the phrase encompassing only the damage that the seller

[9] Art. 68: "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."

[10] *Schlechtriem*, Uniform Sales Law: The UN Convention on Contracts for the International Sales of Goods (1986) (PACE). For the complete discussion, see Legislative History, Summary Records of Meetings of the First Committee, 32nd Meeting 1 April 1980 (PACE).

[11] *Bridge*, The Transfer of Risk under the UN Sales Convention 1980 (CISG), FS Krizter (2008) p. 77 (96).

[12] *Id.*

[13] See *Garro*, Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods, 23 International Lawyer (1989) 443-483

[14] *Nicholas*, in: Bianca/Bonell, Commentary (1987), Art. 68 at 496-501.

knew or ought to have known about by the time of the conclusion of the contract[15] without extension into the casually connect realm. However, one could easily think of situations in which the seller should also bear the risk of subsequent loss or damage directly connected to the original damage.

One should note, Art. 68 should not be interpreted to supplant domestic law into the provisions of the CISG by creating situations in which the sale of a non-existent or no-longer-existent good is void.[16] Under Art. 68 it remains possible for the sale to be valid even though the goods had already been destroyed at the time the contract was concluded. Art. 68 presupposes that a valid contract may be formed in this situation as it fails to void the contract but instead leaves the risk with the seller.

Finally, one should consider the practical situation that exists in the international community and with the use of Incoterms. Art. 68 provides the general rule that risk passes when the contract is concluded. However, this general rule is likely to be displaced in many instances as the parties will have elected to include the Incoterms[17] and as such the circumstances of the case will call for the general rules displacement.[18]

One should note the derogation from the articles of the CISG is permissible within the CISG.[19] Under Art. 6 the parties may "derogate from or vary the effect of any [Convention] provisions."[20] In fact "a very large percentage of such contracts contain trade terms (CIF, C&F, FOB, FAS, CPT, CIP, etc.) clearly designed to regulate the passing of risk"[21] and thereby displace the otherwise applicable law. In these situations, as expressly stipulated in INCOTERMS 2000, under FOB, CIF and CFR contracts, the risk passes when the goods pass the ship's rail at the port of shipment.[22]

III Comparable Rules

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[15] Hager bases his approach on the different wording of the Draft Convention and to the linkage between the second and third sentences of Art. 68. See *Hager*, in: Schlechtriem/Schwenzer, Commentary (2005), Art. 68 at 506. para. 5.

[16] An Indian proposal to consider invalidity under a domestic law did not receive support. See A/Conf. 97/SR.32 at 6-7 § 38-41 (= O.R. 404). For further discussion, see Schlechtriem Uniform Sales Law: The UN Convention on Contracts for the International Sales of Goods (1986) (PACE) at 496-501.

[17] For a further discussion of the Incoterms, see *Gabriel*, Contracts for the Sale of Goods: A Comparison of US and International Law (2009), pp. 297-325.

[18] "[W]here the parties have agreed no trade terms at all, the regulation under the CISG will apply. But these cases are rare." *Enderlein/Maskow,* International Sales Law (1992), p. 257.

[19] See *Lookofsky*, The United Nations Convention on Contracts for the International Sales of Goods, in: Blanpain (ed.), Encyclopaedia of Laws (1993), p. 112.

[20] Art. 6.

[21] *Lookofsky*, The United Nations Convention on Contracts for the International Sales of Goods, in: Blanpain (ed.), Encyclopaedia of Laws (1993), p. 112.

[22] See *Ramberg*, ICC Guide to Incoterms 2000: Understanding and Practical Use (1999), p. 16.

The PICC contains no provisions in relation to passing of risk. The PECL contains no provisions in relation to passing of risk. This is not necessarily surprising, as von Bar and Drobnig point out the passing of risk is “genuinely a contract issue” which is “usually dealt with by agreement of the parties.”[23] However, one should note this is not necessarily the case in relation to consumers.[24] A Proposal for a Directive on Consumer Rights contains a provision under which the risk of loss or damage of the goods is transferred to the consumer only when he or a third person -other than the carrier- acquires the material possession of the goods. The drafters considered that the consumer should be protected against any risk of loss or damage of the goods occurring during the transport arranged or carried out by the seller.[25]

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[23] *von Bar/Drobnig*, The Interaction of Contract Law and Tort and Property Law in Europe: A Comparative Study (2004) p. 329-330

[24] Directive on Consumer Rights, Art. 23 Passing of risk

> 1. The risk of loss of or damage to the goods shall pass to the consumer when he or a third party, other than the carrier and indicated by the consumer has acquired the material possession of the goods.
>
> 2. The risk referred to in paragraph 1 shall pass to the consumer at the time of delivery as agreed by the parties, if the consumer or a third party, other than the carrier and indicated by the consumer has failed to take reasonable steps to acquire the material possession of the goods.

European Commission, The Proposal for a Directive on Consumer Rights, EUROPA, (Oct 2008).

[25] *Id* at para. 38.

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.

(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.

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I Importance and Role of the Provision

In the situation that neither Arts 67 nor 68 applies to the case at hand, Art. 69 provides the residual rules on risk of loss.[26] Art. 69 provides the basic rule that the risk is on the buyer from the moment he takes over the goods or when he commits a breach of contract in not taking delivery of the goods that have been placed at his disposal.[27] Of course, goods are only considered to be placed at the buyer's disposal after they have been identified to the contract.[28] In addition to these basic residual rules, a special rule applies to situations in which the buyer is bound to take over the goods at a place other than the

[26] Although some commentators have read Art. 69 as being limited to domestic sales and thereby find it of limited use, it is clear from the language of Art. 69 that the sale of goods can be an international one under the CISG even when the goods never cross national boundaries. This is of course, because of the practical possibility of the buyer and seller's place of business being located in different states, while the seller secured warehouse space or otherwise has a branch in the same state as the buyer. See *Bridge*, The Transfer of Risk under the UN Sales Convention 1980 (CISG), in: Andersen/Schroeter (eds), Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday (2008), p. 77-105 (97). This of course refers to the applicable law questions raised in Art. 1.
[27] Art. 69(1).
[28] Art. 69(3).

seller's place of business. In situations such as this, risk is transferred when delivery is due and the buyer is aware that the goods have been placed at his disposal.[29] Consequently, Art. 69 can be divided into two separate considerations, cases where the good are handed over at the seller's place of business (Art. 69(1)), and cases in which the goods are to be handed over somewhere else (Art. 69(2)).

II Commentary

1. Goods placed at buyer's disposal- at the seller's place of business

According to Art. 69(1), when the goods are to be delivered at the seller's place of business, the buyer undertakes risk of loss from the moment he takes over the goods or when he commits a breach of contract in not taking delivery of goods that have been placed at his disposal. The primary issue within Art. 69 is the requirements that need to be satisfied to 'place the goods at the buyer's disposal.' Unfortunately, Art. 69 is silent on the issue;[30] however, what is clear is that the drafters did not intend to impose a notice obligation on the seller. Instead, the standard seems to be merely the buyer's awareness of the goods being ready for collection.[31]

Of course, several issues can arise in 'taking over the goods.' If delivery is to take place on a specific date and the buyer takes over the goods on that date, the risk passes when the goods are actually accepted.[32] In addition, and equally simplistic is the situation where the buyer takes over the goods before the agreed date of delivery. In this situation, the risk passes to the buyer when he takes over the goods.[33] Art. 69(1) also adopts the

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[29] Art. 69(2).

[30] Case law is also relatively quiet. See *Appellate Court Köln* (Germany) 9 July 1997 (Video camera case)(2 U 175/95) (PACE) (drawing a distinction between Art. 67 –risk passes when handed over to first carrier- and Art. 69- buyer takes over goods); *District Court Arnhem* (Netherlands) 17 July 1997, Kunsthaus Math. Lempertz v. Wilhelmina van der Geld (If buyer is to collect goods at seller's place, risk passes when buyer takes goods); *Appellate Court Oldenburg* (Germany) 22 September 1998 (Raw salmon case), CLOUT abstract no. 340 (Passage of risk when the buyer takes over the goods at place other than seller's place of business- processing plant); *Lookofsky/Henschel*, Comments on Issues Relating to the Passing of Risk (2004) (PACE) commenting on *Randers County Court* (Denmark) 8 July 2004 (Mobile grain dryer case) (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- such as assisting in the unloading of the good); *Appellate Court Schleswig-Holstein* (Germany) 29 October 2002 (Stallion case) (PACE) (Passage of risk when the buyer is to collect goods at seller's place: risk passes when the buyer takes the goods, despite the fact that the buyer elected to use a carrier); *Oberlandesgericht Linz* (Austria) 23 January 2006 (Auto case)(6 R 160/05z) (PACE) (risk passes to the buyer when he takes over the goods.)

[31] *Bridg*e, The Transfer of Risk under the UN Sales Convention 1980 (CISG), FS Krizter (2008) p. 77 (99).

[32] See *Leif Sevon*, Passing of Risk, Presentation of Schweizerisches Institut für Rechtsvergleichung ed., Wiener Übereinkommen von 1980, Lausanner Kolloquium 1984 (1985), pp. 191-206, 203-4 (PACE).

[33] See *id* at 204.

reasonably pragmatic approach to situations where the seller is incapable of delivering the goods on the contractually specified date. In this situation the risk remains with the seller until the buyer takes over the goods.[34]

Complications arise when the seller has placed the goods at the disposal of the buyer but the buyer has failed to take over the goods. At the point in time that the buyer is aware of the goods readiness, the question becomes how much time the buyer has before the buyer is in breach of contract. In the absence of specific time provisions in the contract, the standard seems to be that of a reasonable time. However, this is not expressly contained within the language of the articles; instead it must be inferred from the seller's obligation to deliver within a reasonable time.[35] One should note, this is not intended to imply that the 'reasonable time' shall be the same for both parties. Instead it stands to reason that 'reasonable time' will depend upon the nature of the goods and the circumstances of the case.

Moreover, the final phrase within Art. 69(1) should be read to limit the provision to cases in which the buyer has delayed taking delivery. But one should not take a restricted view of this issue. Instead it is clear from the drafting committee that the provision should include "those situations in which the goods could not be delivered because of other breaches of the contract by the buyer, such as when the buyer has not obtained a required import license in a timely fashion."[36]

2. Goods placed at buyer's disposal- other than at the seller's place of business

Art. 69(2) makes clear that where delivery is not at the seller's premises, risk is transferred to the buyer when delivery is due and the buyer is made aware that the goods are at his disposal in a place other than the seller's place of business. Of course, this is most likely to occur in situations where the goods are left in the hands of a third party, such as a warehouse or similar location. In situations such as this, placing the goods at the buyer's disposal must also mean that the seller has done all that is necessary for the buyer to take possession.[37] Certainly this must mean the buyer is entitled to withdraw the goods from the control of the third party. However, one should not confuse this requirement with the requirement to deliver documents. Of course, it is possible in some situations for the goods to be placed at the buyer's disposal without the need for documents. In some situations it is possible for the seller to provide instructions for the bailee to hold the goods for the buyer.[38]

3. Identification

[34] See *id.*
[35] See *Bridg*e, The Transfer of Risk under the UN Sales Convention 1980 (CISG), FS Krizter (2008) p. 77 (99).
[36] *Schlechtriem*, Uniform Sales Law: The UN Convention on Contracts for the International Sales of Goods (1986), p. 90 (PACE).
[37] See *Secretariat Commentary* on 1978 Draft, Art. 81 (now Art. 69) para. 7.
[38] See id. para. 8.

Art. 69(3) requires that goods be "clearly identified to the contract" before risk can pass to the buyer. Like Art. 67, Art. 69 presupposes identification of the goods. As such, the goods are first considered to be placed at the disposal of the buyer when such identification takes place: by marking, notice, etc.[39] Of course, the identification must be in line with the seller's rights and obligations under the contract.

4. INCOTERMS

The most obvious differences between the CISG and Incoterms relate to Art. 69. INCOTERMS 2000 specifies that risk passes as soon as the goods have been made available to the buyer at the delivery point.[40] This is true without any further limitations and/or requirements, such as the buyer committing a "breach of contract by failing to take delivery."[41] Moreover, under the Incoterms, the seller has the duty to notify the buyer that the goods are available for him or that they have been delivered.[42] In situations such as this, the seller's failure to notify the buyer would constitute a breach of contract, entitling the buyer to the remedies for breach of contract under the CISG.[43]

III Comparable Rules

The PICC and PECL contain no provisions in relation to passing of risk.

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[39] A similar provision in exists in Arts 67(2) and 67(3).

[40] For example, in EXW and the D-terms (DAF, DES, DEQ, DDU and DDP). See *Ramberg*, To What Extent do INCOTERMS 2000 Vary Articles 67(2), 68 and 69?, 25 Journal of Law and Commerce (2005-06) 221.

[41] Art. 69.

[42] See INCOTERMS 2000: ICC Official Rules For The Interpretation Of Trade Terms (1999) Clause A7; see also *Ramberg*, To What Extent do INCOTERMS 2000 Vary Articles 67(2), 68 and 69?, 25 Journal of Law and Commerce (2005-06) 219-222

[43] See Art. 74.