

**THE TIMING OF THE PASSING OF PROPERTY AND RISK
UNDER THE ENGLISH SALE OF GOODS ACT 1979, THE
CISG AND THE LIBYAN LAW– THE INTERPLAY
BETWEEN THE PRINCIPLE OF PARTY AUTONOMY AND
THE DEFAULT RULE**

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Abstract

This thesis attempts to critically and comparatively analyse the issues relating to the passing of property and risk under the United Nations Convention on the Contract for International Sale of Goods (CISG) and English Law (SGA). The passing of property and risk plays a central role in the area of international legislation in relation to sales contracts. These elements can be the most significant components in contracts of sale between parties, whether in the international or domestic field. The reason is founded on their legal nature and the close relationship between them. The passing of property and risk has been a central issue for practitioners, judges and lawyers dating back to the Roman period and several ideas have been proposed to resolve it. Where the situation is different for contracts of sale in relation to the passing of property and risk, whether in the domestic or international field, it still creates many unresolved problems, because of ongoing changes in the field of modern commerce, which may contribute to unfair implications between the parties.

It has been observed in this thesis that both English law and the CISG adopt the party autonomy principle, where the intention of the parties - whether in relation to the passing of property or risk - is the basic rule. However, the difference lies in the default rules. While English law involves default substitutional rules, which apply in cases where there is an absence of an expressed or implied indication regarding the intention between the parties, the CISG lacks such default rules regarding the transfer of property, which could be viewed as its main weakness, although the CISG does involve such provisions with respect to the transfer of risk.

This thesis will discuss, the legal nature of the rules in relation to the passing of property and risk, and the role of the party autonomy principle, and the impacts and legal difficulties that might arise through the application of these rules, whether they are default rules or based on the party autonomy principle. It will also examine the legal gaps and weaknesses of both legal systems in an attempt to identify such legal difficulties and to find appropriate solutions and remedies.

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Author's Declaration

I hereby declare that all the work in this thesis unless otherwise indicated is entirely my own contribution and was performed by me in the Law School, University of Stirling between June 2012- May 2017.

Anwar A.A. Aboukdir

Dedication

I dedicate this work to my Wife Dr Fadia Gujam who supported me throughout my studies. This work is also dedicated to my lovely daughter Maryam, who dislodged the cloud and brightened my life again.

Abbreviations

C&F- Cost and Freight.

CFR- Cost and Freight.

CIF- A Cost, Insurance and Freight.

CISG- United Nations Convention on the Contract for International Sale of Goods 1980.

CPT- Carriage Paid To.

DAF- Delivered at Frontier.

DDP- Delivered Duty Paid.

EXW- Ex Works (named place of delivery).

FAS- Free Alongside Ship.

FOB- Free On Board.

ICC- International Court of Arbitration.

INCOTERMS -International Commercial Terms of the ICC, revised 2000.

PECL- Principles of European Contract Law.

SGA –Sale of Goods Act 1979.

ULIS -Convention relating to a Uniform Law on the International Sale of Goods 1964.

UN- United Nations.

UNICITRAL-United Nations Commission on International Trade Law.

UNIDROIT- The International Institute for the Unification of Private Law.

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Chapter 1 – Introduction

International trade has become one of the most vital issues in contemporary globalisation. Indeed, the volume of international trade conducted worldwide has continually increased.¹ It follows, therefore, that the rapid growth in international trade requires a consistent legal interpretation to facilitate the formation of contracts between merchants from different countries, and simultaneously to resolve the legal problems that may potentially arise out of contracts of sale.

This need seems particularly pressing when we examine some of the complex issues related to international trade, including dealing with a wide range of goods, buyers and sellers – many of whom are located in different countries - and choosing the applicable rules to govern the contract.² Among them, issues pertaining to the passing of property and risk play a significant role in the area of international legislation, especially in relation to sale of goods contracts. The passing of property involves determining the point in the transaction of a sale when the seller ceases to be the owner of the property and the buyer assumes ownership. A property right can be defined as a connection between an individual and a thing. As Bridge says:

*The touchstone of a property right is its universality: it can be asserted against the world at large and not, for example, only against another individual such as the contracting partner. If, under a contract of sale, I acquire the ownership of a chattel, my property right to the chattel may be asserted not just against the seller but against the whole world.*³

However, to a certain extent, such an absolute statement seems to give way to the issue of the passing of risk which means that liability for loss of and/or damage to the goods passes from the seller to the buyer; the corollary of that transition is that the buyer bears any loss or damage relating to the sold goods.

¹ World Trade Organisation, 'International Trade Statistics 2013' (WTO, 2013)

https://www.wto.org/english/res_e/statis_e/its2013_e/its2013_e.pdf. accessed 04 March 2016.

² Tobias Plate, The Buyer's Remedy of Avoidance under the CISG: Acceptable from a Common Law Perspective, *Vindobona Journal of International Commercial Law and Arbitration* (2002) 6 .57.

³ M. Bridge *Personal Property Law*, Oxford University Press, 2002, p.12

The significance of and interactions between these issues can be repeatedly observed in interpretations given by international or national courts and tribunals,⁴ as well as the peculiar nature of such issues which may contribute to unfair implications between the parties of the contract. This is because the passing of property and risk in the contract of sale has a vital importance in contributing to the potential outcome for either party. This is particularly the case in an international sales contract, where the value of the commodities is usually high, and the contracts invariably complex, and the contracting parties are situated in different countries with different legal systems. Therefore, the parties involved in international sales of goods contracts often take into account the issues related to the passing of property and risk by selecting the exact time that the property and risk pass, and the contractual terms to govern the contract.⁵ Although most national legal systems attempt to address this issue, discrepancies occur in the interpretation provided by the Roman Law countries and those countries following the common law rules, such as England.

The rules on the passing of risk have been the subject of regulation in various international standard trade terms; the most popular and successful attempt to harmonise the law pertaining to the international sale of goods on this matter is the United Nations Convention on Contracts for the International Sale of Goods, adopted in Vienna in 1980 (CISG). However, despite the existence of the CISG, English law still stands firmly on the stage of the international sale of contracts, with significant jurisprudence being provided in this area of law. This divergence originated from the UK's refusal to sign the CISG despite its earlier influential role in drafting the CISG in the early stage.⁶ Accordingly, the parties may subject their issues of the passing of property and risk to either of these two major branches of law. Similarly, the parties may choose to deviate from the rules provided for in their legal systems, in that they have freedom to identify the time when the property and risk will be deemed to have passed. In such cases, it is very likely that the intention of the parties may conflict with the rules of the national law or international convention. Under these circumstances, the immediate question which arises from the passing of property and risk is whether the parties' agreement supersedes the relevant rules. In other words, which

⁴ P. M. Roth, 'The Passing of Risk', (1979), the American Journal of Comparative Law, Vol. 27, No. 2/3, Unification of International Trade Law: UNCITRAL's First Decade p. 291-310

⁵ Indira Carr and Peter Stone, *International trade law* (4th ed, Routledge-Cavendish 2010). 81.

⁶ Sally Moss, Why the United Kingdom Has Not Ratified the CISG, 2J.ofL.and Com.483, (2005-2006). See also Angele Fort, The United nations Convention on Contracts for the International Sale of Goods :Reason or Unreason in the United Kingdom, 26 Baltimore.L.Rev.51(1997);also Nathalie Hofmann, Interpretation Rules and Good Faith as Obstacles to the UK's Ratification of the CISG and to the harmonisation of Contract Law in Europe 22 PaceInt'IL.Rev.141(2010); Barry Nicholas, The Vienna Convention on Contracts for the International Sale of Goods, 105L.Q.R.201(1989); Robert G.Lee, The UN Convention on Contracts for the International Sale of Goods OK For the UK?,J.B.L131[1993].

rule is the primary rule – taking precedence over the application - and which is the default rule under the English law or the CISG?

1.1 Aims and Objectives

The aim of this thesis is to interpret and examine analytically the issues related to the passing of property and risk in international sale contracts for the sale of movable goods under English law and the CISG, which are the two main branches of law influencing the understanding of the current topic among Libyan business people engaged in the international sale of goods, in order to ascertain the interactions between the primary rules and the default rules to serve as guidance for the future enactment of the Libyan sale of goods law. Furthermore, the thesis will attempt to discover the shortcomings and gaps in these legal systems, in an attempt to provide the hypothetical remedies to fill such gaps (if any), as well as identifying what the model for the passing of property and risk should be, by making a comparative analysis of the rules pertaining to property and risk allocation under the CISG and the English Sale of Goods Act 1979 (SGA).

To achieve such aims, the research will examine the relevant provisions in relation to the passing of property and risk under the CISG and the English Sale of Goods Act. It also intends to examine the extent of the application of the party autonomy principle and the legal nature of such rules as they apply in these different systems, as well as the rules concerning the different types of international contracts, including contracts of sale which involve the carriage of goods,⁷ and contracts for the sale of goods in which trade usage is incorporated⁸ and, further, whether the provisions of the CISG and/or SGA provide an ideal solution to these issues or not.

1.2 Reasons for Undertaking the Current Research

The concept of the passing of property and risk in the law of the sale of goods is a crucial point in the contract of the sale of goods: that is to say, determination of the point in the transaction of the sale when the seller ceases to be the owner of the goods and the buyer

⁷ (n 4)296

⁸ Bainbridge, Stephen. "Trade Usages in International Sales of Goods: An Analysis of the 1964 and 1980 Sales Conventions." *Va. J. Int'l l.* 24 (1984): 619

assumes ownership. Furthermore, the bearing of risk is an extremely significant issue which can torpedo the general understanding of ownership and preoccupy both parties involved in a contract of sale. Thus, the importance of the passing of property lies in its consequences, especially in terms of risk, the right to sue, the ability to pass a good title, and the security of payment of a party as against an insolvent other party. Furthermore, in cases of international sales, problems in relation to the passing of property arise most frequently in determining whether the goods can be treated as security for payment of the price.⁹

The transfer of risk in the contract of sale is a question of great practical significance because of its potential for undesirable and unexpected consequences. Risk of loss rules establish whether (a) the seller may still recover the price of the goods, and (b) whether the buyer must pay for the goods and take delivery, despite the fact that the goods are partially damaged or totally destroyed. Although risk has been dealt with extensively, it still creates numerous unsolved problems, by reason of the constant changes in modern commerce: container and multimodal transport, bulk consignments, loss of unascertained goods and interpretation of 'loading' are only some of the problematic areas for which the present study attempts to propose solutions.

The rules on the passing of risk answer the question as to whether the party could claim any remedies for loss despite the passing of risk¹⁰ and whether the buyer is obliged to pay the price for the goods even if they have been lost or damaged, or whether the seller is entitled to claim their price. Due to harsh and sometimes unfair consequences, the passing of risk forms a subject which the parties specifically refer to in their contract in an attempt to avoid confusion and possible litigation.

Normally, the parties make specific arrangements in their contract regulating the passing of property and risk, or make express or implied agreements on the application of standard trade terms. However, in cases where such arrangements are not included, then the rules of national laws or international conventions regulating the matter will apply, whether as primary or default rules. In other words, determining the rule which has priority in application is very important in order to avoid disputes which may arise between the parties regarding such issues.

⁹, Benjamin's *Sale of Goods*, 5th Edn., Sweet and Maxwell, (1997) 1133

¹⁰ As it will be seen this is regulated in article 70 CISG

In fact, accurately determining the time of the passing of property and risk would avoid such disputes which may arise between the parties. The passing of property and risk between the seller and the buyer is a matter of significance in the event of the insolvency of either party, and the liability, and seizure on the outbreak of war. Such issues, in fact, are covered by different rules, including domestic and international rules. These rules present different solutions, and therefore different consequences may result. Such consequences may be unfair, especially if the different solutions adopt different theories in relation to the passing of property and risk.

1.3 The value of the research

Although there may be some legislative gaps in relation to sales – whether they be international or domestic (English law or CISG) - it is relatively easy in a domestic sale for the seller and the buyer to achieve such purposes, since they may know each other well, and, more importantly, their contract is often governed by a uniform domestic sales law under a uniform legal system. However, the issue becomes more complicated in international commercial transactions when the seller and buyer are located in different countries with different social values and subject to different legal systems. This can lead to uncertainty of the law applicable to their contract, and thus can create uncertainty in international commerce and distrust among the parties and seriously undermine international trade.

The value and originality of this research is to examine such complicated issues and risks arising from the passing of the property in relation to international sales of goods from the perspective of party autonomy, both analytically and critically, as well as trying to discover the legislative gaps, whether in international sales or in domestic sales, in order to provide suitable proposals and remedies that would achieve a fair balance between the parties in the contract with respect to these matters, in particular, to provide a model for Libyan legislatures to consider in their enactment of international sale of goods law in terms of the trading with two major systems. Currently, the Sale of Goods law in Libya virtually does not exist. The researcher's legal career in Libya has informed him that only scattered general principles dealing with immovable (real property) under the civil law have been used to interpret moveable goods. Such a failure in providing specific and detailed rules on such issues requires immediate attention by means of an examination of the two major branches of law which directly affect the understanding of the relevant issues.

The analytical critique of the research proposals and remedies may also prove valuable for the English Sale of Goods Act 1979 or the United Nations Convention on Contracts for the International Sale of Goods, in order to find out if there are any legal gaps, and provide the remedies and suitable solutions for issues regarding the rules in relation to the passing of property and risk. Moreover, it may be of value for some developing countries, especially those that are trying to amend their relevant laws or those that are trying to create new laws.

The lack of detailed provisions in Libyan law can be seen in the limited number of provisions applied for interpretation. Only ss. 207, 208, 936 and 937 regulate the passing of property, with s.210 being related to the passing of property and risk. Among them s.936 of Libyan civil law provides the basic rule regarding the passing of immovable property, where the property passes at the time of conclusion of the contract, supplemented by ss 207, 208 and 937 dealing with the identification of the goods, where immovable property in the goods cannot be transferred to a buyer until the goods are ascertained. It is worth noting that the basic rule provided by s. 936 is presented as general rule without any details, and, further, its interpretation links the movable with immovable (real property) and fails to distinguish between them. Moreover, with respect to the provisions for ascertaining the goods, these do not include any rules for ascertaining the intention of the passing of property.

Furthermore, the rule of passing of risk under s.210 of Libyan civil law applies the delivery rule, where the risk passes at the time of delivery. This provision has been applied to interpret all types of contracts, and is not limited to sales contracts. Moreover, Libyan law is also noted for its use of domestic rules in the interpretation of international sale of goods, as the law fails to provide any rules in respect of passing of risk in goods sold in international transit, nor rules governing sale of goods involving carriage of goods by different modes of transportation across the borders. This has created uncertainty for the both Libyan and international traders dealing with Libya under the CISG, English Law and virtually non-existent Libyan frameworks. Consequently, the need arises to create a model of the passing of property and risk which is specific and detailed and covers all the related rules.

To summarise, international trade has become one of the most vital issues in modern life, making the need for an accurate legal system that is able to facilitate the formation of contracts between merchants from different countries and simultaneously resolve the legal

problems that may arise out of contracts of sale more important than ever. This research will be valuable for Libyan legislators or those in other countries in providing a model to draft suitable and detailed legal rules in line with developments in international trade, as well as to avoiding some of the legal gaps and flaws in some other laws related to international trade, whether the English Sale of Goods Act 1979 or the CISG.

1.4 Scope of the Research

Due to the virtual non-existence of Libyan law on the issues examined in this thesis, the scope of the research is mainly focused on the rules covering property and risk passage under the English Sale of Goods Act 1979 (SGA) and the United Nations' Convention on International Contracts of Sales of Goods 1980 (GISG). The coverage of the research attempts to answer the main research questions regarding the time of passing of property and risk and to address any deficiencies and also the role of the party autonomy principle in determining such issues in English law by comparing its provisions with those of the CISG.

As discussed in the next section, the research will employ the methodology of a critical analysis of the laws, doctrines, principles and jurisdictions that are the focus of this study. Focusing on English and common law jurisdictions, as well as judgments handed down by international jurisdiction, including arbitral tribunals, the research will undertake a critique and analyse the issue of the passing of property and risk under English law and the CISG, based on the relevant articles and case law studies of the aforementioned jurisdictions.

1.5 Methodology

The method most suited for achieving the aim of this study is the comparative analytical approach, in terms of analysing relevant legal texts to determine an optimal legal approach to the issue. The purpose of the study is to determine the time of the passing of property and risk, and to address any deficiencies found, as well as the role of the party autonomy principle in determining such issues in English law by comparing it with the United Nations Convention on Contracts for the International Sale of Goods. The comparative methodology allows researcher to examine the difference in legislative regimes, namely

English Sale of Goods Act and the CISG¹¹, their formulation, application and practice. Having considered these issues, the results of this comparison will offer recommendations and remedies that may prove significant in addressing the deficiencies highlighted in the current comparative study.

The comparative analytical method applied involves comparison between the provisions of statutes, regulations and codes that are especially relevant to English law and the United Nations Convention on Contracts for the International Sale of Goods as well as examining case law and the official records and reports of the convention. Sources researched include books, law journals, and other publications in legal and related fields which provide the breadth and depth required for such comparative research.

1.6 Definition of the contract of sale of goods

1.6.1.- A contract of sale of goods

The sale of goods contract is the most commonly used in transactions, whether at the international or domestic level. The CISG, in line with most legal systems¹², adopts the traditional model of offer and acceptance.¹³ It has been defined in art 14 in conjunction with art 23, as a contract of sale concluded when one party makes a proposal and the other party then accepts this proposal. That is to say, there must be a definite offer made by one party that is clearly accepted by the other.¹⁴

Notably, the CISG deals with contracts that generally result from the exchange of concurrent declarations of intention by two or more persons. The process of contract formation is a process of communication between the person making the offer (the seller) and an acceptance by the person to whom the offer is made, the offeree (buyer).¹⁵ In England, on the issue of transferring the ownership of goods, according to s. 2(1) of the

¹¹ Sally Moss, ' Why the United Kingdom has not ratified the CISG ' (2005-06) 25:483 Journal of law and commerce 483-485

¹² Rudolf Schlesinger *Formation of contracts: a study of the common core of legal systems* Vol 2, 1584

¹³ Peter Huber, Alastair Mullis, *The CISG* (2nd edn Sellier European Law Publishers, 2007). 69

¹⁴ Roald Martinussen, *Overview of international CISG sales law* (BookSurge Publishing, 2006).19

¹⁵ Wolfgang Hahnkamper, ' Acceptance of an offer in light of electronic communications ' (Journal of law and commerce 2005-06) 25:147 147

English Sales of Goods Act 1979, a contract of sale of goods is defined as: ‘*a contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price.*’

What this indicates is that the property (ownership) in the goods is passed from the seller to the buyer in exchange for a sum of money determined by the parties of the agreement.¹⁶ In return, the buyer pays the amount of money called the price. Apparently, the contract of sale is an obligatory contract between the parties, where the seller is committed to transfer the property to the buyer, whilst the buyer is committed to paying the price.¹⁷ This definition confirms that the contract of sale is a transfer of property contract. It has been submitted that a contract of sale is first and foremost a contract and a consensual transaction based on an agreement to buy and an agreement to sell, which is distinguished from several other transactions which are normally quite different from the sale of goods, but which, in particular circumstances, may closely resemble them, such as a contract of loan on the security of goods, a gift, or a contract of bailment etc.¹⁸

Benjamin links the concept of the contract of sale to the concepts of sale and agreement to sell. In other words, if the passing of property is postponed to a future date or until the fulfilment of a condition, then the contract is not a sale but an agreement to sell,¹⁹ and, as such, will become a sale only when the property is transferred. The decisive test is, therefore, whether or not the property passes by virtue alone of the making of the contract; as Tucker. once put it, "*I think that everything in the Sale of Goods Act goes to show that the words 'sale' or 'sell,' when contrasted with the words 'agree to sell' or 'agreement to sell,' necessarily involve something under which the property in the goods has been made to pass.*"²⁰

1.6.2 Contract of sale and the agreement to sell

The distinction between the sale and the agreement to sell is significant. Although the sale and the agreement to sell constitute a contract of sale and the general expression embraces both, there is a notable and crucial difference between them. The cornerstone of this

¹⁶ Paul Dobson & Rob Stokes. *Commercial Law*, (7th ed. Sweet & Maxwell Limited of Avenue Road, 2008)

¹⁷ Sanhoori, Abdel Razeq, *The mediator in explaining the Civil Law*, 1970, Encyclopedia of law, Cairo. 19

¹⁸ P.S. Atiyah, John N. Adams; with sections on Scots law by Hector MacQueen, *Atiyah's Sale of goods*, (Harlow: Longman, Twelfth edition 2010), 7,9

¹⁹ *Benjamin's Sale of Goods* (9th Edition Sweet & Maxwell: London 2014) 26,27

²⁰ *Mischeff v. Springett* [1942] 2 All E.R. 349, 352

distinction lies in the obligations and effects of the agreement, such as transfer of property and risk from the seller to the buyer. In the agreement to sell, the property remains with the seller until the contract been signed. It is clear that the difference between the sale and the agreement to sell lies in the title of the property which remains with the seller; nevertheless, in the case of the sale the property passes to the buyer.²¹

The obligation to transfer the property is an obligation under the contract of the sale of goods. In other words, an agreement to sell is a contract, and as such, cannot give rise to any rights in the buyer which are based on property or possession of the goods, but only to claims for breach of contract.²² It is worth considering the circumstances which may affect materially the performance of an obligation and which would make it impossible to implement the contract, such as force majeure and frustration of the contract of sale, which are probably two of the major problems that may be faced in international trade.

²¹ *B.R.K Oteshwara Rao vs G.Rameshwri Bai AIR 2004 A..34*. See also, *Benjamin's Sale of Goods* (9th Edition Sweet & Maxwell, London, 2014) ,27

²²(n19) 26,27

1.6.3 Theories of passing of property and risk

The relevant issues in linking the definitions of a contract of sale and agreement to the passing of property and risk can be further complicated, and indeed have always constituted a problematic area which has formed a subject of regulation in almost every legal system. Depending on the legal structures, social circumstances and background, different theories have been developed and adopted regarding the time of the passing of property and risk.

Property can pass from the seller to the buyer at any time according to the circumstances of the contract. The first instance is where it passes from the seller to the buyer by mere consent - where the transfer of property takes place upon conclusion of the contract of sale. On the other hand, property may pass at a different time, for example at the moment of delivery of the goods, according to the circumstances of the contract of sale.

However, it must be noted that most legal systems which apply any of the above principles, regarding the transfer of either risk or property, allow for the parties' contractual autonomy to set their contractual terms. For example, art 6 of the CISG makes clear that contractual provisions prevail over the rules of the CISG. Indeed, most contracts provide for the time of the passing of risk, i.e. the point from which the buyer must pay for the goods, even if they have been lost or damaged. To this end, the parties sometimes specify precisely the time or place at which the risk passes or, more frequently, refer to standard trade terms, such as those developed by the International Chamber of Commerce. In other words, the parties are given the possibility to derogate from the aforementioned rules provided for in their legal system, where the parties may have contractual autonomy and modify the general rules and, in particular, may prevent the delivery of the goods from determining the passage of property, or may lead to the separation of the moment of the passing of property from the moment of the passing of risk.²³

²³ Marco Torsello, 'Transfer of ownership and the 1980 Vienna sales convention. A regretful lack of uniform regulation' (2000) *International Business Law Journal* 941

1.6.4 Overview on the party autonomy principle

One of the objectives of the current research is to use the concept of party autonomy to examine the rules of the passing of property and risk. The freedom of contract is the first step to comply with the principle of party autonomy, because parties could not have bargaining power without freedom to decide the terms of the contract.²⁴ Party autonomy is a choice of rule doctrine that permits parties to choose the rule to govern their contract.²⁵ In other words, it seems evident that the freedom of the parties to contract according to their intention ought to be recognised when determining the applicable rules to which the parties are willing to be subject, either through a choice a particular clause from a particular law, or create a new clause according to the parties' preference. It has been defined as freedom of contract or self-arrangement of legal relations by the parties according to their intention.

Party autonomy has been a common principle in contract law; thus it has been drafted into one of the most successful international conventions in contract law. Art 19 of CISG states that 'A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.'²⁶ Furthermore, arts 6, 8 and 9 of the CISG deal with party autonomy and parties' intentions and provides the freedom to parties to decide which rule of the country will govern their contract. It provides bargaining power to parties by letting them negotiate the terms of contract in line with their interest. It represents all the characteristics of party autonomy, including freedom of contract, by allowing parties to decide the contractual terms, and equal bargaining power, by letting parties negotiate the terms as to what they give consent.

In the same way, in English law, this aim of freedom of contract is reflected in the wording of most provisions of the SGA. For example, the rules governing: time²⁷ when breaches of conditions can be treated as warranties,²⁸ rejection for trivial breaches,²⁹ the passing of property and risk,³⁰ and payment and delivery,³¹ amongst others, can all be varied by the

²⁴ Nygh, Peter. *Autonomy In International Contracts*. Oxford University Press. 1999,29

²⁵ Willis Reese & Maurice Rosenberg, *Conflict of laws, cases and materials* (8th ed. 1984) 576–96. See also David McClean, Morris: *The conflict of laws* (5th ed. 2000) 4–5

²⁶ CISG, art 19

²⁷ SGA, s 10

²⁸SGA, s 11(4)

²⁹ SGA, s 15A(2)

³⁰ SGA, s 17 and 20

parties' agreement. The wording of these provisions indicates that variations from the contract can be either expressed or implied.³² In this context, Chalmers stated that sale is a consensual contract, and the Act does not seek to prevent the parties from making any bargain they please. Its object is to lay down clear rules for the case where the parties have either formed no intention or failed to express it.³³ Indeed, regarding the issue of party autonomy, the CISG and English law are both seemingly flexible instruments designed to accommodate the parties' expectations under the contract.

In the case where party autonomy has not been implemented to provide parties with the freedom to decide contractual terms,³⁴ it is subject to domestic legislation, because legislation sets some limitations to protect public or individual interests. In that case, the expressions of 'good faith' in civil law and 'duty not to misrepresent', 'fair dealing' and 'unfair terms' in English law represent the private or individual interests that are aimed to be protected, such as protection of the weaker party in the contractual relationship. On the other hand, the most common limitation is that of the mandatory rules, especially in conflict law which is prone to give courts authority to decide to what extent the terms would be enforceable. In fact, such mandatory rules aim to protect morality, equity and public interest.³⁵ Therefore, international contracts face some difficulties in applying such principles, because every country tries to protect their own public policy by implementing limitations on party autonomy. Yet the party autonomy principle remains the most important principle in the area of sales contracts, as will be seen.

1.6.5 Force majeure and frustration

Due to the limited length of the research, the doctrine of force majeure is not included in the main theme of the thesis. Nevertheless, it must be clearly distinguished from the theories of property and risks. The execution of contracts may be exposed to risks and difficulties impeding their implementation, and sometimes these may make it impossible to fulfil the contract, which leads to a breach of the contractual relationship balance between the parties, due to force majeure.

³¹ SGA, s 28

³² SGA, s 15A(2)

³³ Mackenzie Chalmers, *Sale of Goods Act 1893*, (2nd ed London W Clowes & Sons 1894)

³⁴ (n24)211

³⁵ Ibid.

The doctrine of exemption, under the CISG, is basically predicated on how risk of liability and exemption from damages play out when a party fails to perform any obligations in the contract due to unforeseen circumstances beyond his control. It must be proved that he could not reasonably be expected to have taken the impediment into account at the time the contract was concluded, or to have avoided or overcome it or its consequences. Furthermore, goods might suffer loss or damage at various points in time from the formation of the contract of the sale of goods up to the actual handover to the buyer.³⁶ This loss, if it is accidental, will fall within the concept of risk; the incidence of risk according to Bugden and Lamont-Black is relevant in determining any right of suit and/or damages and question of insurable interest.³⁷

In other words, such unexpected or unforeseen events may prevent the implementation of the conditions contained in the contract of sale and may make the contract impossible to implement. This then becomes detrimental to the rights of the parties, leading to a breach of the nodal balance between the parties. Once the contract becomes impossible for any reason, then it can be said that this is a case of force majeure or an unexpected event, caused by an external power, for instance earthquakes, storms and wars.

The doctrine of force majeure exempts a defaulting party from liability of implementation of the contractual obligation, including the passing of risk.³⁸ Art 79 of the CISG states that a party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences. Namely, the impediment must not fall in the sphere of risk of the obligor; it must have been unforeseeable; and, it or its consequences must have been unavoidable.³⁹ For instance, if the goods are at the

³⁶ Bernd von Hoffmann, 'Passing of Risk in International Sales of Goods' (1986) Ch. 8, 267. Available at <http://www.cisg.law.pace.edu/cisg/biblio/vonhoffmann.html>

³⁷ Paul M. Bugden and Simone Lamont-Black, *Goods in Transit* (Sweet & Maxwell, 2013) para 25-027. See also Fritz Enderlein & Dietrich Maskow, "International Sales Law", Oceana (1992), 261

³⁸ Sylvain Bollée, 'The Theory of Risks in the 1980 Vienna Sale of Goods Convention' (1999-2000) Pace Law School Institute of International Commercial Law 245-290. See also John Honnold *Uniform Law for International Sales* (3ed Kluwer Law International, The Hague, 1999) Article 79 para 423.4

³⁹ Stoll and Georg Gruber in Peter Schlechtriem and Ingeborg Schwenzer (eds) *Commentary on the UN Convention on the International Sale of Goods* (2 English ed., Oxford University Press, Oxford, 2005) Article 79 paras 10-24

buyer's risk and perish or deteriorate, the buyer may be liable for damages for non-acceptance, if the seller has suffered any repercussions.⁴⁰

Nevertheless, a party assumes the risk which comes with some bundle of obligations; he would not be shielded from liability under art 79 of the CISG when faced with events which fall squarely outside his control. This is because it will be contradictory for a party who legally bears the risk to also turn round and say the obligation is frustrated and thus seeking exemption from his liabilities, though he can be exempted from paying damages if the elements of art 79 are proved.⁴¹

However, such exemption from liability of implementation of the contractual obligation, would be subject to art 81(2) of the CISG, which gives a party who has performed the contract either wholly or in part the right to claim restitution from the other party of whatever the first party has supplied or paid under the contract. Furthermore, the theories of risks are different from the doctrine of frustration. The doctrine of frustration regards the contract as terminated⁴² when it is frustrated by some extraordinary and unforeseeable event, which can be considered a reason for exemption from contractual liability.⁴³

Under the doctrine of frustration provided in the common law and s.7 of the SGA, the contract is avoided and both parties are relieved from all their obligations under the contract Subject to the issue of restitution.

However, this will not be the case if the special rules as to the passing of risk of loss provide that any party bears the risk.⁴⁴ For instance, under the contract of sale of goods, the doctrine of discharge (frustration) can be displaced by the operation of the rules as to risk,

⁴⁰ Sylvain Bollée, 'The Theory of Risks in the 1980 Vienna Sale of Goods Convention' (1999-2000) Pace Law School Institute of International Commercial Law 245-290

⁴¹ Ndubuisi augustine nwafor. 'Comparative and Critical Analysis of the Doctrine of Exemption/Frustration/Force Majeure under the United Nations Convention on the Contract for International Sale of Goods, English Law and UNIDROIT Principles' (PhD university of Stirling 2015). At 78

⁴² John O. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (3rd edition edn Kluwer Law International, 1999)..369-1, n.369-2. discussion infra Ch.II, Part I.A.1, A.2

⁴³ Ewan McKendrick, *Force majeure and frustration of contract* (Lloyds of London Press, 1991). See also G.I. Treitel, *Frustration and force majeure* (London, Sweet & Maxwell, 1994)

⁴⁴ G.I. Treitel, *Frustration and force majeure* (London, Sweet & Maxwell, 1994),77

if under those rules the risk can pass at an early stage rather than at the later stage of the contract performance.⁴⁵

Risk implies that a party is bound to bear the accidental loss of or damage to goods, while frustration implies the allocation of risk in a contract when a situation that is out-with the fault and liabilities of the parties happens to render the contractual performance impossible. Whenever a contractual party has knowingly contracted to assume a risk, then the contract will not be said to have been frustrated if the impediment that renders the contract impossible to perform fell within the contracted risk.⁴⁶

Generally, under the 1979 Act, which reflects the position in common law, if the risk falls on the buyer he must take the risk of damage or loss, take delivery of the goods and pay for them. If the property in the goods has passed, the seller will be able to bring an action against the buyer for the price, under s.49(1), if the buyer fails to pay for the goods.

It must be noted that under the English law of frustration, a contract of sale cannot be frustrated by the destruction of the subject matter, or part of it, after the risk has passed to the buyer.⁴⁷ Due to the limited word count, the doctrines of force majeure and frustration have to be excluded from the discussion in this thesis, and the discussion will only be focused on the principles and theories related to the passing of property and risk.

1.8 A Roadmap of the Thesis

This thesis is divided into seven chapters. Chapter One has introduced the thesis, outlining the significance of the issues to be examined, the scope and value of the research and providing definitions of various terms under the two instruments. Chapter Two concentrates on examining the issue of the passing of property and risk under Libyan law. This chapter will address the provisions governing the issue of passing of property, including the party autonomy principle, and will attempt to ascertain the primary rule and the default rule, at the same time providing a critical analysis and discussion of the rules of passing of property under the Libyan Civil Code, highlighting the weaknesses in the

⁴⁵ Ibid (n 26) para 3-010, 81

⁴⁶ (n 41)308

⁴⁷ (n 44)

Libyan law in order to determine the remedies in accordance with English law and the CISG.

Chapter Three concentrates on examining the issue of passing of property under English law. It provides critical analysis and discussion of the rules of passing of property under English law. The discussion will address the provisions governing the issue of passing of property, including the party autonomy principle, and will attempt to ascertain the primary rule and the default rule. In order to determine the exact time of passing of property, through the discussion on the rules of passing of property in the specific and unascertained goods and the role of subjective intention and appropriation of goods in determine the time of passing of property will be identified.

Chapter Four provides provides a detailed examination and discussion of discussions of the issue passing of property under the CISG. This chapter intends to answer the question of whether the CISG regulates the issue of the passing of property and whether the CISG considers the passing of property an issue which is based on the impact of the contract of sale, or is it one of obligations and rights of the parties within the contract of sale? Furthermore, interpretation of the provision of art 4(2) becomes essential, as it seems to expressly exclude the issue of the timing of the passing of property from the scope of application of the CISG. It is also necessary to examine the party autonomy principle as an important principle which runs through the entire thesis and is integral to understanding the strengths and recognising the ambiguities of the CISG, with respect to the passing of property issue, through examining the provisions of art 6 of the CISG.

Chapter Five examines the provisions regarding the passing of risk issue under English law, and tries to determine the exact time when the passing of risk to the buyer takes place. This chapter provides critical analyses of the provision of s.20 of SGA. It further presents a critical evaluation of the importance of the intention of the parties and the *prima facie* of passing of risk with the property, attempting to answer the questions that arise as to whether “unless otherwise agreed” or “risk being passed with the property” is the basic rule; why English law links the passing of risk to the passing of property, and why English law does not leave the timing in relation to the passing of risk to the parties involved. Reading it in conjunction with s.17 of SGA, the chapter also sets out to identify the gaps, if any, in relation to such issues in the SGA.

Chapter Six focuses on the rules of passing of risk under the CISG. The time of passing of risk under the CISG, depending on the circumstances of the terms of the contract of sale will be the main focus of the chapter. The discussion will be extended into the provisions of arts 67, 68 and 69. Therefore, a critical analyses examination of these different aspects of this issue and other related articles will be carried out in this chapter. Furthermore, the principles applying to the passage of risk, together with sanctions where the seller breaches the contract (art 70), the concept of the buyer's right of avoidance as a remedy and its main requirement of fundamental breach, as well as the meaning, implications and justifications for such a remedy, will be discussed and analysed. The chapter also examines the party autonomy principle and the legal nature of the passing of risk rules under the CISG, through the role of art 6 of the CISG.

Finally, Chapter Seven will summarise the findings of the study and its criticisms of the passing of risk issues under both the English law and CISG and provide remedies and suggestions for a way forward to fill the gaps in this area of law, by addressing the issue of a fair balance between the parties in the contract with respect to these matters.

Chapter 2 – Overview of passing of property and risk under the Libyan Law

2.1 Introduction

The Libyan legal and governmental structures are based on two constitutional documents. These are the Constitutional Proclamation of December 1969, replacing the former Libyan Constitution of 1951, and the Declaration of the Establishment of the People's Authority, enacted in March 1977. Both embedded a rather peculiar form of government, termed Jamahiriya (“rule of the masses”), a political agenda that may be described as a socialist ideal under an authoritarian cover.

The socialist theory adopted by the Libyan government is embedded both in the Constitutional Proclamation and the Declaration, which had a significant influence on commercial trading, and, subsequently, on the commercial law. It saw the Commercial Code 1953 thoroughly revised and revoked while the Civil Code of 1954, although maintained, provides few detailed provisions on the time of passing of property and risk.

In the revoked Libyan Commercial Code 1953, the issues of passing of property and risk were not regulated, while, the Libyan Civil Code 1954 remains the primary law for civil transactions. This includes sale of goods contracts, real and personal rights and obligations, specific performance, evidence, assessment of damage and the contractual relationships surrounding sale exchange. Implicitly, the issues of passing of property and risk could have been argued to be covered by the Libyan Civil Code 1954. However, its apparent lack of detail regarding the issues of passing of property and risk fails to provide a clear guidance on this area of law.

Actually, the lack of detailed provisions in Libyan law can be seen in the limited number of provisions applied for interpretation. Accordingly, ss207, 208, 936 are the only provisions regulating the passing of property with s210 being related to the passing of risk, supplemented by s147 regarding the party autonomy principle. Among these, s936 of Libyan civil law provides the basic rule regarding the passing of immovable property, where the property passes at the time of conclusion of the contract, supplemented by ss207 and 208, dealing with the identification of the goods, where immovable property in the goods cannot be transferred to a buyer until the goods are ascertained. Nevertheless, the

rule provided by s936 comes as general rule without any further details and its interpretation covers both movable and immovable (real property), failing to distinguish between them. Moreover, with respect to the provisions of ascertaining the goods, this does not include any rules for ascertaining the intention of the passing of property.

The delivery principle adopted in s210 of the Libyan civil law, which is applied to interpret all types of contracts and is not limited to the sale of goods contract, dominates the issue of the passing of risk. According to this provision, the risk passes at the time of delivery; however, this provision is inconsistent with the Libyan law, in which risk would transfer regardless of the identification of goods. What transpires is that the Libyan law links the issue of passing of risk to the delivery time, instead of linking it to the situation of goods. Consequently, further complications may arise regarding the issue of the passing of risk when it is linked to the delivery time. Such complications also occur in circumstances where the parties intend explicitly or implicitly to pass the risk before the delivery, in the case of unascertained goods, under s147 of the Civil Code.

In addition, Libyan law is also noted for its use of domestic rules in the interpretation of international sale of goods, as the law fails to provide any rules in respect of passing of risk in goods sold in international transit, nor rules governing the sale of goods involving carriage of goods by different modes of transportation across the borders. This has created uncertainty for the both Libyan and international traders dealing with Libya under the CISG, English and virtually non-existent Libyan frameworks. Consequently, the need arises to create a model of the passing of property and risk which is specific and detailed and covers all the related rules.

2.2 Passing of property under the Libyan law

Under the Libyan law, the passing of property rules are stipulated in the Civil Code 1954. Section 407 of the Libyan Civil Code defines the contract of sale as a contract that obliges the seller to pass the property of goods to the buyer against payment. In other words, this contract is a binding contract for both parties, whereby the seller must pass the property and the buyer must pay the price. Therefore, some law scholars argue that the main function of a sales contract under Libyan law is the passing of property.¹

¹ Sanhoori, Abdel Razek, *The mediator in explaining the Civil Law*, (4th edn, Encyclopedia of law, Cairo 1970) 349

The timing of the passing of property is stipulated in s936 of the Libyan Civil Code. The guiding principle in relation to the passing of property is that the property of moveable and immovable (real property) goods passes from the seller to the buyer at the time when the contract is concluded. It reads: *the property in the movable and immovable goods passes to the buyer when the contract is made, as long as the seller is owner of the goods and subject to section 207..* This provision provides the general principle of the timing of passing of property and covers both immovable and movable property but fails to distinguish between immovable (real property) and movable goods and take into account the different types of properties. In the widest and most comprehensive sense of movable and immovable property, the provision lays down the general concept in respect of property and is interpreted to be applicable to both movable as well as immovable property, subject to the express language of the section concerned.

Seemingly, the real test according to Libyan law of whether a property is immovable or movable is the intention behind the transfer and the transferability of the property. For example, generally a tree will be treated as an immovable property, but it will be treated as movable property if it is felled and used to build a house and both pass according to the same rules subject to s207, where the goods must be ascertained goods, as long as the seller is the owner of the goods which is to be discussed in a later section. Thus, the general principles dealing with immovable (real property) under the civil law has been used to interpret movable goods, where property of immovable and movable goods passes at the time when the contract is made.

However, the parties may choose to deviate from the rules provided by the guiding principle, in that they are free to identify the time when the property and risk will be deemed to have passed, where the ascertainment is further qualified in s147, which makes the passing of property dependent upon the intention of the parties, under these circumstances. The immediate question which arises regarding the passing of property is whether the parties' agreement supersedes the relevant rules. In other words, which rule is the primary rule – taking priority over an application?

2.2.1 Intention of the parties to pass property and the legal nature of the Libyan law

The basic rules which govern the process surrounding the passing of property from the seller to the buyer in a transaction adopt the general principle of passing of property when

the contract is made. However, this rule has to be further analysed against s147 of the Libyan Civil Code.

Section 147 provides that: *The contract makes the law of the parties. It can be revoked or altered only by mutual consent of the parties.*

According to s147, the parties of the contract can exercise contracting autonomy, according to their intention. Formation of a contract generally requires an offer, acceptance, consideration, and a mutual intent to be bound. S147 provides the party autonomy principle, where the parties are free to contract according to their intention. Logically, the coverage of the party autonomy principle in the Libyan Civil Code undoubtedly extends to cover the issues of passing of property and risk, as well the rights and obligations of the parties to the contract.

Such a view receives support in the argument that the passing of property issue may be expressly or implicitly inferred from the terms of contract, the transaction or by usage. In practice, it has been held that the basic rule is intention of the parties, where the parties are obliged to fulfil the contract according to their agreement.² Thus, the property of goods may pass at the time of the conclusion of the contract or at the time chosen by the parties, according to their intention.

Apparently, the court has given effect to the parties' intention where they agreed; giving priority to an agreement between the parties may refer to the principle of the freedom of parties to contract and create the terms of their agreement as they desire (the party autonomy principle). Accordingly, the parties have the right to create the terms of the contract according to their intention. Although Libyan law does not mention it expressly, it has been indicated that the intention of the parties with regard to the passing of property and risk takes priority over any other rules. In other words, the parties' intention supersedes any other rules, since it could be viewed as the basic rule in relation to the passing of property.

Indeed, it seems that the Libyan law provides a system which is governed by the rule that the property passes when the contracting parties intend for it to pass. If, however, the intention of the parties is being overlooked by the parties, the court will resort to other criteria to supplement the parties' intention with a default rule. In other words, in the

² Libyan Supreme Court no 8571, 66. 22 /12/ 1970.

absence of any expressed or implied indication regarding the intention between the parties with respect to the time of passing of property in an award, the property then passes to the buyer, according to s936, where the property of movable and immovable (real property) goods passes from the seller to the buyer at the time when the contract is concluded. In this case it is clear that Libyan law provides a substitutional rule, presented in s936, which applies in the case of absence of any indication regarding the intention between the parties with respect to the timing of the passing of property

Apparently, this agreement is the primary rule and takes priority in application over any other rules. As a result, the principle of time when the contract is made is apparently merely a substitutional principle, not a dogma. In other words, the intention of the parties is the basic rule which takes priority over the rule provided in s936 of the Libyan Civil Code. It seems that Libyan law has adopted two legal rules regarding the passing of property. In the sense that the idea lies in the adoption of both: a basic rule, which overrides any other rules in application, and a substitutional rule, which applies in the case of the absence of a basic rule. Nevertheless, such rules of passing of property should be provided by the basic rule in s147 or by the substitutional rule in s936, which would be inapplicable unless the goods are specific goods and the seller must be the owner of the goods, moreover the contract should be an unconditional contract.

2.2.2 Passing of property of specific goods under the Libyan law: definition of ascertainment

Section 208-1 defines specific goods as *goods identified and agreed on at the time a contract of sale is made.*

This means the parties understand which goods which have been agreed upon. Apparently, the property cannot pass to the buyer at the time of making the contract unless the goods are ascertained goods at the time a contract of sale of goods is made, taking the intention of the parties into consideration. Following this, an agreement on undefined goods outside the scope of the contract of the sale of goods, as well as future goods, means these are goods to be manufactured or acquired by the seller after the contract of sale has been made.

In general, specific goods are those goods agreed at the time when the contract is made. For example, goods sold in supermarkets are specific goods, because both parties (buyer and seller) have agreed and identified upon the goods at the cash desk.

Actually, at the time when the contract is made, no property of unascertained goods can be passed to the buyer unless the goods are ascertained. Accordingly, the principle that property changes ownership at the moment the contract is made in relation to specific goods seems to be an absolute rule with respect to time of ascertaining the goods. Nevertheless, different rules may be applied to determine the timing of ascertainment, which may be well after the time when the contract was made.

Clearly, the time of contract of sale being made is the main factor with regard to ascertaining the goods. While this appears to be an absolute rule with respect to the time of ascertaining the goods in the case of passing of property at the time of the contract, the element of the parties' intention, as stipulated in s147 of the Libyan Civil Code, should also be considered. Under party autonomy, the property of goods passes at the time when the parties intend it to pass. The reading seems to suggest that ascertainment can be subject to the parties' intention, as the ascertained property in goods passes when parties intend it to pass, under s147.

In the case where the goods are ascertained, the property will only pass when the parties intend it to be passed. Determining such intention relies on the reading of the terms of the contract, the conduct of the parties, and the circumstances of the case. However, in the case where no such intention can be discerned, then s936 will be applied where the property passes at the time of the contract is made, though this is subject to the rule of s208, where the goods are identified and agreed on at the time a contract of sale is made. Accordingly, no property passes until the goods are ascertained, whether at the time of the contract or a later time.

Requirement of Ascertained Goods

Section 207-1 provides that: *No transfer of property in the goods can take place from the seller to the buyer unless and until they are ascertained.*

This provision provides the starting point in restricting the passing of property to ascertained goods. Hence, where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer until the goods are ascertained. In fact, the enforcement of s207-1 means that there is no field for the transfer of property unless the goods are ascertained. Noticeably, it restricts the transfer of ownership and makes it only apply to ascertained goods, which appears to be a mandatory provision.

In fact, while aforementioned provision of s 936 of Libyan Civil Law provides the general rule regarding the passing of property, where the property passes at the time of conclusion of the contract, it is restricted by s207-1 which deals with the identification of the goods and the property in the goods cannot be passed until the goods are ascertained. This provision makes a distinction between specific and unascertained goods.

It has been held that, the property of movable and immovable goods passes to the buyer at the time of conclusion of the contract, as long as the sold goods have been identified and agreed on at the time a contract of sale is made, unless the parties agreed otherwise.³ This includes the complete share specified or percentage of goods identified and agreed at the time of making the contract of sale;⁴ it also constitutes existing specific goods.

Following this, an agreement on unascertained goods outside the scope of the contract of the sale of goods, as well as future goods, which are goods to be manufactured or acquired by the seller after the contract of sale has been made, and these can never be specific goods, unless such goods are described carefully and sufficiently to the contract of sale. However, it is worth mentioning that, apart from the actual identification of the goods, ascertainment may also cover goods identified merely through description. Provided that the description was careful and sufficient, the goods are considered to be specific goods, which are therefore sales by description, and cover catalogue purchases and orders made through a dealer.

Unidentified parts of an identified bulk

Unidentified parts of an identified bulk are considered as ascertained goods under s218 of Libyan Civil Code provides that, *when goods are sold in bulk, property is transferred to the buyer in the same way as property of an ascertained good.*

In meaning, a buyer of part of an identified bulk becomes an owner in common of the bulk, with each such buyer's undivided share in the bulk, even in the case of goods in bulk when the amount of the price depends on the extent, weight or measure of the goods sold being ascertained. Clearly, the Libyan Civil Code has addressed the problem of a sale of a part of an undivided bulk, where the property of such kind of goods passes at the time of making

³ Libyan Supreme Court no 223, 57. 22 /11/ 1990

⁴ Libyan civil code, S 208

the contract, as long as the contract of sale is an unconditional contract and the seller is the owner of the goods.

Appropriation

S208 provides that, *where there is a contract for the sale of unascertained or future goods by description, and goods of that description and are unconditionally appropriated to the contract, the property in the goods then passes to the buyer.* Accordingly, in the case of sale of unascertained goods property passes to the buyer when goods are unconditionally appropriated to the contract.

The importance of ascertainment can be seen in s208 of the Libyan Civil Code, which applies to such contracts: it outlines the basic requirements which allow for property to pass, confirming that the goods must be unconditionally appropriated. It appears that appropriation plays a key role in the process of converting goods from being unascertained to become ascertained.

This rule covers the process of converting the goods from being unascertained to be ascertained. It seems to be a dynamic process, which allows the property to be passed to the buyer. Accordingly, no property passes until the goods have been appropriated, and the passing of unascertained or future goods should occur through their unconditional appropriation. Although s208 states that unascertained or future goods by description must be unconditionally appropriated to the contract, it provides no guidance regarding how such appropriation can occur, whether by the seller with the assent of the buyer or by the buyer with the assent of the seller. Consequently, a lot of possibilities can arise and cause confusion in applying this rule.

Borrowing from English jurisprudence, it has been said that appropriation involves selection on the part of the seller, in which he has the right to select and choose the article which has been agreed within the terms of the contract of the sale of goods.⁵ However, selecting the goods which the seller intends to pass is not sufficient. If that were the only issue, the seller could feasibly change his mind and use the selected goods to fulfil a different contract, thereafter using different goods to fulfil this contract. Therefore,

⁵ *Benjamin's Sale of Goods*(8th Edition, Sweet & Maxwell, London , 2010) 232

appropriated goods within the contract must be reasonably supposed to attach to the contract irrevocably. In other words, the goods in question have to be irrevocably earmarked and attached to the relevant contract. This means that there exists irrevocable identification of the goods, which puts it beyond the power of the seller to substitute goods.⁶

Indeed, the goods could be appropriated unconditionally in different ways; it may take place through delivery, through a process of exhaustion of all other options, through consolidation, or by segregation. Thus, appropriation can occur when the buyer's portion is physically isolated from the bulk. It may also occur through the withdrawal of the remaining portions owned by other buyers, ascertainment by process of exhaustion. It can also come about when the buyer purchases the remainder of the bulk, including his own unascertained portion.⁷

In fact, Libyan law states that unascertained goods must be ascertained but does not offer a specific explanation of how appropriation could occur. This provides a wider field for the parties to express their intention as to how the goods can be unconditionally appropriated; at the same time, it gives freedom to the courts to interpret and infer appropriation from the facts and circumstances of individual cases. Obviously, an intended appropriation must be unconditional in order to be effective. Namely, the party appropriating the goods must intend to appropriate the agreed goods unconditionally, and not upon some future event. Further, unconditionally means that such appropriation is not subject to any express or implied condition, or any future act.⁸

Generally, the contract of sale must be unconditional, and appropriation must also be unconditional in order to allow the property to pass. However, a condition can be expressed or implied. It may be imposed on appropriation even if it is not included under the terms of contract, showing that the seller intends to reserve certain rights upon the goods until such conditions are fulfilled. This ensures that the appropriation is ineffective and prevents the property from passing, at least until the fulfilment of the conditions.

⁶ P.S. Atiyah, John N. Adams ; with sections on Scots law by Hector MacQueen , *Atiyah's Sale of goods*,(Harlow: Longman, Twelfth edition, 2010) 7, 9

⁷ William Tetley, Q. C., 'Sale of Goods the passing of title and risk: a resumé Faculty of Law McGill University Montreal, Quebec, Canada 19

⁸ (n 6)240.

In fact, the goods must be ascertained in order for the property to pass, but such ascertainment, which may occur through unconditional appropriation, is no more than making it possible for the property to pass, and once goods are ascertained the property passes at the time when the parties intend it to pass, according to s147 of Libyan Civil Code.

In meaning, Libyan law has adopted the principle of party autonomy as an essential principle, as shown by its incorporation into its provisions as a basic rule. This means that the principle of appropriation and consent is just that, a general principle, not a basic rule or dogma. Actually, while the basic standards of transfer of property in relation to specific goods constitute the time when the contract is made, and the intention between the parties, the basic standards underpinning the transfer of property in relation to unascertained goods is unconditional appropriation.

In other words, an appropriation is the legal principle according to the Libyan law, but that does not necessarily result in the passing of property, which still requires the intention of both parties, which is basic rule of passing of property. Section 147 allows the property to pass when the parties intend it to pass. Thus, the intention of the parties is paramount and overrides any other rules. On the other hand, s208 of Libyan Civil Code states that no property in unascertained goods is transferred to the buyer unless and until the goods are ascertained.

This means that, where there is a contract for the sale of ascertained goods which are unconditionally appropriated under the contract, with absence of any expressed indication regarding the intention between the parties with respect to the time of passing of property in an award, the property then passes to the buyer at the time when the contract is made, according to s936.

In fact, in the case of specific goods, property passes when the contract is made, or at a later time, depending on the goods in question and the intention of the parties according to s147. In that sense, the goods do not need to be appropriated unconditionally, because they are already ascertained goods. However, in the case of unascertained goods, the situation is different, because the goods still need to be appropriated unconditionally. Obviously, if there is intent between the parties, but no appropriation takes place, the property cannot be deemed to have passed, because s208 prevents the property from passing; only when the

goods have become appropriated according to the intention of both parties is it deemed to have passed.

Assuming that the goods are appropriated unconditionally under the contract of sale, but the parties intended to pass the property at a specific time, for example, at the time of bill of lading is delivered, the property cannot pass until the bill of lading is delivered to the buyer, even if the goods are appropriated.

Apparently, the main function of appropriation is to identify the goods, ascertain them, and tie them irrevocably into the particular contract - thereafter the property cannot pass once it has been ascertained, but it can pass when the parties intend for it to pass. In other words, the goods may become ascertained, yet do not pass until such time as both parties intend for it to pass.

The seller must be the owner of the goods

According to s207 of the Libyan Civil Code, if the seller is not the owner of the goods nor the authorized agent of the owner at the time of the sale, no property passes. This situation in fact, may arise in a range of cases, running from the situation where the seller has stolen the goods all the way to a case where the seller honestly believes that he is the owner of the goods but has himself been misled by a previous seller.

In such cases there is a conflict of interest between that of the original owner of the goods who is seeking to recover them or their value and the ultimate buyer who has paid good money for goods which he believed the seller was entitled to sell to him. In general, it is desirable to protect the interests both of the owners of property and of honest buyers who pay a fair price, so no property passes at the time of conclusion of the contract, even in the case of specific goods in an unconditional contract.

The contract should be an unconditional contract

An unconditional contract should be interpreted as a contract containing no condition unfulfilled by the seller and the conditions shall be essential conditions. According to s255-1 of the Libyan Civil Code, *any conditional contract is not effective unless the condition is fulfilled*. Clearly this provision is a general provision that applies to any contract, then, logically, extends to cover the contract of sale consequently the contract of sale must be unconditional contract.

Obviously, this interpretation focuses on essential conditions. An unconditional contract is meant to indicate that the contract is free of any condition which affects the passing of property. For example, a conditional sale agreement, under which the passing of property occurs only upon payment of the price, or a contract under which the seller must himself acquire the goods before he can fulfill his agreement to sell them to the buyer, would not be unconditional.

If the contract of sale is unconditional and the goods specific, property to the specific goods passes, when the contract is made, unless the parties have a contrary intention. It is immaterial whether the time of payment or the time of delivery are postponed, unless the parties have agreed that the passing of property is conditional on the payment or on the delivery, in which case the payment or delivery will be the condition would prevent the passing of property. The courts, however, usually infer from the contract that the parties did not intend title to pass, but rather intended that it should pass only upon delivery or payment.

Payment condition

In fact, section 419 of the Libyan Civil Code restricts the time of passing of property on the payment where the parties have agreed that the passing of property is conditional on the payment. In that sense, the contract of sale must be an unconditional contract and should not be subject to the payment as condition.

In fact, the parties are free to agree that the passing of property is conditional upon the payment, and that such an agreement could be expressed or implied. Nevertheless, the situation would be different if the postponement of payment was agreed as the condition. In this situation, the property cannot pass until the condition of payment is fulfilled because the payment becomes a related condition to the property when the parties agree to suspend the transfer of property on the payment.

However, if the price paid premiums and the payment carried out all of the premiums, the transfer of property to the buyer is based on the time that the contract of sale is concluded.⁹ In other words, the general rule of passing of property from the seller to the buyer at the time as the contract is concluded still applicable even in the case of a conditional sale agreement, under which the passing of property occurs only upon payment of the price,

⁹ Libyan civil code, S3

where the property passes retroactively at the time of making the contract not at the time of the payment.

Clearly, the provision of s419 is grounded on the party autonomy principle, where parties are free to decide contractual terms.¹⁰ Nevertheless, postponement of payment on its own cannot affect the passing of property, which means that the property can be passed to the buyer even when payment is postponed. Therefore, payment should not be considered as a condition which can prevent the passage of property, unless otherwise agreed.

In fact, where there is a contract of sale of specific goods, no property passes to the buyer at the moment of making the contract, if the contract of sale is subject to any condition, whether the payment or otherwise. It does not matter whether it is an expressed or implied condition, as long as the condition is unfulfilled, even if the condition related to certain rules outside the scope of the contract of sale.

Ascertaining the intention of the parties

Although the Libyan law sets conditions for transfer of property where the seller must own the goods, the goods must be specific goods and there must be an unconditional contract, in fact an ambiguity lies in the lack of some detailed rules that would provide presumptions for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

In general, where the seller is bound to measure or weigh the goods to ascertain the price and that the specific goods are in a deliverable state, the rules would provide presumptions for ascertaining the intention of the parties in the case of absence of any indication of intention of the parties. This ambiguity, in fact, might be due to considering the rules regarding the deliverable state among the acts of ascertaining the goods. Nonetheless, the lack of such rules in the Libyan Civil Code could weaken the Libyan position on this issue.

It seems that, the idea adopted by Libyan Civil Code lies in the adoption of both a basic rule, which overrides any other rules in application, and a substitutional rule, which applies in the case of the absence of a basic rule. In other words, it has adopted the principle of party autonomy, and at the same time adopted a different principle, which is that the passing of property when the contract is made applies in the case of absence of any

¹⁰ Nygh, Peter. *Autonomy in International Contracts* (Oxford University Press. 1999) 211

expressed indication regarding the intention between the parties with respect to the timing of the passing of property.

Clearly, the Libyan law adopts the party autonomy principle, where the intention of the parties - whether that be in relation to the passing of property or risk - is the basic rule. It is worth noting that, the enforcement of ss207, 208 and dealing with the identification of the goods, where the property in the goods cannot be passed until the goods are ascertained, may restrict passing of property, where there is no field for the transfer of property unless the goods are ascertained. Clearly, such a rule restricts the transfer of property and makes it only apply to ascertained goods, which appears to be a mandatory provision.

2.3 Passing of risk under the Libyan law

The exact time of the passing of risk in a contract of sale is very significant to both the seller and buyer. The reason for this lies in the importance of determining which party will bear the consequences of damage or loss. Existence of risk is commonly understood to define the state of the person who suffers the damage when goods are lost. In other words, being in risk can make one party within the contract free from carrying out his obligations, whereas the other party remains bound to perform his obligations. Nearly every national legal system includes rules on the passing of risk, and the passing of risk has also been the subject of regulation in the Libyan Civil Code. Apparently, the general principle in Libyan law is that the risk of accidental loss or damage falls on the party who in the possession and has control of goods, in that sense, the risk passes at the same time as delivery of the goods.¹¹

According to s210 of the Libyan Civil Code, the passing of risk is not related to the issue of passing of property, but linked to the time of delivery. Consequently, goods remain at the seller's risk until the delivery time, but when the delivery has been made to the buyer the goods are at the buyer's risk, notwithstanding of passing of property. This is due to the fact that the obligation to deliver the goods may be separated from the obligation of the passing of property, unless the parties under contract have agreed otherwise.

¹¹ Libyan civil code s.210

2.3.1 Linking passing of risk with the concept of delivery under the Libyan law

According to s424-1 of Libyan Civil Code, the delivery may occur through different methods. It may imply a physical act which the seller must perform in order to put the goods in a deliverable state, where, obviously, this act is found in actual delivery. Furthermore, it can occur when the seller aims to enable the buyer to obtain control of the goods, by putting the goods at the buyer's disposal. Under this concept, s424-1 of Libyan Civil Code states that: *Delivery consists in putting the goods at the disposal of the buyer, even if the buyer is not in physical possession of the goods, as long as the goods are under the control of the buyer.*

Due to a lack of case law, it is unclear whether the concept of delivery according to the Libyan law is restricted to the physical meaning of delivery or is understood in a broader sense, which includes putting the goods at the buyer's disposal. Consequently, the buyer is likely to be placed with positive burden in his awareness of 'at the buyer's disposal' and such a burden can be created by the handing over of documents or by any other (informal) message.

2.3.2 Exceptions in relation to passing of risk under the Libyan law

The link between risk and delivery is restricted by s426 of the Libyan Civil Code, where the passing of risk under this provision does not depend on the buyer's taking physical delivery of the goods. The goods could be passed by the buyer's taking physical delivery, or at the time at which the goods are placed at his disposal, when delivery is due.

Although the passing of risk at the time at which the goods are placed at the buyer's disposal when delivery is due may deviate from the general rule of s210, it can be also understood as a delivery as long as the buyer has become aware and delivery is due, where the goods are placed under the buyer's control. In the case of default of the buyer to taking possession of them, the risk of loss or damage will still be passed, on the grounds that delivery has occurred by placing them at the buyer's disposal. On the other hand, unsuitability may entitle the buyer to reject goods that are not in conformity with the contract.

According to English jurisprudence, it has been said that passing of risk at delivery time seems most fair, on the ground that the party who was in the possession of goods would be in the better situation to take the convenient precautions to protect them, and should also be in a suitably connected position to deal with the lost or damaged goods and insurer when the goods are insured.¹² Directly linked with such a view is the question related to goods in transit. As indicated above, the Libyan law provides no rules to regulate the issue of passing of risk in contracts of sale which involve the carriage of goods. The lack of detailed provision on this issue is further exacerbated by Libya's domestically oriented Civil Code.

Due to the different nature of domestic and international sale of goods contracts in terms of the transportation involved, the Libyan law's use of domestic rules, designed to deal with local trading conditions, as the law in the interpretation of international sale of goods is inappropriate. It fails to provide any rules in respect of passing of risk in goods sold in international transit or any rules governing the sale of goods involving carriage of goods by multi-modes of transportation across the borders. This is most evident in the concept of delivery adopted in the Libyan Civil Code, where the absence of legal rules regulating this issue could be considered as a weakness in Libyan law, which provides no answer, nor is there any dedicated rule for regulating the issue of the passing of risk in goods in transit where contracts of sale involve the carriage of goods. Furthermore, this local transaction oriented rule does not apply in the case where the buyer is not responsible for the loss or damage of the goods before delivery, which is a common situation in international trade, where the buyer would be released from his obligation to pay the price and is entitled to recover what he may have already paid under the contract, unless the loss or damage occurs after notice is given to the buyer to take over the delivery of the goods.¹³

The general rule is that the risk passes to the buyer only at the time of delivery; this rule is, in fact, restricted by s426 of the Libyan Civil Code, where the passing of risk under this provision does not depend on the buyer's taking physical delivery of the goods. It could be passed by buyer's taking physical delivery, or at the time at which the goods are placed at his disposal when delivery is due.

Although the passing of risk at the time at which the goods are placed at the buyer's disposal when delivery is due may deviate from the general rule of the s210, it can be also

¹² Wilson J.F, *Carriage of Goods by Sea* (, 4th edition, Harlow: Long man 2001) 138

¹³ Libyan civil code s. 426

understood as a delivery as long as the buyer has become aware and delivery is due, where the goods are placed under the buyer's control. In the case of default of the buyer to Take possession of them, the risk of loss or damage will be passed, on the grounds that delivery has occurred by placing them at the buyer's disposal. On the other hand, an unsuitability may entitle the buyer to reject the goods are not conformity with the contract.

2.3.3 The lack of conformity of the goods

Conformity of the goods, whether it relates to discrepancies in the quantity or quality of the goods at issue, it makes no difference whether the quantity of the goods delivered is more or less than agreed upon. Non-conformity of the quality of goods means delivery of goods whose quality is worse or better than agreed upon. In other words, one of the most important obligations of the seller is to deliver of goods in conformity with the contract, while the right of the buyer is to examine the goods to ascertain whether they are in conformity with the contract or not, and reject the goods when they do not conform to the contract, according to s427 of Libyan Civil Code.

Hence, according to s427 when the seller fails to deliver such conforming goods for any reasons, either for reasons caused intentionally by the seller, such as counterfeit goods and fraud, or by accidental causes, for instance loss or damage of the goods during transfer, the seller is deemed to have breached a contractual obligation. A breach of contract by the seller which is sufficient to allow the buyer to reject goods that are not conformity with the contract.

Accordingly, under Libyan law, in such a situation despite the passage of risks, if the buyer properly rejects the non-conforming goods, the risk will revert back to the seller and the buyer would be able to place the risk on the seller, whilst the buyer exculpates himself. At the same time, despite the risk being passed, the buyer is entitled to request the seller to reduce the price of goods that do not conform to the contract, even if the price has already been paid. However, the general rule will not apply where the parties have agreed when the risk should pass.

2.3.4 Parties' agreement on passing of risk

According to s147 of Libyan Civil Code, the seller and buyer may agree on when the risk of loss or damage passes to the buyer. In principle, Libyan law links the passing of risk to

the delivery time, as provided in 210. However, the parties may, by agreement, separate the passing of risk from the delivery time. An argument departing from the general rule, indicating that one party should bear the risk, may be expressly or implicitly inferred from their transaction or by usage. The wordings of the Libyan civil code appear to be sufficiently wide in the sense that, where there is an express or implied agreement providing that the parties utilise party autonomy on such a matter. If so, one party is to bear the risk according to the agreement made between the parties even though he has no delivery of the goods. It could be understood that Libyan law gives priority to the intention of the parties over any other rule. This makes it more flexible with respect to the passing of risk, according to the party autonomy principle which is clearly expressed in s147.

On the other hand, the lack of agreement between the parties on the timing of the passing of risk can be objectively interpreted as meaning that the parties intend to follow s210 and to have the risk being passed at the time of delivery. The risk however, may pass exceptionally to the general rule; this can be inferred by the authorities (court) from the circumstances of the case. Where the parties intend to pass the risk separately, i.e. before or after the delivery, it is clear and logical that the goods must be sufficiently identifiable as those to which the risk relates. It might therefore be assumed that the contract must be one for the sale of specific goods, or if it was one for the sale of unascertained goods, the goods should have become ascertained before the risk could pass.¹⁴

In general, as discussed above, the Libyan law appears to distinguish between specific and unascertained goods with regard to the issue of timing in relation to the passing of property. On the other hand, there is no provision highlighting the passing of risk with regard to whether the goods are specific or unascertained. It would appear that there is no problem regarding the passing of risk at the same time of delivery or even after the delivery time, because timing in relation to the passing of risk would be linked and subject to the act of delivery in the case of specific goods, where the goods already will be ascertained through the act of delivery. However, the germane question relates to unascertained goods, where the parties intend to pass the risk before the property, by reason of whether the goods are still unascertained.

From the foregoing, it can be observed that the risk may pass before the delivery time, regardless of whether the goods are specific or unascertained, where, there is nothing

¹⁴ *Benjamin's Sale of Goods* (8th Edition edn Sweet & Maxwell, London 2010) 303. See also Aedit Abdullah "Issues in the Transfer of Risk in CIF Contracts." *Sing. L. Rev.* 14 (1993) 151

peculiar about separating the transfer of risk from the delivery time in the case of unascertained goods. Based on this, further complications may arise when the issue of the passing of risk is linked with the passing of delivery; such complications may occur in circumstances where the parties intend, explicitly or implicitly, to pass the risk before the delivery, even if the goods remain unascertained, based on s147, which could be considered as a weakness in Libyan law as well be seen.

2.3.5 Party autonomy and the legal nature of passing of risk

the restriction discussed above cannot be seen in the case of passing of risk, simply because the general rule of passing of risk under the Libyan law is determined by the delivery time, where the goods supposed to be ascertained unconditionally through the act of delivery. However, according to the principle of party autonomy provided by s147 of Libyan Civil Code, it is possible for the parties to pass the risk at any time other than the delivery time. Consequently, it is possible for them to pass the risk of unascertained goods to shape their own agreements according to their wishes.

Indeed, in the contract of a sale of specific goods, the risk could be passed from the seller to the buyer separately, before or after the delivery, especially in cases involving the passing of risk after or at the same time of delivery, as this indicates clearly that the goods are specific goods, where the goods could be ascertained unconditionally through the act of delivery. It appears that there is no difficulty with passing risk in accordance with the intention of the parties involved, whether before or after delivery, so long as the contract is for the sale of specific goods.

However, the question which is most likely to arise in such circumstances is whether the risk can pass before the delivery in relation to unascertained goods. According to the provision of s147 mentioned above, this may occur in circumstances where the parties intend, explicitly or implicitly to pass the risk before the delivery, even if the goods remain unascertained; here the priority, indubitably, will be given to intention of the parties, if any, on the ground of the party autonomy principle.

Actually, as we have noticed, there is no expressed provision in Libyan Civil Code which prevents the parties in the contract from agreeing to pass the risk before the delivery, even if the goods are unascertained. Hence, under party autonomy principles adopted by the Libyan law, risk may theoretically pass on without identification being necessary.

Indeed, the issue of unascertained goods remains debatable, where the law does not mention unspecified goods, the negative interpretation of the provision can mean that the risk cannot pass until it is specified; however, the Libyan law does not specifically deal with the passing of risk in relation to unascertained goods as it did in regard to passing of property. This may be due to the fact that, the Libyan law links the issue of passing of risk to the delivery time, where the goods are supposed to be ascertained goods through the act of delivery.

On the other hand, suppose that Libyan law linked the risk to the condition of the goods, where no risk passes to the buyer until the goods are clearly identified within the contract, then the risk could never be passed until the goods are ascertained. Nevertheless, the fact is that the Libyan law does not mention such rules. Therefore, the researcher views the absence of legal rules regulating such issues could be considered as a weakness in Libyan law.

2.4 Conclusion

The lack of detailed provisions in Libyan law can be seen in the limited number of provisions applied for interpretation. Where the Libyan law is unclear is particularly with respect to the issues of passing of property and risk. Firstly, the general principle of passing of property and risk does not distinguish between immovable (real property) and movable goods, where the same provision applies regardless whether it immovable or movable goods. In addition the Libyan law lacks provisions related to ascertaining the intention of the parties. Furthermore, it is noted for its use of domestic rules in the interpretation of the international sale of goods, as the law fails to provide any rules in respect to passing of risk in goods sold in international transit, nor rules governing the sale of goods involving carriage of goods by different modes of transportation across the borders. The weakness in Libyan law is also demonstrated by the fact that it links the passing of risk to the delivery time, but not to the condition of the goods, where that could cause difficulties is particularly in the case of applying the party autonomy principle, where the parties may agree to pass the risk before delivery time for unascertained goods, as discussed. A research study bridging the gaps in the current Libyan law in this area of law could be invaluable for Libyan legislators or other countries in providing a model to draft suitable and detailed legal provisions in line with developments in international trade, as well as helping to avoid some of the legal gaps and flaws in some other related laws, including the English Sale of Goods Act 1979 or the CISG.

Chapter 3. - Passing of property under the English Law

3.1 Introduction

A crucial point of discussion in relation to the law of sale of goods, is the passing of property from the seller to the buyer. The precise moment determining the passing in a sale's transaction is when the seller ceases to be the owner of the property, and the buyer assumes ownership. In English Law, the period of time in which property passes differs according to whether the contract is for the sale of specific goods or unascertained goods. According to s16 of the Sales of Goods Act 1979, *where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless must be and until the goods are ascertained*. Since property in the unascertained goods cannot be transferred to a buyer until the goods are ascertained, as *Re Wait*¹ indicated, it is important to understand at what point goods become ascertained.

The traditional view, that the property in specific goods passes from the seller to the buyer at the same time as the contract is agreed, works on the basis that the contract of sale is unconditional, that the specific goods are in a deliverable state, and that the parties have not agreed otherwise. However, such a traditional premise no longer works in modern commerce, as Lord Diplock made clear when he commented on this matter in the case of *Ward v Bignall*, stating that, *Very little would be needed in modern times to give rise to the inference that the property in specific goods is to pass only on delivery or payment*.² Essentially, the transfer of property in English law depends not only on the goods to be specified, but also ideational conditions to be met before property is considered as being transferred.

In England, the rules governing the issue of the passing of property, which identify the exact time when the property passes from the seller to the buyer, are stipulated in the Sale of Goods Act 1979. In accordance with s16 of the SGA 1979, the guiding principle in relation to the passing of property is the ascertainment of those goods intended to be passed from the seller to the buyer. The ascertainment is further qualified in s17(1), which makes the passing of property dependent upon the intention of the parties, and applies both to specific goods, goods identified and agreed on at the time a contract of sale is made, and

¹ *Re Wait* [1927] 1 Ch 606 (CA)

² *Ward v Bignall* [1967] 1 QB 534

also to unascertained goods which, though not identified and agreed on, are ascertained at a later stage.

Accordingly, the parties have the right to agree the time when the property passes in relation to specific goods, and in addition to making sure that the goods are appropriated unconditionally within the contract. From the foregoing, it would appear that there is a relationship between s16 and s17, in the sense that there are two fundamental factors required for the transfer of ownership: the first, as pointed out in s16, is that, subject to s18(5), the goods must be ascertained by appropriation and consented to; the second, pointed out in s17, involves the intention of the parties to pass the property. Where complication arises in this regard is in whether s16 or s17 is the primary rule in the passing of risk.

Furthermore, s18-1 of the Act provides guidance where the parties have not expressed or implied intention as to when the property should pass. It states that where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer at the time at which the contract is made, and it is immaterial whether the time of payment of the price or the time of delivery of the goods are both postponed.

Accordingly, specific goods are defined as those identified and agreed on at the time a contract of sale is made. This includes an undivided share, specified as a fraction or percentage of goods identified and agreed on, under an amendment made by section 1 of the Sale of Goods (Amendment) Act 1995. Thus, a contract for the sale of a quarter-share in a named racehorse will be a contract for the sale of specific goods.³ This may be an exception to the rule in relation to the passing of property in specific goods, but such an exception is important and will be examined and discussed further in the course of this theme.

In this chapter, the researcher will discuss the rules governing the transfer of property in specific goods and unascertained goods, which must be ascertained in order to pass from the seller to the buyer. The purpose of this chapter is to conduct an in-depth legal analysis on the topic of the passing of property, by clarifying whether the ascertainment or party intention is the primary rule governing the process. In this chapter, the discussion will focus initially on the issue of the passing of specific goods in terms of objective and

³ Ibid.

subjective ascertainment. The discussion will be followed by the passing of property in relation to unascertained goods, where the concept of appropriation and assent will be examined.

3.2 Passing of property of specific goods under English law

3.2.1 Objective Ascertainment – Requirement of Ascertained Goods

The SGA 1979, s61(1), defines specific goods as *goods identified and agreed on at the time a contract of sale is made*. This includes the complete share specified or percentage of goods identified and agreed at the time of making the contract of sale,⁴ it also constitutes existing specific goods. In other words, the parties understand which goods have been agreed upon. Apparently, the property cannot pass to the buyer unless the goods are ascertained goods at the time a contract of sale of goods is made, taking the intention of the parties into consideration. Following this, an agreement on undefined goods outside the scope of the contract of the sale of goods, as well as future goods, are goods to be manufactured or acquired by the seller after the contract of sale has been made, and these can never be specific goods.⁵

Apart from the actual identification of the goods, ascertainment may also cover goods identified merely through description.⁶ In one particular case, *Varley v Whipp*⁷, the purchaser had not seen the goods, yet his reliance on the description alone was considered a sale by description. In this case, the seller agreed to sell a reaping machine described as new the previous year. The buyer had not seen the machine previously, and when it was delivered to him, he discovered that it was an old machine. The court ruled that it was a sale by description of “specific goods”, meaning goods identified and agreed upon at the time a contract for sale is made. As the machine did not correspond to the description, the buyer was at liberty to reject the machine.

According to Channell J, one has to consider the relationship between the identification of the machine and the statements made in the description of goods at the time at which the

⁴ Paul Dobson, *Sale of Goods and Consumer Credit* (6th edn Sweet & Maxwell Limited, London UK 2000). 26; See s.61 SGA 1979

⁵ P.S. Atiyah, John N. Adams; with sections on Scots law by Hector MacQueen, *Atiyah's Sale of goods*, (Harlow: Longman, Twelfth edition 2010) 7,9

⁶ s18. Rule 5. SGA. 1979

⁷ *Varley v Whipp* [1900] 1 Q.B. 516

contract was made, such as that the machine which was to be sold had never been seen by the buyer, being a self-binder, being nearly new, and having been used to cut only about fifty or sixty acres, , which are considered as identifying and ascertaining the goods. Provided that the description was careful and sufficient, the goods are considered to be specific goods. The same rule also applies to all future and unascertained goods, which are therefore sales by description, and cover catalogue purchases and orders made through a dealer.⁸

Generally speaking, specific goods are those goods agreed at the time when the contract is made. For example, goods sold in supermarkets are specific goods, because both parties (buyer and seller) have agreed and identified upon the goods at the cash desk. A second-hand car deal also meets the criteria for specific goods, as the parties in question know which specific car is being sold. However, accounted bottles of wine from a seller's bulk stock is not considered a contract for specific goods, due to the fact that the description of the wine does not tell the consumer which specific bottles of wines from the seller's stock are being sold. This is because the definition and identification of specific goods are related to an undivided share, which is either specified as a fraction or percentage, or even the exact type of goods being sold.⁹ Therefore, an examination and interpretation of the terms of the contract is very important in order to identify whether the goods represent specific goods or not.

Furthermore, in the *Re Wait*¹⁰ case, a contract to sell 500 tons of wheat out of 1000 tons does not represent a contract of sale in specific goods, because there is no identification or ascertainment in the amount of 500 tons out of bulk 1000 tons of wheat. Even if the 500 tons is separated from the bulk amount of 1000 tons, it still would not make them specific goods, because the standard of specific goods is measured by the time at which the contract is made. By contrast, if the 500 tons of wheat had been agreed and identified at the time of making the contract they would be considered as specific goods.

On a practical level, there is some ambiguity as to whether goods are specific or not. In the case of *Kursell v. Timber Operators (1927 CA)*,¹¹ by the contract dated in September 1920,

⁸ Statutory regulation of contracts for the sale and supply of goods, Electronic copy available at: <http://www.nadr.co.uk/articles/published/shipping/003CHAPTERTHREETRADE1.pdf>. <accessed on 1 May 2017>

⁹ (n 5) 26

¹⁰ (n 1)

¹¹ *Kursell v. Timber Operators* [1927] 1 K.B. 298

when the seller agreed to sell and the buyer agreed to buy all available saleable timber, defined as "all branches and trunks of trees in the forest of Luhde in the Republic of Latvia but not trees of less than six inches in diameter at a height of four feet from the ground". The buyers were given fifteen years in which to cut the timber. After the contract was made the Latvian government passed an agrarian law whereby the forest became the property of the Latvian Government; the contract was annulled and all property of the vendors and purchasers in the forest was confiscated.

The legal result of these facts focused on the title of the property and whether it was a contract for the sale of specific goods on the basis of ascertainment. In this case not every tree in the forest had been identified and agreed upon, but only those complying with a certain measurement, which had not been made. Therefore, it was ruled that the property had not passed to the buyer. It was pointed out that the definition of specific goods will not fit the trees of which it cannot be determined at the time of contract of sale is made. Had the trees conformed to the stipulated measurements specified at the time of the contract, their property could be passed, because they were ascertained at moment of making the contract.

However, the purpose of the goods contracted and the general language used in the contract may also have impacts on ascertainment and fulfil the requirements of ascertainment. What was agreed to be sold was specific goods, consequently the property could be passed to the buyer, because the goods were identified and agreed upon at the time the contract of sale was made.¹²

Both cases discussed above share similar facts but received different judgments. This is because in the case of *Joseph Reid Pty Ltd* the property of all timber has been passed and considered specific goods, reliant on clause 8A of the contract. Namely, all timbers, without exception and regardless of certain measurements.

However, in the *Kursell* case the contract contained a "qualified" statement of the timber which was intended for sale; the timber which has been described as all trunks and branches of trees but not seedlings and young trees of less than six inches in diameter at a height of four feet from the ground at moment of contract of sale is made. Consequently, the property of young trees of less than six inches at the time when the contract is made cannot be passed, due to the fact that the goods had not been sufficiently identified at the

¹² *Joseph Reid Pty Ltd v Schultz* 338 JQAT (1949)

time of making the contract. In contrast, in the *Joseph Reid Pty Ltd* case the general language allows the goods to be sufficiently identified at the time of making the contract by clause 8A of the contract.

To summarise, at the time when the contract is made, no property of unascertained goods can be passed to the buyer unless the goods are ascertained. Accordingly, the principle that property changes ownership at the moment the contract is made in relation to specific goods seems to be an absolute rule with respect to time of ascertaining the goods. Nevertheless, different rules may be applied to determine the timing of ascertainment, which may be well after the time when the contract was made.

Subjective Intention

It is clear that the time when the contract of sale is made is the main factor with regard to ascertaining the goods. While this appears to be an absolute rule with respect to the time of ascertaining the goods, rather than being a time of passing of property, nevertheless, the element of the parties' intention, stipulated in s17(1) of SGA 1979, also has to be considered. Section 17(1) states that the property of goods passes at the time when the parties intend it to pass. The reading seems to suggest that ascertainment can be subject to the parties' intention, as the ascertained property in goods passes when parties intend it to pass under s17(1), even if it is a later time from making the contract of sale.

In other words, in the case of where the goods are ascertained, the property will only pass when the parties intend it to be passed.¹³ Determining such intention relies on the reading of the terms of the contract, the conduct of the parties, and the circumstances of the case.¹⁴ However, in the case where no such intention can be discerned, then the rules of s18 on ascertaining intention will be applied, with the exception of rule 5. Nevertheless, it is worth noting that s18 is subject to an ascertainment objective under s16 and s17 of SGA.

¹³ S. 17 (1) SGA.

¹⁴ S. 17 (2) SGA.

3.2.2 Presumed Subjective Intention -Rules for ascertaining the intention of the parties

Under the SGA, the parties' intention can be expressed under s17(1) or be inferred under s18, which lays down five rules, examined in this section, to help in ascertaining what the intention required in determining the passing of property.

3.2.2.1 Rule 1- Ascertainment of intention from fulfilled, implied and conflicting conditions – the importance of unconditional contract

Section 18-1 of the SGA emphasizes the importance of an unconditional contract in inferring parties' intention. It states that *where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.*

According to this provision, assuming that the goods are in a deliverable state and the contract is unconditional, the property passes to the buyer when the contract is made, even if the time of payment or delivery (or both) is postponed. However, the question that requires analysis is the meaning of "unconditional contract". According to *Taylor*, an "unconditional contract" should be interpreted as an unconditional contract containing no condition unfulfilled by the seller and the conditions shall be essential conditions.¹⁵ Obviously, this interpretation focuses on essential conditions. The difficulty is what is meant by the term "essential condition" and how can we recognise it in the contract of sale of goods?

Essential condition

In general, every contract of sale of goods must contain a number of conditions between the seller and the buyer. Moreover, every contract of sale contains fundamental conditions or obligations in its terms, which apply to both the seller and the buyer, namely, that the seller must deliver the goods and pass the property to the buyer. In return, the buyer must accept the goods and pay the price. The question related to the words "unconditional contract" in s18-1 of SGA, which stipulates that the obligations are included in the terms of

¹⁵ *Taylor v Combined Buyers Ltd* [1924] N.Z.L.R.627

the contract, would transfer the contract to being a conditional contract and deprive it of all its effects, due to non-fulfilment.

Among the discussions in the literature, Tetley maintained that English law rests on this point.¹⁶ However, it has been suggested that the essential condition which can prevent the passing of property in relation to specific goods at the time when the contract is made, is the condition which can affect the property only;¹⁷ and related to the passing of property only.¹⁸ Others have said it is the condition which prevents rule (1) (passing of property in specific goods at the time of a contract is made) from being applied. Accordingly, an unconditional contract is a contract which contains no condition, and the non-existence of an unfulfilled condition would prevent applying the rule (1).¹⁹

However, how can one see such conditions in the terms of the contract and recognise them as effective conditions in the contract of sale of goods, i.e. as conditions that can be expressed or implied? Actually, the identification of the conditional contract varies from case to case. For example, the condition may be expressed by the parties or it may be an implied condition. In the *Varley* case discussed above, although the machine was sold by description and was described specifically at the time of making the contract of sale, nonetheless the property never had passed, due to the unfulfilled implied condition that the goods shall correspond with the description, as highlighted by Channell J.; thus, the contract was not an unconditional contract for the sale of specific goods. As a result, the property did not pass when the machine was put on the railway, as putting the goods on the railway did not fulfil the implied condition. It was decided, therefore, that the earliest time at which the property could be said to pass would be when the machine was accepted by the buyer. Without the buyer's acceptance, the property had never passed.²⁰

A similar view can be seen in relation to *Ollett v Jordan*,²¹ where the defendant, who was a fish merchant at Hull, received an order for the supply of a quantity of herrings to a hospital (buyer) at Eastbourne and dispatched them by rail. The goods were fit for human

¹⁶ (n 5) 312

¹⁷ William Tetley, Q. C., 'Sale of Goods the passing of title and risk a resume' (Faculty of Law McGill University Montreal, Quebec, Canada) 19

¹⁸ For example, a conditional sale agreement, under which the passing of title occurs only upon payment of the price, or a contract under which the seller must himself acquire the goods before he can honour his agreement to sell them to the buyer, would not be "unconditional" within the meaning of rule 1.

¹⁹ (n 4)33

²⁰ *Varley v Whipp* [1900] 1 QB 513

²¹ *Ollett v Jordan* [1918] 2 KB 41

consumption when they were delivered to the railway company, however, upon their arrival, they were no longer fit for human consumption.

The appellant (buyer) argued that the property in the herrings was not transferred until the buyer had an opportunity of examining them to ascertain whether they satisfied the description and were fit for human consumption. The judge was of the view that this contract of sale was subject to the implied condition that the herrings should be fit for human consumption, as the defendant was charged under the Public Health rules which provide that the fish should be fit for its purpose. The period for this implied condition lasted from the time when they were put on the railway at Hull and the time when, in the ordinary course of transit, they arrived at Eastbourne, to the time when the boxes were opened and examined by the intending purchaser within a reasonable time. In other words, there was no complete sale until the buyer had an opportunity of inspection. If the goods were not fit for their purpose, the buyer was not bound to accept them. Consequently, the property had never passed, due to the non-fulfilment of the implied condition in this type of sale.

In other words, where there is a contract of sale of specific goods, no property passes to the buyer at moment of making the contract if the contract of sale is subject to any condition. It does not matter whether it is an expressed or implied condition, as long as the condition is unfulfilled, even if the condition related to certain rules outside the scope of the contract of sale, as decided in *Ollett* where the condition was imposed upon the seller by the Public Health rules.

Compared to “conditional contract”, postponement of delivery and of payment play less significant roles in the issue of the passing of property. According to s18-1 of the SGA 1979, the property in relation to specific goods passes to the buyer when the contract of the sale of goods is made, unless circumstances change, and it therefore becomes immaterial whether the time of delivery, or the time of payment (or both) are postponed.²² Generally, under English law, the property may pass to the buyer without delivery or payment or both.²³

However, conflict may arise if the payment and delivery are set as conditions to be fulfilled. If we accept payment and delivery as conditions, that means there is a condition

²² *Simmons v Swift* (1826) 5 B. & C.862

²³ *Badische Anilin und Soda Fabrik v Hickson* [1906] A.C. 419

in the agreement and the contract is conditional; consequently, the property cannot be passed to the buyer until such conditions are fulfilled. At the same time, there is no contract of sale of goods devoid of the obligations of the payment and the delivery of goods.²⁴

Accordingly, if the contract of sale is unconditional and the specific goods themselves are in a deliverable state, title to the specific goods passes, according to rule 1 of s18, when the contract is made, unless the parties have a contrary intention. It is immaterial whether the time of payment or the time of delivery is postponed. The courts, however, usually infer from the contract that the parties did not intend title to pass in accordance with rule 1, but rather intended that it should pass only upon delivery or payment.²⁵

Despite the parties' intention assuming the primary role, the existence of an inconsistent intention arising from the different interpretations of postponement of delivery and payment could oust the application of s18 rule 1. This was considered in *Re Anchor Line (Henderson Bros) Ltd*,²⁶ where the buyer company agreed with the sellers' agents to buy a crane for a deferred purchase price of £4000, with annual payments by the buyers for "interest" and "depreciation" respectively, to be deducted from the £4000. In the meantime, the buyers were to have "entire charge and responsibility" for the crane. Later the buyer went into voluntary liquidation and the liquidator obtained a court order to sell all the buyers' assets. It is submitted that conflicting intention arose from the wordings of "depreciation" and "entire charge and responsibility" which appeared in the contract.

It was argued that the letter of the sellers' shows that the intention was that the property should not pass until it had been paid for in full. This is shown by the provision as to depreciation and therefore that it was not included in the assets sold to the new company. The liquidator rejected these claims and contended that on a contract for the sale of specific goods the property is transferred to the buyer at such time as the parties intend it shall be transferred, and the intention of the parties must be ascertained having regard to the terms of the contract, the conduct of the parties, and other circumstances: where the goods are in a deliverable state the property in them passes to the buyer when the contract is made, unless a different intention appears from the terms of the contract.

²⁴ (n 7)

²⁵ *R.V. Ward Ltd. v. Bignall* [1967] 1 Q.B. 534 at p. 545

²⁶ *Re Anchor Line (Henderson Bros) Ltd* [1936] Ch. 211

The court was of the opinion that the intention of the parties was different from that which would be inferred from the document. This difference may refer to their variances in the interpretation of the word of depreciation. Hence, the acceptable interpretation of the word depreciation related to the dividing of payment. Namely, postponement of payment on the annual payments refers to the interest and depreciation and is not a condition to transfer the property. Consequently, it is admitted this contract is an unconditional contract for the sale of specific goods.

Therefore, it has been held that, if postponement of purchase price and delivery of the goods can properly be described as a postponement of the completion of the purchase, the property will pass once the contract has been entered, although in that sense the completion of the purchase is deferred.

The general principle is that the passing of property is a distinctive and separate matter from the payment and delivery of goods.²⁷ In other words, the postponement of payment or delivery on its own cannot affect upon the passing of property; however, the property can be passed to the buyer even when delivery is postponed. Therefore, payment and delivery should not be considered as conditions which can prevent the passage of property unless otherwise agreed.

The parties are free to agree that the passing of property is conditional upon the payment or delivery of goods (or both), and that such an agreement could be expressed or implied. Nevertheless, the situation would be different if the postponement of delivery and payment was agreed as the condition. In this situation, the property cannot pass until the condition of payment or delivery or both are fulfilled, because the payment or delivery becomes a related condition to the property when the parties agree to suspend the transfer of property on the payment or delivery of goods.²⁸ The courts, however, usually infer from the contract that the parties did not intend property to pass in accordance with s18 rule 1, but rather intended that it should pass merely upon payment or delivery of the goods. In such situation payment or delivery becomes a conditions must be fulfilled in order to transfer the property.²⁹

²⁷ *Dennant v Skinner and Collom* [1948] 2 K.B.164

²⁸ *Ibid.* 212

²⁹(n 25)

Indeed, an unconditional contract is a contract free from any conditions which can affect the passing of property, immaterial of whether it relates to the payment or delivery of goods or even otherwise. Passing of property actually, has a special legal nature, separated from payment and delivery, unless the parties have agreed that the passing of property is conditional on the payment or delivery of goods. Nevertheless, in the absence of intention of the parties to pass the property at specified time, the property of an unconditional contract in specific goods cannot be passed from the seller to the buyer until they are in a deliverable state, which will be discussed in the next section.

3.2.2.2 Rule 2- The requirement of actual deliverable state and its implied meaning

The passing of property can also be implied by the factor of “deliverable state” observed in s18 rule 2, which provides that, if specific goods have to be put in a deliverable state, the property presumptively passes when this is completed and the buyer receives the notice.

According to s61-5 of the SGA 1979, the deliverable state is defined as goods in a state where the buyer is bound to take delivery of them. Namely, goods which require work in order to make them ready for delivery or in line with the agreed goods in the contract of sale, are not considered to be in a deliverable state. Therefore, in *Underwood Ltd v Burgh Castle Brick & Cement Syndicate*³⁰, the specific procedures required to place the goods in a deliverable state became the determining factor for the passing of property. In this case, the seller had agreed to sell a horizontal condensing engine at a price free on rail in London, which allows for the passing the property at the time of loading the goods on the train. It weighed thirty tons and was bolted to and embedded in a flooring of concrete. Before it could be delivered by rail it had to be detached and dismantled. During the loading operation, the seller damaged it by accident, the buyers later refused to accept it.

In his decision on the buyer’s refusal to take the delivery, Bankes L.J, supported by Scrutton L.J., placed the emphasis on the required procedures and stated that, even though, the general principle that the property in specific goods passes on the making of the contract, the proper inference to be drawn is that the property was not to pass until the engine was safely placed on rail in London. This judgment can be interpreted as meaning that the general principle only applies where no different express or implied intention

³⁰*Underwood Ltd v Burgh Castle Brick & Cement Syndicates* [1922] 1 K.B. 343

exists. However, in this case, the moment that this engine was in a deliverable state when it was put on train was the determining factor of the requirement of deliverable state of the heavy engine. This is because the sellers were bound to do something for the purpose of putting this engine in a deliverable state safely. Deliverable state does not depend upon the mere completeness of the subject matter in all its parts. It depends on “the actual state of the goods” at the date of the contract and the state in which they are to be delivered according to their agreement. It could be understood that the judgment of the case considered the risk and expenses involved in dismantling and transferring this engine. Consequently, the parties’ real intention to have the engine “delivered free on rail” is implied to have the seller putting the engine in a deliverable state safely. In order to do it, he had to dismantle the engine and the failure to do so determined that the title of the engine was never passed over to the buyer.

A similar line of argument can be observed in *Philip Head Son Ltd v Showfronts Ltd*³¹ where the defendant building contractors bought carpet from the plaintiffs; the carpet was delivered to the showrooms where it was to be laid, and was sent away by the plaintiffs' sub-contractor for stitching, and was returned the next day in heavy bales and was subsequently stolen. It was held that the carpet in its bales was not in a “deliverable state” because the court inferred that the carpet should be laid by the seller. It is not enough to say that the carpet was in deliverable state when was delivered to the buyer’s premises, it had to be laid by the seller in order to be in deliverable state. Accordingly, the property had not passed and remained with the plaintiffs and the defendants were not liable for the price, simply because that deliverable state depends on the actual state of the goods at the date of the contract and the state in which they are to be delivered by the terms of the contract,³² not the mere completeness of the subject matter in all its parts.

Nevertheless, it has been argued that s.61-5 of SGA does not give a comprehensive definition of deliverable state and whether “delivery of physical possession of goods” is a requirement, particularly, where the goods are in a deliverable state but defective. Under these circumstances, the buyer is not bound to take delivery of them on the basis of breach of contractual terms. Atiyah³³ pointed out that this argument was largely a response to some difficulties created by s11 of the 1893 Act, which were addressed with amendments

³¹ *Philip Head Son Ltd V Showfronts Ltd* [1970] 1 Lloyd's Rep. 140

³² *Ibid.*

³³ P S Atiyah, John N Adamss, Hector MacQueen, *Atiyah's Sale of goods*, (11th edition ,pearson education limited, 2005) 324

in the SGA, 1979. However, if the buyer decides to reject the goods for any reason, the property reverts to the seller. The buyer's refusal of goods would indicate non-physical possession of the goods. Therefore, it seems to be generally the case that the phrase regarding the goods being in 'deliverable state' concerned to deliver the goods which are related to delivery of physical possession of goods. Actually, the passing of the possession of goods differs from the passing of the property of goods, because the physical possession of goods can be transferred only if the parties intend to pass it.

Indeed, there is a tendency to interpret the term "deliverable state" by reference to the physical possession of goods,³⁴ which means that it distinguishes between the passing of property of goods and the transfer of the physical possession of goods. These generally do not occur simultaneously. Consequently, the seller can be in possession of goods even when the property of them has passed to the buyer. In contrast, the seller can retain the title of the property even though the physical possession of goods has been delivered to the buyer.³⁵

It is worth of noting that the rule of putting goods in a deliverable state applies only when this obligation is placed upon the seller and the buyer could not make the property pass by performing the acts which was the seller's duty to do; consequently, this rule would not apply in the case where this obligation was placed on the buyer,³⁶ and the situation would be covered by the parties' intention under s17 of SGA 1979.³⁷

3.2.2.3 Rule 3 – The elements of weighing, measuring or testing requirements in ascertaining intention

Where there is a contract for the sale of specific goods, the seller may be bound to weigh, measure, or do something to the goods to ascertain the goods to be placed in a deliverable state. This rule is a structural rule; it is probably construed to cover some components. According to s18-3 of SGA 1979, the property does not pass if the seller failed to weigh, measure, test or do something else required by the contract to put the goods in a

³⁴ Ibid.

³⁵ Paul Dobson & Rob Stokes. Commercial Law, (7th ed. Sweet & Maxwell Limited of Avenue Road, 2008) PAGE number

³⁶ *Acraman v Morrice* [1849] 8 C.B.449

³⁷ See Above NO 11

deliverable state for the purpose of ascertaining the price. It is clear that the aim of the rule is to ascertain the price of goods where the price is unknown, because the price cannot be computed until the extent or quality of the goods has been determined.³⁸

However, would the passing of property be decided otherwise had the price already been paid by the buyer? Similar to the requirement of goods “being put free on rail” in *Underwood Ltd v Burgh Castle Brick & Cement Syndicate*, the sale of hay in *Lord Eldon v Hedley Bros*³⁹ provided for the sale of the hay at various prices per ton “put free on rail”. The buyer paid the estimated value of the stacks of hay to the seller, a party to the tenancy agreement with another landlord, at the time of entering into the contracts. After the termination of the tenancy agreement, the landlord's agent advised the buyer that as a result of the termination of the tenancy agreement, the hay would not be allowed to be removed from the farm, but the buyer continued the process of cutting into the eight stacks of hay and taking the hay away. The landlord, thereupon, brought an action against the buyer and contended that the seller had no right of property or beneficial interest in the goods.

The appellant (landlord) contended that at the date of the contracts for the sale of the hay the subject matter of the contracts was not ascertained and therefore, no property in the goods sold passed to the buyers until they were ascertained, and the property in unascertained goods only passes to the buyer when goods of the description are unconditionally appropriated to the contract and in a deliverable state, as required by both ss18-2 and 18-3. Goods could not have been unconditionally appropriated to the contracts in the present case until the hay in the stacks had been cut, tied, weighed and measured. Before then, the goods were in an unascertained state and the property could not be transferred to the buyer by merely a contract for the sale of such goods.

Such arguments were accepted by Slesser L.J who upheld that parties’ intention must be supplemented by the interpretation of the implied condition under s18-3 of the SGA. He stated that the goods were unascertained and the property had not passed to the buyer at the time of making the contract of sale because the goods had to be weighed in order to ascertain the price. He interpreted “weighing the goods” as the privilege of the seller, in order to ascertain what price he was entitled to receive from the buyer. The estimated value of the stacks of hay could not be implicitly translated into the actual price of the goods. Nevertheless, it is worth noting that this rule does apply to cases where the goods have

³⁸ *The Napoli* (1898) 15 T.L.R.56

³⁹ *Eldon v Hedley Bros* [1935] 2 KB 1

been sold for a lump sum with an ascertained price,⁴⁰ nor where the goods have been weighed or measured before the contract of sale is made.⁴¹

Additionally, the duty to weigh, measure, and test or to do something to the goods must be carried out by the seller, because it's his/her duty⁴² and nobody else's, unless the parties have agreed otherwise, which can be seen in *Turley v Bates*,⁴³ where the re-seller was not relieved of such implied duty before the property being passed. Essentially, this rule involves the obligation of the seller who is bound to measure and test or to do something for the goods. Clearly, it is designed to deal with cases where the passing of property is conditional upon some further required acts or things related to placing the goods into a deliverable state.⁴⁴ Consequently, the line between the requirement of doing something and a conditional contract seems being blurred.

In fact, the conditional contract and obligation of the seller to do something are mostly similar, as both can be inferred from the circumstances of the case, as *Cockburn's Tr v Bowe*⁴⁵ demonstrated. In this case, the seller agreed to sell growing potatoes and undertook to lift them and put them in pits before carrying them to the station. It was held that the goods were in a deliverable state at the time of putting them in the pits; however, the obligation of carrying them there related only to the actual delivery. It depends on the actual state of the goods at the date of the contract and the state in which they are to be delivered by the terms of the contract. Critically, inference of the circumstances of the cases when the parties intended the passing of property makes this rule may cause more uncertainties in sale of goods contracts than desired in the cases where the actual price has been paid.

⁴⁰ *Hanson v Meyer* (1805) 6 East 614

⁴¹ *Hinde v Whitehouse* (1806) 7 East 558

⁴² *Turley v Bates* (1863) 2 H. & C. 200

⁴³ *Ibid.*

⁴⁴ (n 33) 328

⁴⁵ *Cockburn's Tr v Bowe* [1920] 2 SLT 17

3.3 Passing of property in unascertained goods under the English law

3.3.1 Objective ascertainment in in unascertained goods and parties' intention

Apart from the ascertainment of specific goods, the SGA also covers the sale of unascertained goods. In law, whether the goods are classified as specific or unascertained goods is a determining factor in terms of the nature of the contract of sale and legal implications. In the case where the goods are specific, the contract is termed a contract of sale when the goods are specific and ascertained. However, a contract is merely an agreement to sell, when the goods are unascertained.⁴⁶

In fact, when the contract for the sale of goods is made, it is at that point that one has to clarify whether the contract involves the sale of identified goods, which avails the parties the remedies available in the case of breach of a sale of goods contract. In contrast, if the goods are unascertained at the time the contract is made, then the contract is deemed as an agreement to sell, and no property can be transferred to the buyer until the goods become ascertained, and also until the parties intend for it to pass.⁴⁷ Until the goods are ascertained, the parties' intention is assumed to play a less important role in determining the passing of property.

According to the SGA 1979, the meaning of 'unascertained goods' can be categorised into three sections: (i) manufactured goods which are grown by the seller⁴⁸ (others call this category 'future goods'); (ii) generic goods: that is to say, a certain quantity of goods in general without any specific identification of their content; (iii) an unidentified portion of a specified bulk or whole.⁴⁹ Although the law does not distinguish between these categories, the rules relating to the passing of property in relation to the category of unascertained goods are different.⁵⁰ Accordingly, s16 SGA states that, in cases relating to the contract for the sale of unascertained goods, no property can be deemed to have transferred to the buyer

⁴⁶ *Benjamin's Sale of Goods*(8th Edition, Sweet & Maxwell, London ,2010) 232.

⁴⁷ S16. SGA 1979

⁴⁸ (n 5) 322

⁴⁹ (n 46p) 232

⁵⁰ (n 5p) 322

unless and until the goods have been ascertained. This is the case even in situations where the parties have agreed otherwise.

The importance of ascertainment can be seen in s18-5-1 of the SGA, which applies to such contracts: it outlines the basic requirements which allow for property to pass, confirming that the goods must be unconditionally appropriated by one of the parties within the contract, and with the assent of the other party. It appears that appropriation plays a key role in the process of converting goods from being unascertained to ascertained. However, it can be observed from the language of s18(5) (1) of the SGA 1979, that there is further evidence of party intention playing the primary role, where appropriation can be carried out before or after the parties' consent being given expressly or impliedly.

This raises a question about the relationship between appropriation and the party intention to pass the property, as well as whether ascertainment through appropriation or parties' intention is the primary rule in determining the exact moment unascertained goods can be passed from the seller to the buyer, or whether an ascertainment can be interpreted as a tool to clarify the intention of the parties under the concept of certainty.

3.3.2 Appropriation

Appropriation or intention?

S18-5-1 of the SGA provides: Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods then passes to the buyer; and the assent may be express or implied, and may be given either before or after the appropriation is made.

Such rules cover the process of converting the goods from being unascertained to ascertained. It seems to be a dynamic process, which allows the property to be passed to the buyer. Accordingly, no property passes until the goods have been appropriated, and the passing of unascertained or future goods should occur through their unconditional appropriation. Further, such appropriation by one party shall not be effected without the

consent of the other party. In fact, appropriation is a term related to the concept of certainty.⁵¹ Therefore, appropriation can be understood in different ways.

Benjamin is of the opinion that appropriation involves selection on the part of the seller, in which he has the right to select and choose the article which has been agreed within the terms of the contract of the sale of goods. In principle, appropriation is an act by one party only: usually the responsibility falls on the seller to identify and select the goods which are to be sold, but this responsibility may also be placed on the buyer. In other words, an appropriation is a selection duty related to the transfer of property.

The duty to appropriate carries with it an authorisation to select the goods which are to be delivered in order to fulfil the contract. It is apparent that there can be responsibility placed on the seller beyond the actual delivery of goods to the buyer, which involves the selection and appropriation of the particular goods to be sold in fulfilment of the contract irrevocable to those goods.⁵² This definition links appropriation to the act of selecting the goods. Namely, appropriation by the selection of goods depends on the intention of the party who is appropriating the goods. Critically, the element of common intention must always be borne in mind.

In other words, selecting the goods which the seller intends to pass is not sufficient. If that were the only issue, the seller could feasibly change his mind and use the selected goods to fulfil a different contract, thereafter using different goods to fulfil this contract. Therefore, appropriated goods within the contract must be reasonably supposed to attach to the contract irrevocably. Quite simply, the contracted goods (and no other goods) are subject to the contract of sale.⁵³

The parties may agree upon a specific article of goods (and no other) to be sold in order for the property to pass. In addition, where the parties are agreed upon in relation to the specific article, nothing remains to be done in order for the property to pass. Furthermore, appropriation is to be understood as an overt act manifesting intent to identify specific goods as those to which the bargain of the parties shall apply.⁵⁴ Nevertheless, the property may not pass, because the passing of property cannot depend solely on appropriation; it still requires the intention of both parties, as will be seen later.

⁵¹ (n 46 p) 373

⁵² *Ibid.*, 238,239

⁵³ (n 5p), 327

⁵⁴ Louise Merrett. Commercial Law Lectures 2011-2012 Sale of Goods, Trinity College

Methods of appropriation

In light of the above, unconditional appropriation is essential factor which allows the property of unascertained goods to pass, subject to the consent of the other party. Once this premise is established, the important question in this context is how unascertained goods become unconditionally appropriated within the contract. The goods could be appropriated unconditionally in different ways; this may take place through delivery, through a process of exhaustion of all other options, through consolidation, or by segregation.

Thus, specific goods, partially identified as coming from a designated bulk, are not considered 'ascertained' until they have been separated from that bulk, which usually happens immediately before delivery. Appropriation can occur when the buyer's portion is physically isolated from the bulk. It may also occur through the withdrawal of the remaining portions owned by other buyers: ascertainment by process of exhaustion. It can also come about when the buyer purchases the remainder of the bulk, including his own unascertained portion.⁵⁵

The English law states that unascertained goods must be ascertained but does not offer a specific explanation of how appropriation could occur. This provides a wider field for the parties to express their intention as to how the goods can be unconditionally appropriated; at the same time, it gives freedom to the courts to interpret and infer appropriation from the facts and circumstances of individual cases. Therefore, a lot of possibilities can arise and cause confusion in applying this rule.

Accordingly, appropriation may take place by action; delivery of goods would constitute appropriation under s18-5 of the SGA 1979, unless the seller reserves the right to dispose of the property. Namely, when the seller delivers the goods to the buyer, confirming the contract as described, this counts as appropriation, which is assumed to be unconditional and subject to the consent of the buyer. However, it is clear that, should the seller deliver the goods which are then mixed with other goods, no property can be deemed to have passed, because the property, at that point, remains unascertained goods.

This can be seen in *Healy v Howlett & Sons*,⁵⁶ where the defendant ordered 20 boxes of mackerel from the plaintiff, and the plaintiff dispatched 190 boxes, instructing the railway

⁵⁵ (n17 .P)24, 25

⁵⁶ *Healy v Howlett & Sons* [1917] 1 K.B. 337

officials to assign 20 boxes for the defendant from those 190; it emerged that the fish had deteriorated because of the delay. Avory J, pointed out that, whether the twenty boxes of mackerel became the property of the buyer depends on whether there was an appropriation of the twenty boxes at the time when they were put on the train or not. The plaintiff's instruction to assign 20 out of 190 boxes did not constitute appropriation. This is because there was no objective way of determining which 20 boxes assigned to the buyer.

Suppose that, in relation to this case, twenty boxes had become bad. It is quite impossible to say, taking into consideration all the evidence available, which of the various purchasers would have been bound to take the twenty bad boxes. Moreover, the seller or the carrier could replace the boxes with other boxes. If it was so, it is impossible to determine which of the purchasers was bound to take the twenty unfit boxes; thus, it follows that no particular twenty boxes were the property of any particular purchaser at that time. It can only be said that 20 boxes were delivered to the buyer: they became identified and appropriated irrevocably through the delivery act when they became the possession of the buyer.

A similar analogy can be applied in the sale of wine⁵⁷ or bags of coal, where the goods were unconditionally appropriated by the contract when the seller unloads the bags into the buyer's coal shed; once they were placed in the buyer's coal shed, such bags then become known, and each can be distinguished from the rest of the bags of coal. Moreover, the seller could not replace them with other bags when they became the buyer's possession.⁵⁸

A similar line of argument was made in *Donaghy's Rope and Twine Co Ltd v Wight, Stephenson Co*⁵⁹, where the appropriation was completed when the goods (rope) were placed in a warehouse as requested. It follows that the property had passed, because the goods were sufficiently marked and identified, particularly when the seller placed them in the warehouse (agreed as the place of delivery) for the buyer.

Seemingly, the main principle of appropriation of goods within a contract of sale is when the parties have - or could be reasonably supposed to have had - an intention to attach the contract irrevocably to those goods. In other words, at the time of delivery, when the goods enter into the possession of the buyer, then the seller becomes unable to replace them with other goods.

⁵⁷ *Re London Wine Co* 1986 QBD

⁵⁸ (n4 P)37

⁵⁹ *Donaghy's Rope and Twine Co Ltd v Wight, Stephenson Co* (1906) 25 NZLR641

However, the decision in *Re Ellis Son & Vidler Ltd*⁶⁰ was different; the wine was sold on such terms that, after the sale, it would be stored for the buyers by the seller. In this case, however, the wine was segregated in the seller's warehouse. Namely, upon the contract of sale being agreed, the wine was segregated (by year and description) from all other trading stock by the seller, and thereafter stored together with other wine.

The main point in the present case is the segregation of wine within the seller's warehouse, which enabled the particular wine to be identified upon the contract of sale. This wine - detailing the appropriate year and description - was segregated from the seller's general stock and so it was possible to identify who owned which bottles in the stock. It was held that, by segregating the wine in this way, it could be sufficiently appropriated and ascertained at the point when segregation occurred, and, subsequently, the property passed, subject to agreement from both parties.⁶¹

Comparative analysis reveals that the key distinctions between *Re Ellis & Son* and *Re London Wine* were that, in *Re Ellis Son*, there was segregation of the wine by the seller which enabled the particular wine to be identified and appropriated under the contract of sale. In the *Re London Wine* case, On the other hand, the stock had been mixed with other bottles of wine by the seller, and it was thereby impossible to identify who owned which bottles of wine in the stock. Furthermore, the seller in the *Re London Wine* case was free to provide his customers with other available wine, unlike the seller in the *Re Ellis Son* case, who could not do so because the goods were segregated and appropriated to the contract of sale.

Continuous Appropriation through third parties

Actually, the property of unascertained goods passes by an unconditional appropriation which may be carried out by the seller, or by the buyer when they are in the possession of goods. However, in cases where goods are in the possession of a third party, such as a warehouse keeper or a carrier (i.e. when the seller delivers the goods to the carrier, and the third party sets the goods aside for delivery to the buyer), the goods in this situation become unconditionally appropriated, and the property can then pass subject to assent.⁶² Often the seller delivers the goods to the carrier for transportation: in this context the time when the property of unascertained goods - which have been appropriated and are

⁶⁰ *Re Ellis Son & Vidler Ltd* [1994] 2 BCLC 681

⁶¹ (n 4 P)39-40

⁶² *Wardar's (Import and Export) Co Ltd v Norwood and Sons Ltd*[1968] 2 QB 663

irrevocably attached to the contract - passes is the same as when the goods are delivered to the carrier. The carrier becomes an agent for the buyer, and if there exists a binding contract between the seller and buyer then the property passes (through such a delivery) to the carrier.⁶³

The difficulties which can arise where the buyer has to collect the goods not from the seller but from a third party lie in whether the goods can be unconditionally appropriated by the third party or not. Clearly, the goods can be appropriated by the delivery of the third party. However, that is subject to two limitations: the first is that no unconditional appropriation can take place when the seller reserves the right of disposal according to s19 of the SGA 1979; the second is that the goods must be ascertained; in other words, the goods must be appropriated clearly and irrevocably.

Therefore, in the *Healy* case, it was held that sending 190 boxes by rail was not an unconditional appropriation because no appropriation was carried out by the seller or the carrier; consequently, it was impossible to identify which of the 20 boxes had been dispatched to the defendant from the overall number of boxes. The seller had batched 190 boxes of fish and instructed the railway company (i.e. the carrier) to signal which of the 20 boxes were meant for the defendant, and make clear that the remaining boxes were for other buyers. Conversely, assuming that the 20 boxes intended for the defendant were unconditionally appropriated or segregated (i.e. set aside), it is almost impossible to hold that the property had not passed.⁶⁴

In fact, in cases where goods have to be dispatched by a carrier, it is usually the case that they will be unconditionally appropriated when handed over to the carrier. Obviously, there is an unconditional appropriation when the goods are identified, and the third party or carrier acknowledges that he now holds them for the buyer. In the sale of 600 cartons of frozen kidneys (out of a total bulk of 1500) which had been stored by the seller, the carrier found that 600 cartons had been set aside for the buyer. It was established that there had been an unconditional appropriation at the time when the order was accepted, and thereafter loading commenced.⁶⁵

⁶³ (n 48)

⁶⁴ (n 56)

⁶⁵ (n 4) 40-41

To sum up, one way of passing property in relation to unascertained goods is through an action which could occur by delivery, segregation or otherwise, whether by the seller or by a third party, such as a carrier. However, this is not the only way to pass property.

Furthermore, property in relation to unascertained goods may pass to the buyer when they become ascertained through a process of exhaustion. This]’/ can be seen in *Karlshamns Oljefabriker v Eastport Navigation Corp*,⁶⁶ when the seller sold 6000 tons of copra under a CIF contract, and shipped 16,000 tons on one ship in undivided bulk, with one part intended for the plaintiffs and the second for other buyers, such that a process of elimination took place. The ship called first of all at Rotterdam, then at Hamburg, discharging all the copra intended for other buyers, whilst retaining the copra destined for the plaintiffs. It was held that the property had passed to the plaintiffs, because the goods had become ascertained through a process of exhaustion:

From a critical perspective, the real difficulty arising in this context lies in deciding whether the selection of goods made by the seller irrevocably determines his intention or not. In other words, the seller or carrier may change his mind and send such goods to someone else. The question in the last case is: how can we be sure that, out of 16, 000 tons of copra, the exact 6,000 tons which were intended for the plaintiffs were actually delivered? It cannot occur at the time of sending the goods; however, as outlined, it can occur by following a process of exhaustion.

3.3.3 Unconditional Appropriation

Apart from its irrevocable character, an intended appropriation must be unconditional in order to be effective. Namely, the party appropriating the goods must intend to appropriate the agreed goods unconditionally, and not upon some future event. Further, unconditional means that such appropriation is not subject to any express or implied condition, or performance of any future act.⁶⁷

Generally, the contract of sale must be unconditional, and appropriation must also be unconditional in order to allow the property to pass. Accordingly, a condition can be expressed or implied. It may be imposed on appropriation, even if it is not included under the terms of contract, showing that the seller intends to reserve certain rights upon the

⁶⁶ *Karlshamns Oljefabriker v Eastport Navigation Corp* [1982] 1 All ER 208

⁶⁷ (n 46) 240

goods until such conditions are fulfilled. This ensures that the appropriation is ineffective and prevents the property from passing, at least until the fulfilment of the aforementioned conditions. Actually, such conditions apply for both the appropriation of goods and the contract of sale, as well as the contract of sale in relation to both specific and unascertained goods.

Merrett holds the view that the general and most important rule is that appropriation is not unconditional if the seller only intends to let the buyer have the goods on payment. Any term showing that the seller intends to reserve certain rights over the goods until he has been fully paid makes the appropriation conditional and prevents the property from passing until that happens.⁶⁸ Although payment may be an important rule, as well as a condition preventing the passing of property, it is not necessarily the only rule affecting the property. This is because the terms of unconditional appropriation also exist in the contract of sale. This may include anything done by the seller or the buyer, whether is related to the contract or to the goods.

For instance, the seller's actions in packing the goods into cases, marking them with the buyers' names, registering them for consignment, and ordering shipping space in a named ship were viewed as an unconditional appropriation in *Carlos Federspiel & Co. SA v. Charles Twigg & Co. Ltd*⁶⁹, as Pearson J viewed the goods as irrevocably earmarked for use in the performance of these actions.

The researcher agrees that the goods could be unconditionally appropriated to the contract if they have been irrevocably marked for use under the contract of sale. In other words, this requires the seller to act in such a way that places the goods out of his control. Therefore, he cannot use them in the performance of a different contract. This corresponds with the requirement that the appropriation be unconditional, which means that the seller must not reserve the right of disposal of the goods for any reason, whether it is a condition, such as payment, or not putting the goods irrevocably within the contract.⁷⁰

Therefore, putting the goods irrevocably under the contract is an important condition which would affect the transfer of property, as well as payment, and any other conditions which would be effective upon the passing of property. Indeed, where a further decisive act

⁶⁸ (n 54)

⁶⁹ *Carlos Federspiel & Co. SA v. Charles Twigg & Co. Ltd* [1957] 1 Lloyd's Rep. 240

⁷⁰ Fidelma White & Robert Bradgate, *Commercial Law* (Exford University Press, Exford UK OX2 6DP 2007), 173,174

was required to be undertaken, this would constitute *prima facie* evidence that the property does not pass until the final act has been carried out irrevocably.⁷¹

Expressed and implied intentions are both given effect and it is immaterial if the condition related to payment or otherwise. Therefore, when the seller reserves the right of disposal, the buyer cannot acquire the property. When the goods are sold under the terms of payment within seven days against the transfer term of order, it is the express term that a right of disposal is reserved by the seller, as he is not bound to deliver the order until payment has been made, and, consequently, no property is deemed to have passed to the buyer⁷².

Furthermore, the implied requirement can be observed in the case of the *Ollett v Jordan*⁷³ discussed above. This also applies to the reference previously made to s18 rule 3, which deals with the contract of the sale of specific goods where the seller is bound to weigh or measure or test the goods for the purpose of ascertaining the price. Although rule 3 is confined to the sale of specific goods, it seems to apply to unascertained goods as well, as discussed in *Lord Eldon v Hedley Bros.*⁷⁴

Indeed, the normal meaning of the term ‘unconditional’ is that appropriation is not subject to any overt or implied condition upon fulfilment, or to any other point or act which prevents the passing of property. But does an unconditional appropriation sufficient for the transfer of property or is this not the case? This will be examined in the next section.

3.4 Assent and appropriation:

Assent, in fact, could be defined as the authority conferred by the buyer on the seller to pass the property by appropriation.⁷⁵ Under s18 rule 5-1 of the SGA, such assent can often be difficult to infer. Nevertheless, it may be expressed or implied, and it can be given by the buyer when the goods are appropriated by the seller and by the seller when the goods are appropriated by the buyer. Further, it may be given in advance, before the appropriation is made, or afterwards.⁷⁶

⁷¹ (n 46) 240

⁷² *Shipton, Anderson & Co. and Harrison Brothers & Co* [1915] 3 KB 676

⁷³ (n 21)

⁷⁴ (n 4) 37

⁷⁵ (n 46)

⁷⁶ (n 33) 342

In fact, act of appropriation has no legal consequences, unless it has been assented to by another party in the contract. Subsequently, the party with assent of appropriation will in effect be an offeror,⁷⁷ while the parties who carried out irrevocable appropriation will be seen as offeree/s. It is noteworthy that the property passes when the other party assents to such appropriation.⁷⁸ Accordingly, the act of assent is very important in relation to the passing of property.

In other words, assent can play a significant role in determining the timing of the passing of property where the parties intended to pass the property at the time when the goods became unconditionally appropriated. Namely, the time of assent could coincide with the passing of property, or given after appropriation has taken place. In the case where the seller sold unascertained bags of rice, which he was to collect, and the buyer received the goods in a condition which signified that they were ready for collection, it emerged that the bags had been requested by the buyer for the delivery order, but the buyer did not collect the goods. In that case it was held that the property had passed to the buyer by his assent, which had been inferred from his failure to object after receiving the delivery order.⁷⁹ Indeed, where the buyer approved the appropriation - which was made by the seller, as he intended to deliver the goods in accordance with the contract of sale - it was felt that the buyer had subsequently assented, and the property passed without delivery, which was deemed immaterial.

Therefore, the property of the bags of rice had passed to the buyer even though he was not in possession of them - i.e. property passed without delivery.⁸⁰ This in fact, accords with the doctrine which distinguishes between the passing of property and the delivery of physical goods. Therefore, the seller may be in possession of goods although the property has passed to the buyer.⁸¹

The time of assent could coincide with the passing of property when assent is made after appropriation. On the other hand, property may pass by the appropriation of goods under the contract when the assent of such appropriation was agreed previously.⁸² Essentially, the assent of the buyer is an authority conferred by the buyer on the seller in order to pass the

⁷⁷ *Ibid*

⁷⁸ (n 4) 42

⁷⁹ *Ibid.*, 43.

⁸⁰ (n 4) 43

⁸¹ (n 35)

⁸² *Pletts v Beattie* [1896] 1 QB 519

property of goods by appropriation.⁸³ Therefore, it is necessary to enquire whether or not such authority has been given. In the case where the plaintiff agreed to buy quarters of barley he had seen, approved and taken a sample from, the buyer's action in sending his own sacks for re-fills was an assent and had conferred authority onto the seller to pass the property of goods on appropriation, when he saw and approved the goods, before taking away a sample.⁸⁴

It is also necessary to enquire what the terms of such authority are. Thus, the terms of the assent in a contract of sale may be inferred from the facts and circumstances of the contract. It has been held that the dispatch and receipt of invoices and delivery orders clearly identify that the property has passed, even if there is no assent to the appropriation by the buyer.⁸⁵ Further, the implied assent may be inferred from the rule of the act itself. s18 5-1 states that, where the goods are delivered to the carrier for shipment to the buyer, the goods are taken to be unconditionally appropriated under the contract of sale. However, this rule disregards the assent of the buyer, and it is clear that such assent must be understood to have been given under these circumstances.⁸⁶

⁸³ *Jenner v Smith* (1869) LR 4 CP 270

⁸⁴ *Aldridge v Johnson* (1857) Incomplete citation

⁸⁵ *Hendy lennox ltd. v Grahame Puttick Ltd* (1984) 2 All ER 152

⁸⁶ Atiyah, *The Sale of Goods* (9th ed. 1995) 342

3.5 Conclusion: Intention of the parties to pass property and the legal nature of appropriation:

Article 16 SGA provides that: *‘Where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained.’*

It is clear that this article provides the general principle and starting point when considering the passing of property in relation to unascertained goods. Accordingly, where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless (and until) the goods are ascertained. Namely, no unascertained goods can pass ownership; indeed, the goods must be ascertained, even if the parties in the contract have intended otherwise.

This is a provision which therefore takes priority over any wishes or intentions to the contrary by either party.⁸⁷ It seems to be more a logical matter than a legal principle, i.e. whether the transfer of property relates only to ascertained goods or otherwise. In fact, the enforcement of s16 means that there is no field for the transfer of property unless the goods are ascertained. Obviously it restricts the transfer of ownership and makes it only apply to ascertained goods, which appears to be a mandatory provision. The question which has arisen in this context is whether the English law means that the property in ascertained goods can be passed, while no property passes in unascertained goods.

In fact, English law highlights the intention of the parties to pass the property merely in relation to specific goods. There is no indication with respect to the intention of the parties to pass the property in relation to unascertained goods. Certainly, s17 of the SGA, which deals with the intention of the parties only, operates in the sale of specific goods. Thus, the parties must ascertain the goods through appropriation, making sure that the timing of the transfer process is both understood and agreed upon by both parties so that the property may pass. Accordingly, the parties have the right to agree the time when the property should pass, in addition to making sure that the goods are appropriated unconditionally

⁸⁷ *Ibid.*, 322

within the contract. Indeed, this section modifies s16, ensuring it is a matter of logic, as opposed to one of mere legal principle, as will be seen.⁸⁸

From the foregoing analysis, it would appear that there is a relationship between s16 and s17, in the sense that there are two fundamental factors required for the transfer of ownership: the first, pointed out in s16, is that the goods must be ascertained and consented to, subject to s18 -5; the second, pointed out in s17, involves the intention of the parties to pass the property (party autonomy principle).

A further question arises in terms of whether the property passes when ascertained by unconditional appropriation, or through the intentions of both parties. Put another way, if there is intent by the parties, but no appropriation takes place, can we say that the property has passed?

In the case of *Ross T Smyth & Co Ltd v T D Bailey Son & Co*,⁸⁹ where a seller contracted to sale to buyer 15,000 units, 2 per cent more or less, of No 2 yellow American corn, with an option to the seller of shipping a further 3 per cent more or less on contract quantity. At the foot of the contract were the words: "Separate documents for each 1,000 units and each 1,000 units to be considered a separate contract." In pursuance of this contract, the sellers wrote to the buyers giving notice of appropriation of approximately 15,444 quarters of corn as per bill of lading, and sent a provisional invoice for 15,444 quarters, and the provisional invoice stated that there were 15 bills of lading, each for an amount of bushels equivalent to 1,000 units, and one for an amount equivalent to 444 units. The buyers rejected the provisional invoice as not being in accordance with the contract, and, on the same day, the sellers sent an amended provisional invoice for 15,000 quarters which was rejected by the buyer as well.

The Court of Appeal held that the result of the appropriation was that the property (in the whole amount) of goods had passed to the buyers, and that there was nothing the seller could do or say which would undo such an appropriation. However, the House of Lords adopted that the notice of appropriation under an ordinary CIF contract is not intended to pass and should not prevail over the parties' intention. To pass the property, it still need to intention of the parties, because the normal inference in CIF contracts, especially where the

⁸⁸ (n 17) 25

⁸⁹ *Ross T Smyth & Co Ltd v T D Bailey Son & Co* [1940] 3 All ER 60

bill of lading was made out to seller's order, was that property passed on tender of documents.

In analysis, the two opinions are not incompatible. The first view adopts the idea that although the property may pass through appropriation, this does not mean that the property transfers only through appropriation, regardless of the intention of the parties. In contrast, the second view states that the passing of property cannot occur by appropriation, and that appropriation is not the main factor in the passing of property. In other words, the Court of Appeal held that the result of the appropriation was that the property of goods had been passed to the buyers, because the contract was CIF, and by employing a CIF contract the parties had already intended to pass the property when the documents were delivered to the buyer - this was in accordance with the terms of CIF contracts, where the document plays a very important role. However, the House of Lords made clear that the property was passed when the parties intended it to pass, and in the present case the parties intended to pass the property on tender of the documents relating to the CIF contract terms; therefore, appropriation under an ordinary CIF contract made clear that there was no intention to pass, and therefore the property did not pass.

Actually, the intention of the parties appears clearly where the parties intend to pass the property of goods at a particular time. The courts readily draw inferences as to the parties' intention from the terms used in the sales contract. For instance, if the parties specify that the contract is FOB, the court can rely on a *prima facie* presumption that the parties intended title to pass on shipment.⁹⁰ In *Steel Co. of Canada Ltd. v. The Queen*, the Supreme Court held that in a contract stipulating FOB, property of goods did not pass to the buyer until delivery was made at the chosen point (over the ship's rail).⁹¹

Generally, the cardinal rule in cases of FOB contracts is that the property passes on delivery (i.e. in this case, at that moment when the goods had passed over the ship's rail) unless the goods were put over the ship's rail as mixed with similar goods for a similar contract and were not appropriated specifically to any particular contract at the time of shipment, in which case the goods remain unascertained, which means that the property did not pass to the buyer.⁹² When this action has been carried out, the seller is deemed to

⁹⁰ *Pyrene Co. v. Scindia Steam Navigation Co.* [1954] 1 Lloyd's Rep. 321 at p. 332. See also *Carlos Federspiel & Co. SA v. Charles Twigg & Co Ltd*, 1957 Lloyd's Rep. 1 240 (1957) 247-48; See also *Olbert Metal Sales Ltd. v. Cerescorp Inc.* [1997] 1 F.C. 899, 904-906

⁹¹ *Steel Co. of Canada Ltd. v. The Queen* [1955] S.C.R. 161

⁹² *Stock v Inglis* (1884) 12 QBD 564

have delivered the goods to the buyer, since shipment of designated goods is an essential condition for the passing of property.⁹³

In the *Carlos Federspiel* case, the plaintiffs sued for the goods, contending that the property in the goods had passed to them. Pearson J held that the property should pass immediately upon shipment. Thus, it was judged that the property (a consignment of bicycles) did not pass until shipment had taken place, even though the consignment had been marked with the buyer's name, due to the fact that s17 was deemed irrelevant, since both parties - by making an FOB contract - had indicated their intention that the property was to pass only at that point when the goods were loaded onto the ship.⁹⁴

In analysis, the goods must be ascertained in order for the property to pass, but such ascertainment, which may occur through unconditional appropriation, is no more than making it possible for the property to pass, and once goods are ascertained the property passes at the time when the parties intend it to pass, according to s17.1 of the SGA, which is followed by a list of five rules, provided in s.18, for ascertaining the intention of the parties, depending on whether the goods sold are specific or unascertained goods.⁹⁵ Lord Wright made clear that appropriation identifies the goods, and ties them irrevocably into the particular contract. That is the legal principle according to the SGA, but that does not necessarily result in the passing of property, which still requires the intention of both parties.⁹⁶

A different judgment was given by the case of *Jenner v Smith*⁹⁷, however, where the plaintiff, at a fair, orally contracted to sell to the defendant at a given price per cwt. two packets of hops, which were on the spot and were inspected and approved by the defendant. There were two other packets, of which samples were shown, but which were lying in a warehouse. The defendant took away with him the first two packets, but the last two were to be forwarded to him at a future time. The plaintiff went to the warehouse and selected two out of three packets which he had there, and marked them to wait the buyer's order without any alteration. A few days later the plaintiff sent the defendant an invoice describing the numbers, the weight, and the price of the two packets delivered at the fair,

⁹³ Aashish Kaul, *Passing of Property in International Sale Contracts A Conceptual Analysis*, (2003) <http://www.ebc-india.com/lawyer/articles/671.htm> <accessed on 1 May 2017>

⁹⁴ (n 69)

⁹⁵ Charles Debattista 'Transferring Property in International Sales: Conflicts and Substantive Rules Under English Law' (1995) 26(2) *Journal of Maritime Law and Commerce* 273

⁹⁶ (n 89) 76

⁹⁷ (n 83)

and also of the two which had been set apart at the warehouse, and at the same time enclosed a draft for acceptance. The defendant sent back the draft and refused to receive the last two packets for the reason that there was no contract for them at all, and the contract was for the first two packets .

Keating, J. stated that no property had passed to the buyer, stating that the general rule of law had not been contested on the part of the plaintiff; and pointed out that where goods are sold, but some condition remains to be met by the seller before it is dispatched to the buyer, no property is deemed to have passed according to the contract of sale.

A close examination of the facts revealed that the condition that remained to be met for the appropriation of goods to take place was an extensive authority conferred by the defendant on the plaintiff to pass the property. In a sense, they never agreed to hold the two packets on behalf of the buyer; and, if they did, there is no evidence of any authority from the seller that they might do so. Assuming the defendant conferred such authority on the plaintiff, when he agreed to receive the last two packets , the property would have passed by such an appropriation.

On the other hand, using the buyer's own sacks to fill with the goods was seen as an implied intention to transfer the title from the seller to the buyer in *Aldridge v. Johnson*,⁹⁸ It was held that the property in the 155 sacks of barley had passed to the buyer by the appropriation made by the seller (with the assent of the buyer). It also held that, where there is a sale of unascertained goods, in which some action remains to be undertaken by the seller before delivery to the buyer, no property can be deemed to have passed until that action has been undertaken.

It appears that the buyer made the seller his agent for the purpose of weighing and performing all the other acts necessary for the appropriation to pass. Thus, such authority is interpreted as the intention between the parties that they intended to pass the property upon appropriation. In other words, in the absence of any expressed indication regarding the intention between the parties with respect to the timing of the passing of property in an award, the rules of s18 will be applied. Where there is a contract for the sale of unascertained goods in a deliverable state, which are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods then passes to the buyer. Accordingly, when the buyer

⁹⁸ *Aldridge v. Johnson* (1857) 119 E.R. 1476

gave such authority to the seller to appropriate the goods, this could signify that they intended the property to be passed at the time of appropriation.

Analytically, it can be argued that, despite the different decisions in both cases, both agreed that the property passed by appropriation, on the grounds that the parties intended to pass the property by an appropriation according to s18 rule5-1 of SGA. However, in the case of *Jenner v Smith*, the property could not pass because the defendant never gave the plaintiff authority to make the selection, on the grounds that the defendant did not accept, indeed refused to receive the last two packets, due to the fact that there was no contract between them. On the other hand, in the second case, it appears that the buyer sent 200 sacks to be filled by the seller, and such an action could be interpreted as authority being conferred onto the seller to pass the property by appropriation.

Timing of the transfer of property and the legal nature of appropriation

In light of the above discussions, it is clear there are different opinions regarding the factors which determine the timing of the transfer of property and the legal nature of appropriation. In the case of *Ross T Smyth*, property passed at the time when the parties intended it to pass and the function of appropriation was merely to identify the goods and tie them irrevocably into the particular contract. It did not necessarily result in the passing of property, but was still the intention of the parties (party autonomy principle) as the fundamental principle which determines the time of the passing of property.

In other words, English statutory law has adopted the principle of party autonomy as an essential principle, demonstrated by the fact that it incorporated it into its provisions as a basic rule, meaning that the principle of appropriation and consent is just that, a general principle, not a basic rule or dogma.⁹⁹ Supporting this view, Benjamin said that an appropriation is an overt act manifesting the intent to identify specific goods which have been agreed on in the bargain between the parties.¹⁰⁰ Similarly, in the judgment of the

⁹⁹ Marco Torsello, 'Transfer of ownership and the 1980 Vienna sales convention. A regretful lack of uniform regulation' (2000) *International Business Law Journal*. 940, 941. See Also Evelien Visser, *Favor Emptoris: Does the CISG Favor the Buyer?* (1998) University of Missouri, Kansas City. *Law Review* 77-92. See Also Katerina Georgiadou, 'Apathy Vis-a-Vis the UN Convention on Contracts for the International Sale of Goods (CISG) in the UK and Two Proposed Strategies for CISG's Incorporation in the UK Legal Order' (2012) 3 *Pace International Law Review Online* Compparnoi, 267. See Also Nisreen Mahasneh, 'The Seller's Obligation of Delivery and Conformity under a Contract for Sale of Goods. The Approaches of Both English Law and The Vienna Convention on Contracts for the International Sale of Goods 1980.' (Doctor of Philosophy in Law University of Aberdeen 2001)

¹⁰⁰ (n 46) 238

Carlos Federspiel case, although the goods were deemed to have been appropriated when the goods were marked with the buyer's name, the property did not pass until shipment had taken place, because the type of contract indicated that the parties intended for the property to pass on shipment.

Although these last two cases led to different decisions, they concluded with the same meaning, which is that the property passes by appropriation according to intention of the parties, and by authority given to the seller by the buyer to pass the property. It has been argued that appropriation must be more than an act of selection, and more than the simple contracting of goods, in order to answer the agreed terms of a contract. It must be an act which is intended, and agreed upon, in terms of the contract, to signify the transfer of property to the buyer.¹⁰¹

Indeed, although the basic standards of transfer of property in relation to specific goods are the time when the contract was made and the intention between the parties, the basic standards underpinning the transfer of property in relation to unascertained goods are the unconditional appropriation and intention of the parties. In other words, English Law introduces the distinction between absolute and conditional contracts of sale, where an absolute or unconditional contract of sale is a contract by virtue of which the seller transfers the property in goods to the buyer, while a conditional contract of sale is an agreement to sell by virtue of which the seller agrees to transfer the property in goods to the buyer at a future time or subject to some condition. The decisive criterion is the intention of the parties; however, where the parties do not agree on the issue, it is presumed that they wanted the ownership to pass at the time of the conclusion of the contract.¹⁰² Accordingly, under English Common Law, the property in the goods sold could pass on different occasions: at the time of the conclusion of the contract, or at the time of the ascertainment of the goods, in addition to which, property passes at the moment chosen by the parties.¹⁰³

Section 17 states that the property will pass when the parties intend it to pass. Thus, the intention of the parties is paramount and overrides any other rules.¹⁰⁴ However, s16 of the SGA states that no property in unascertained goods is transferred to the buyer unless and

¹⁰¹ Ibid. ,239 & 245

¹⁰² (n 89)

¹⁰³ P. Atiyah, *The Sale of Goods* (9th ed. 1995); See also Chalmers' *Sale of Goods Act 1979* (18th ed, Michael Mark & Jonathan Mance eds., 1981)

¹⁰⁴ Ricard Stone, *Contract Law* (6th Ed Gavendish Publishing Limited, 2006-2007) 227

until the goods are ascertained. In fact, in the case of specific goods, property passes when the contract is made, or at a later time, depending on the goods in question and the intention of the parties, according to s17. Namely, the goods do not need to be appropriated unconditionally, because they are already ascertained goods.

However, in the case of unascertained goods, the situation is different, because the goods still need to be appropriated unconditionally. Obviously, if there is intent between the parties, but no appropriation takes place, the property cannot be deemed to have passed, because s16 prevents the property from passing; only when the goods become appropriated according to the intention of both parties is it deemed to have passed.

Assuming that the goods are appropriated unconditionally under the contract, but the parties intended to pass the property at a specific time, such as in the case of *Ross T Smyth*, where the parties intended to pass the property on tender of documents according to the terms of the CIF contract, under such a contract, the property cannot pass until the bill of lading is delivered to the buyer even if the goods are appropriated. Such rules apply to specific goods as well, where the goods have already been ascertained. In this assumption there is no ground to apply the rule of s16; but rather s17. Indeed, this may explain why the English law highlights the intention of the parties to pass the property within s17 merely in relation to specific goods.

On the other hand, where there is a contract for the sale of unascertained goods in a deliverable state which are unconditionally appropriated under the contract, with absence of any expressed indication regarding the intention between the parties with respect to the time of passing of property, in an award, the goods then pass to the buyer, according to s18 rule 5-1. Due to the fact that no time has been specified for the passing of property, s18 lays down various rules to help ascertain the intention of both parties. In light of the analysis above, it could be understood that the primary rule is that property passes when both parties intend that it should pass.¹⁰⁵

Although the English law does not mention expressly and there is no indication which takes priority over the intention of the parties in relation to the ascertainment of goods. The first view makes the intention of the parties the main factor in the passing of property. Indeed, the decision in the *Ross T Smyth* case provides a logical interpretation of s16 and s17 of SGA. Put simply, English law may signify that property in ascertained goods can be

¹⁰⁵ *Chitty on Contracts volume 2*. (31th Edition, Sweet & Maxwell uk. October, 2012)

passed; however, no property passes in unascertained goods, where the intention of the parties is the main factor, and that property passes only at such times as both parties agree for it to pass.

Accordingly, it seems to be that the main function of appropriation is to identify the goods, ascertain them, and tie them irrevocably into the particular contract in order to determine the price - thereafter the property cannot pass once it has been ascertained, but it can pass when the parties intend for it to pass. In other words, the goods may become ascertained, yet do not pass until such time as both parties intend for them to pass.

Chapter 4 – Passing of property under the 1980 Vienna Convention on the International Sale of Goods

4.1 Introduction

It is important in the scope of contracts for the sale of goods to determine the time when property passes and when the buyer becomes the owner of goods. In fact, under a domestic sale, it is relatively easy for the parties in the contract to achieve such purposes, since their contract is often governed by a uniform domestic sales law based within a uniform legal system.¹

However, the passing of property becomes a more complicated issue when applied to modern commercial transactions, where the parties in the contract of sale are often located in different countries – which may have different social values and different legal systems. In deciding when the property of goods under an international sales contract passes from the seller to the buyer, it is first necessary to examine the rules on timing in relation to the passing of property.²

It is common knowledge that the basic dichotomy as to the fundamental requirements to be fulfilled in order to transfer property is due to the existence of different legal systems. For example, within one legal context, property may pass from the seller to the buyer by mere consent at the conclusion of the contract,³ while under another legal system property would be deemed to have passed at the moment when the goods were delivered.⁴ For instance, in art 1804 of the French Civil Code⁵ property passes according to the intention of the parties or, if the contract is silent, property passes at the time of the conclusion of the contract,⁶ notwithstanding whether the goods have been delivered or their price paid. Nevertheless,

¹ Tran Quoc Thang. 'Passing of Property Under Contracts for the International Sale of Goods: Should the CISG Regulate the Transfer of Property?' (Durham University 2004)

² Charles Debatistita, 'Transferring Property in International Sales: Conflicts and Substantive Rules Under English Law' (1995) 26 *Journal of Maritime Law and Commerce*. See Also Eg S Gopalan 'Transnational Commercial Law: The Way Forward' [2003] <access via WestLaw website> (20 Jun. 2004). *American University International Law Review* 803, 803-4

³ Marco Torsello, 'Transfer of Ownership and the 1980 Vienna Sales Convention: A Regretful Lack of Uniform Regulation' (2000) *International Business Law Journal* . See Also PM Vecchi, *Il principio consensualistico. Radici storichee realta applicativa* (1999)

⁴ *Ibid.* See Also F. Ferrari, *Principio consensualistico ed Abstraktionprinzip*, *Conlr- Impr.*, at 887 et seq. (1992)

⁵ French civil Code

⁶ Marco Torsello, 'Transfer of ownership and the 1980 Vienna sales convention. A regretful lack of uniform regulation' (2000) *International Business Law Journal* 940

the fact that the property has passed does not release the seller from the obligation to deliver the goods,⁷ nor does it release him from the obligation to keep the goods safe until delivery.⁸ It is noteworthy that the French approach towards the transfer of property is similar to that in many other countries, including: Italy, Belgium, Luxembourg, Portugal, Denmark, Norway and – outside of Europe - Mexico, Canada (Quebec), the US (Louisiana)⁹, and some Arab countries such as Libya.¹⁰

English statutory law, the SGA 1979, is founded on the same rule, but differs with respect to the question of distinction between absolute and conditional contracts of sale.¹¹ It is assumed that the goods are in a deliverable state and the contract is unconditional when the property passes to the buyer when the contract is made, even if the time of payment or delivery (or both) is postponed as stipulated in s18.¹² However, the crucial standard is the intention of the parties according to s17 of the SGA.¹³ It should be noted, that most legal systems have also adopted this principle, as well as the principle of party autonomy, which has been adopted and implemented in all member states of the European Union as well as in the United States, in particular by means of postponement of the time in which the property passes according to the intention of the parties.¹⁴

However, according to the principle of delivery, the passing of property takes place at the time when the goods are delivered, and, primarily as an effect of delivery.¹⁵ The principle of delivery actually applies in several different legal systems, for example, Germany, Greece, the Netherlands, Spain, Switzerland, as well as most former socialist countries, and - outside of Europe –most Latin American countries, including Brazil.¹⁶ Nonetheless, it is noteworthy that all legal systems which adhere to this rule, still adopt the principle of party autonomy, where the intention of the parties is necessary to determine the purpose of delivery, or timing in relation to the passing of property. For example, this is the case with

⁷ Ibid.

⁸ L. Cabella Pisu, *Garanzia e Responsabilità* in L. Vacca (ed.), supra n. 14, 757 et seq

⁹ (n 6) 940.

¹⁰ Libyan civil law S 147

¹¹ S.18 sga 1979 .Also (n 6)940

¹² Ibid.

¹³ Charles Debatista, 'Transferring Property in International Sales: Conflicts and Substantive Rules Under English Law' (1995) 26 *Journal of Maritime Law and Commerce*

¹⁴ Giesela Rühl, 'Party Autonomy in the Private International Law of Contracts: Transatlantic Convergence and Economic Efficiency' (2007) 03 *Clpe Research Paper Series* 4-7- 40. available at: <http://ssrn.com/abstract=921842>. Also See See Above NO 6 , 941

¹⁵ William Tetley, Q. C., 'Sale of Goods the passing of title and risk a resume' Faculty of Law McGill University Montreal, Quebec, Canada. P27. See Also Hartkamp, Arthur, and Christian Von Bar. *Towards a European civil code.* (Kluwer law international, 1998). 495, 495

¹⁶ (n 6) 941

respect to the *constitutum possessorium*, *the traditiobrevi manu*, and the sale of goods held by a third party,¹⁷ where the delivery of goods may not coincide with an intention of the parties to transfer the property.¹⁸ Indeed, rules applied by different legal systems (and practices) often leads to uncertainty of the law as it is applicable to an international contract of sale, and thus, can create distrust among parties and seriously undermine international trade.¹⁹

Reflecting upon this situation, Benjamin points out that “in any event, uniformity of international practice with regard to sales of goods in transit (notably CIF sales) means that the above rules are not likely to be called-on frequently.”²⁰ However, this is far from the reality with the applications of party autonomy, where consent and delivery principles are adapted in various jurisdictions.²¹ The importance of identifying the time when the property is passed becomes paramount in international trade. Indeed, the absence of regulation in relation to the transfer of property under existing legal frameworks - including the CISG - may cause some legal problems, including those affecting uniformity of purpose, with rules related to the passing of risk, and issues related to third party complexities, such as title conflict, insolvency and tort (in addition to the possibility of overlap among these problems); moreover, this absence of regulation also has an effect on the purpose of the convention, either directly or indirectly.²²

Therefore, there is a justifiable need to unify the rules governing international trade.²³ However, a uniform law is not something which can be drafted in the same way as domestic law. Notwithstanding this, the main question no longer lies in the creation of such a uniform law, but the implementation of the so-called uniform law.²⁴ Obviously, common methods related to the unification of law are set out either through unification of the rules of choice of law or through the unification of the rules of substantive law. Put simply, the former sets out uniform legal rules to refer the contract or dispute to be subject to the domestic law of a particular country; in other words, the parties within the contract would choose the applicable law, while the latter lays down uniform substantive law to be applied

¹⁷ Ibid.

¹⁸ F. Ferrari, *Principio consensualistico ed Abstraktionprinzip*, Conlr- Impr., at 887 et seq. (1992)

¹⁹ Eg S Gopalan 'Transnational Commercial Law: The Way Forward' [2003] <access via WestLaw website> (20 Jun. 2004). *American University International Law Review* 803, 803-4

²⁰ Benjarnin, *Sale of Goods* (4th ed. 1992) 25-126

²¹ (6)940

²² (n 1)

²³ Ibid.

²⁴ René R David 'The Methods of Unification' (1968) 16 *American Journal of Comparative Law* 13, 14

to a particular contract or dispute.²⁵ Against this background, the United Nations Convention on Contracts for an International Sale of Goods (hereinafter: CISG) was created in the attempt to provide modern, uniform and fair rules of law representing compromises and solutions amenable to all legal systems in international sales of contract. Such rules, in fact, aim to govern the formation of contracts for the international sale of goods, as well as the rights and obligations of buyers and sellers²⁶. However, unlike the English approach, the CISG does not directly regulate the issue of passing of property.

4.2 The Passing of Property under the CISG - Is the Passing of Property Not Dealt with Expressly or Still Part of the Seller's Obligation?

Unlike ss16 and 17 of the SGA 1979, no direct provision is dedicated to the passing of the property in the CISG. In order to consider whether the CISG regulates the issue of the passing of property, one should start with the most basic question. Does the CISG consider the passing of property an issue which is based on the impact of the contract of sale, or is it one of obligations and rights. If the answer is negative, then two further questions arise. Firstly, would it be possible - and will it be possible in the future - to unify the rule on the passing of ownership; and secondly, will it be unnecessary to unify the rule on this matter. Debattista puts these questions in the context of the transfer of property and calls for the needs to distinguish between “contractual effects of the transfer” and “proprietary effects of the transfer”.²⁷

Contractual effects of the transfer

The contractual effects of the transfer refer to the rights and obligations of the seller and the buyer connected to the property of the goods. In matters of contract, these essentially relate to the contractual relationship between the parties. In contrast, the proprietary effects of the passing of property refer to the validity of the transfer and its effects on the

²⁵ Ibid. See Also M Bridge *The International Sale of Goods: Law and Practice* (OUP Oxford 1999) 37

²⁶ Maureen T. Murphy, 'United Nations Convention on Contracts for the International Sale of Goods: Creating Uniformity in International Sales Law' (1988) 12(4) *Fordham International Law Journal* 727

²⁷ L Collins and others (eds) *Dicey and Morris on the Conflict of Laws* (Sweet & Maxwell London 13th ed 2000).965;. See also. C Debattista 'Transferring Property in International Sales: Conflicts and Substantive Rules Under English Law' (1995) 26(2) *Journal of Maritime Law and Commerce* 273, 274-276

proprietary rights of the seller, buyer and any related third parties.²⁸ In other words, the characteristics of an international sale of goods contract consists of the obligation of the seller to deliver the goods and transfer the property in the goods to the buyer,²⁹ who, for his part, agrees to pay the price for the goods and take delivery of them. The primary obligation of a buyer under the contract of sale is to pay the price for the goods delivered. According to art 6 of the CISG; a buyer is under the obligation to pay the purchase price at the deadline agreed and to take delivery of the goods. The immediate question is whether the reading of this provision is sufficiently and essentially related to the timing of the passing of property (i.e. when property passes).

As discussed, the issue of the passing of property is one of the seller's obligations and relates to the contractual relationship between the parties; it is governed by the provision dealing with the rights and obligations of the parties arising from such a contract of sale of goods.³⁰ This was also confirmed in the explanatory note³¹ of the CISG (11 April 1980), which considered the transfer of property is one of the seller's obligations, with the words that *Obligations of the sellers include delivering goods in conformity with the quantity and quality stipulated in the contract, as well as related documents, and transferring the property in the goods*. Furthermore, as the CISG is often viewed as the law governing this contractual area between both parties,³² it may be reasonable to conclude that the CISG intends to address this issue from the perspective of the obligations and rights of the parties of the contract.

Over and above this, the CISG provides quite a number of rules governing certain issues related to proprietary effects, where art 30 of CISG requires the seller to pass property to the buyer, and indirectly governs such issues as those included in arts 41 and 42 CISG (the seller's obligation to deliver goods free from any third-party rights or claims), art 53 (the buyer's obligation to pay the price), articles 66 – 70 (the passing of risk of the good's loss or damage) and arts 85 – 88 (the obligation to preserve the goods). The property question

²⁸ Ibid.

²⁹ Article 30 CISG

³⁰ Franco Ferrari, Harry M. Flechtner, Ronald A. Brand, *The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the U.N. Sales Convention* (Sellier European Law Publishers, 2003),97

³¹ United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG). Available at http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html

³² F Enderlein and D Maskow 'Commentary on the United Nations Convention on Contracts for the International Sale of Goods and Convention on the Limitation Period in the International Sale of Goods' (excerpt) (29 Jun 2004) Available at <http://www.cisg.law.pace.edu/cisg/biblio/enderlein-art04.html#art041>

will, of course, remain very important but only for the purpose of determining the rights of buyer and seller *vis-à-vis* third parties and *vice versa*.³³

In other words, such relevant provisions govern the issue of property in general and are not concerned with the issue of passing of property (the time of passing of property). Following this logic, there is a difference between the issue of property in general and the issue of the time of passing of property, as a particular issue, as seen in art 30, which states that '*The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention.*' Obviously, the word "must" indicates and confirms that the passing of property is one of the seller's obligations.³⁴

It appears that art 30 obliges the seller not only to deliver the goods but also to hand over all documents relating to the goods and to transfer the property in them. However, the timing for such an obligatory duty to take place is not expressly provided in the CISG, Thus the question arises: Is the timing of such a duty of passing of property governed by the law applicable by virtue of the rules of private international law?³⁵ as well as whether the domestic law can determine the time of passing of property according to the various standards, including the intention of the parties' standard.³⁶

4.2.1 Scope of the Convention Regarding Transfer of property

It seems there is an irreconcilable paradox between art 30 which considers the passing of property is one of the seller's obligations and art 4(b), with regard to the issue of the proprietary effects of the passing of property (timing of the passing of property). Nduo views the two principles as different, because of the clear language used in art 4(b) of the CISG,³⁷ which states that:

³³ Jacob S. Ziegel, Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods (July 1981) Pace Law School Institute of International Commercial Law .4

³⁴ F Enderlein in P Sarcevic and P Volken (eds) International Sale of Goods (Dubrovnik Lectures, Oceana) (1996) 133, 144. Available at <http://www.cisg.law.pace.edu/cisg/biblio/enderlein1.html#ia>

³⁵ CISG, art 7

³⁶ Peter Schlechtriem, 'The Seller's Obligations Under the United Nations Convention on Contracts for the International Sale of Goods' (2004) Pace Law School Institute of International Commercial Law

³⁷ Muna Nduo, 'The Vienna Sales Convention 1980 And The Hague Uniform Laws On International Sale Of Goods 1964: A Comparative Analysis' (1989) 38 International and Comparative Law Quarterly 5. Also See (n 6)939

This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with: (a) the validity of the contract or of any of its provisions or of any usage; (b) the effect which the contract may have on the property in the goods sold.

In other words, we should distinguish between 'contractual effects of the transfer' and 'proprietary effects of the transfer'.³⁸ The contractual effects of the transfer refer to the rights and obligations of each party relating to the property of the goods. Examples are: whether the seller has a duty to transfer good title to the buyer or whether the seller is liable to the buyer for defects in the quality of the goods. These mainly relate to the contractual relationship between the seller and the buyer and thus, are 'matters of contract'. In contrast, the proprietary effects of the transfer of property refer to the validity of the transfer and its effects on the proprietary rights of the seller and buyer and related third parties.³⁹

According to Lookofsky, art 30 governs only the formation of a sales contract and rights and obligations of the parties.⁴⁰ The paradox is that the language used in art 4(b) seems to expressly exclude the issue of the timing of the passing of property from the scope of application of the CISG.⁴¹ Indeed, art 4(b) has been interpreted as expressly stating that the contractual validity and property effects of the contract are placed beyond the scope of the CISG. The Secretariat Commentary on the 1978 Draft of the CISG, supports such a view by stating *subparagraph (b) makes it clear that the Convention does not govern the passing of property in the goods sold.*⁴²

³⁸ L Collins and others (eds) *Dicey and Morris on the Conflict of Laws* (13th edn Sweet & Maxwell London, 2000) 965. See also C Debattista 'Transferring Property in International Sales: Conflicts and Substantive Rules Under English Law' (1995) 26(2) *Journal of Maritime Law and Commerce* 273, 274-276

³⁹ L Collins and others (eds) *Dicey and Morris on the Conflict of Laws* (13th edn Sweet & Maxwell London 2000) 965; . See also C Debattista 'Transferring Property in International Sales: Conflicts and Substantive Rules Under English Law' (1995) 26(2) *Journal of Maritime Law and Commerce* 274

⁴⁰ Joseph Lookofsky (ed), *Understanding the CISG* (3rd n edition edn Kluwer Law International, Netherlands 2008) ,22

⁴¹ Ibid. See Also D. Maskow, The Convention on the International Sale of Goods from the Perspective of the Socialist Countries, in *Vendita Intemazionale. La Convenzione di Vienna delrl 1 aprile 1980*, 39, 51

⁴² Secretariat Commentary art. 4 para. 4. See also Benjamin Mahr, 'Is the Vienna Convention on international sale of goods too much influenced by civil law and should it contain a rule on the passing of property' (2004) (*International Business law*) 11

Furthermore, with reference to the effect of a sales contract on the property in the goods sold, some court decisions provide evidence for such exclusion. For instance, a German court decision stated that the Convention did not cover the question of the validity of a retention of property clause in a contract where a Dutch seller, plaintiff, sold a yacht to a German company. Under the contract, the seller retained property in the yacht. The yacht was subsequently transferred to the defendant, a silent partner of the German company. When the German company was declared bankrupt, the parties disputed the validity of the retention of property clause. The court expressed that the CISG did not apply to the validity of a retention of property clause.⁴³ In another decision, the Australian court, when applying the CISG to determine whether a retention of property clause had actually been agreed by the parties – and, if so, what its content were - ruled that the effect of such a clause on the property in the goods was to be determined according to the law applicable by virtue of the rules of private international law.⁴⁴

This echoes Ziegel's statement that in view of the difficulty of reaching a consensus on a suitable set of rules, the UNCITRAL working group preparing the draft convention did not attempt to incorporate such rules into CISG,⁴⁵ devoting its efforts especially into issues of fraud, duress, illegality, capacity to contract, and agent's authority⁴⁶. Exclusion of the passing of property was said to be justified on the basis that such an issue was not deemed serious enough to warrant codification.⁴⁷ It was regarded as unnecessary, in the sense that the rules provided by this convention related to the issue of the passing of property can be based existing articles: for example, the obligation of the seller to transfer the property in goods free from any right or claim not accepted by the buyer, under Articles 39 and 40; the passing of risk, regarded in a number of legal systems as the essential consequence of the passing of property, under Articles 78 to 82; the obligation of the buyer to pay the price (Article 49), and the obligation to preserve the goods and to bear the cost of preservation, which are subsidiary aspects (Articles 74 and 77) .⁴⁸

⁴³Germany 16 January 1992 Appellate Court Koblenz (Motor yacht case)

: <http://cisgw3.law.pace.edu/cases/920116g1.html>

⁴⁴ Federal Court, South Australia District Adelaide, 28 April 1995, in 57 Federal Court Report (1995), 216

⁴⁵ (n 19)

⁴⁶ Harry . Flechtner, 'The Several Texts of the CISG in a Decentralized System Observations on Translations, Reservations and other Challenges to the Uniformity Principle in Article 7(1)' (1998) Journal of Law and Commerce 187-217

⁴⁷ Text of Secretariat Commentary on article 4 of the 1978 Draft. Available at

<http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-04.html#1>. (n 35)

⁴⁸Secretariat Commentary on article 4 of the CISG 1978 Draft. Official records of the united nations conference on contracts for the international sale of goods, Vienna, ·10 March-II April 1980,at17. See Also TUNC, André, Commentary on the Hague Conventions of the 1st of July 1964 on International Sale of

In this regard it has been argued that, in order to be feasible, the CISG should not regulate every matter in international trade; it would be better served to leave some issues to the general principles and the rules of private international law.⁴⁹ This is because international conventions are mostly concerned with limited issues. However, it is essential that research is undertaken in order to establish the feasible conventions⁵⁰, as such issues may lead to changes in domestic legal concepts, where states will make reservations towards the parts relating to these issues, leading to a non-ratification process.

Under the CISG, unlike the national sale of goods law, the rights and obligations of the parties do not turn on the locus of property. In this respect, it has been said that the CISG adopts the same approach as the American Uniform Commercial Code⁵¹ which is heavily influenced by the Hague Convention, sharing similar concerns and situation. In The Hague Convention of 1964, relating to a Uniform Law on the International Sale of Goods [hereafter ULIS], also excludes the issue of the passing of the property, where art (8) of the ULIS corresponds to art 4 of the CISG.⁵² This article states that:

The present Law shall govern only the obligations of the seller and the buyer arising from a contract of sale. In particular, the present Law shall not, except as otherwise expressly provided therein, be concerned with the formation of the contract, nor with the effect which the contract may have on the property in the goods sold, nor with the validity of the contract or of any of its provisions or of any usage.

The explanation in the similarities between the ULIS and the CISG given by Tunc can also provide support for such a view. Tunc states that there was no significant change between the provisions of the ULIS and those of the CISG on this issue, the commentary on art 8 of

Goods and the Formation of the Contract of Sale. Prof. Dr. Ahmet Cemil Yildirim. Lack of uniform application regarding transfer of property in international sales contracts with particular regard to retention of title clauses. Pace Law School Institute of International Commercial Law. 2012

⁴⁹ Eg E Visser 'Favour Emptoris: Does the CISG Favour the Buyer?' (1998) University of Missouri, Kansas City Law Review 77, 80-82, <http://www.cisg.law.pace.edu/cisg/biblio/Visser1.html#b*> (24 Jun. 2004); F Ferrari 'Assumption of Debts as a Subject Matter Excluded from the US Sales Convention (Commentary on OGH, April 24, 1997)' Pace University Website <http://www.cisg.law.pace.edu/cisg/biblio/ferrar.html#*> (28 Jun 2004); RA Hillman 'Applying the United Nations Convention on Contracts for the International Sale of Goods: The Elusive Goal of Uniformity' (1995) Cornell Review of the Convention on Contracts for the International Sale of Goods 21-49 <http://www.cisg.law.pace.edu/cisg/biblio/hillman1.html#*> (28 Jun 2004)

⁵⁰ Evelien Visser, 'Favor Emptoris: Does the CISG Favor the Buyer?' (1998) Pace Law School Institute of International Commercial Law. 77-92

⁵¹ (n 21), See Also UCC 2-401

⁵² Dr. Ahmet Cemil Yildirim. Lack of uniform application regarding transfer of property in international sales contracts with particular regard to retention of title clauses. Pace Law School Institute of International Commercial Law,2012

the ULIS would also be applied to art 4 of the CISG. In other words, art 8 of the ULIS is a good cross reference to CISG art 4(b). CISG art 4(b) carried forward without change a concept related in ULIS article 8. The Tunc Commentary on this ULIS counterpart to article 4(b) can be regarded as equally applicable to the CISG.⁵³ In other words, the passing of property, of course, remains a very important issue under CISG, but only for the purpose of determining the rights of the buyer and the obligations of the seller *vis-a-vis* third parties, and *vice versa*.⁵⁴ Tetley has argued that art 4(b) was legitimised – at least in part - based on the inflated size of the CISG. Moreover, the Convention concerns itself with risk rather than property.⁵⁵

However, in an international context, where the transaction can rarely be performed instantly and normally requires a complex performance under the CISG,⁵⁶ involving the carriage of the goods and related risks,⁵⁷ the issue of the passing of ownership is strictly related to the risk of accidental loss or damage of the goods and to the problem of the allocation of such risk.⁵⁸ The traditional rules hold the view that the risk of loss follows the property (*res perit domino*) - a principle which is accepted in many different legal systems. However, this link between the passing of property and the passing of risk seems to be broken in the CISG. While the issue of the transfer of property is left unregulated, it has provided for a regulation of the transfer of the risk of loss or damage of the goods separately from the issue of the passing of property⁵⁹. Under these circumstances, certain commentators have argued that property was not a very useful tool for allocating entitlements in sales transactions. In particular the tendency to treat property as a collective concept has been criticised, which ascribes all the incidents of property to one of the parties and precludes a sensible distribution of risk and benefits during the transitional stage of the sale.⁶⁰

It is an extremely attractive paradox, and to a large extent only an apparent paradox - at least in view of the reasoning frequently set forth to justify the lack of a uniform regulation

⁵³ TUNC, André, Commentary on the Hague Conventions of the 1st of July 1964 on International Sale of Goods and the Formation of the Contract of Sale

⁵⁴ (n 201). See also. Benjamin Mahr, 'Is the Vienna Convention on international sale of goods too much influenced by civil law and should it contain a rule on the passing of property' (2004)(International Business law) ,11

⁵⁵ William Tetley, Q. C., 'Sale of Goods the passing of title and risk a resume' Faculty of Law McGill University Montreal, Quebec, Canada, 29

⁵⁶ (n 6) 939

⁵⁷ D.E. Murray, Risk of Loss of Goods in Transit: A Comparison of the 1990 Incoterms with Terms from other Voices, U. Miami Inter- Am. L. Rev. . (1991)., 93, 94

⁵⁸ (n 6)939

⁵⁹ Ibid ,943.

⁶⁰ K_ Llewellyn, *Through Title to Contract and a Bit Beyond*,15 N.Y. U. L. Rev., 159

of this matter.⁶¹ So much so, that some scholars believe that the differences in various legal systems regarding the transfer of property are “too large to bridge”,⁶² and should take into account that rules vary largely in respect to many aspects of the contract of the sale of goods, including issues relating to the passing of property, such as the timing of the passing⁶³ and warranty for quality, which is a most material factor related to the contract of the sale of goods, where a wide divergence exists between different domestic laws.

Thus, from the foregoing, it can be understood that the CISG only governs the contractual effects of the transfer of property, and seems to exclude the proprietary effects; this serves to leave the rules on property open, especially in regard to the rights and obligations of the parties.⁶⁴ It was regarded as neither possible to unify the rule on this point, nor was it regarded as necessary to do so.⁶⁵ On the other hand, others have regarded it as both possible and necessary to unify the rule on the passing of property in the international context under the CISG, as will be seen.⁶⁶ Accordingly, the question still arises: is it possible - or might it be possible in the future - to unify the rule on the point of the passing of property?

Unify the rules in the future?

In relation to the international context, the most recent tendency in the regulation provided for international uniform commercial law, shows that those responsible for drafting such regulations have abandoned the target of reaching uniformity across different legal systems, and have instead adopted the more realistic view of creating a uniform set of rules specifically formed in order to govern international trades.⁶⁷ This is reflected clearly in the lack of texts covering the passing of property, whether under the ULIS, or in the CISG.⁶⁸

⁶¹ (n 6)939

⁶² (n1)

⁶³ D. Jacobson, 'International Sale of Goods' (2008) 3(04) International and Comparative Law Quarterly 661.

⁶⁴ Michael G .Bridge, 'Uniformity and Diversity in the Law of International Sale' (2003) 15(1) Pace International Law Review 57. See Also Eg JS Ziegel 'Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods' (1981) (excerpt) <<http://www.cisg.law.pace.edu/cisg/text/ziegel4.html>> (29 Jun 2004) or Secretariat Commentary on Article 4. See also D. Maskow, The Convention on the International Sale of Goods from the Perspective of the Socialist Countries, in Vendita Internazionale. La Convenzione di Vienna del 1 aprile 1980, 39, 12

⁶⁵ Text of Secretariat Commentary on article 4 of the 1978 Draft. Available at <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-04.html#1> . (n 35)

⁶⁶ (n 1)134,135,136

⁶⁷ P. Lagarde, Approche critique de la lex mercatoria, in Le droit des relations économiques internationales. Etudes Goldman, (1982). 1142. (n 6)946

⁶⁸ (n 36)95

However, the emphasis of the debates should not be on the possibility or impossibility of unified rules on the passing of property under the CISG, since the relevant issue is a more practical and logical matter, rather than a question of theoretical possibility. Therefore, the opposing arguments mentioned above - which regard as impossible the idea of a unified rule on the transfer of property under the CISG - have been criticized as subjective, because there are in fact no standards available to judge whether a certain difference between any two legal systems on this point of law is “too large” or “too small”.

Accordingly, it has been argued that even where there is a large gap/difference between systems of common law and civil law regarding certain remedies, it was in fact possible to unify the rule on this point under the CISG.⁶⁹ For instance, the principles of the *lex mercatoria* (law merchant) have been accepted in the common law system for many generations,⁷⁰ when the autonomous mercantile courts began to decline in relative importance and the *lex mercatoria* began to merge with common law, where it became an integral part of the common law.⁷¹ Lord Mansfield said that ‘*The mercantile law is the same all over the world. For, from the same premises, the sound conclusions of reason and justice must universally be the same.*’⁷² Some may even adopt a more optimistic view maintaining that the unification of the rule on the passing of property in the international context is possible. They consider that the adoption of a uniform solution for international trade is more feasible, since it does not impose a modification of domestic legal rules, especially on international trade, which has its own specific regulations, which to a large extent overcomes national borders and domestic legal rules.⁷³

However, leaving the gaps to be filled by non-binding rules such as the *lex mercatoria* has its own risk in achieving unified interpretation. In this respect uniform rules are certainly desirable, notably because other rules related to the passing of property are not provided for in the CISG, nor are they provided for in other international uniform law conventions, especially those concerning the retention of property.⁷⁴ Consequently, uniform legislation in relation to the passing of property is possible, and should be achieved in the international context. As David has argued, ‘*today the problem is not whether international*

⁶⁹ (n 15) 134,135,136

⁷⁰ Byron Beers, 'Introduction to Law Merchant' (2007) 29. See Also *Miller v Miller*, (Ky) 296 SW2d 684Also (n 1)662

⁷¹ Gesa Baron, Do the UNIDROIT Principles of International Commercial Contracts Form a New Lex Mercatoria? , 35

⁷² *Pelly v. Royal Exchange Assurance Co.*, 1 Burr. 341, 347

⁷³ (n 6) 946

⁷⁴ Ibid.

unification of law will be achieved; it is how it can be achieved'.⁷⁵ In this context, some legal scholars have argued that the solution to be adopted is the one in accordance with the principle of delivery, on the basis of exclusion of the principle of consent.⁷⁶

⁷⁵ (n 24)

⁷⁶ (n 6)946

4.2.2 Principle of delivery and transfer of property under the CISG

Under the principle of consent, requiring merely the consent to transfer property with an outcome that,⁷⁷ subject to the appropriation of goods and parties' agreement otherwise,⁷⁸ property often passes at the conclusion of the contract. However, the major distinction between the delivery principle and the consent principle is that the former requires an act of delivery of the goods for the transfer of property, unlike the principle of consent, which requires merely the consent to transfer the property, and thus the outcome is that property often passes at the conclusion of the contract⁷⁹, subject to the appropriation of goods, where the property could be passed even without an act of delivery, and when the parties agree otherwise, in which case property passes according to such an agreement.⁸⁰

Indeed, in some countries, the passing of property is related to the physical delivery of goods. where property passes at the time of delivery unless the parties have agreed otherwise.⁸¹ This indicates that delivery does not form a compulsory requirement for the passing of property, since the parties may agree otherwise. Meanwhile, this can be interpreted as meaning that in the absence of agreement between the parties, property will pass at the time of delivery, signifying that the intention of the parties is necessary in order to determine the purpose of delivery and the passing of property.⁸²

Had the principle of delivery – a principle which has already been adopted by many legal systems⁸³– been adopted, the interpretative issue could have been avoided, on the grounds that in the CISG, risk passes at the time of delivery, which may create a balance regarding the issue of the link between the time of passing of risk and time of passing of

⁷⁷ JH Dalhuisen Dalhuisen on International Commercial, Financial and Trade Law (Hart Publishing Oxford and Portland, Oregon 2000) 403-407. See Also Professor U Drobnig '*Transfer of Property*' in A Hartkamp and others (eds) Towards a European Civil Code (2nd edn Nijmegen: Ars Aequi Libri 1998) 496 -498

⁷⁸ (n 1)156

⁷⁹ JH Dalhuisen Dalhuisen on International Commercial, Financial and Trade Law (Hart Publishing Oxford and Portland, Oregon 2000) 403-407. See Also Professor U Drobnig '*Transfer of Property*' in A Hartkamp and others (eds) Towards a European Civil Code (2nd edn Nijmegen: Ars Aequi Libri 1998) 496 -498

⁸⁰ (1),156

⁸¹ W Tetley '*Sale of Goods - The Passing of Title and Risk - A Resume*' chapter 7 of Marine Cargo Claims (4th edition to be published in March 2005) <<http://tetley.law.mcgill.ca/maritime/ch7.pdf>> (2 Jul 2004) 27
⁸² (n 6) 941. See also, the UCC s 2-401(2); see also the Vietnam Commercial Law 1997 Article 58

⁸³ E. Visser '*Favour Emptoris: Does the CISG Favour the Buyer?*' (1998) University of Missouri, Kansas City Law Review 77, 80-82, <http://www.cisg.law.pace.edu/cisg/biblio/Visser1.html#b*> (24 Jun. 2004); . See also, Official records of the united nations conference on contracts for the international sale of goods, Vienna, •10 March-II April 1980,82

property and confirm that the transfer of property would occur at the same time as the delivery. Undoubtedly, this corresponds with the principle *res perit domino*, which is evidently contained in many legal systems, and would avoid what might be labelled *favor emptoris*

It should be noted that some rules are provided by the CISG regarding the passing of property. In the previously mentioned arts 39, 40, 49, 74, 77, 78, and 82, specific reference is made to the issue of the passing of property.⁸⁴ Critically, although such provisions are linked to the passing of property, these provisions did not address the issue of timing of passing of property, whether explicitly or by implication.

Furthermore, as discussed in the previous chapter, the adoption of the principle of delivery may allow a role to be played by the appropriation of goods, where, in practice, such appropriation often happens upon delivery. Thus, property often passes upon delivery, where the goods become ascertained.⁸⁵ In other words, the goods could be appropriated unconditionally in different ways and one of these ways is delivery. Namely, specific goods, partially identified as coming from a designated bulk, are not considered 'ascertained' until they have been separated from that bulk, which usually occurs through physical delivery. Appropriation can occur when the buyer's portion is physically isolated from the bulk. It may also occur through the withdrawal of the remaining portions owned by other buyers, and ascertainment by a process of exhaustion. It can also come about when the buyer purchases the remainder of the bulk, including his own unascertained portion.⁸⁶

Typically, the physical possession of goods and passing of property do not occur simultaneously under the consent principle, such as in English law, unless the parties agree otherwise, where the physical possession of goods can be transferred simultaneously with the property, if the parties intend to pass it, or in the case of the appropriation of goods, where property passes at the time of appropriation, when such appropriation occurs through delivery.⁸⁷ This is in contrast to the principles of delivery, where it is generally the

⁸⁴ (6)946

⁸⁵ RL Theriot 'An Examination of the Role of Delivery in the Transfer of Ownership and Risk in Sales under Louisiana Law' (1986) 60

⁸⁶ Mahr, Benjamin, 'Is the Vienna Convention on international sale of goods too much influenced by civil law and should it contain a rule on the passing of property?' (2004). 8

⁸⁷ P S Atiyah, John N Adamss, Hector Macqueen, *Atiyah's Sale of goods*, (11 Edition). P324. See also Paul Dobson & Rob Stokes. *Commercial Law*, (7th ed. Sweet & Maxwell Limited of Avenue Road, 2008)

case that the passing of property and the physical possession of goods occur simultaneously at the time of delivery.

Indeed, even though there is a significant difference between the various legal systems regarding the time of passing of property, it is still possible to unify the rule on this point under the CISG. In fact, supporters of this view believe that the principle of delivery offers a solution which not only bridges such a gap, but is also clearer and less subject to exceptions. On the other hand, it is noticeable that the supporters of the principle of delivery clearly rely upon the advantages of such an idea as being best suited under CISG. In other words, the principle of delivery corresponds to the concept of the passing of risk, where property and risk could be passed at the same time on the grounds that the risk under CISG passes at the time of delivery.

From the aforementioned, it can be said that, in spite of the variation of views and dichotomies in relation to the unification of the rules on the issue of the passing of property, the consensus is that the CISG does not govern the passing of property. While some scholars and the drafters of the CISG tend to assert that it is not possible to unify the rule on this point (nor was it regarded necessary to do), others disagree with them, stressing that possibility and necessity will see the eventual codification on the passing of property under CISG. In their view, the solution to be adopted is one in accordance with the principle of delivery, where they exclude the principle of consent, as it is not only inapplicable directly to most modern commercial transactions involving transfer of ownership, but an unhelpful and misleading distinction between validity among the parties to the contract can be undesirably implied.⁸⁸ Nonetheless, this suggestion seems to be detached from the principle of party autonomy in contract law, therefore, it becomes necessary to focus on the legal nature of the CISG and its relationship to principle of party autonomy.

4.3 Party autonomy principle and the basis of the CISG

In this section, the examination will focus on whether party autonomy plays a role in filling the gap of the passing of property in the CISG. In order to understand the basis of the CISG, an in-depth legal analysis of some relevant provisions must be undertaken, especially those provisions related to the property issue, highlighting other domestic laws.

⁸⁸ (6)946

In fact, all the previously mentioned legal systems, whether based upon the principle of delivery or of consent, defer to the parties' contractual autonomy to regulate and determine the time at which the property passes from the seller to the buyer.⁸⁹ The principle of freedom of contract is rooted primarily in the *laissez faire* doctrine - a doctrine which received support from Adam Smith.⁹⁰ However, the modern freedom of contract is not without limitation. There are several examples of legislative interference with the freedom of contract, and a wide range of legislation has been passed that altered the UK contract law in terms of how it incorporates the freedom of contract. Two examples of such legislation are s17 of the SGA 1979 and the Unfair Contract Terms Act 1977.⁹¹

As discussed in the introduction, despite the limitations to party autonomy, in general, the parties are given the possibility to identify the time when the property will be deemed to have passed. As a result, the principles of consent and delivery are merely a substitutional principle, not a dogma.⁹² In other words, the intention of the parties is the basic rule which takes precedence over principles of consent and delivery in the application. The importance of party autonomy is also reflected in the rule of delivery, where recourse to the intention of the parties is necessary in order to determine the purpose of a delivery and thereafter to determine the time of the passing of property. On the other hand, the delivery may not occur simultaneously with the intention of the parties to transfer property, which may occur separately; the parties may therefore intend to pass the property at a different time from the time of delivery.⁹³

It could be understood that, even under the legal systems that follow the principle of delivery, the parties in the contract have an absolute right to identify the time of delivery, as well as the time of the passing of property - whether through determining the time of a delivery according to the general rule, or separately from the time of delivery according to their intention in the terms of the contract of sale. Similarly, under English law, s17 of the SGA states that the property passes when the parties intend it to pass. Hence, the intention of the parties is paramount and overrides any other rules.⁹⁴ Thus, property of goods may

⁸⁹ Ibid, 941

⁹⁰ Katerina Georgiadou, 'Apathy Vis-a-Vis the UN Convention on Contracts for the International Sale of Goods (CISG) in the UK and Two Proposed Strategies for CISG's Incorporation in the UK Legal Order' (2012) 3 Pace International Law Review Online Comnparnoi, 265

⁹¹ Thomas Wilhelmsson, *Various Approaches to Unfair Terms and Their Background Philosophies*, 14 JURIDICA INT'L (2008) 51, 52, available at. <http://www.juridicainternational.eu/index.php?id=12728>

⁹² (n941)

⁹³ Ibid.

⁹⁴ Ricard Stone, *Contract Law* (6th Ed Gavendish (Check if this could be Cavendish) Publishing Limited, 2006-2007) 227

pass at the time of the conclusion of the contract, or at the time chosen by the parties (according to the intention of the parties).⁹⁵

It seems that most legal systems have adopted both these legal rules regarding the passing of property: a basic rule, which overrides any other rules in application, and a substitutional rule, which applies in the case of the absence of a basic rule. In other words, they have adopted the principle of the intention of the contracted parties. However, they have adopted different principles as to whether the principle of consent or the principle of delivery applies in the case of absence of any expressed indication regarding the intention between the parties with respect to the timing of the passing of property, regardless of which is considered the basic rule and which is the exception .

However, due to the absence of a rule governing the passing of property, the situation under the CISG may be different. As seen above, all the interpretations are agreed that the CISG does not govern this issue. Consequently, the exclusion of the issue of the passing of property from the scope of the convention leaves gaps which must be filled in conformity with other provisions of CISG.

4.3.1 Party autonomy principle under the CISG

In order to answer the last question, we must further explore the analysis and interpretation of some relevant provisions under the CISG. The CISG is one type of international convention on the unification of substantial law, which has binding force upon the parties concerned – unless, of course, the parties in question have agreed to exclude the rules of the convention and incorporate or refer to different rules in their sales contract. In other words, when speaking of the binding force of the convention, it is worth bearing in mind some provisions of the CISG, led by art 6, where one should note that the application of the CISG has no mandatory force for the parties and is subject to the party autonomy principle⁹⁶ as one of the important parts of the contract law, which is the first step to comply with party autonomy principle. This is because it allows parties to exercise bargaining power with freedom and flexibility to decide the terms of the contract to

⁹⁵ P. Atiyah, *The Sale of Goods* (9th ed. 1995). See also, Chalmers' *Sale of Goods Act 1979* (18th ed. Michael Mark & Jonathan Mance eds., 1981)

⁹⁶ (no 1) 32.

achieve the best interest for both parties, either under the domestic laws or international laws.⁹⁷

Article 6 of the CISG states: *'The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provision.'* The convention is non-mandatory in nature, in the sense that parties who desire not to apply the provisions of the CISG upon their commercial relationships are expressly empowered by Article 6 to reject the convention in its entirety, or derogate from (or vary) the effect of any of its rules.⁹⁸ Accordingly, where it allows, the parties may exclude the convention's application entirely or partially, or derogate from its provisions.⁹⁹ In this sense, the relevant rules can be excluded by the parties' choice of law, under art 7 (2). In addition, it is possible simply to reject the CISG without choosing an applicable law, where agreement between the parties becomes the basic rule. Namely, art 6 allows the parties not only to exclude the Convention but also "vary the effect" of its provisions.' Art 6 also enables parties to shape their own agreements according to their wishes. Practically, any rule of the Convention can be altered or rejected by the parties; further, by the Convention, the parties are given the freedom to derogate from the CISG, or from the rules provided for in their domestic legal system.¹⁰⁰

Indeed, it appears that one of the purposes of art 6 of the Convention is that it gives the parties absolute freedom to exclude the application of the convention, or derogate from or vary the effect of any of its provisions, by allowing the parties to exclude the convention entirely or partially (or, once again, derogate from its provisions). Moreover, it incorporates the principle of contractual freedom into its provisions as an essential principle; this may be attributed to art 6, which established one of the fundamental principles of the convention, namely, contractual freedom.¹⁰¹

It is noteworthy that art 6 is not the only provision to emphasize party autonomy. Article 19 further provides freedom to parties to negotiate the terms which would govern their

⁹⁷ Aytar, Gokhan. 'Party Autonomy, Choice of Law and Wrap Contracts' (Master thesis university of oslo 2012),6

⁹⁸ Thomas J. Drago, Esq. Alan F. Zoccolillo, Esq, 'Be Explicit: Drafting Choice of Law Clauses in International Sale of Goods Contracts' (2002) Pace Law School Institute of International Commercial Law , 17

⁹⁹ (n 55)

¹⁰⁰ Prof. Dr. Peter Schlechtriem, 'Uniform Sales Law - The UN-Convention on Contracts for the International Sale of Goods' (1986) Pace Law School Institute of International Commercial Law. Available At <http://cisgw3.law.pace.edu/cisg/biblio/slechtriem-06.html#b97>

¹⁰¹Ulrich Schroeter, 'Freedom of Contract: Comparison Between Provisions of the CISG (Article 6) and Counterpart Provisions of the PECL' (2002) 6 University of Mannheim - Faculty of Law 257-266

contract according to their intention, where art 19(1) stipulates: '*A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer*'¹⁰² and provides bargaining power to parties by letting them negotiate the terms of contract in line with their interest. Article 19, in fact, sets requirements to form the enforceable contract, where one party proposes his/her intention, while the other party gives consent to what has been proposed if he/she satisfies it, otherwise it is possible negotiate different terms.¹⁰³ Article 19 purports to give the parties absolute and unlimited power to agree and replace their own negotiations with each other.¹⁰⁴

It has been said that one of the greatest characteristics of the CISG is that it offers modern and flexible rules, and always allows for modification and/or exclusion. In this regard, Chief Justice Erle reported that, '*every man is the master of the contract he may choose to make: and it is of the highest importance that every contract should be construed according to the intention of the contracting parties*'.¹⁰⁵ Support for this principle is found in the CISG, where the CISG gives greater significance and encourages the principle of freedom of contract, as it allows parties to opt in and out of its standards or even choose the application of an utterly different legal system.¹⁰⁶

In this sense, those who drafted the convention clearly acknowledged its non-mandatory nature; as a result, party autonomy plays a crucial role in international commerce.¹⁰⁷ It can be understood that the CISG recognises that party autonomy is the essential principle.¹⁰⁸ It could even be said that it has adopted the freedom of contract principle, as well as giving express recognition which serves to protect this right in the international sale of goods.¹⁰⁹ Clearly, arts 6 and 19 together create a freedom of contract principle under the CISG: while art 19 extends absolute freedom to the parties in order to negotiate the terms of

¹⁰² CISG, Article 19

¹⁰³ (n 1) 5

¹⁰⁴ GERMANY Bundesgerichtshof [Federal Supreme Court] 9 January 2002, available online at <<http://cisgw3.law.pace.edu/cases/020109g1.html>>; [GERMANY Landgericht [Lower Court] Kehl 6 October 1995, available online at <<http://cisgw3.law.pace.edu/cases/951006g1.html>

¹⁰⁵ *Clarke v. Wilson* [1865] 144 Eng. Rep. 450

¹⁰⁶ *The Napoli* (1898) 15 T.L.R.at 264265

¹⁰⁷ Oberster Gerichtshof [Supreme Court], Austria, 21 March 2000, *Internationales Handelsrecht*, 2001, 41 available online at <http://cisgw3.law.pace.edu/cases/000321a3.html>. See Also Oberster Gerichtshof (Supreme Court) 15 October 1998 CLOUT case No. 240, Austria available online at <http://cisgw3.law.pace.edu/cases/981015a3.html>. See Also Landgericht [Regional Court] Stendal, Germany, 12 October 2000, *Internationales Handelsrecht*, 2001, p. 32 available online at <http://cisgw3.law.pace.edu/cisg/text/draft/001012case.html>.

¹⁰⁸ (n 6) 266

¹⁰⁹ *Ibid.* Also See CISG, art. 6

contract in line with their interests, art 6 gives the parties the freedom to reject the convention in its entirety or derogate from or vary the effect of any of its rules.

However, such a relationship between arts 19 and 6 should be aligned to an interventional relationship between arts 4 and 6 of the CISG, where art 6 purports to give to the parties an absolute and unlimited power to vary the effect of the Convention by their agreement; whereas, on the other hand, art 4 makes it clear that, in the absence of contrary provision, the CISG does not affect any rule of domestic law dealing with the "validity" of a contract provision. Reading them together, arts 6 and 4 create a tripartite hierarchy, together with domestic law provided in article 7, with validity at the top, the agreement of the parties in the middle, and the Convention at the bottom. The domestic law on validity continues to control the agreement of the parties, and both control the Convention.¹¹⁰

Nevertheless, art 7(2) of the CISG clearly shows that general principles can only be applied when issues are governed by the CISG but are not expressly settled by the CISG. Accordingly, it must ascertain whether or not a specific issue is governed by the CISG. Each case will have to be examined individually to ascertain whether or not art 7(2) of the CISG can be applied. Thus, if a matter is expressly outside the scope of application of the CISG, art 7(2) the CISG and the Convention's general principles must not be referred to. This means that issues concerning the passing of property of the goods sold or issues concerning the validity of the contract or of any of its provisions are beyond the reach of "gap-filling" under art 7(2). Put simply, this is because art 4(2) CISG expressly put this issue outside the scope of the Convention.¹¹¹

¹¹⁰ E. Allan Farnsworth [U.S.], Review of Standard Forms or Terms Under the Vienna Convention, 21 Cornell International Law Journal (1988) 439-447

¹¹¹ André Janssen and Sörren Claas Kiene, *The CISG and Its General Principles* (Sellier: Munich 2009) 267-285. See Also John O. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (3rd edition edn Kluwer Law International, 1999), 128

4.3.2 The issue of passing of property and party autonomy principle under the CISG:

By parties' choice of law

It is notable that the principle of party autonomy plays a significant role within the passing of property, where such issues will ultimately be referred to the domestic sales law. Such chosen applicable laws may lead to the inapplicability of the Convention under art 6. Despite this, the parties still have freedom to identify the time of the passing of property based on the principle of party autonomy; as pointed out previously, most legal systems if not all, allow for contractual autonomy between the parties to regulate their contract by determining the time at which the property passes from the seller to the buyer.¹¹² For instance, the property of goods will be passed at the time when the parties intend to pass, based on s17-1 of the SGA.

Moreover, the parties also have absolute freedom to determine the exact timing of the transfer of ownership by choosing an applicable law which is consistent with their interest, whether at the time of delivery or at the time of making the contract.

Party autonomy in an international sale of goods contract permits parties to choose the law of a particular country or sovereignty to govern their contract (where the contract involves two or more jurisdictions).¹¹³ It seems evident that the parties' freedom must be recognized when determining applicable law to which the parties are willing to be subject, through either a choice of law clause in the contract or the preference of the parties.¹¹⁴ Namely, they have to choose the law in order to signal whether they intend to pass the property at the time of delivery, or adopt the consent principle, i.e. if they intend to pass the property at the time of making the contract.

By parties' choice

¹¹² (n 6) 941

¹¹³ Willis Reese & Maurice Rosenberg, *Conflict of laws, cases and materials* 576–96 (8th ed. 1984). See also David McClean, Morris: *The conflict of laws* (5th ed. 2000) 4,5

¹¹⁴ Ole Lando, contracts, *International encyclopedia of comparative law* (3th ed kurt lipstein ed., 1971)

However, it is clear that, according to arts 6 and 19 of the CISG, that the domestic rules, whether the law chosen by the parties or according to private international law rules, is not the only remedy to determine the time of the passing property. In this sense, according to the articles mentioned above, the parties may exclude the convention's application entirely or partially or derogate from its provisions under art 6, in which case they have absolute freedom to negotiate the terms of contract and to determine the timing of the passing of property according to their intention and in line with their interests, under art 19 of the CISG.¹¹⁵

Indeed, the intention of the parties seems to be the crucial factor with respect to determining the timing of the transfer of property from the seller to the buyer. It was stated in *Koblenz* that the agreement would regulate property if the parties had reached an agreement. Therefore, according to the court, in the absence of the agreement and given the CISG's exclusion of the issue of the passing of property, the applicable law has to be determined by parties' intention, through conflict of laws rules.¹¹⁶ In other words, the party autonomy principle plays a significant role in such issues, where the parties have an absolute freedom to fill the gaps left by the CISG, including the freedom to choose the time when the property passes, whether in accordance to the principle of delivery, or the principle of consent, or even according to the intention of the parties, where the property may pass at the time intended by the parties.¹¹⁷

From the foregoing, it can be said that, although the Convention expressly excludes the issue of the transfer of property, by art 4 (2), in the sense that there are no default rules regarding the issue of transfer of property to derogate from it or vary its effect, nevertheless, according to arts 6 and 19, it is still possible for the parties, with or without a chosen applicable law, to fill in such gaps left open by the CISG and to determine the timing of the passing of property according to their own intention. This is simply because the freedom of contract principle exists in contract law, and no provision in the Convention prevents the parties from shaping the agreement according to their wishes/interests.

It could be understood that the legal basis of the CISG may signify that property in goods can be passed according to the intention of the parties, where the intention of the parties is the main factor in identifying the time of the passing of property. Consequently, property

¹¹⁵ (101)

¹¹⁶ Oberlandesgericht Koblenz, 16 January 1992, n. 5 U 534/91, in *Recht der Internationalen Wirtschaft* (1992)1019

¹¹⁷ S.17 SGA 1979. See also Art. 1583 c.c. (France, Belgium)

passes at such times as both parties agree for it to pass. Accordingly, it can be said that, although art 4(2) expressly excludes the issue of the transfer of property from the scope of the application of the convention, it seems that the CISG covered the issue of the passing of property by ensuring it was implicit in the party autonomy principle.

To summarise, the exclusion of the issue of the passing of property by art 4(2) left the remedy of such an issue open, and, in many cases, the remedies rely on the intention of the parties involved. Furthermore, arts 6 and 19 gave the parties an absolute freedom to identify the terms of their contract, including the ability to determine the time at which the property is transferred from the seller to the buyer. It is worth noting that, despite the basic idea of party autonomy, certain limits upon the party autonomy doctrine and the issue of appropriation must be taken into account.¹¹⁸ In the issue of appropriation, apart from the potential complications between party autonomy and the various interpretations on the timing of the passing of specific property under domestic laws, party autonomy may be further complicated by the passing of unascertained goods, where the goods have not yet to be appropriated. In other words, with the absence of any indication in the CISG regarding such an issue, the question which arises is whether the property could pass in such cases where the goods are unascertained, based on the intention of the parties? Unlike most domestic laws, including English law, which prevents the transfer of property from the seller to the buyer unless and until the goods are ascertained,¹¹⁹ the situation in the CISG seems to be different, in the sense that the domestic laws cover the passing of property in detail - including the issue of the passing of property in the case of unascertained goods but the CISG disregards this issue in its entirety.

¹¹⁸ Mo Zhang, 'Party autonomy and beyond: an international perspective of contractual choice of law' (2006) 20 *Emory International Law Review* 523. See Also Matthias Lehmann, 'Liberating the Individual from Battles between States: Justifying Party Autonomy in Conflict of Laws' (2008) 41:381 *Vanderbilt Journal Of Transnational Law* 384,402

¹¹⁹ S,16 SGA 1979

4.4 Conclusion

By undertaking a comparative analysis between English law and the CISG, it is clear that, as seen, the property of goods under English law passes from the seller to the buyer according to the intention of the parties or, in the absence of such intention, at the same time as the contract is made. The research undertaken in Chapter Three showed that the provision of s16 of SGA prevents the transfer of property from the seller to the buyer unless the goods are ascertained. Namely, it restricts the transfer of ownership and makes it only apply to ascertained goods, which appears to be a mandatory provision¹²⁰. In other words, English statutory law adopts the party autonomy principle as a basic rule, at the same time providing substitutional provision as exemplified in the principle of consent, while both principles are subject to the rule of s16 of SGA, where the goods must be ascertained.

However, the current chapter has demonstrated that the key distinction between English law and the CISG lies in the substitutional rule. In other words, while English law provides a substitutional rule, which applies in the case of absence of any indication regarding the intention between the parties with respect to the timing of the passing of property, the CISG expressly excludes this issue by art 4(2) and leaves the remedy of such issues wide open and depending upon the intention of the parties. Put simply, the CISG does not provide any substitutional or detailed provision to govern the issue of the passing of property, whether in relation to specified or unascertained goods. Conversely, on the issue of risk, it covers such issues and provides detailed provisions to govern the passing of risk whether in relation to specific or unascertained goods, as will be seen in arts 66 to 70, examined in Chapter Six, which provide explicit rules on the time of the passing of risk, stipulating that such risk does not pass to the buyer until the goods are clearly ascertained.

According to this logic it is possible for the parties to pass the property of unascertained goods, where they reject CISG, without any applicable law agreed with the parties to shape their own agreements according to their wishes.¹²¹ In short, there is no provision in the

¹²⁰ Paul Dobson, *Sale of Goods and Consumer Credit* (6th edn Sweet & Maxwell Limited, London UK 2000) ,37

¹²¹ GERMANY Bundesgerichtshof [Federal Supreme Court] 9 January 2002, available online at <<http://cisgw3.law.pace.edu/cases/020109g1.html>>] Also see [GERMANY Landgericht [Lower Court] Kehl

Convention which prevents the parties in the contract from agreeing to pass the property, even if the said goods are unascertained. This may be avoided by adoption of the principle of delivery, where the goods could be appropriated unconditionally through the act of delivery.¹²² On the other hand, it seems to be impossible to assume the passage of property in unascertained goods through the principle of consent or principle of intention of the parties; this is simply because the rules of domestic laws may prevent transfer of property from the seller to the buyer unless and until the goods are ascertained.

Thus, though the Convention and most domestic laws - including English law - come together with regard to the principle of party autonomy, they differ on the issue of the substitutional rule. In this sense, there seems to be no significant difference between the legal nature of the Convention and that of English law, where both have adopted the party autonomy principle in order to determine the time of the transfer of property. However, the difference lies in relation to the substitutional rule, where English law - and most other domestic laws - have incorporated such a rule in their provisions in order to avoid complications arising in relation to the passing of property in unascertained goods, as well as the cases where the parties' intention is absent.

Hence, the answers to such unresolved issues under the CISG seem to have to rely on the legal effects of the substitutional rule, or at least highlighting unascertained goods, as English law has done. Such difficulties could be avoided and the passing of property may be regulated under the Convention implicitly on the grounds that the principle of party autonomy is the basic rule allowing the property of goods to be transferred to the buyer at such time as the parties to the contract intend it to be transferred. In the absence of any such intention between the parties, conflict of law rules will be applied to determine the applicable rules, and consequently the timing of the passing of property will be determined in accordance with the rules of the applicable domestic law, which will revert to the delivery principle, the consent principle or even in accordance with the party autonomy principle as examined in this chapter.

It is important to determine if the property in the goods has passed to the buyers in their respective situations and with which party the risk is present. Therefore, it is necessary

6 October 1995, available online at <<http://cisgw3.law.pace.edu/cases/951006g1.html>. Also See Above Willis Reese & Maurice Rosenberg, *Conflict of laws, cases and materials* (8th ed. 1984) 576–96 ,747
¹²² (n 201). See Also. Benjamin Mahr, 'Is the Vienna Convention on international sale of goods too much influenced by civil law and should it contain a rule on the passing of property' (2004)(International Business law) 11, 24-25

Chapter 4

to discuss the issue of passing of risk along with the issue of passing of property, because of the close link between them.

Chapter 5 – Passing of risk under the English law

5.1 Introduction

The passing of property cannot be understood fully without considering the issue of the passing of risk in the property involved in the sale of goods contract. In a contract of sale, the exact time when the passing of risk takes place is very important to the parties under contract, because, in most cases, it determines who bears the consequences should there be any loss or damage. Generally, risk can be understood to describe the position of the party who bears the risk when goods are lost or damaged. In other words, when one party within the contract is discharged from having to perform his obligations, the other bears the risk. However, determining which party is bearing the risk, depends on knowing the actual timing of the passing of risk. Apparently, the general principle in English law is that the risk of accidental loss or damage falls on the owner of the goods, in the sense that the risk passes at the same time as the property. However, in special circumstances the SGA provides that risk does not always follow ownership directly, so that some other person besides the owner may have to cover the cost of accidental loss or damage.

Nevertheless, this rule can be modified, and passing of property and passing of risk may be separated by agreement between the parties. That means that passing of risk is a matter of intention. Under s20 (1), the goods remain at the seller's risk until property is transferred to the buyer. This rule applies irrespective of which party has possession of the goods. However, the general rule will not apply where the parties have agreed when risk should pass.¹ Based on this, further complications may arise in circumstances where the parties intend, explicitly or implicitly, to pass the risk before the property,² even if the goods remain unascertained, based on s.17 and s 20 (1), as will be discussed later.

5.2 The basic rule- “unless otherwise agreed” or “risk being passed with the property”?

Section 20 (1) of the SGA 1979 states: *Unless otherwise agreed, the goods remain at the seller's risk until the property in them is transferred to the buyer, but when the property in*

¹ S. 20 (1) SGA, 1979

² S.17 SGA, 1979

them is transferred to the buyer the goods are at the buyer's risk whether the delivery has been made or not. As a general rule, the *prima facie* risk of loss transfers with the property. Namely, if the goods are damaged or lost before the property has passed, the seller bears the risk. Following the same rule, the risk falls upon the buyer when the property passes, irrespective of whose actual possession the goods were in at the time.

In principle, as explained above, English law links the passing of risk to the passing of property. as provided in s20-1. However, the parties may, by agreement, separate the passing of risk from the passing of property and an argument departing from the general rule indicating that one party should bear the risk may be inferred from their transaction or by usage. Although risk can be transferred before or after the property changes hands, the goods must be specified or easily ascertained.³ In other words, if there is an agreement between the parties which stipulates that one of them is to bear the loss or damage of risk - even if he or she has no possession of the property⁴ (for example, in cases where the seller reserves the right of disposal) - the priority must be given to the terms of agreement.⁵

Thus, as with the questions examined in Chapters Three and Four, questions arise as to whether “unless otherwise agreed” or “risk being passed with the property” is the basic rule; i.e. why English law links the passing of risk to the passing of property, and why English law does not leave the timing in relation to the passing of risk to the parties involved.

In terms of the first question, the wordings of the SGA appear to be sufficiently wide and detailed, in the sense that, where there is an express or implied agreement that means one party is to bear the risk according to the agreement made between the parties, even though he has no property. In other words, the precedence undoubtedly must be given to the agreement. Nevertheless, in the absence of an agreed time in relation to the passing of risk, the general rule of s20-1 will be applied and the risk therefore passes with the property, namely, the risk of accidental loss or damage falls on the owner of the goods. This means the English statutory law adopts the principle of *res perit domino*. The rule of *res perit domino* is, in fact, generally an unbending rule of law, arising from the very nature of

³ *Benjamin's Sale of Goods*(8th Edition, Sweet & Maxwell, London ,2010),302

⁴ *Stock v Inglis* (1884) 12 qbd 564

⁵ Atiyah P S ,John N Adamss,Hector Macqueen, *Atiyah's Sale of goods*, (11th edition ,pearson education limited, 2005),324

property⁶. Thus, it could be understood that English law gives precedence to the intention of the parties over any other rule. This makes it more flexible with respect to the passing of risk. In addition, the term “unless otherwise agreed” is clearly expressed in s20.

Accordingly, the rule of *res perit domino* constitutes a general rule, but the intention of the parties remains the cornerstone regarding the timing in relation to the passing of risk. On the other hand, the lack of agreement between the parties on the timing of the passing of risk can be objectively interpreted as implying that the parties intend to follow s20-1 and to have the risk being passed at the same time as the passing of property- so their silence can be implicitly understood as an implied intention to pass the risk at the time as the passing of property.

The issue of the passing of risk, according to the provision of s20-1, appears to be linked to the rules of ss17 and 18 of the SGA.⁷ Put simply, when such rules govern the passing of property, so long as the risk follows, the property will be passed intuitively, according to the rules underpinning the passing of property. In analysis, it seems that s20 does not provide any new rule; it apparently refers the issue of timing in relation to the passing of risk to the rules on the passing of property contained in s17 and s18 of the SGA. This interpretation is evident in *Pignataro v Gilroy*,⁸ where the defendants sold 140 bags of rice to the plaintiff. The goods were unascertained by description, and the particular bags required to satisfy the contract were not then ascertained; the plaintiff was told that 125 bags would be delivered at Chambers' Wharf, and that the remaining 15 bags would be delivered to the defendants' place of business. The plaintiff sent a cheque to meet the price of the goods, and asked for a delivery order as arranged. On the following day, the defendants wrote to the plaintiff enclosing a delivery order for only 125 bags from Chambers' Wharf, and stating that the 15 bags were ready for delivery. However, the defendants failed to send the 15 bags, which had been stolen some time shortly before that agreed date of delivery. On the issue whether the property of 15 bags of rice became the property of the buyer, the court, relying on “risk being passed with the property”, found for the plaintiff upon the grounds that the subject-matter of the sale had involved unascertained goods and there was no evidence of appropriation by either party with the assent of the other, and that, consequently, the property had not passed to the plaintiff at the time of the loss. Hence, the seller bore the risk.

⁶ Ibid ,354.

⁷ Ibid.

⁸ *Pignataro v Gilroy*, [1919] 1 K.B. 459

However, Rowlatt J of the Divisional Court focused on the element of assent and stated that, under the above contract, it would be the duty of the sellers to appropriate the goods to the contract; and if such appropriation were assented to, expressly or impliedly by the buyer, the property would have passed. In the current case, the implied assent was considered by Rowlatt J. He pointed out that when the seller received the cheque for the goods and was asked for a delivery order it was right and proper for them to appropriate and place at the disposal of the buyer the goods for which he thus paid in order to effectuate a delivery or its equivalent concurrently with the receipt of the money. They did send a delivery order for the goods at Chambers' Wharf, and as to the 15 bags, told the plaintiff that they were ready, and asked that they should be taken away. It might well be contended that not only as regards the goods covered by the delivery order, but also as regards the goods at the defendants' own premises, which they told the plaintiff were ready to be taken away, there was an appropriation, to which, by asking for the delivery order, the plaintiff had assented in advance. Rowlatt J held that assent can be implied or expressed. The possibility of an implied assent was overlooked by the county court. As the assent can be implied, the 15 bags of rice were appropriated and the property passed to the buyer, thus the risk passed to the buyer as well.

It is not clear whether the judge reached his judgment on the grounds that the subject matter involved the sale of unascertained goods, and that, consequently, as the property had not passed to the buyer, nor had the risk. In contrast, applying the same provision, Rowlatt J reached a completely different conclusion and stated that: *'Under the above contract it would be the duty of the sellers to appropriate the goods to the contract; and if such appropriation were assented to, expressly or impliedly, by the buyer, the property would have passed when they received the cheque for the goods and were asked for a delivery order.'* It is noticeable that the subject matter in this case is who will bear the risk of stolen goods. However, the discussion was focused upon the question of whether the property has been passed or not according to the rules of passing of property, without discussing the question of the risk. This explains, without any doubt, that the issue of the passing of risk in s20 is based on and linked to the rules pertaining to the passing of property – that is, the rules detailed in s16, s17 and 18. Thus, while s20 ostensibly governs the process of passing of risk, an in-depth analysis reveals that the rules governing the issue of the passing of risk are the same rules as that governing the issue of the passing of property, as *Pignataro* has demonstrated.

Therefore, when Rowlatt J decided that the goods must be appropriated and assented by the buyer in order to pass the property, the risk is interpreted as being passed consequently. Corresponding with s16 of the SGA which prevents the transfer of property until the goods are ascertained, the risk will be passed simultaneously with property, where the passing of property occurred according to s17 and s18 of the SGA.

Practically, it seems that s20 is no more than just an illustrative article and refers to the rules of passing of property. In other words, it is only a presumptive one, so any statutory reform that links the risk without the property would yield modest improvements in practice.⁹ Critically, there is a distinction between the passing of property and the delivery of physical possession of goods. Therefore, the seller may be in possession of goods although the property and risk have passed to the buyer.¹⁰

It seems that the general rule of s20 is an unfair rule on the buyer because sometimes the buyer could bear the risk of goods and at the same time the seller is still at possession of them. However, one must understand that the general rule stated in s20-1 of the SGA 1979 should not be read alone and is subject to the qualifications contained in sub-ss (2) and (3), meaning that sub-sections (2) and (3) are really specific examples of the general principle that the passing of risk is to do with the allocation of the risk of damage which is not the fault of either party. It may modify subsection (1) and provide a balance between the parties. The most important example of this is where the risk is on one party, but the other party is in possession of the goods and fails to take good care of them. Accordingly, the party who is in possession of goods must take care of goods even when the property and risk have been passed to the other party. It is worth noting that the determination of risk can be different in the case of delayed delivery from what it would otherwise have been.¹¹

Although the general rule *res perit domino* is a *prima facie* rule; there seem certain cases and possibilities where risk may pass at a different time from the property. In other words, where it is expressed by “unless otherwise agreed”. It is therefore possible to make provisions in the contract of sale to determine that risk passes at a different time from the property. Undoubtedly, phrase “unless otherwise agreed” points to the party autonomy principle. Accordingly, it could be passed before or after the property has been passed,

⁹ Michael Bridge, *The Sale of Goods* (Second ed Oxford University Press, Oxford UK 2009),157

¹⁰ Paul Dobson & Rob Stokes. *Commercial Law*, (7th ed. Sweet & Maxwell Limited of Avenue Road, 2008)

¹¹ Professor Michael Furmston, *Principles of Commercial Law* (Second edition edn Cavendish Publishing Limited, London UK 2001),70

according to an agreement of the parties, as will be seen. Moreover, in some cases the risk may pass at a different time from the property, even in cases where there is no expressed or implied agreement.¹²

5.3 Exceptions to the Default Rule

In certain cases, exceptions from the general rule, where the risk may pass separately from the property, can be allowed to remain in the absence of any expressed or implied agreement between the parties. The risk however, may pass exceptionally to the general rule; this can be inferred by the authorities (court) from the circumstances of the case. Although English statutory law does not indicate that the risk may pass separately from the property in the absence of any expressed or implied agreement between the parties, it is clear that the principle has been adopted in the common law.

5.3.1 Buyer's immediate right and interest may overwrite the default rule and assent – risk may pass before the passing of property

In common law, the risk may pass before or after the property has passed, according to various cases involving the effects of immediate interest. In the case of *Sterns V. Vickers*,¹³ the defendants sold the plaintiffs 120,000 gallons of white spirit, which was part of a larger quantity then lying in a certain tank belonging to a storage company. They and later handed the buyers a delivery warrant, in which the company undertook to deliver that quantity of the spirit according to the buyer's order. Subsequent to the buyer's acceptance of that warrant and before the quantity purchased had been separated from the bulk, the spirit in the tank deteriorated in quality. It was determined that the property did not pass, on the grounds that the goods were still unascertained goods.

Shearman J decided that the goods were still unascertained goods and so long as the property did not pass to the buyer, then the risk supposed to be borne by the seller. Obviously, the grounds of this judgment in relation to the passing of property accords with the general rule relating to the passing of risk. In fact, according to the general rule in relation to the passing of risk, the questions to be discussed in the present case are whether

¹² Ibid ,69.

¹³ *Sterns V. Vickers* [1923] 1 K.B. 78

the property in the undivided portion of the larger bulk had been passed to the buyer and whether there was any agreement between the parties regarding the passing of risk?

It is clear that there was no evidence of any such agreement in this case. The goods remained unascertained and the buyer did not wish to take delivery at that time, but made his own arrangements for further storage with the company, and paid them storage rent. Having left the spirit in storage for some months, he subsequently found that the spirit in the tank had deteriorated in quality. Based on s20 -2 in the SGA, no property had passed to the buyer, hence it could be assumed no risk had passed.

Nevertheless, the judgement of Shearman J. was reversed by the Court of Appeal, which found that the risk had passed to the buyers, and the loss must be borne by them. Such a view was subsequently upheld by the House of Lords. Lord Normand stated that the risk was actually passed to the buyer without the property, due to the fact that the buyers indirectly paid for the storage rent and this meant they had an immediate interest in it. The action of paying for the storage acted as the catalyst to allow the buyers rather than the seller a practical and immediate interest in the goods. Thus, the acceptance of the delivery warranty by the buyer in the present case was regarded as the crucial factor, since it was this that gave the buyer an immediate right and interest to the possession of the goods even though the property had not yet passed.¹⁴ It is clear that the Court of Appeal relied on the acceptance of the delivery warranty by the buyer, stating that as the buyer had accepted the delivery warranty he was bound to take reasonable care of the goods or bear the risk.

However, acceptance of the delivery warrant and possession by the buyer cannot be considered as actual delivery in all circumstances, because it would mean that the property passed to the buyer on the grounds that the goods became ascertained goods by action of delivery; as we have seen, risk would pass as well. However, the court did not address this issue but relied upon acceptance of the delivery warranty as an exceptional circumstance in the passing of risk before the property.

¹⁴ (n 4)

5.3.2 Seller's absolute warranty may overwrite the default rule and assent – risk may pass after the passing of property

From the foregoing analysis, it can be observed that the risk may pass before the property, regardless of whether the goods are specific or unascertained. Indeed, as it is difficult to see how the goods remain at the buyers' risk when he has neither the property nor possession,¹⁵ similarly, it is not easy to imagine circumstances in which the risk remains with the seller after the property has passed to the buyer in the absence of an expressed agreement relating to the passing of risk.¹⁶ s20 states that the risk *prima facie* passes at the same time as the property; consequently, according to the general rule, the buyer would bear the loss of risk which occurred before he disapproved them.¹⁷

Nevertheless, the common law provided a different opinion, where the risk could pass after the property, which can be seen in *Head v Tattersall*.¹⁸ The contract of sale stated that the horse was warranted to have been hunted with the Bicester hounds, and that if it did not answer to its description the buyer should be at liberty to return it by the evening of a specified date. The horse did not answer to its description, as it had never hunted with the Bicester hounds. It was returned by the date named and the court found that the buyer was induced by the warranty to buy the horse, and that the injury sustained by the horse was not caused through any negligence or default of the buyer's servant. Obviously, the property of the horse has been passed to the buyer, without any express agreement related to the passing of risk. This means that the risk should be passed as well, according to the general rule; however, in this case, the court held that the risk must be borne by the seller.

According to the court, the seller warranted the goods, which gives the buyer the right to return the horse, according to the subsequent condition in the contract. In the contract, there was an express condition in the contract giving the buyer an absolute right, under certain circumstances, to return the horse. Therefore, the buyer was entitled to recover the costs, while the seller must therefore bear the loss.

¹⁵ *Comptoir d'Achat et de Vente du Boerenbond Belge S/A v. Luis de Ridder Limitada (The Julia)*, 1949 A.C. 293 (1949)

¹⁶ (n 3)365

¹⁷ *Ibid* ,307.

¹⁸ *Head v Tattersall. (1871-72) L.R. 7 Ex. 7*

In this case, the seller's warranty, in the form of an express condition in the contract, gave the buyer an absolute right to return the horse. Because of this absolute right, the court held that the risk did not pass to the buyer until he was satisfied with the fulfilment of the warranty. Accordingly, there is no doubt that the seller had accepted to bear liability for the horse if it did not answer to its description, and that could be understood as an implied agreement between the parties that the seller would be liable to bear all the consequences of the contract of sale, including the risk. In other words, the warrant note serves as an implied agreement in risk passing.

The researcher agrees that it was logical for the court to hold that the risk did not pass to the buyer, according to the fact of existing agreement between the parties. In support of that, the Scottish Law Commission reported that the common law provides that such risk passes to the buyer at the date when there is a binding contract for sale (when the buyer is satisfied with the goods) and not when he acquires ownership of the property, which might take place at a future time.¹⁹

Although both *Vickers* and *Tatterall* reached the same conclusion, namely, that the risk passes at a different time from the property, *Vickers* adopted the principle that acceptance of the delivery warranty by the buyer was evidence of the passing of risk, while *Tattersall* adopted the circumstance of the risk of warranted goods to be revisited, and held that the risk remains with the seller even if the property has passed to the buyer. Indeed, *Vickers* concluded that the risk passed to the buyer before the property, when he accepted the delivery warranty. In other words, the buyer would assume the risk even when the property had not been passed due to the goods being unascertained.

Some problems which arose in this case are closely related to the difficulties arising with respect to the passing of property; namely, the assumption that the sale of goods in this case involved the sale of unidentified parts of an identified bulk. This issue was addressed in the Sale of Goods (Amendment) Act 1995, which allows the property in an unidentified part of an identified bulk to be passed to the buyer who has paid for some or all of goods forming part of an identified bulk. In fact, in the sale of an unidentified part of an identified bulk, it can never be held that the risk passes before the property in the sale of such

¹⁹ Scottish Law Commission (Scot Law Corn No 127)

unascertained goods, otherwise the passing of property and therefore, passing of risk, is still governed by s18 Rule 5 as discussed earlier.²⁰

The timing in these cases may also shed light on the discrepancy between the common law rules and s20-1 of the SGA. In the case of *Vickers*, where it was held that the risk (without the property) had passed to the buyer, it was because the buyer rather than the seller was seen to have an immediate and practical interest in the goods; as, for example, when he had an immediate right under the storekeeper's delivery warrant to the delivery of a portion of an undivided bulk in the store, or an immediate right under several contracts with different persons to the whole of a bulk not yet appropriated to the several contracts. The same conclusion must be drawn by English law, but on a different basis, which is the passing of risk with property, according to s20 and s20A, which may be referred to the fact that the case occurred before the promulgation of that act. However, in *Tattersall* the property passed while the risk remained with the seller, on the grounds that the warranty of goods by the seller was an express condition – thus the same conclusion was drawn in English law but on a different basis, which is that risk can pass according to the implied agreement between the parties, because they have an absolute right to agree and determine the time when the risk will pass.

5.4 Intention of the parties to pass the risk and the legal nature of the rule of *res perit domino* principle under the SGA

It is important to understand the basic rules which govern the process surrounding the passing of risk from the seller to the buyer in a transaction. It seems that the English statutory law adopts the principle of *res perit domino* with regards to the time in which transfer of risk takes place. Consequently, as general rule, the *prima facie* risk of loss transfers with the property. Namely, if the goods are damaged or lost before the property has passed, the seller bears the risk and *vice versa*.

However, the point which should be discussed is relevant to the term of '*unless otherwise agreed*' set out in s20 of the SGA. The concept of '*unless otherwise agreed*' actually means that the parties within the contract have an absolute right to agree upon the time in which the passing of risk takes place.

²⁰ (n 3)354

Accordingly, it can be observed that the passing of risk may be governed by more than one rule: according to these criteria, English statutory law appears to be a mixed system, and one which does not strictly follow the *res perit domino* rule. As already pointed out, it appears that the risk could pass with the property at that point when the property passes to the buyer, or at a different time, according to the agreement existing between the parties. With an express or implied agreement otherwise than the basic rule, one party may bear the risk according to the agreement, even though the property is not in their possession. In the absence of such an agreement determining the time in relation to the passing of risk, the rule of s20-2 will be applied and the risk therefore passes with the property. However, the question which arises in this context is whether any of these rules represent the general and basic rule. Put another way, which of them is the principle and which the exception?

The difference is, in fact, clear regarding the basic rule surrounding the passing of risk. It has been noted that the basic rule is that the owner of the property bears the risk, according to s20-2 of the SGA, *res perit domino*; the presumption, therefore, is that the risk and property pass together.²¹ However, others have relied on the same section but reached a different conclusion, when they said that the basic rule is that the risk passes at the time agreed upon by the parties, where the parties may agree to separate the passing of risk from the passing of property, s20-1 of the SGA 1979.²²

In more detail, s20-2 of the SGA 1979 connects risk with passing of property.²³ If the sale does not involve carriage of goods, risk may be summarized according to the rules of passing of property, where property passes then the risk will pass at the same time.

Nevertheless, the situation will be different according to part one of s20-1, (*unless otherwise agreed*) where the parties agree to pass the risk at different time. In other words, in a shipment contracts such as in CIF contracts risk may pass on shipment or as from shipment and is commonly separated from property, as property may not pass before

²¹ Benjamin's *Sale of Goods* (8th Edition edn Sweet & Maxwell, London 2010). P302. See also, Fidelma White & Robert Bradgate, *Commercial Law* (Blackstone Legal Practice Course Guide) (Oxford University Press, Oxford UK OX2 6DP 2007)P180. Also see Andreas Alsterberg 'Transfer of risk In sale of goods on shipment terms' (2006/2007)(Maritime Law) 18

²² Prof. Tetley, William, Q.C. *Sale of Goods-The Passing of Title and Risk*. Faculty of Law McGill University. See also Dionysios Flambouras, 'Transfer of Risk in the Contract of Sale involving Carriage of Goods: A Comparative Study in English, Greek Law and the United Nations Convention on Contracts for the International Sale of Goods' ((2001)) VI 87-149. Number 39

²³ *Martineau v Kitching*(1872) LR 7 QB 436, 456

appropriation and in many cases appropriation takes place on dispatch of notice of appropriation or on arrival of the ship²⁴ or may pass on tender of the shipping documents.

Moreover, the rule that risk in transit loss in shipment sales passes on or as from shipment according to intention of the parties, appears to allow the seller to pass the risk in goods which have been lost or damaged before property passes²⁵. Similarly, in FOB contracts property is separated from risk. Then the risk will be passed according to intention of the parties, separately from property.²⁶

Although both opinions rely upon the same section, they differ with respect to determining the basic rule relating to the passing of risk. The first view relies on the second part of s20, which provides that *goods remain at the seller's risk until the property in them is transferred to the buyer, but when the property in them is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not*. Namely, this view adopts the rule of *res perit domino*, where the risk passes with the property. On the other hand, the first part of s20 also states *unless otherwise agreed*, which can then be interpreted as a principle and assumed as basic rule in which the parties can agree when the risk shall pass. They have the absolute right to select the time when the risk passes; and this could occur before or after the time at which the property passes.²⁷

Atiyah maintains that, if there is an express agreement that one party is to bear the risk, even though he has no property, the effect must undoubtedly be given to the agreement, but in the absence of such an express contract the rule *res perit domino*, generally speaking, is an unbending rule of law arising from the very nature of property. Thus, there is nothing peculiar about separating the transfer of risk from the transfer of property.²⁸ Actually, the intention of the parties appears clearly where the parties intend to pass the risk of goods at a particular time; thus, the parties can separate the passing of risk and property.

²⁴ *Benjamin's Sale of Goods*, 5th Edn., Sweet and Maxwell, (1997), 19-082

²⁵ Debattista, Charles. *The Sale of Goods Carried by Sea*. (Second ed. London : Butterworths. 1998) ,74

²⁶ Dionysios Flambouras, "Transfer of Risk in the Contract of Sale involving Carriage of Goods: A Comparative Study in English, Greek Law and the United Nations Convention on Contracts for the International Sale of Goods " ((2001)) VI 87-149. <http://www.law.pace.edu/cisg/biblio>

²⁷ Paul Dobson, *Sale of Goods and Consumer Credit* (6th edn Sweet & Maxwell Limited, London UK 2000),45

²⁸ P.S. Atiyah, John N. Adams; with sections on Scots law by Hector MacQueen, *Atiyah's Sale of goods*, (Harlow: Longman, Twelfth edition 2010),343

The link between risk and property under English statutory law applies unless the parties agree otherwise. Therefore, the second part of s20 of SGA cannot apply to the sales contracts on shipment terms, where the parties of the contract are contracting autonomously and make special provisions in their contract whereby a risk may pass separately from the property.²⁹ Certainly, where the parties agree that the risk passes to the buyer on shipment contracts, the priority will be given to the intention of the parties, and the risk will be supposed to have been passed according to their agreement, and then the buyer would bear the risk of any loss or damage which precedes the contract under which he bought the goods.

In other words, where the goods are sold on shipment terms and are lost or damaged after shipment but before property in identifiable goods passes to a particular buyer through ascertainment and appropriation, the rule in shipment sales would appear to put the risk of transit loss or damage onto the buyer, who would need to look elsewhere for his remedy, if any, for such loss or damage.³⁰

In practice, this can be seen clearly in the case of *Inglis v. Stock*,³¹ where the seller agreed to sell 200 tons of sugar of a certain description to the plaintiff, to be shipped from Hamburg to Bristol on a FOB basis, and also made a similar contract for the sale of sugar to another Bristol merchant. Forwarding agents at Hamburg shipped about 400 tons of sugar of the description contracted for in 3900 bags, and consigned the same to “order Bristol”. The plaintiff did not appropriate specific bags of sugar to any particular contract at the time of shipment. Later, the entire consignment was lost during the voyage, before the goods became appropriated, and the buyer shouldered the risk under the terms of FOB.

Reviewing this decision, it is worth noting that, had the contract been for specific goods, no issue would have arisen, because the property would be supposed to have passed, which would mean the risk had passed as well. However, as the goods were unascertained, the property could not have passed by the time the damage occurred. It is clear that the passing of property was postponed because the cargo was part of unascertained goods.

In analysis, the goods remain unascertained, which means that the property did not pass to the buyer. Consequently, according to the *res perit domino* rule of s20 of the SGA, it can

²⁹ (n 26)

³⁰ Andreas Alsterberg, 'Transfer of risk In sale of goods on shipment terms' (2006/2007)(Maritime Law) ,20

³¹ (n 4)

be assumed that the risk did not pass to the buyer as either, on the basis that the property and risk should pass at the same time. However, in the present case the court ruled that the risk had been passed to the buyer before the property; it is clear, however, that such a judgment does not comply with the rule of *res perit domino*, where the risk passes with the property. Nevertheless, it does comply with the rule of part one of s20 of SGA which states *unless otherwise agreed*, with the intention of the parties to pass the risk from shipment even if the property has not passed.

In other words, the choice of employing an ordinary FOB contract can be seen as a case of “*unless otherwise agreed*”, as the parties make special provisions in their contract whereby a risk may pass on shipment. Thus, regardless of whether the property has passed to the buyer or not, a seller would not be responsible for any damages or losses after delivering the goods over a ship’s rail in such a type of shipping contract.

From the previous analysis, it would appear that the court gave effect to the parties’ intention where they agreed to pass the risk on shipment according to the FOB terms. The parties’ intention supersedes any other rules, such as *res perit domino*, since it could be viewed as the basic rule in relation to the passing of risk under FOB contract. Moreover, according to any agreement between the parties, risk can clearly pass before the property, where the goods are specific or ascertained. Therefore, in principle, goods should be ascertained before risk passes.

However, such a principle may not be necessarily the case. In certain situations, the risk for goods not yet separated from bulk may be passed notwithstanding that the property is still vested in the seller.³² In this sense, despite an ordinary CIF contract, risk passes on shipment to the buyer when property in them passed, or as from shipment. This rule indicates two different methods of passing of risk under the CIF contract. The first one is that, when the seller has completed his contractual duty on CIF terms and delivered the goods on board the vessel, and then risk passes to the buyer on shipment. The second one is that the seller bought the goods which are already afloat; on this ground, he can make the goods subject of the contract with the buyer, in which case the risk passed “as from

³² Benjamin's *Sale of Goods* (6th Edition edn Sweet & Maxwell, London 2002),272,273

shipment.” In this sense, it can be said that risk passed before the shipment, because of the intention of the parties.³³

The issue arising in this context is whether the parties agreed that the risk would be passed to the buyer before the property, presuming that the goods are specific goods, or sufficiently identifiable as those to which the risk relates, or, if they were for the sale of unascertained goods, that the goods should become ascertained before the risk passes. However, such a presumption is not necessarily the case, because the risk in goods not yet ascertained or separated from bulk may be passed to the buyer, despite the property in the goods still resting with the seller.³⁴

This can be seen in *Sterns v. Vickers*³⁵ where the goods remained unascertained and the Court of Appeal held that whether the property in the undivided portion of the larger bulk had passed or not upon the acceptance of the delivery warrant, the risk had passed to the buyers, and thus the loss must be borne by them. According to this view, the buyer bears the risk for goods according to the implied agreement between the parties at the point when the buyer accepts the delivery note.³⁶

It appears that the relationship between parts one and two of s20 with regard to determining the timing of the passing of risk, is one of the relationship between a basic rule and an exception. Put simply, where the parties agree to pass the risk at a particular time, the precedence of an enforcement will be given for the intention of the parties; the risk will then be passed at an agreed time, regardless of whether the property has been passed or not. In other words, where the parties agree to pass the risk at a particular time, the risk must pass in accordance with the agreement; otherwise the risk will pass with the property, according to part two of s20 of the SGA (*res perit domino*). This means the intention of the parties with regard to the passing of risk plays a significant role in terms of defining the moment when the passing of risk takes place.

In the application of the principle of “*unless otherwise agreed*”, it is possible to say that the intention of the parties “to agree otherwise”, where they agree to pass the risk in a

³³ Zorlu Ramazan , The main differences between CIF and FOB contracts under English law,6, Available at http://www.akellawfirm.com/yayinlar/THE_MAIN_DIFFERENCES_BETWEEN_CIF_AND_FOB_CONTRACTS_UNDER_ENGLISH_LAW.pdf. See also, *Wiebe v Dennis Bros* [1913] 29 TLR. 250

³⁴ (n 3)303

³⁵ (13)

³⁶ (n26)

different way from that stipulated in part two of s.20 -1, is the basic rule underpinning the passing of risk, so long as the parties agree to pass the risk separately from the property. On the other hand, in the absence of any expressed or implied agreement between the parties with respect to the passing of risk separately from property, *prima facie* the risk will be passed with the property under *res perit domino*, according to part two of s20-1.³⁷

In cases where the parties intend to pass the risk with the property, whether by expressed or implied agreement, the risk is transferred with the property where the property passes according to s17 and s18 of the SGA. In this sense, the passing of risk is linked to the passing of property. Furthermore, the issue of the intention of the parties to pass the property according to s.17 and S.18 may play a multiple role, including issues relating to the passing of property and risk simultaneously.

In other words, where by an express or implied agreement the parties' intention is to pass the property at a particular time, this agreement will govern the issue relating to the passing of risk as well, and the risk will be passed at the agreed time. Thus, it can be seen that the actual time at which the risk passes may be based on the issue of determining whether the passing of property occurs according to s17 or s18. Thus the risk and the property will pass at the same time according to an agreement regarding the passing of property, where the rule of *res perit domino* will be implied, although the passing of risk is not made explicit in such an agreement.

It may be difficult to determine whether the intention of the parties is the basic rule or not. However, from the previous analysis, it seems that the English law offers a system which is governed by the rule that the risk passes when the contracting parties intend for it to pass. If, however, the intention of the parties is being overlooked by the parties, the court will resort to other criteria to supplement the parties' intention with a default rule, such as *res perit domino*.³⁸ Considering that the principle of precedence is a standard in determining the basic rule (namely, the basic rule is the applicable principle which must be taken into consideration over all other rules) *Stock* clearly demonstrates that the court gave priority in the application to the agreement between the parties over all other rules and placed the risk on the buyer as occurring from the shipment. In other words, the agreement between the parties was the basic principle; however, in the absence of such an agreement, other rules, such as *res perit domino* rule, will be applied.

³⁷ Sale of Goods Act 1979

³⁸ (n 26)

Giving priority to an agreement between the parties may refer to the principle of the freedom of parties to contract and create the terms of their agreement as they desire (party autonomy principle), in which case the parties have an absolute right to create the terms of the contract according to their intention. Although English statutory law does not mention it expressly, it has been indicated that the intention of the parties with regard to the passing of risk takes precedence over the *res perit domino* rule, and might even be adopted within the English law rules.³⁹

From the foregoing, it can be concluded that the priority in the performance is always given to the agreement of the parties. In other words, intention between the parties has the priority; which is the basic rule with regards to the passing of risk; and the *res perit domino* rule is the default rule in the absence of parties' intention.

5.5 Passing of risk in relation to specific and unascertained goods

In general, English statutory law distinguishes between specific and unascertained goods with regard to the issue of timing in relation to the passing of property. As examined in Chapter Three, s16 of the SGA points out that, in a contract for the sale of specific goods, the property passes at the time the contract is made, or when the parties intend it to pass, according to s17 of the SGA. Furthermore, if no time is specified for the passing of the property, s18 provides rules for ascertaining when the goods becomes specific goods and the parties' intention has been ascertained. This means that where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained. From this we can conclude that there is distinction between specific and unascertained goods with regard to timing in the passing of property, and thus the timing in relation to the passing of property will differ depending on whether the goods are specific or unascertained goods.

However, in s 20-1 SGA, which states that *Unless otherwise agreed, the goods remain at the seller's risk until the property in them is transferred to the buyer, but when the property in them is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not*, there is no indication of an issue relating to the passing of risk with

³⁹ S 20 (1) SGA 1979

regard to whether the goods are specific or unascertained. It would appear that there is no problem regarding part two, where the risk passes at the same time as the property, because timing in relation to the passing of risk would be subject to the passing of property in the case of specific goods; consequently, no property would be transferred to the buyer unless and until the goods were ascertained. For example, in a FOB contract, where the property can be passed even though the goods are still in transit, this means if the goods already ascertained then the risk will be passed at the same time as the property, based on the terms of a FOB contract, where the property and risk are passes from shipment in the case where the goods are ascertained.

5.5.1 Unless otherwise agreed

As with other aspects of these laws, the difficulty lies in the phrase '*unless otherwise agreed*' set out in part one of s20 of SGA. It is clear that where there is an express or implied agreement one party will bear the risk according to the agreement, even though they have no property, and regardless of whether he/she is in possession of goods. Accordingly, when the parties intend to pass the risk at a specific time, the risk may pass separately, that is, before or after the property. Where the parties intend to pass the risk separately, i.e. before or after property, it is clear and logical that the goods must be sufficiently identifiable as those to which the risk relates. It might therefore be assumed that the contract must be one for the sale of specific goods, or if it was one for the sale of unascertained goods, the goods should have become ascertained before the risk could pass.⁴⁰

Nevertheless, despite the existence of an English statutory law, there is no provision highlighting the passing of risk with regard to whether the goods are specific or unascertained; it appears that the goods must be sufficiently identifiable as those to which the risk relates. The identity of the goods to which the risk relates, seems to be an implied standard in the issue of determining the passing of risk, as will be seen. Therefore, in the contract of a sale of specific goods, the risk could be passed from the seller to the buyer separately, before or after property, especially in cases involving the passing of risk after property, as this indicates clearly that the goods are specific goods, because according to s16 of the SGA no property in the goods is transferred to the buyer unless and until the

⁴⁰ Benjamin's *Sale of Goods* (8th Edition edn Sweet & Maxwell, London 2010),303. See also Aedit Abdullah "Issues in the Tranfer of Risk in CIF Contracts." Sing. L. Rev. 14 (1993),151

goods are ascertained. It appears that there is no difficulty with passing risk separately in accordance with the intention of the parties involved, whether before or after property, so long as the contract is for the sale of specific goods. The germane question relates to unascertained goods, where the parties intend to pass the risk before the property, by reason of whether the goods are still unascertained or where the seller reserves the right of disposal: do the same rules apply?

5.5.2 Passing of risk in unascertained goods

English statutory law adopts the principle of *res perit domino*, where the risk passes at the same time as the property, or when the parties intend and agree to pass the risk at the same time as the property. However, this can occur only in the circumstance of ascertained goods and not in the circumstance of unascertained goods.

In support of that, Benjamin states that the goods must be sufficiently identifiable as those to which the risk relates and points out that the contract must be one for the sale of specific goods⁴¹. Presumably, if the contract is for the sale of unascertained goods, that means goods should have been ascertained before the risk passes.

Accordingly, it seems to be difficult or even impossible according to part two of s20-1 of the SGA, to comprehend that, where the goods are unascertained, the risk could transfer at the same time in which the property passes. This is because s16 of the SGA prevents the transfer of property from the seller to the buyer unless and until the goods are ascertained; consequently, no risk passes so long as the risk is linked to the property. On the other hand, with regard to the passing of risk after the passing of property, clearly there is no problem, because it is logical that the risk passes after the property when the property has already passed, which means it is inevitably specific goods.

However a further question which is most likely to arise in such circumstances is whether the risk can pass before the property in relation to unascertained goods?

⁴¹ Ibid.

5.6 The possibility of the passing of risk before the passing of property

Without a clear provision, it seems to be the case that an argument may be restricted in relation to the passing of risk before the property, where the goods are unascertained goods. This may occur in circumstances where the parties intend, explicitly or implicitly, to pass the risk before the property, even if the goods remain unascertained, or alternatively, when the seller reserves the right of disposal. Furthermore, in CIF contracts, the position will be different, for it is “otherwise agreed”. Property does not usually pass until tender of documents, which usually occurs after the goods have been shipped. The rule is that risk is to pass on shipment or as from shipment.⁴² Accordingly, risk is thus separated from property and could be passed before property being passed regardless the goods are specific or unascertained goods.

In fact, as we have noted, there is no expressed provision in English statutory law which prevents the parties in the contract from agreeing to pass the risk before the property, even if the goods are unascertained. Accordingly, under party autonomy and English law, risk may theoretically pass on shipment without identification being necessary.⁴³ However, we could assume that the *prima facie* and general standard of the English law is the sufficiently identifiable goods which the risk relates, and the contract must then be one for the sale of specific goods. As a result, it is illogical to rely upon such standards, due to the fact that they are impossible to apply, because the goods remain unascertained and are not sufficiently identifiable as those to which the risk relates (unknown goods). Accordingly, the risk could be said not be able to be passed before the property in relation to unascertained goods.

On the face of it, this conclusion appears to be in conflict with *Inglis v Stock*.⁴⁴ However, the situation was different in *Inglis v. Stock*, where the goods were unascertained; hence, the property could not have passed by the time the damage occurred; however, the court held that the buyer had responsibility for the risk of the goods from the moment of shipment, under the terms of FOB. It was noteworthy that the courts held that the buyer was at risk even though the goods were unascertained. Actually, if a contract had been for

⁴² (n 15) 309

⁴³ (n 26.)211

⁴⁴ (n 4)

specific goods, no issue would have arisen, but the goods were unascertained and therefore the property could not have passed by the time the damage occurred, according to the standard of sufficiently identifiable goods of which the risk relates and *res perit domino*. Consequently, it would be assumed that the risk did not pass to the buyer as well. Nevertheless, in the current case, the risk passed to the buyer separately, before property, and before the goods became appropriated. The agreement of the parties is the basic rule in the passing of risk under an FOB contract, where they agree to pass the risk from shipment and furthermore, property supposed to be passed at such time, but the paradox in the current case is that the court held that property had not passed by the time the damage occurred. Similarly, this can be seen in the case of *Sterns v. Vickers*⁴⁵ where the goods remained unascertained and the Court of Appeal held that the risk had passed to the buyers upon the acceptance of the delivery warrant, even though no property had passed.

In both cases the risk was held to have passed before the property. However, the difficulty in relation to ascertaining which unproportioned goods are at the buyer's risk is highlighted by Dobson. Dobson is of the view that, presumably, it would be decided by the proportionality standard (*pro rata*).⁴⁶ This can clearly be seen in the *Sterns* case, where the buyer should bear the risk of 120,000 from 200,000 gallons, which presumably would be on a *pro rata* basis, where the buyer would bear $120,000/200,000=3/5$ of the loss.⁴⁷ Indeed, this is possible, as in current cases where the contracts are for the sale of unascertained goods out of a specified bulk. It is possible to identify the bulk, calculate the total loss and ensure the buyer bears a proportion according to his share of the bulk. However, the author is of the opinion that this could not occur where the contract of sale concerns the sale of purely generic goods, because it would be impossible to identify those goods which were at the buyer's risk. It follows that it would therefore be impossible to identify any goods which were *pro rata* at his risk. As a result, it is impossible for the risk to pass.⁴⁸

This view is supported by the amendment introduced by s20A of Sale of Goods (Amendment) Act 1995 which points out that, property in an undivided share in the bulk is transferred to the buyer, and the buyer becomes an owner in common of the bulk and the goods at the buyer's risk on a *pro rata* basis.⁴⁹ Nevertheless, the *pro rata* solution has been

⁴⁵ (n 13)

⁴⁶ (n27)46

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ *Martineau v. Kitching (1872) L.R. 7 Q.B 436, 453-454.*

criticised, especially in large bulk commodity shipments where part of the cargo had deteriorated, as it would be inefficient and result in time consuming litigation. It would work only if the seller has not clearly appropriated or the carrier had not delivered the goods to a particular buyer.⁵⁰

Critical analysis shows that risk in a specified quantity of unascertained goods, according to the Sale of Goods (Amendment) Act 1995, will be passed simultaneously with the property, where the Act allows the property to pass in relation to such goods. However, it has been noted that the risk would pass when the property passes, namely, the act seems link the passing of risk to the passing of property. In fact, the Sale of Goods (Amendment) Act 1995 mentions property instead of risk. There is no indication of the passing of risk separate from property, whether the goods are unascertained or of an unspecified quantity. Nevertheless, the difficulty of passing risk in relation to a specified quantity of unascertained goods seems to have been solved, in the sense that, where property can be passed, the risk could be passed as well. However, issues can still arise where the parties intend to pass the risk separately, before the property, if the goods are unascertained or relate to a specified quantity of unascertained goods, as will be seen.

5.6.1 Should risk be linked to the passing of property or to the situation of the goods?

According to the discussion in the previous section, the issue of the passing of risk in unascertained goods remains debatable. In other words, although the statute does not mention unspecified goods, the negative interpretation of the provision can mean that the risk cannot pass until they are specified as, neither the SGA 1979, nor the Sale of Goods (Amendment) Act 1995 specifically deal with the passing of risk in relation to unascertained goods. Nevertheless, both are linked to the issue of the passing of risk to the passing of property, in that the property is never to pass until goods are specific goods, in SGA 1979, or a specified quantity of unascertained goods, in the Sale of Goods (Amendment) Act 1995.

⁵⁰ (n24)246

Thus the question is whether English statutory law prevents the transfer of risk in relation to unascertained goods, or is restricted merely to the passing of property in cases where the goods are undivided shares in goods forming part of a bulk, according to the conditions set out in s20A. In particular, unlike property, risk can pass before the goods have been ascertained, at any rate, where the goods form part of a larger, but identified, bulk. In most FOB contracts, risk may pass on shipment, regardless of whether property passes at that stage; and this is so even where the goods have been shipped in unsegregated parcels,⁵¹ as *Stock* clearly demonstrates the influence of parties' choice of FOB contract on the interpretation of the passing of risk.

In fact, this leads us back to the previous argument regarding intention of the parties to pass the risk and the legal nature of the rule of *res perit domino*. With an intertwined relationship between the parties' intention and the general rule on the passing of risk, a difficulty may arise whether the precedence should be given to the intention of the parties.⁵² In other words, assuming the parties agree to transfer the risk regardless of the situation of the goods, whether they are ascertained or unascertained, and precedence is given to their intention, the risk will be passed in the case of unascertained goods separately, before the property, according to agreement of the parties as seen in *Inglis v. Stock*⁵³. This is contrary to the principle of *res perit domino*, because the English statutory law linked issue of passing of risk to the passing of property, where no property passes in the case of unascertained goods, and not to the situation of the goods.

On the other hand, suppose that English statutory law linked the risk to the situation of the goods, where no risk passes to the buyer until the goods are clearly identified within the contract, then the risk could never be passed until the goods are ascertained, nor could risk could be passed before property. This is because linking the risk to the situation of the goods extends to property as well. In other words, no property could be passed until the goods are ascertained, and then no risk could be passed until property is passed. Despite the different perspectives, the results were identical, as discussed in *Stock* and *Vickers*: the risk was deemed to have passed separately and before the property, where the goods remained unascertained or a specified quantity of unascertained goods.

⁵¹ John Bassindale, 'The passing of ownership and risk in international commodity contracts' (1993)

⁵² See above, Intention of the parties to pass the risk and the legal nature of the rule of *res perit domino*

⁵³ (n4)

By undertaking a comparative analysis, one may say that the Sale of Goods (Amendment) Act has established that the risk can be passed where the goods are a specified quantity and unascertained; however, the risk in such circumstances must be based on the transfer of property, where the Act allows the passing of property over an undivided share in the bulk of goods. According to the Sale of Goods (Amendment) Act, due to the link with property, the risk never passes separately without the property. However, in both of the cases cited the risk is deemed to have been passed to the buyer, without the property; where the property remains with the seller, irrespective of whether the goods are unascertained goods or a specified quantity of unascertained goods. Accordingly, it seems that the passing of property is the heart of the matter, while the transfer of risk is based on the transfer of property, according to English statutory law, in common law it is permitted for the risk to pass separately, before the property, without any condition.

Indeed, it seems that English statutory law implies that no risk is deemed to have passed until the property has passed, and no property passes until the goods are identified in the contract; however, it did not remedy an issue where the risk passed separately and before the property expressly. A difference between English statutory law and common law regarding this issue is noted. It would seem that the common law is broader than English statutory law; where the common law allows for the passing of risk, even if the goods are unascertained, and does not link risk to the passing of property; whereas English statutory law requires the passing of property in order to pass the risk, despite the space left for parties' intention. One may say that the current cases were previous to the promulgation of the law; nevertheless, English statutory law does not rule explicitly on this issue.

The applicable standard is that goods must be sufficiently identifiable as being those to which the risk relate, in the forms of a specified quantity of unascertained goods, and no property, and consequently risk, passes in relation to unascertained goods. It may be the subject of criticism that there is no explicit provision in English statutory law for this issue. It has been argued that, although the SGA has endeavoured to codify the common law on sale of goods, some areas were left out of the statutory framework and are governed by the common law; consequently, contracting parties choosing 'English statutory law' as the governing law of the contract are agreeing to the applicability of both the common law and the SGA.⁵⁴ This is reflected in s62-2 of the SGA.⁵⁵ On other hand, we cannot overlook

⁵⁴ Lachmi Singh. 'The United Nation Convention on Contracts for the International Sales of Goods 1980 (CISG) An examination of the buyers remedy of avoidance under the CISG: How is the remedy interpreted, exercised and what are the consequences of avoidance?' (PhD University of the West of England, Bristol 2015)

the common law as the primary source of English statutory law, where the risk could be passed separately before the property.

In fact, with the absence of any such indication on this issue in English statutory law, the question that arises is whether the standard of common law can be considered as the applicable standard or not? In fact, the answer to this question lies in the provision of s.62 of the SGA, as mentioned, consequently and logically it can be said that the risk may pass separately before the property and it is immaterial whether the goods are ascertained or unascertained goods.

To conclude, it is arguably the case that there are three standards which could cover the issue of the passing of risk in relation to unascertained goods. The first is the sufficiently identifiable goods standard, where the goods must be specific or a specified quantity of unascertained goods. Critically, this view actually links the issue of passing of risk to the issue of the passing of property, so that no risk could be passed until the property passes, and, as result, no risk passes in relation to unascertained goods, even in such cases where the parties have agreed to pass the risk separately before the property.⁵⁶ Additionally, the buyer may bear the risk even if he/she is not in physical possession of the goods, where it is deemed that he/she is the owner of said goods.

This opinion seems to reflect approach of the English statutory law, although it does not state it expressly. The second instance is provided by the *Stock* case, which gave freedom for the risk to pass separately before the property and did not link the risk to the property. In fact, such a view relied on the intention of the parties and gives priority to the agreement between the parties over any other rule. Clearly, this view reflects the party autonomy principle. Accordingly, despite the criticism over the imposition of an unfair burden on the buyer when he/she is not the owner of the goods, the buyer may bear responsibility for the risk, even when he/she is not in physical possession of the goods nor holds the property, because according to this view appropriation is regarded as irrelevant, and it argues that risk passes as from shipment in any situation.⁵⁷ The third standard involves cases where the

⁵⁵ SGA, s 62(2) states: 'The rules of the common law, including the law merchant, except in so far as they are inconsistent with the provisions of this Act, and in particular the rules relating to the law of principal and agent and the effect of fraud, misrepresentation, duress or coercion, mistake, or other invalidating cause, apply to contracts for the sale of goods'.

⁵⁶ Aedit Abdullah, "Issues in the Transfer of Risk in CIF Contracts." *Sing. L. Rev.* 14 (1993). 160 to 169

⁵⁷ *Margarine Union GmbH v. Cambay Prince Steamship Co. Ltd.*, 1969 Q.B.1 219 (1969)

parties intend to pass the risk when the buyer accepts the delivery note. This view, highlighted in the *Vickers* case, where the court held that the risk had passed to the buyer, relied on the implied agreement between the parties, and the delivery warrant, where the buyer accepted the delivery note although the property remained with the seller. Indeed, the researcher is of the view that this might be more logical than the others because the court relied on physical possession, which is supported by the buyer's acceptance of the delivery warrant of goods; thus the buyer becomes the possessor of those goods, and hence becomes responsible for the care of those goods.

5.7 Fault Basis - Exceptions in relation to passing of risk under English law

As we have seen, it is generally the case that the risk passes simultaneously with the property. However, it may also pass at a different time, according to the intention of the parties, whether before, after, or even at the same time as the property passes – in the case of the latter, the parties intend to apply the principle of *res perit domino*. In fact, as pointed out in the previous sections, risk may pass otherwise, whether according to the terms of the contract or the situation of the goods. Obviously, the risk will be passed regardless of the principle of *res perit domino*, according to the terms of the contract, including the expressed or implied intention of the parties. This includes the cases where there is delay in delivery, delivery to the carrier, or where the seller of goods agrees to deliver them at his own risk, or according to the situation of the goods, such as in the case of conformity of the goods to the contract. Under these circumstances, instead of following the principle of *res perit domino* or parties' intention, the passing of risk will be operated on a "fault basis" as examined below.

5.7.1 Delay in delivery:

The first of these particular rules is contained in s20-2, which reads: *where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party at fault as regards any loss which might not have occurred but for such fault*. The scope of application of this sub-section concerns delivery terms, including shipment terms, such as FOB and CIF contracts, where the seller is bound to deliver the goods whether at

the port of shipment or at any place according to the terms of the contract.⁵⁸ Further, the provision of s20-2 is not restricted to shipment contracts, but is extended to conclude any contract of sale of goods regardless of the place of delivery, so long as the contract is a contract of sale. The interpretation of s20-2 should be read in conjunction with s102 of the SGA, which states, *whether any other stipulation as to time is or is not of the essence of the contract depends on the terms of the contract*. Namely, the determination of the time of delivery is subject to the parties' absolute right to agree on this matter. Accordingly, s20-2 applies only in the case of agreement between the parties on the timeline for the delivery of the goods.

However, an issue may arise in the cases where the parties fail to agree on the timing of the delivery. Delay of delivery at fixed time, in fact can be caused by faults attributed to either parties or the seller alone.⁵⁹ In the case of delay, the party with delay of delivery must bear the risk, even though the other party would be expected to assume the risk in the normal situation.⁶⁰ For instance, under a typical FOB sales contract, the buyer must procure space on board a vessel. If the buyer fails to do so within a reasonable or agreed time, the buyer must bear the risk of any deterioration of goods on the wharf.⁶¹ Thus, a simple failure to perform by a specified date, although a breach of contract, does not entitle the other party to treat the contract as repudiated. However, a failure to perform an obligation within a reasonable or agreed time, depending on the interpretation of the contract, may amount to repudiation of the obligations for the other party.⁶²

In the same context, s29-3 of the SGA states that '*Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time*'. Accordingly, if the contract is silent as to the time of delivery, the seller is bound to deliver the goods within a reasonable time.⁶³ A "reasonable time" is defined in s59 of the SGA as any time which is not manifestly unreasonable under the circumstances and this time may be affected by the

⁵⁸ However, s20-2 does not apply where the buyer deals as a consumer. See Benjamin's *Sale of Goods* (8th Edition edn Sweet & Maxwell, London 2010),316

⁵⁹ Michael G. Bridge, *The Sale of Goods* (Oxford University Press, Oxford UK 1998) ,126

⁶⁰ Prof. Tetley, William, Q.C. *Sale of Goods-The Passing of Title and Risk*. Faculty of Law McGill University, 33,34

⁶¹ *Lusograin v. Bunge*, 1986 *Lloyd's Rep.* 2 654 (1986)

⁶² *Astra Trust Ltd v. Adams and Williams*, 1969 *Lloyd's Rep.* 17, 28. (1969)

⁶³ S.59 SGA 1979

usage of trade, Consequently, a failure to perform within a reasonable time may, depending on the interpretation of the contract or the trade usage, amount to repudiation.⁶⁴

Delay and the breach of the contract

As discussed above, if the seller fails to deliver the goods within an agreed period or within a reasonable timeframe, the risk is placed on his part. However, it is noteworthy that the application of s20-2 may affect the nature of the contract where the risk passes on, or from shipment - such as in CIF and FOB contracts - where the parties intend to pass the risk before the goods are delivered. In this regard, Debattista maintains that the assumption that this sits ill with the nature of those contracts is unwarranted, as delay in discharge caused by the seller would very likely involve a breach of his obligation to procure a contract of carriage. Consequently, the risk of post-shipment loss caused by delay is attributable to and lies with the seller, because he is deemed to be in breach of his contractual obligations, rather than because of the application of s20-2.⁶⁵ In this regard, Debattista further argues that his view can be supported by s27 of the SGA, which states that it is the seller's duty to deliver the goods and the buyer's duty to accept and pay for them, in accordance with the terms of the contract of sale, in the sense that the delivery of goods by the seller and acceptance of them by the buyer within the agreed period time or reasonable time is an essential duty.

That can be seen in *Bowes & Co v Shand & Co*⁶⁶ where the seller was imposed with risk in his failure to deliver shipments according to the agreed time. In this case, the court held the view that contracts must be interpreted strictly, so as to render shipments made in in February, earlier than March, as agreed in the contract, a breach of the contract of sale, which entitled the plaintiffs to reject the rice. This gave the buyer the right to claim damages from the respondents in respect of any damage they had suffered.

In summary, when the seller or the buyer failed to ship the goods within the agreed period of time, he was in breach of contract, moreover, according to s20-2 he should assume the risk. Since a party is obliged to deliver the goods within a reasonable time, the party in breach bears the risk regardless, whether the breach lies in a delivery by shipment or by a

⁶⁴ (n 62)

⁶⁵ Charles Debattista, 'Sale of goods carried by sea' (1ST edition edn Butterworth & Co Ltd, London 1990),93. See also Andreas Alsterberg, ' Transfer of risk In sale of goods on shipment terms' (2006/2007)(Maritime Law) ,23

⁶⁶ *Bowes & Co v Shand & Co* [1874-80] All ER Rep 174

separate route, an obligation to deliver the goods, to hand over any documents relating to them, and transfer the property or an obligation to take delivery within an agreed period of time, or within a reasonable time.⁶⁷ Such a view has attributed the legal nature of the delay to delivery of the goods. Nonetheless, the next question which needs to be addressed is the consequences of the lack of expressed wordings of the ‘fault basis’ in s20-2 of the SGA.

5.7.2 Fault of one of the parties

It has been argued that the risk of shipment loss or damage caused by delay is attributable to the fault of either the seller or the buyer, but only “as regards any loss which might not have occurred but for such fault”.⁶⁸ For instance, under a classic FOB contract, the buyer must procure space on board a vessel, where the buyer fails to do so within a reasonable time, and the buyer at fault must bear the risk even though the seller would normally have had to bear the risk until the actual shipment. Although this risk is imposed on the buyer, the title remains with the seller.⁶⁹ The determination of fault leading to risk allocation can be seen clearly in the case of *Demby Hamilton & Co Ltd v Barden*,⁷⁰ where the buyer delayed in collecting the goods at the time agreed and when he did collect it, it was discovered that the juice had deteriorated. Although the juice was unappropriated and placed in casks waiting for collection, risk was transferred to the buyer. despite the fact that no property had passed to the buyer.

In principle, no property passed to the buyer in the unappropriated goods, hence no risk should be passed to the buyer according to s20-1. However, in *Demby Hamilton* the situation was different, where the exception is supposed to be applied instead of the general rule in part one or part two of s20-1, in the sense that the risk of deterioration of juice occurred as result of delay of the buyer in collecting the goods within reasonable time. In other words, delivery has been delayed through the fault of the buyer. The court supported the view that where delivery has been delayed through the fault of the buyer, the goods are at the risk of the party in fault “as regards any loss which might not have occurred but for such fault.” The court also pointed out that the goods referred to must be

⁶⁷ S27 SGA1979

⁶⁸ Fidelma White & Robert Bradgate, *Commercial Law* (Blackstone Legal Practice Course Guide) (Exford University Press, Exford UK OX2 6DP 2007), 181, 182. Also See Prof. Tetley, William, Q.C. Sale of Goods-The Passing of Title and Risk. Faculty of Law McGill University

⁶⁹ *Lusograin v. Bunge*, [1986] 2 *Lloyd's Rep.* 654; *Bunge v. Tradax*, [1981] 2 *Lloyd's Rep.* 1 (H.L.)

⁷⁰ *Demby Hamilton & Co Ltd v Barden* [1949] 1 All ER 435

the contractual goods which have been assembled by the seller for the purpose of fulfilling his contract and making delivery. The 30 tons of juice were goods which the sellers rightly and reasonably kept for the fulfilment of their contract, and had awaiting the collection. Due to the breach on the buyer's part alone, it was held that the buyer must bear the risk of deterioration on the ground that delivery was delayed by his default and that delay had caused deterioration. Nevertheless, the fault of either of the parties cannot be considered a delay unless the other party has fulfilled his obligations.

On the other hand, the option to return goods does not affect the passing of risk from the seller to the buyer in any case where the seller has fulfilled his obligations of delivery towards the buyer.⁷¹ Consequently, if the contract relates to a sale of unascertained goods and the buyer delays, then the risk passes only when the seller has set aside goods manifestly appropriated to the contract and has notified the buyer that this has been done. It is an essential obligation on the part of the seller to undertake all acts necessary in order to enable the buyer to take delivery⁷². In other words, risk would pass when the seller has done everything necessary to enable the buyer to take delivery.⁷³ Thus, where the seller is ready and willing to deliver the goods to the buyer but the buyer does not take delivery of the goods within agreed or a reasonable time, he is liable to bear any risk caused by his omission or refusal (fault) to take delivery⁷⁴. While this view has attributed the legal nature of the delay to deliver the goods, due to the fault of either buyer or seller, through breach of contract, the next question is which one is more compatible with English statutory law perspective.

5.7.3 Evaluation of fault basis in English law

Based on the discussion above, it can be said that the latter view which adopted the fault as basic delay seems more compatible with an English statutory law perspective theoretically, as the word fault appears in s20-2. In practice, we have seen that the *Bowes* case made the decision on the ground of breach of contract, whereas the *Demby's decision* was based on

⁷¹ Heli Piksilä-Rantanen and Tommi Härmä, 'Obligations Of The Seller According To The Finnish Sale Of Goods Act – What One Should Know About Finnish Law When Conducting International Sale Of Goods' (18 January 2013) mondaq 22/11/2013
<<http://www.mondaq.com/x/216608/Contract+Law/Accelerated+Reorganization>

⁷² *raineri v miles* [1981] AC 1050

⁷³ S.P. de Cruz, 'Risk of loss: A Need for Reform' *Anglo-American law review* 12. (1982)

⁷⁴ *Ibid.*

the fault of the party as the basic cause of delay. This leads the researcher to highlight the relationship between the fault of the party and the breach of the contract. In fact, according to contract law, the parties to a contract that is legally enforceable are obligated to perform the obligations arising from the contract terms, and failure to perform may constitute a breach of the contract, for which the other party may seek remedies due to such a breach.⁷⁵ A breach of contract can take various forms including the fault of the party.

From the forgoing analysis, we can see that the legal nature of s20-2 is based on the contractual relationship between the seller and the buyer, where the party breaches the terms of the contract through the delay to delivery of the goods, by any reason, including the fault, as the seller is obligated to deliver the goods at the place of business of the buyer, unless the parties agree upon a different arrangement such as in shipment contracts.⁷⁶

One may argue that the basic principle of s.20-2 is the delivery of goods, wherein the risk passes according to the delivery. In other words, while the *prima facie* in s20(1) is *res perit domino* unless otherwise agreed, the *prima facie* in s20-2 is the time of delivery. Namely, it is acknowledged that the risk passes simultaneously with the property or according to the intention of the parties, such as in a CIF or FOB contract, where the goods have been ascertained and shipped at the same time as delivery. If the fault acts as an intervening factor in the delivery, then the risk will pass automatically to the party whose action or inaction has caused the delay of delivery. Thus, it appears that the crucial factor with respect to the passing of risk in the application of s20-2 is the timing of the delivery of goods, not the time of passing of property. Therefore, it can be said that the delivery of goods plays an important role in the transmission of risk alongside the principle of *res perit domino* and the intention of the parties.

5.8 Passing of risk involving third party (delivery to the carrier)

Section 32-1 of the SGA deals with the sale of goods in transit, where the seller is authorised or required to send the goods to the buyer, and/or deliver the goods to a carrier and states that ‘*Where, in pursuance of a contract of sale, the seller is authorised or*

⁷⁵ Moussa Sékou, 'A Comparative Study of Contract Formation and Breach of Contract and Liability in China and Ohada Space Contract Laws' (2011) 4, No. 2; September 2011, 157

⁷⁶ (n 27)194

required to send the goods to the buyer, delivery of the goods to a carrier (whether named by the buyer or not) for the purpose of transmission to the buyer is prima facie deemed to be a delivery of the goods to the buyer.'

In such a case, the risk is deemed to have passed simultaneously with the property. Namely, depending on the contractual terms, the *prima facie* rule is that risk passes with the property upon delivery to the carrier, where the property passes from the seller to the buyer, whether upon the conclusion of the contract, or at the moment of shipment (i.e. from the time at which the goods are handed over to the carrier). Due to the provision of s32-1, in the case of unappropriated goods, s18 must be read in conjunction with s16, as it is obvious that if the seller delivers goods which are mixed with other goods (such as unascertained goods) to a carrier, no property can be deemed to have passed.⁷⁷ What constitutes appropriation will vary according to the types of goods in question and the general circumstances of the case.

Generally, unlike property, the risk can pass before the goods have been ascertained, in circumstances where the goods form part of a larger but identified, bulk. In most FOB. and CIF contracts, risk will pass on shipment, regardless of whether property passes at that stage; and this is even so where the goods have been shipped in unsegregated parcels.⁷⁸ In common law, there exists a dichotomy on the question of appropriation in relation to law and equity, where the risk in relation to unascertained goods has passed from the seller to the buyer on shipment before the passing of the property according to intention of the parties.⁷⁹

At this juncture, it is necessary to distinguish the difference between the passing of risk under s32-1 and s20-2 respectively. While part two of s.20-1 links the issue of the passing of risk to the issue of the passing of property *res perit domino* and according to the parties' intention, in part one of the same provision, s32-1 introduces an intervening factor when the involvement of the carrier of the shipments is concerned. In such cases, the property transfers as the risk passes on shipment,⁸⁰ even though the delivery of goods to the carrier could occur before the actual passing of property, where the goods form part of a larger but identified bulk or unascertained goods.

⁷⁷ Atiyah, P.S. "*Sale of Goods*" 3th edition, .114

⁷⁸ (n51)

⁷⁹ (n 4)

⁸⁰ Sale of Goods Act 1979

Indeed, on the basis of “in pursuance of a contract of sale”, it seems that s32-1 makes the delivery of goods to the carrier a basic rule in relation to the passing property and then passing of risk; however, a close reading of the provision reveals its compatibility with s20-1, as in the case where the passing of risk occurs simultaneously with the passing of property in the sale of goods in transit contracts, then *prima facie* risk could be passed on the principle of *res perit domino*.

Nevertheless, according to common law, in the case where a carrier is involved in the transport of property, the risk passes to the buyer regardless of whether the property has passed or not. Thus, the time of delivery could be a basic rule regarding the passing of risk, based on the intention of the parties, where they have agreed that the risk would pass on shipment.⁸¹ Indeed, despite the difference between English statutory law and common law regarding this issue, the result is the same, which is that the risk passes to the buyer on delivery to the carrier. Namely, the general rule will be applied where the seller is required by the contract to send goods to the buyer, in cases where delivery to a carrier is presumed to constitute delivery to the buyer. However, further issues may arise in s32 where the seller is liable to bear the risk retroactively in the case of loss or damage to goods due to an unreasonable carriage contract made by the seller.

5.9 The retrospective passing of risk in seller’s failed duty involving third party

In fact, even if the risk lies with the buyer while the goods are in transit, the seller may still be liable if damage or losses are due to an unreasonable contract of carriage made by the seller with the carrier. Section 32-2: states that *Unless otherwise authorised by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable having regard to the nature of the goods and the other circumstances of the case; and if the seller omits to do so, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself or may hold the seller responsible in damages.*

⁸¹ (n 4)

According to s32-2, the buyer could alternatively take an action in damages against the seller for failing to make a reasonable contract of carriage, having regard to the nature of the goods and other circumstances. In other words, the risk passes to the seller retrospectively, subject only to the reasonable burden of the carrier. Therefore, according to s32-2, the seller should make a carriage contract with the carrier on behalf of the buyer, taking into consideration the nature and circumstances of the goods; subsequently, he will disclaim any responsibility for bearing the risk as long as he has made such a contract with the carrier. In such contracts, the seller will have regard to the nature of the goods and other circumstances, otherwise the goods remain at the seller's risk, in the sense that the seller is liable to the buyer for any loss or damage caused from the breach of his obligations under the contract of sale, and the carrier being liable for such loss or damage under the contract of carriage.⁸² This is exemplified in the case of *B.G. Fruit Market Ltd v National Fruit Co.*, where the seller was obligated to send the goods in heated wagons but failed to stipulate that condition with the carrier. It was held that the seller was in breach of the contract of sale and therefore liable when the goods suffered frost damage after being left unheated.⁸³ It is clear that the seller made the carriage contract with the carrier on behalf of the buyer; at the same time he continued to bear the risk of goods retrospectively, because he failed to stipulate that the goods must be carried in heated accommodation/environment.

However, the question may arise as to whether liability in relation to an event such as the theft of goods is attributable to the party who carries the risk, or is the responsibility of the other party, whose fault has caused or enabled the event? *Thomas Young & Sons v Hobson & Partner*,⁸⁴ highlights that such an issue should rest on the burden of proof. In this case, the plaintiffs sold seven electric engines to the defendants. It was a terms of the agreement that the engines should go by rail, that they should be put in box wagons with the sellers bearing the relevant costs. The sellers put the engines on rail in box wagons, but did not secure them by means of battens or in any other manner, with the result that they arrived in a damaged condition. The buyer's refusal to take the delivery was viewed as succeeding in proving that the seller had failed in their duty under s32-2 of the SGA to make such a reasonable contract with the third party. Considering the nature of the goods and the other

⁸² carles Debattista, *'Sale of goods carried by sea' in* (1ST edition edn Butterworth & Co Ltd, London. 1990),94,95. See Also Prof. Tetley, William, Q.C. *Sale of Goods-The Passing of Title and Risk*. Faculty of Law McGill University,35

⁸³*B.G. Fruit Market Ltd v National Fruit* (1949) 59 DLR 87

⁸⁴ *Thomas Young & Sons v Hobson & Partner* (1949) 65 T.L.R. 365

circumstances of the case, the buyer was accordingly entitled to reject the goods. It will ordinarily be the obligation of the party alleging fault to prove it; if he or she fails to do so, the loss will fall within the risk. Consequently, the goods remain at seller's risk, in the sense that he is liable to the buyer for any loss or damage resulting from this breach of his obligations under the contract of sale.

However, the situation differs depending on the type of contract and the obligations of the parties under the contract of sale. . For example, in some of types of contracts, the seller is responsible for making arrangements for shipping the goods, and as a result is obligated to conclude such a contract of carriage, such as in the case of CIF, C&F and FOB with additional services, whereas the buyer is responsible to do it in other types of contracts, as is the case in straight FOB.⁸⁵

Moreover, s32-2 should apply regardless of whether the seller contracts with the carrier as principal or as agent for the buyer. However, the words "*make such contract with the carrier on behalf of the buyer*", may present some difficulties if interpreted strictly as meaning "agent for the buyer". This would mean that this section would be excluded from application of the terms concluded in CIF, C&F and FOB with additional services, because in these types of contract the seller is obliged to conclude such a contract of carriage in his own name and then transfer it to the buyer as one of the seller's duties. However, under a straight FOB contract the situation is different, because in this type of contract of sale the seller concludes no contract of carriage at all, because the seller needs only to put the goods on board. Thus, he is not obligated to carry and transfer the goods - in none of these types of contract does the seller contract with the carrier as agent for the buyer. Accordingly, s32-2 would not be applicable for straight FOB contracts, as the seller is not obliged to send the goods to the buyer unless the FOB contract obliges the seller to conclude such a contract of carriage in his own name on behalf of the buyer, as in the case of CIF and C&F contracts.⁸⁶

⁸⁵ Indira Carr, '' in *International Trade Law* (first edn Cavendish publishing limited, Great Britain 1996),26,31. See Also *Benjamin's Sale of Goods* (8th Edition edn Sweet & Maxwell, London 2010),313

⁸⁶ See above NO 61 p117,118. Also see Carles Debattista, '*Sale of goods carried by sea*' in (1ST edition edn Butterworth & Co Ltd, London. 1990, 95

Notification of shipment

A C&F contract may not fit within an application with the straight FOB contract under s.32-2. Nevertheless it could meet the condition laid down in s32-3, which establishes the presumptive rule that, “[u]nless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit; and if the seller fails to do so, the goods are at his risk during such sea transit.” It is clear that an effect of this provision is to give such notice to the buyer as may enable him to insure the goods. It appears that the main issue addressed in this section is: whose duty is it to effect an insurance cover?

Thus, where the seller is under an obligation to effect insurance cover, the section is evidently inapplicable. Therefore, the provision is inapplicable to contracts concluded on CIF and FOB with additional services, because the contract does not require the buyer insure the goods, unless there are risks not covered by the seller.⁸⁷ It seems clear that in the case of *Law & Bonar, Limited v British American Tobacco Company, Limited*,⁸⁸ where defendants bought from the plaintiffs a quantity of Calcutta hessian at a price CIF Smyrna, to be shipped from Calcutta and to arrive at Smyrna by September, 1914. The defendants stipulated in the contract that the goods were to be at the plaintiffs' risk until actual delivery to the defendants. In fulfilment of the contract, the goods were shipped by the plaintiffs' correspondents in Calcutta on the British Steamship City of Winchester. It is noteworthy that on July 31, the seller wrote to the buyer pointing out that war risk was not covered by the insurance under the contract, but on August 4, 1914, war was declared between Great Britain and Germany and on August 13, 1914, the vessel was sunk by a German cruiser and the goods were lost.

To determine the issue of risk passing, the buyer was first of all required to bear the risk according to the terms and contract of the CIF, which stipulated insurance against marine risks, as required by the contract, and that the goods were at the seller's risk until the point of delivery. However, the buyer will bear the risk from shipment. In the current case, it was supposed that the seller is not obliged to give such notice to the buyer on the basis that the CIF contract dictates the seller's duty to insure the goods. Nevertheless, the goods were lost by an act of war, which was not covered by the insurance under the contract.

⁸⁷ Carles Debattista, *'Sale of goods carried by sea'* in (1ST edition edn Butterworth & Co Ltd, London. 1990),96

⁸⁸ *Law & Bonar, Limited v British American Tobacco Company, Limited* [1916] 2 KB 605

Rowlatt J. reported the possibility that s32-3 may apply to a contract made at a time when insurance against war risk was usual, but in that case the seller would be under an obligation to provide war risk cover anyway. Generally, s32-3 does not apply to a CIF contract in times when no one contemplates war, and when war is not being insured against. On the other hand, when the war was becoming imminent, another form of insurance emerged and the contract ceased to be one which dealt exhaustively with the question of insurance. A new obligation therefore arose for the seller, in relation to whether there was an employment of the seller by the buyer to effect such an insurance against war risks. Rowlatt J. pointed out that:

This sub-section annexes a term to the contract, and whether it is applicable or not to be decided at the time when the contract is made. I say nothing as to whether the sub-section could apply to a CIF contract made at a time when insurance, other than those to be provided by the seller - e.g., against war risks - are usual. That point does not arise. In this case I do not think that there is any real evidence that it was usual to insure against war risks at any material time. Nor am I certain whether the buyers themselves had made up their minds whether they would insure against war risks or not.

Accordingly, it was held that s32-3 is inapplicable to ordinary CIF contracts; there was no evidence of such employment, in the sense that the seller was irresponsible to effect such insurance, on the grounds that insurance does not cover war risks. Even if the contract is CIF, at the same time, he must give such notice to the buyer as may enable him to insure them during the transit. It is clear that s 32-3 could be applied to a CIF contract only in cases where risks are not covered by the seller. There is surely an obligation on the buyer to do so in respect of documentary credit purchases, and it is only in respect of these contracts that the s32-3 requirement comes into play and where the seller may remain at risk if there is insufficient information for the buyer to be able to insure the cargo.⁸⁹

However, s32-3 can be applicable to contracts where insurance is not included in an agreement, such as in the case of C&F and ordinary FOB terms. Nevertheless, the situation may be different in the case of FOB or C&F contracts, with additional services, where such contracts are extended to include an insurance contract to be undertaken by the seller, unlike the classic FOB and C&F, where it is undertaken by the buyer, who still

⁸⁹ Nationwide Mediation Academy for NADR UK Ltd 'The passing of risk in cif and fob contracts' (2004) 34. Available at <http://www.nadr.co.uk/articles/published/shipping/003CHAPTERTHREETRADE3.pdf>

needs such notice as may enable him to insure the goods. Namely, s32-3 applies to classic contracts rather than contracts with additional duties.⁹⁰

On the other hand, in a classic FOB contract, s32-3 may still not be applicable and the seller may remain at risk if there is not sufficient information for the buyer to be able to insure the cargo.⁹¹ For example, in the case of *Wimble, Sons & Co. v. Rosenberg & Sons*⁹², under an FOB sales contract the plaintiffs sold the defendants goods to be shipped by the buyer, who then sent instructions to the plaintiffs to ship the goods to Odessa and to pay freight on their account, leaving it to the plaintiffs to select the ship. The cargo was loaded on a Sunday. The seller did not notify the buyer of the loading and the name of the vessel because of a postal delay. The buyer had no open cover and was uninsured. He claimed that he did not know the name of the vessel or that the goods had been shipped.

A close examination of the facts reveals that although under FOB terms the seller must give notice to the buyer to enable him to insure the goods, the essential information possessed by the buyer for insurance purposes rendered s32-3 inapplicable. The buyer knew the port of discharge and did not need to know the name of the vessel, since he could have effected insurance on an Odessa voyage by a vessel or vessels to be declared. Buckley L.J. pointed out that the seller provided sufficient information on the freight and the ports of loading and discharge which should have enabled the buyer to take out open cover, thus fulfilling the requirements of s32-3. In fact, the buyer can always take out a general policy of insurance, without needing to know the name of the ship.

However, as Hamilton L.J. argued, if this view is correct, the section imposes no obligations on the seller, because the buyer already has sufficient information to take out a general insurance policy anyway, in the sense that the buyer knew the description of the goods from the contract he made, the port of discharge because it was selected by him and the port of loading from the contract. Actually, the buyer will always know the freight and ports of loading and discharge. In the FOB contract it is often the buyer who nominates the vessel, so he should not be able to claim ignorance of its name. Even though s32-3 applies, the duties are not onerous and therefore the section is not useful at all.⁹³ Alternatively, following Hamilton J., it may be that s32-3 only applies to contracts which specify

⁹⁰ (n 87) 97

⁹¹ (n 59)119

⁹² *Wimble, Sons & Co. v. Rosenberg & Sons* [1913] 3 K.B. 743. C.A

⁹³ (n 87)

destination; thus since delivery is at the place of destination and involves sea transit, warehouse to warehouse. etc. s32-3 could apply to any type of FOB contract where the seller undertakes to arrange the vessel and has a choice of ports of loading.

5.10 Goods delivered at seller's risk

On this issue, s.33 provides an illustration of overlapping, when it states that *Where the seller of goods agrees to deliver them at his own risk at a place other than that where they are when sold, the buyer must nevertheless (unless otherwise agreed) take any risk of deterioration in the goods necessarily incident to the course of transit.*

Occasionally the seller agrees to bear the risk throughout the transfer; regardless of the *res perit domino* rule. This rule is subject to the seller's agreement. In any event, s.33 has a restricted scope in international sales. For instance, the parties may incorporate into their own agreement trade terms such as the Incoterms.⁹⁴

Obviously, this provision comes from the principle of party autonomy, where the parties have the freedom to agree when the risk passes. Therefore, it can be said that the application of s.33 may be consistent with the presumptive rule in s.20-1, where the risk remains with the seller even if the property has passed.⁹⁵ In general, under the rules of s.20-1 of the SGA, the parties of the contract may agree expressly or implicitly that the risk is separate from the property.⁹⁶

However, the question arising is: Does s.33 change the nature of the contract in cases of contract for sales involving the carriage of goods, such as FOB or CIF, where the risk passes to the buyer, whether on shipment or from shipment, at which point the seller will not be responsible for any damage or losses after that? In other words, in the first the parties are agreed on the CIF or FOB terms to pass the risk on (or from) shipment, while the second is where the seller agrees to bear the risk through the transfer, according to s.33 SGA.

⁹⁴ Benjamin's *Sale of Goods*, (A.G. Guest ed., 3d ed. 1987), 1522. 1523

⁹⁵ (n 59)120

⁹⁶ Clive M. Schmitthoff, *The Sale of Goods* (2d ed Kluwer Law International 1966), 94

However, the scope of this rule is unclear with respect to the words *the goods necessarily incident*. It seems that s33 effectively limits the scope of such an agreement by splitting the risk during transit so that the seller bears the risk of what may be called "extraordinary" loss or damage; that is, due to an accident or casualty. In other words, s33 gives an illustration of overlapping the risks, the seller having the general risk and the buyer that of deterioration that is necessarily incident to the course of transit. It must follow from s33 that if deterioration is due to a combination of a "transit" risk and some other cause, the loss is to be shared. Perhaps the circumstances and ordinary principles of causation are adequate to ensure that one party does not bear more than is his due, as well as in cases of overlapping "risks".⁹⁷

This can be understood by looking at a Canadian case, *Winnipeg Fish Co. v. Whitman Fish Co*⁹⁸ where cured fish were sold by sample under FOB terms, namely, to be shipped during the winter from the seller's warehouse at Canso to Winnipeg. The sample was sound and satisfactory. The fish arrived in Winnipeg in a frozen state and were received by the buyer and kept by them in an outhouse for several weeks before being placed in the freezer, the atmospheric conditions being such that the fish could not, in the meantime, have deteriorated by thawing. Some of the fish when sold proved unfit, and were subsequently returned, while the whole shipment was found unfit for human consumption and not up to standard. On inspection the health inspector condemned the whole carload and it was destroyed. Approximately six weeks after the fish had been received, the buyer notified the seller of the rejection of the carload. In an action for the price at which the fish had been sold, the buyer counterclaimed for damages due to breach of warranty and consequent loss to their business.

It was held that the seller could not recover, and that the buyer was entitled to receive damages on their counterclaim, and that the risk must be borne by the seller. In fact, the sale had been made subject to delivery by the seller at Winnipeg. Accordingly, under s.33 any loss occasioned by deterioration in transit not necessarily incident to the course of transit should be borne by the sellers. The loss in this case was not so incident, and furthermore, under the circumstances, the buyer had notified the sellers of the rejection within a reasonable time. The judge further highlighted that, assuming the goods to have been delivered to the carrier at Canso in suitable and good condition, as found by the Court

⁹⁷ L. S. Sealy, 'risk in the law of sale' (April 1972,) Cambridge Law Journal, , 247

⁹⁸ *Winnipeg Fish Co. v. Whitman Fish Co* [1909] S.C.R. 453

of Appeal, any damage causing deterioration to the fish arising from their having been frozen and thawed during transit, not being necessarily incident to such transit, must under the circumstances of this case be held to have been accidental and exceptional and so must fall on the seller.

From the foregoing, it appears that s33, with its limited allocation of necessary risk to the seller, should not be understood to detract from the broader allocation of risk according to *prima facie* rule in s20 or special rules in s32-2 and (3). In other words, it should not be allowed to undermine the normal rule that, where the risk is on the buyer, the seller must still ship goods that will not in a normal transit deteriorate to the point of unsuitability. On the other hand, an unsuitability may entitle the buyer to reject goods that are not in conformity with the contract.

5.11 The lack of conformity of the goods with the contract

In terms of conformity of the goods, whether it relates to discrepancies in the quantity or quality of the goods at issue, it makes no difference whether the quantity of the goods delivered is more or less than agreed upon. Similarly, non-conformity of the quality of goods means delivery of goods whose quality is worse or better than agreed upon. Moreover, goods must be of satisfactory quality according to s14 of SGA, namely they would meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods.⁹⁹ Thus, it has been stated that a contract of sale is not only a contract that goods will arrive, but a contract to ship and deliver goods conforming to the contract of sale.¹⁰⁰ Generally, conformity can be discussed from several perspectives. In other words, one of the most important obligations of the seller is to deliver goods in conformity with the contract, and the right of the buyer is to examine the goods to ascertain whether they are in conformity with the contract or not, and reject the goods when they do not conform to the contract, according to s.14 SGA.

Hence, when the seller fails to deliver such conforming goods, by any reasons, whether by intention, such as counterfeit goods and fraud, or by accidental causes, for instance loss or damage of the goods during transfer, he is deemed to have breached a contractual obligation. A breach of contract by the seller which is sufficient to allow the buyer to reject

⁹⁹ *Jewson Ltd. v. Kelly*, 2003 E.W.C.A. Civ 1030 (2003)

¹⁰⁰ *Groom v Barber [1915] 1 K.B. 316*

the documents or reject the goods on arrival, if he has already accepted the shipping documents, results in situations where the buyer does reject the goods, in placing the risk on the seller whilst the buyer exculpates himself.¹⁰¹ Accordingly, under English law, in such a situation, if the buyer properly rejects the non-conforming goods, the risk and the property will revert back to the seller.¹⁰²

However, when goods arrive that are not fit for the intended purpose and not in conformity with the contract, it may be difficult to determine whether this is due to the seller's breach in delivering goods of unsatisfactory quality, or due to an event that occurred in transit, while the goods were at the buyer's risk. The risk allocation will depend on the evidence regarding the state of the goods upon shipment and subject to the burden of proof theory. Namely, where the buyer claims the goods to be in non-conformity with the contract, the burden is on the buyer to show that they were not capable of withstanding the voyage. On the other hand, the seller has to identify the cause or causes of damage or loss and prove that they were out of the seller's sphere of responsibility.¹⁰³

In essence, according to the SGA, risk passes with the property, while property passes at the moment of making the contract or when intended in the contract of sale. Therefore, regardless of whether risk and property pass at the moment the contract is made, or at an intended time, according to s17 of the SGA, it is assumed that the property becomes the risk of the buyer who will bear any risk of loss or damage to the goods. However, if the buyer rejects goods whose non-conformity was caused by the seller the risk and the property will revert to the seller retrospectively; accordingly, the time of passing of risk occurs at the same time as rejection of non-conforming goods. However, the carrier being liable for such loss or damage under the contract of carriage according to s32-2 of the SGA.¹⁰⁴

Some difficulty may arise in this context, in the case of CIF contracts, in which documents are transferred and payment made, in the case where a buyer accepted the documents and later rejected the goods. He might obtain a conditional property on tender of documents, which then leads to losing his right to reject the goods, by having dealt with the documents.

¹⁰¹ (n 89)35

¹⁰² *Kwei Tek Chao v. British Traders and Shippers Ltd*, 1954 Q.B.2 459 (1954)

¹⁰³ Michael Bridge, *The Sale of Goods* (second Edn Oxford University Press, Oxford UK 2009) ,162

¹⁰⁴ (n 87)95

In the case of *Kwei Tek Chao v. British Traders and Shippers Ltd*¹⁰⁵, London exporters, under a CIF contract made in August 1951, for the sale of 20 tons of Rongalite to Hong Kong merchants, at a price of £590 a ton, for shipment to Hong Kong by October 31 1951, at latest, the sellers presented to the buyers' bank bills of lading on December 10 1951, purporting to show that the goods had been shipped. They received payment of the price agreed under the contract. In fact, the bills of lading had, without the knowledge of the sellers, been forged by the third party, the sellers' shipping agents being privy to the forgery, and the goods had not been shipped until November 3, 1951. The buyers knew before the ship arrived on December 10 that the date of shipment, as indicated by the bills of lading, was false but, nevertheless, they took delivery of the goods, retaining them in a godown in Hong Kong. Owing to the late shipment of the goods the buyers lost a contract for resale. An embargo placed by the Chinese authorities on the importation of Rongalite from Hong Kong resulted in such a serious fall in the market price that Rongalite became virtually unsaleable in Hong Kong. In February, 1952, the buyers discovered that the bills of lading had been forged and sued the sellers for the return of the price, or alternatively for damages for breach of contract. Devlin, J held that what the buyer obtains when the title under the documents is given to him is the property in the goods, subject to the condition that they revert to the seller, if, upon examination, he finds them in non-conformity with the contract.

In analysis, a CIF contract puts a number of obligations upon the seller, some of which are related to the documents and some of which are related to the goods. These are separate obligations; the right to reject the documents arises when the documents are tendered, and the right to reject the goods due to unconformity arises when they are delivered. Accordingly, the right to reject the goods, thus passing of the risk to the seller retrospectively, would be at the moment when the goods are loaded and after an examination, and not at the moment of obtaining documents.

Arguably, even though property and risk will be passed, it seems to be that the position under English law is that handing the documents over, and mere acceptance of the documents, does not preclude subsequent rejection of the goods for breach of condition related to non-conformity of the goods. Thus, the fact that risk will have been passed to the buyer is not absolute. It can be understood that the risk will not have passed on mere

¹⁰⁵ (n 102)

delivery of documents in any case, and so the result as between buyer and seller will be the same.¹⁰⁶ Accordingly, a CIF buyer does not lose his right to reject the goods by dealing with the documents.¹⁰⁷

¹⁰⁶ Atiyah, P.S. "*Sale of Goods*" 5th edition, 246

¹⁰⁷ (n 102)

5.12 Conclusion

To understand the legal nature of these rules, it is essential to examine the rules and the exceptions to the risk doctrine in the SGA, in the sense of the nature and basis of these rules.¹⁰⁸ However, as mentioned above, the passing of risk according to s20-1 may be governed by more than one rule; according to these criteria, English statutory law appears to have a mixed approach.¹⁰⁹ Namely the risk could be passed with the property *res perit domino* rule, at the point when the property passes to the buyer, or at a different time separate from the property, according to the agreement of the parties. It has been noted that the general rule is that the risk passes with the property, according to *res perit domino* under s20 of the SGA.¹¹⁰ Others have relied on the same section but reached a different conclusion, arguing that the basic rule is that the risk passes at the time agreed upon by the parties, according to the intention of the parties.¹¹¹ The rule of s20 may be prevailed by expressed or implied agreements; furthermore, it is subject to exceptions or modifications which would determine the timing when the passing of risk takes place.¹¹² Therefore, in order to ascertain the legal nature of these rules and the relevant exceptions, a comparison between the first and second part of s20-1 of the SGA is required.

In fact, it is clear that the risk may pass at a different time from the property, where the buyer has the right to examine the goods in order to ascertain whether they are in conformity with the contract or not. In other words, under English law, in a situation where the buyer rejects the non-conforming goods, the risk and the property will be revested in the seller. Similarly, with respect to s33, the seller may choose to ignore the rule of *res perit domino* and agree to bear the risk through the transfer. That means also the risk passes at different time from property, where the property passes on (or from) shipment and the risk passes at the place of destination. Therefore, it can be said that application of these two rules may be contrary to the presumptive rule in s20-1, in that the risk remains

¹⁰⁸ Paul Todd, 'Risk the General Rule' (26 Dec 1997.) Paul Todd's home page 06/02/2014
<<http://pntodd.users.netlink.co.uk/intr/risk/risk.htm#toc>

¹⁰⁹ (n 26)

¹¹⁰ Benjamin's *Sale of Goods* (8th Edition edn Sweet & Maxwell, London 2010). P.302. See also, Fidelma White & Robert Bradgate, *Commercial Law* (Blackstone Legal Practice Course Guide) (Oxford University Press, Oxford UK OX2 6DP 2007), 180

¹¹¹ Prof. Tetley, William, Q.C. *Sale of Goods-The Passing of Title and Risk*. Faculty of Law McGill University. Also (n 89)

¹¹² Robert Bradgate, Fidelma White, *Commercial Law* (OUP Oxford, UK 2007) .181

with the seller even if the property has passed. At the same time their application complies with part one of s20-1 and the words *unless otherwise agreed*, in the sense, the parties of the contract may agree expressly or impliedly that the risk is separate from the property. Accordingly, these rules could be included under the category of the first part of s20-1, where the parties agree impliedly or expressly that the goods must be of satisfactory quality with the contract, according to s14-2, which states that ‘*Where the seller sells goods in the course of a business, there is an implied condition that the goods supplied under the contract are of merchantable quality.*’

From the foregoing, it can be concluded that the legal nature of the passing of risk, under rules of conformity with the contract and the rule of s33, is the intention of the parties, where the parties have absolute right to agree upon the time of passing of risk according to part one of s20-1, unless otherwise agreed. Consequently, it can be said that the time at which risk passes under both rules relies on the intention of the parties, which can be considered under the category of part one of s20-1, where parties’ intention is the primary rule with regards to the passing of risk.¹¹³

Furthermore, as the research has suggested, the situations under s20-2 and s32 may be different, as the delayed delivery of the goods through the fault of either the buyer or seller will have impacts on how the risk is passed. This depends on whether the goods are at the risk of the party at fault, under s20-2, or whether the seller breaches his obligations according to s32 of the SGA. Accordingly, the passing of risk under the rules of s20-2 and s32 occurs separately from the property. Consequently, despite the primary rule under s20-1 of the SGA, it can be said that the risk rules under both s20-2 and s32 will be viewed as exceptions.

¹¹³ See above, Intention of the parties to pass the risk and the legal nature of the rule of *res perit domino*.

Chapter 6 – Passing of risk under the CISG

6.1 Introduction

The passing of risk – and in particular which party will bear the risk - is an important issue, and one which preoccupies both parties in a contract of sale. The reason for its importance lies in its peculiar nature, which might lead to certain harsh and unfair effects upon the contracting parties. This is especially the case for international sale of goods contracts between different states, where sales involving the carriage of goods is the most common situation in international sales contracts.¹

Almost every national legal system includes rules on the passing of risk, and hence, under a domestic sale, unlike international sales, it is relatively easy for the parties in the contract to achieve their purpose. When one looks at the diverse solutions to the issue of the passing of risk across various legal systems, there are various points for determining the timing of the passing of risk, including the moment of conclusion of the contract; the moment in which property passes and the moment the goods are handed over,² in addition to the party autonomy principle. Therefore, such an important issue as sales law could not be left out of the scope of one of the most successful attempts to unify the law pertaining to the international sale of goods, which is the United Nations Convention on Contracts for the International Sale of Goods (the CISG).

In fact, unlike the issue of timing in relation to the passing of property, the CISG deals with the issue of risk more broadly and in further depth, concerning itself with the issue of the risk, rather than the issue of time in relation to the passing of property.³ As the principles incorporated in the English law are party autonomy and that risk *prima facie* passes with property, the principles which are incorporated in the CISG for risk to pass at different moments as will be examined in this chapter.

The actual moment in which the risk passes under the CISG depends on the circumstances of the terms of the contract of sale. Generally, it lies under the provision of arts 67, 68 and

¹ Goodfriend, Douglas E. "After the damage is done: risk of loss under the United Nations Convention on Contracts for the International Sale of Goods." Colum. J. Transnat'l L. 22 (1983): 575, 593

² Heidelberg, 'The Passing of Risk A comparison between the passing of risk under the CISG and German law' (1999) 2,3,4. Available at , <http://www.cisg.law.pace.edu/cisg/biblio/romein.html#passing>

³ William Tetley, Q. C., 'Sale of Goods the passing of title and risk a resume' Faculty of Law McGill University Montreal, Quebec, Canada, 29

69, as well the principles applying to the passage of risk, together with sanctions where the seller breaches the contract (Art 70). However, the issue of delivery can be an important factor to be considered in the issue of the passing of risk, as the CISG allows the risk to be passed with property and also that the risk of loss of or damage to the goods to be passed to the buyer when delivery of the goods is effected in accordance with the provisions of the contract. An examination of different aspects of this issue and other related articles⁴ will also be carried out in this chapter.

6.2 Risk and the Concept of Delivery

It is necessary to consider whether the concept of delivery has served well to determine the time of the passing of risk, and whether there has been delivery of goods, then to determine the main issue which is whether the contract of sale involves the carriage of goods under the CISG.

The concept of delivery is, in fact, the key principle in sales law in civil law countries; it can be seen in French law (namely *deliverance*).⁵ In the third Session of the Working Group, the UNCITRAL concluded that the concept of delivery under art 19 of the ULIS was an unsatisfactory way to approach the practical problem of risk, because such a concept of delivery leads to different interpretations and evident difficulties in practice ,especially in international sale transactions where neither the seller nor the buyer, but an independent carrier, is in possession of the goods for a certain period of time.⁶

In general, the handing over of the goods is complete when the goods are in the physical care of the carrier. For instance, in a case where damage was caused by improper loading by the seller onto a truck arranged by the buyer, the German court held that “handing over” requires that the carrier takes care of the goods, which implies an actual surrender of the goods to the carrier; and that it is necessary for the seller to load the goods onto or into the

⁴ Erauw, Johan. "CISG Articles 66-70: The Risk of Loss and Passing It." *JL & Com.* 25 (2005): 203..See Also Gustin, Manuel. "Passing of Risk and Impossibility of Performance under the CISG." *International business law journal* 3/4 (2001): 379-400

⁵ Mahr, Benjamin, 'Is the Vienna Convention on international sale of goods too much influenced by civil law and should it contain a rule on the passing of property?' (2004).

⁶ Report of the Working Group on International Legislation on shipping on the work of its third session, 31 January - 11 February 1972, Geneva. Also see Mahr, Benjamin, 'Is the Vienna Convention on international sale of goods too much influenced by civil law and should it contain a rule on the passing of property?' (2004),⁹

respective means of transport; and that the risk only passes when loading is completed.⁷ Similarly, in a Swiss case, the court found that the risk had not passed when the goods (a machine) fell on the ground from a fork lift and became unsaleable before the machine was loaded on a truck that arrived to pick up the goods.⁸

On the other hand, a Chinese court held that the risk does not pass even when the goods are handed over to the carrier, if the seller fails to present a bill of lading to the bank issuing the letter of credit for payment within the time limit stipulated in the sales contract (with the consequence on that case that the bill of lading did not reach the buyer); without referring to art 67, the court held that the seller still bore the risk because of its breach of contract.⁹

In the case where the parties agree to make the goods available at the seller's place of business at a specific time but the goods were destroyed before delivery to the buyer, it is deemed that the seller has performed his contractual duty to deliver the goods and put them at the disposal of the buyer. However, under the rules on risk of loss under the ULIS, the risk would remain with the seller because the goods are still under his actual possession. Therefore, the approach chosen by the Working Group at the fourth session, was to draft a statement of the seller's duty with respect to performance of the contract rather than as a definition of the concept of the act of physical delivery.¹⁰ This can be seen clearly in art 30 of the CISG, which regulates the seller's obligations regarding the handing over of goods and documents.¹¹

From the foregoing it can be understood that the concept of delivery according to the Convention should not be restricted to the physical meaning of delivery, but should be

⁷ Landgericht Bamberg, Germany, 23 October 2006 (Plants case), available on the Internet at <http://cisgw3.law.pace.edu/cases/061023g1.html>

⁸ Bundesgericht, Switzerland, 16 December 2008, available on the Internet at <http://cisgw3.law.pace.edu/cases/081216s1.html>.

⁹ Wuhan Maritime Court, Hubei, People's Republic of China, 10 September 2002 (Nanjing Resources Group v. Tian An Insurance Co. Ltd., Nanjing Branch), available on the Internet at <http://cisgw3.law.pace.edu/cases/020910c1.html>

¹⁰ Report of the Working Group on International Legislation on shipping on the work of its fifth session, 5-16 February 1973, New York.,²⁴

¹¹ Prof. Dr. Peter Schlechtriem, 'Uniform Sales Law - The UN-Convention on Contracts for the International Sale of Goods' (1986) Pace Law School Institute of International Commercial Law. Available At <http://cisgw3.law.pace.edu/cisg/biblio/slechtriem-06.html#b>, 55

understood in a broader sense, which includes putting the goods at the buyer's disposal. In the case of default of the buyer to take possession of them, the risk of loss or damage will be passed, on the grounds that delivery has occurred by placing them at the buyer's disposal.

Nevertheless, the delivery rule does not seem to be of much practical importance. As Flambouras highlighted, the parties normally express their own intention regarding the timing of the passing of risk under art 6 of CISG, thus excluding an application of the Convention.¹² Accordingly, it can be said that the risk may pass at various times depending upon the circumstances and terms of the contract of sale, whether under one of the rules mentioned, or according to the intention of the parties. For that reason, the questions arising in this context are: which of these rules mentioned, including the intention of the parties rule, is the general and basic rule for the passage of risk? And what moment of the performance, among the various points mentioned above, determines the time of passing of risk?

6.3 Passing of risk in cases involving Carriage of Goods- Article 67 CISG:

Article 67 (1) stipulates:

If the contract of sale involves carriage of the goods and the seller is not bound to hand them over at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract of sale. If the seller is bound to hand the goods over to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place. The fact that the seller is authorized to retain documents controlling the disposition of the goods does not affect the passage of the risk.

It should be said that, it is common knowledge that contracts involving carriage of goods are the most commonly used in international sales contracts.¹³ Therefore, the first rule

¹² Dionysios Flambouras, 'Transfer of Risk in the Contract of Sale involving Carriage of Goods: A Comparative Study in English, Greek Law and the United Nations Convention on Contracts for the International Sale of Goods' (2001)) 87-149 Pace Institute of International Commercial Law. Also See Ulrich Schroeter, 'Freedom of Contract: Comparison Between Provisions of the CISG (Article 6) and Counterpart Provisions of the PECL' (2002) 6 University of Mannheim - Faculty of Law 257-266

¹³ Sylvain Bollée, 'The Theory of Risks in the 1980 Vienna Sale of Goods Convention' (1999-2000) Pace Law School Institute of International Commercial Law 245-290. Available at, <http://www.cisg.law.pace.edu/cisg/biblio/bollee.html>. Also See VALIOTI, Zoi. "Passing of Risk in

concerning the passing of risk established in art 67 is: *'If the contract of sale involves carriage of goods ... the risk passes to the buyer when the goods are handed over to the first carrier.'* In this sense, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer. However, the second part of article 67(1) seems to stipulate exception from the first part of the article, as it covers situations where the seller is bound to hand the goods over to a carrier at a particular place, and provides that the risk does not pass to the buyer until the goods are handed over to the carrier at that place. In turn, this leads to some essential questions: (i) when does a contract of sale involve the carriage of goods; and (ii) what constitutes the first carrier? In addition to the issue of handover at particular places there is also the question of what roles they play in the passing of risk.

6.3.1 Risk and contracts of sale involving carriage of goods

As mentioned above, the majority of international sales involve the carriage of goods. One of the main difficulties of interpretation emerging from art 67(1) is the ambiguity of the expression "contract of sale involving carriage of the goods".¹⁴ Seemingly, the CISG does not provide a specific rule of interpretation in terms of the timing where the contract of sale involves the carriage of goods¹⁵.

According to the provision, the contract of sale may expressly or implicitly include that the goods are to be carried by including details with respect to the manner of carriage, e.g. CIF or FOB terms. To be more specific, the word cannot mean simply that a consequence of the sale will be carriage of the goods, as defined in art 67(1), but must refer to a provision in the contract, expressed or implied, requiring or authorizing carriage to be arranged.¹⁶ Consequently, the carriage may be operated by one of the parties in the contract of sale, or

international sale contracts: A comparative examination of the rules on risk under the United Nations Convention on Contracts for the International Sale of Goods (Vienna 1980) and INCOTERMS 2000." Nordic Journal of Commercial Law 2 (2004): 01-51. Available at <http://www.cisg.law.pace.edu/cisg/biblio/valioti1.html#iii>. Also see D.E. Goodfriend, 'After the Damage is Done: risk of Loss Under the United Nations Convention on Contracts for the International Sale of Goods' (1983) Columbia Journal of Transnational Law., 589

¹⁴ Sylvain Bollée, 'The Theory of Risks in the 1980 Vienna Sale of Goods Convention' (1999-2000) Pace Law School Institute of International Commercial Law, 245-290

¹⁵ Dionysios Flambouras, 'Transfer of Risk in the Contract of Sale involving Carriage of Goods: A Comparative Study in English, Greek Law and the United Nations Convention on Contracts for the International Sale of Goods' ((2001)) <http://www.law.pace.edu/cisg/biblio>

¹⁶ Barry Nicholas, 'Commentary on the International Sales Law' (1987) Pace Law School Institute of International Commercial Law. Available at, <http://www.cisg.law.pace.edu/cisg/biblio/nicholas-bb67.html>

by an independent carrier, depending on the circumstances and terms of the contract.¹⁷ Essentially, the ambiguities in the expression under art 67(1), lie in determining whether the contract of sale of goods involves the carriage or not, which leads to a further question as to whether the seller or the buyer or independent party can be deemed as the carrier under the article. On the other hand, the silence of the parties concerning whether or not the contract involves carriage has to be construed on a case to case basis.¹⁸

The application of arts 31(a) and 6 in lieu of art 67 of the CISG

A further complication arising from the interpretation of art 67 can be seen in the following scenario. Suppose, the seller employs his own means to deliver the goods to the buyer; an essential question that demands an answer is whether the contract of sale involves carriage? If so, does the risk pass from the seller to the buyer when the seller loads the goods onto his own transportation, as art 67 makes it clear that the transfer of risk only occurs when the goods are handed over to a carrier? Is it sufficient for the seller to effectuate the carriage himself with his own means of transport and with his own personnel or does it have to be carried out by an independent carrier? All these factors will have a direct legal impact on the interpretation of the passing of risk.

It has been argued that the term "involves" should be interpreted to require that the contract provides for the carriage of the goods.¹⁹ In practice, in contracts that do not provide where the buyer is to arrange for collection of the goods, the requirement is met in cases where the seller is required or authorised to arrange for carriage.²⁰ For instance, in *Frozen Chicken* involving a French seller and a German buyer, the seller delivered the goods according to its general business conditions "free delivery, duty-paid, untaxed" and handed the goods over to a carrier. The buyer denied that delivery had taken place and the seller produced an unsigned receipt with the buyer's stamp on it in order to prove delivery. The

¹⁷ Sylvain Bollée, 'The Theory of Risks in the 1980 Vienna Sale of Goods Convention' (1999-2000) Pace Law School Institute of International Commercial Law 245-290. Available at, <http://www.cisg.law.pace.edu/cisg/biblio/bollee.html>. Also See VALIOTI, Zoi. "Passing of Risk in international sale contracts: A comparative examination of the rules on risk under the United Nations Convention on Contracts for the International Sale of Goods (Vienna 1980) and INCOTERMS 2000." *Nordic Journal of Commercial Law* 2 (2004): 01-51. Available at <http://www.cisg.law.pace.edu/cisg/biblio/valioti1.html#iii>.

¹⁸ Bernd von Hoffmann, 'Passing of Risk in International Sales of Goods' (1986) Ch. 8, 265-303. Available at <http://www.cisg.law.pace.edu/cisg/biblio/vonhoffmann.html>

¹⁹ (n 16)487-495

²⁰ (n 14)

buyer refused to pay and the seller sued it for the outstanding purchase price.²¹ The court held that the buyer had no obligation to pay the purchase price under arts 66 and 67(1) of the CISG, as the risk had not been passed to the buyer when the goods were handed over to the carrier for transmission to the buyer. Under the term of free delivery, the seller was bound to deliver the goods at the buyer's place of business at his own risk, according to art 31 and 6 of the CISG respectively. In other words, the fact that the seller arranged carriage insurance indicated its intention that it was ready to bear the risk of the transport of the goods. This would especially be the case where shipping of the goods is carried out by the seller's own transportation.²²

The parties' intention to have the risk passed at the buyer's place of business in Germany was highlighted as the significant factor, and accordingly led the court to deviate to arts 31(a) and 6 of the CISG. Although the contract of sale involved carriage of goods from France to Germany by the seller, the court did not apply art 67(1) in a case where the parties agreed that the goods would "be delivered free", as the court interpreted the term as meaning that the seller is committed to deliver the goods to the buyer's place of business. In other words, the court considered the buyer's place of business was the place of delivery of goods, thus, such a contract of sale does not involve the carriage of goods according to art 67(1).²³ By contrast, if the contract of sale involves carriage, but requires the seller to have the goods handed over to the buyer at a particular place, the matter is governed by the residual rule in art 69 and the risk will pass when the buyer takes delivery of the goods, as will be seen.²⁴

An arbitral tribunal also held the view that a carriage is deemed to be included in the contract if the contract provides that the buyer should pick up the goods at the seller's address and carry the goods to his own place of business, as decided by the Hungarian court in a case where the FOB contract required the Hungarian buyer to pick up the fish eggs at the Yugoslav seller's address and carriage the goods to his place of business in Hungary. Payment was due two weeks after the delivery of the goods, at which time the

²¹ (Frozen chicken case). Germany 20 November 1992 Appellate Court Karlsruhe

²² Ibid.

²³ (n 21)

²⁴ Barry Nicholas, 'The Vienna Convention on International Sales Law' (1989) Pace Law School Institute of International Commercial Law, 201-243

UN embargo against Yugoslavia took effect in Hungary. The seller demanded the price of the goods; however, the buyer could not pay owing to the UN embargo.²⁵

It was held that the contract involved carriage under FOB terms and the risk of damage of goods passed to the buyer under articles 66 and 67(1) CISG. However, under a contract of sale which involves the carriage of goods, when it expressly or implicitly provides for subsequent carriage, the contract may expressly provide that the goods are to be transported through carrier by one of the parties, including details with regard to the manner of carriage, such as in the cases of CIF or FOB terms, which spell out which party has the obligation to arrange for a contract of carriage. In that sense, the court based its decision on the intention of the parties, where the parties intended to apply FOB terms, under which the risk passes to the buyer from the time of delivery, and because the delivery time was at the (Yugoslavian) place of business of the seller, the risk then passed at that time, even if the carriage was carried out by the one of the parties, which was the buyer in this case.²⁶

Clearly, the different decisions in relation to both cases are due to the different circumstances and the terms of each contract, even though both involved the transfer of the goods from one place to another by one of the parties, where one was by the seller and the other was by the buyer. In other words, in the first case, the court depended on the terms of free delivery, in which the seller was bound to deliver the goods at the buyer's place of business and at his own risk based on the combined effects of arts 31 and 6 of the CISG which argue for the intention of the parties (clause-free delivery) and the circumstances of the contract: i.e. when the seller arranged carriage insurance, as well as the fact that the goods were carried for the buyer by the seller's own means of transportation. This indicates that the seller meant to bear the risk of the transport of the goods. Despite the similar line of argument, however, the decision was different in the second case, due to the different circumstances and terms applied. In other words, in its interpretation of the parties' intention the court applied the FOB terms, where the risk passes from the time of delivery and at the place of business of the seller.

Therefore, it can be said that the concept of the contract of sale which involves the carriage of goods varies and depends on the circumstances of individual contracts. This can be seen in a German decision which held that a contract providing for delivery "free of charge" was

²⁵ *Választottbírószág csatolták a Magyar Kereskedelmi és 163* [HUNGARY Iparkamara 10 December 1996]

²⁶ *Ibid.*

still a contract involving carriage, where the buyer engaged the carrier and the seller was charged for the transport.²⁷ Nevertheless, where the seller was to deliver the goods free at the buyer's address, with customs duties unpaid, it was held that the risk passed at the time of the place of delivery at the buyer's place of business.²⁸

Due to its non-mandatory nature, the parties may agree, under art 6 of the CISG, to exclude the convention's application, either as a whole or partially, or to derogate from the provisions of art 67; alternatively, they may be bound by trade usages or a course of dealing that derogates (art 9). Accordingly, if agreement between the parties is consistent with art 67(1), the provision would be applied. This is also true when the parties agree on terms that address the passing of risk, and the terms CIF²⁹, C & F³⁰ and "list price ex works", are consistent with art 67(1). By contrast, if the trade term is inconsistent with art 67(1), the agreement between the parties would prevail, in accordance with art 6, and the risk then passes according to art 69. Thus, although the goods in the cases examined above were handed over to a third-party carrier, the court did not apply art 67(1), due to the fact that the parties had agreed that the goods would be delivered "frei haus" ("free delivery"), which the court concluded to mean that the seller was assumed to deliver the goods to the buyer's place of business.³¹

It is noteworthy that, on deciding whether a contract of sale involves carriage or not, the issue of whether the contract of carriage is to be arranged by the seller or the buyer appears irrelevant.³² In other words, there is no problem that the sale involves carriage whether it is the duty of the seller to arrange the carriage, or the duty of the buyer to arrange the carriage. Furthermore, some cases apply art 67(1) without specifying which party was to arrange the carriage³³. Namely, whether the word "carriage" should exclude situations where the carriage is wholly operated by one of the parties depending on the circumstances and terms of each contract. It appears that art 67(1) most likely applies at any time, according to agreement between the parties, as long as such agreement is consistent with

²⁷ *Benjamin's Sale of Goods* (8th Edition, Sweet & Maxwell, London, 2010), 232

²⁸ *Wire and cable case*. SWITZERLAND Appellationshof Bern 11 February 2004

²⁹ Cantone del Ticino Tribunale d'appello, Switzerland, 253, 15 January 1998

³⁰ Cámara Nacional de Apelaciones en lo Comercial, Argentina 191, 31 October 1999.

³¹ Oberlandesgericht Karlsruhe, Germany 317, 20 November 1992. See Also 83J Hellner, 'The Vienna Convention and Standard Form Contracts' in P Sarcevic and Volken (eds) *Dubrovnik Lectures* (1986) 335, 344 - 345 ('Standard Form Contracts'). For the English approach, critique for the ship's rail and proposed solutions, see Ch. III.2(2) and (5), 3(1) and (2), 4(2)

³² Audiencia Provincial de Córdoba. 247 [SPAIN Audiencia Provincial de Córdoba 31 October 1997

³³ *Live sheep case*. GERMANY Oberlandesgericht Schleswig 22 August 2002

article 67; nevertheless, the concept of delivery indicates an actual transfer of possession,³⁴ which assumes that the carrier is an independent entity from the parties within the contract.³⁵

Risk and Independent carrier

As discussed above, art 67(1) applies to sales involving carriage performed by the contracting party or an independent carrier. In terms of “carrier”, it is a debateable term: some have suggested that the carrier must be self-employed and independent. In other words, the goods should be carried by a third party, and thus, the cases involving the carriage of goods by the parties themselves should not fall within the scope of art 67(1).³⁶ In view of that, a third party (i.e. an independent carrier) should be responsible for the carriage of goods, as the phrasing of art 67(1) "*when the goods are handed over to the first carrier ... If the seller is bound to hand the goods over to a carrier*", expressly states that the seller is supposed to hand over the goods to a carrier, meaning a third party, because it is not possible to give the goods for carriage to himself.³⁷

It has been argued that the primary rule of the CISG is that risk passes at such time as when the seller delivers the goods to the first carrier. Under traditional terms, the passing of risk typically occurs when goods pass from the ship's rail or are delivered on board.³⁸ Hager is of the same opinion that carriage should be made by an independent carrier and not by the seller's personnel. Otherwise, it is open to the buyer to accuse the seller for not exercising due care and leads to an increase in the possibility of dispute and litigation

³⁴ John O. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (3rd edition edn Kluwer Law International, 1999)..369-1, n.369-2. discussion infra Ch.II, Part I.A.1, A.2

³⁵ (n 15)

³⁶ D.E.Goodfriend, "After the Damage is Done: risk of Loss Under the United Nations Convention on Contracts for the International Sale of Goods" (1983) 22 *Columbia Journal of Transnational Law* 575, 593. See Also F.Enderlein and D.Maskow, *International Sales Law* (Oceana Publications, 1992). 265

³⁷ Dionysios Flambouras, 'Transfer of Risk in the Contract of Sale involving Carriage of Goods: A Comparative Study in English, Greek Law and the United Nations Convention on Contracts for the International Sale of Goods' (2001) *Pace Institute of International Commercial* .106. See Also D.E.Goodfriend, "After the Damage is Done: risk of Loss Under the United Nations Convention on Contracts for the International Sale of Goods" (1983) 22 *Columbia Journal of Transnational Law* 575, 593

³⁸ Neil Gary Oberman. *Transfer of risk from seller to buyer in international commercial contracts: a comparative analysis of risk allocation under the CISG, UCC and Incoterms* n. 111 (available at <http://www.cisg.law.pace.edu/cisg/thesis/Oberman.html>).

between the parties.³⁹ Furthermore, when the goods are carried by the seller, he has to bear the risk himself, as a carrier whose liability is covered by insurance, the seller-carrier is linking risk, underwritten by an insurance policy, with carrier's duties. This would increase his eagerness in meeting his obligation in terms of transporting and delivering the goods safely. Consequently, the possibility of bad faith on the seller carrier's side during the transit could be eliminated. Accordingly, in the case where the seller carries the goods by his own means of transport, these do not fall into the scope of art 67(1) but art 69 (1), where the seller bears the risk until the goods are delivered to the buyer.⁴⁰

Hence, according to this opinion, under art 67(1) the risk passes only if goods are delivered to an independent carrier. Consequently, the handing over goods to a carrier which belongs to the seller (or his personnel) is not sufficient for that purpose, simply because the delivery of the goods to the carrier indicates the transfer of the possession of those goods (i.e. the power to control the goods) and consequently the carrier must be an independent legal entity.⁴¹

In contrast, Nicholas argues that having the goods placed on board the vessel of the first carrier on the instructions of the seller could be interpreted as constituting a handing over by the seller, thus rendering the second sentence of article 67(1) applicable⁴². However, this view was challenged by Berman and Ladd, on the grounds that a literal interpretation of the first sentence of art 67(1) applies only if the seller, and not the first carrier acting as the seller's agent, hands over the goods to a carrier at an intermediate point⁴³. They are of the view that, Nicolas's interpretation would nullify the Convention's primary rule that risk passes on delivery to the first carrier.⁴⁴ The reason behind this provision is the non-splitting of risk during transit, so that, in order to avoid problems of proof and arbitrary solutions,

³⁹ Ingeborg Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)* (Third Edition edn Oxford University Press, 2010). See Also D.Flambouras, "Transfer of Risk in the Contract of Sale involving Carriage of Goods: A Comparative Study in English, Greek Law and the United Nations Convention on Contracts for the International Sale of Goods", available at <http://cisgw3.law.pace.edu/cisg/biblio/flambouras.html>. See Also C.M.Bianca and M.J.Bonell (eds), *Commentary on the International Sales Law. The 1980 Vienna Sales Convention* (Milan: Giuffrè, 1987).

⁴⁰ (n 34)

⁴¹ Honnold, *Uniform Law for International Sales* n. 369-1. See Also Sylvain Bollée, 'The Theory of Risks in the 1980 Vienna Sale of Goods Convention' (1999-2000) *Pace Law School Institute of International Commercial Law* 245-290

⁴² (n 16)491-492

⁴³ 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

⁴⁴ J Honnold, 'Risk of Loss' in Galston and Smit (eds) *International Sales*(1984) Ch. 8., 5.

risk is borne by one person for the whole of the transit process.⁴⁵ In light of recent developments in international trade, and especially with respect to the transport of containers, unless damage or loss is due to an identifiable cause, it is difficult to assess at what stage of the transit loss or damage occurred and therefore who bears the risk. Furthermore, with regard to modern contracts of carriage, the carriage frequently involves multimodal transport operators, and includes a series of different modes of carriage, as well as a series of different carriers.⁴⁶

Flambouras emphasises the significant role played by the control criteria in determining whether the carrier is an independent entity or not in the case where the seller is an owner of a company which conducts transport operations or forms part of his firm. Consequently, whether the seller has “an absolute control” over such a freight company or not holds the key to the issue of an independent carrier. In the case where the subsidiary is only formally independent, but in reality the seller has substantial or complete control over it, art 67(1) will not be applicable. On the other hand, if the seller is not closely related to the subsidiary company, then art 67(1) will be applicable and the buyer should bear the risk during transport, since the goods are not significantly under the seller's control.⁴⁷

In this regard, the freight forwarder should not be considered an independent entity, unless he accepts liability of the risk of goods to take part on the carriage of the goods. In other words, the criterion of liability to take control of the goods would constitute a criterion in determining whether the carrier belongs to the seller or not.⁴⁸ Nevertheless, a different view suggested by Hager and agreed by Valiotti is that the freight forwarder should be considered as the first carrier, and risk should pass to the buyer from the moment when the goods are handed over to him, since he forms an independent entity, which takes control of the goods.⁴⁹ Similarly it has been held that delivery to a freight forwarder is the equivalent of delivery to the first carrier.⁵⁰ Nevertheless, it is noteworthy that the carrier as an independent entity was not expressly incorporated into the provision of art 67(1), which means that the door is open to different interpretations and this could attract criticism.

⁴⁵ Goodfriend, 'Risk of Loss under the CISG' (1984) 22 Col. J. Trans'l Law 575, 579

⁴⁶ (n 15)

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Zoi Valiotti, 'Passing of Risk in international sale contracts: A comparative examination of the rules on risk under the United Nations Convention on Contracts for the International Sale of Goods (Vienna 1980) and INCOTERMS 2000' (2003) Pace Law School Institute of International Commercial Law NO109,110

⁵⁰ *Oberlandesgericht Köln*, 283 Germany, 9 July 1997]

6.3.2 Critical evaluation of art 67(1)

From the foregoing discussion, it can be said that, when the goods are carried by the seller or by a carrier belonging to the seller himself (or his personnel), the emphasis should not be placed on art 67(1) but on the agreement of the parties, in accordance with art 6; consequently, the risk will pass according to art 69 of the CISG. Art 69 applies to the case where the parties agreed that the seller bears the risk under the term of free delivery, where the seller is bound to deliver the goods at the buyer's place of business at his own risk on the basis of arts 6 and 31, as seen in the *Frozen Chicken* case.⁵¹

Following the examination of the debates on the term “independent carrier”, the independent carrier theory fits well with respect to cases where the goods are carried by the seller. However, at the same time, it seems to omit the consequential impacts of the buyer’s duty, i.e. whether the carriage of the goods operated by the buyer himself is considered under such a theory or not. In fact, it appears that the independent carrier theory disregards the case where the contract provided that the buyer should pick up the goods at the seller's address and carry the goods. The literal interpretation of an independent carrier would have excluded the buyer from being considered as an independent carrier under art 67(1), as in the Hungarian case where the court held that the contract involved carriage.⁵²

In spite of the fact that the risk will be passed at the time of delivery when the carriage of the goods is operated by one of the parties, based on the agreement between the parties, nevertheless, the research shows that the time and place of delivery could make a difference in terms of determining whether arts 67(1) or 69 will be applied. Where the parties agree for the carriage to be operated by the seller, the risk will pass at the time of delivery at buyer's place according to art 69. Consequently, the risk will not be passed to the buyer when the goods were handed over to the carrier during transit and during the carriage process by the seller to the buyer. This is because the goods were not yet delivered and are still under the control of the seller. Similarly, the case of delivery at a particular place to the buyer would see the application of art 67(1),⁵³ because the risk passes at the

⁵¹ (n 21)

⁵² (n 25)

⁵³ Gustin, Manuel, ' Passing of risk and impossibility of performance under the CISG ' (2001) International Business Law Journal 1,3. See Also The United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) ' The Commonwealth Secretariat (London,) 0 85092 382 4 26 accessed 12/11/2014

time the goods are handed over at a particular place to the buyer, which corresponds with the provisions of this article.

From the discussion in the previous section, it can also be supposed that an independent carrier theory is based on the liability and control criteria on the physical possession of the goods. However, the paradox is that such criteria may also correspond with the case where the buyer is the carrier. Therefore, restricting the application of art 67(1) to the case where the carrier is an independent entity is undoubtedly unsatisfactory in practice, on the ground that this provision can also be applicable in the case where the delivery of goods is to be operated by the buyer as examined above.⁵⁴ Moreover, although the independent entity carrier theory seems logical in excluding the seller from the scope of application of art 67(1), it is illogical and unpractical with respect to excluding the buyer where the contract of sale can involve carriage of goods, by an independent entity or by the buyer himself. For both cases, the risk does not always pass to the buyer when the goods are handed over to the first carrier, as it is sometimes subject to exceptions. Thus, according to the second sentence of the first paragraph, *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*, and according to the second paragraph of article 67, *the risk does not pass to the buyer until the goods are clearly identified to the contract*. These issues are discussed below.

6.3.3 Risk and Carriage from a particular agreed place

In international shipping, goods sometimes can be agreed to be handed over to the carrier at the agreed place specified by the seller.⁵⁵ Accordingly, the seller may only discharge himself from the risk when he hands over the goods to the carrier at the place provided under the contract of sale. In fact, the expression “handing over” in art 67(1) of the Convention actually fulfils the delivery obligation. It means that the goods must be transferred to the carrier's physical control at an agreed place, or made available for delivery at an agreed place and at a specific (and agreed) time, and is fulfilled as soon as the carrier obtains physical possession of the goods for the purpose of carriage. The fact that the seller is authorised to retain documents controlling the disposition of the goods does not affect the passage of the risk.

⁵⁴ (n 453)

⁵⁵ G.Hager in Ingeborg Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)* (Third Edition edn Oxford University Press, 2010). art 67, para 6

It seems that this rule could be suitable to be applied for FAS contracts, where the risk passes when the seller places the goods alongside the ship on the port. The same rule applies to FOB and CIF contracts as well⁵⁶ as seen in a Spanish court decision, where the dispute was over goods that were defective upon arrival, arising from a contract of sale agreed between an Italian seller and a Spanish buyer. During the performance, however, when the goods were loaded at the Italian port, the captain of the vessel signed the document bearing the remark "clean on board". It was held that, in view of the type of contract entered into between the seller and the buyer regarding the delivery and carriage of the goods, following arts 31 and 67 of the CISG, the liability of the seller ceased when the goods were loaded on the vessel at the port of origin; consequently, from that moment, the risk passed to the buyer. It is clear that, under such contracts the ship's rail could be seen as the boundary between the seller and buyer as the risk passes at this place.⁵⁷ In this sense, under FOB terms, 'at the agreed port' equates to delivery at a particular place.

Significant points can be taken from the wording of art 67(1) involving contracts of sales which include carriage of goods, in the words "handing over", and the relationship between the first and second sentences of art 67(1). It could be understood that the primary difference between part one and part two of art 67(1) lies in the place of delivery, in the sense that under the first part, the seller is not required deliver the goods at particular place, while he is obliged to hand them over at a particular place under the provision of part two of art 67(1). In other words, the risk under part two does not pass to the buyer until the goods are handed over to the carrier at the agreed place, unlike part one, where the risk passes to the buyer when the goods are physically handed over to the first carrier.

However, a difficulty in interpretation arises under the second sentence of art 67(1), where the seller is bound to hand the goods over at a particular place, and arranges for the goods to be transported to the particular place by an independent carrier, and for this carrier to place them on board the ship. In such a case, it is not clear which sentence of art 67(1) should apply. If this "placing on board by the carrier on the instruction of the seller" is treated as the equivalent of "a handing over by the seller", the second part applies. On the other hand, it could be argued that the seller is not bound personally to hand the goods over at a particular place, but merely to arrange that the goods are so delivered. Then, the case

⁵⁶ Zoi Valiotti *Passing of Risk in international sale contracts: A comparative examination of the rules on risk under the United Nations Convention on Contracts for the International Sale of Goods (Vienna 1980) and INCOTERMS 2000*, 28

⁵⁷ *Ibid.*

would be presumably governed by the first sentence. Under this construction, the second sentence would apply only where the seller uses his own transport facilities to carry the goods on the first part of their journey.

This thesis submits that the first interpretation is preferable⁵⁸ on the grounds that if the second one were adopted, it would make the distinction between the first and second sentences meaningless. In any case, the risk remains with the seller while the goods are transported in his vehicles,⁵⁹ otherwise, it would not provide a solution different from that of the "first carrier" rule, while the second sentence is supposed to be a further qualification to the first. The same result would then follow from a single sentence, providing that the risk passes to the buyer when the goods are handed over to the first carrier.⁶⁰ However, this is not the only exception as the application of art 67(1) may also be precluded in certain circumstances, particularly when the goods are not identified, according to the second paragraph.

⁵⁸ (n 14)

⁵⁹ Ibid.

⁶⁰ B. Nicholas in Bianca & Bonell, *Commentary on the international sales law - the 1980 Vienna Sales Convention* 492 (Giuffrè, Milan, 1987). See Also G. Hager in Schlechtriem, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, at 506 (Clarendon Press, Oxford, 1998)

6.3.4 Risk and Identification of the goods under art 67 of the CISG

6.3.4.1 Unascertained goods

Article 67(2) provides that risk does not pass to the buyer "until the goods are clearly identified to the contract." This principle can be seen in many legal systems,⁶¹ since it is common for goods to be shipped under more than one contract of sale, or for a larger quantity of goods to be shipped than is needed to satisfy the contracts which the seller has so far made. In the case where the goods are sold as unascertained goods, the provision imposes an additional condition to the passing of risk, which is identification of such goods to the contract of sale.

It is common that the seller may sell undivided bulk goods for the performance of several contracts, such as in the sale of oil contracts, or even a larger quantity of goods than is needed to fulfil the contracts he has made. In fact, if a portion of such unidentified goods is lost or damaged accidentally, it would be unfair to allow the seller to decide which goods are to be delivered to which buyer. Therefore, the policy underlying art 67(2) is to prevent the seller, in case of loss or damage of such goods, from falsely claiming that the lost or damaged goods were those purchased by the buyer.⁶² In other words, this provision is an attempt to protect the buyer from the false claims of the seller.⁶³

It is necessary, therefore, that the goods are identified and that this occurs through a list of the type of acts provided by art 67(2), whether by markings on the goods, by shipping documents, by notice given to the buyer or otherwise. Apparently there is no specific act required, as the list is in no way exhaustive. For instance, the Swiss court noted that the parties to a CIF contract agreed that the risk of loss would pass when cocoa beans clearly

⁶¹ French civil law, Arts. 1138, 1585

⁶² John O. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (3rd edition edn Kluwer Law International, 1999), at n.369-2. See also Sylvain Bollée, 'The Theory of Risks in the 1980 Vienna Sale of Goods Convention' (1999-2000) *Pace Law School Institute of International Commercial Law* 245-290. See also Manuel Gustin, 'Passing of risk and impossibility of performance under the CISG' (2001) *International Business Law Journal* 1,3. See also Jan Ramberg, 'To what extent do incoterms 2000 vary Articles 67(2), 68 and 69?' (2005) 25:219 *Journal of law and commerce* 220,221. See Also Zoi Valioti, 'Passing of Risk in international sale contracts: A comparative examination of the rules on risk under the United Nations Convention on Contracts for the International Sale of Goods (Vienna 1980) and INCOTERMS 2000' (2003) *Pace Law School Institute of International Commercial Law* NO99. P15. See Also Dionysios Flambouras, 'Transfer of Risk in the Contract of Sale involving Carriage of Goods: A Comparative Study in English, Greek Law and the United Nations Convention on Contracts for the International Sale of Goods' ((2001)) VI 87-149,26

⁶³ (n 49)

identified to the contract of sale were handed over to the carrier at the port of shipment.⁶⁴ In another instance, the German court's emphasis was placed on whether the goods were clearly identified by the description of the goods in the shipping documents⁶⁵. This approach is based on the practice that the name of the buyer is normally marked on the goods, or the person entitled to claim delivery from the carrier may be inferred from the shipping documents. Particularly, the bill of lading then entitles the buyer to receive goods that are clearly identified to the contract by the shipping documents. Similar to the approach taken by the German court, an arbitral tribunal in Russia found that a seller could clearly identify the goods for the purposes of the contract by means of shipping documents.⁶⁶

Benjamin holds the view that identification involves the selection the article which has been agreed within the terms of the contract of the sale of goods. Such responsibility usually falls on the seller, who is in the better position to identify and select the goods which are to be sold, but this responsibility may also possibly be placed on the buyer by consent of the seller also.⁶⁷ For instance, the parties may agree to have the buyer himself separate the goods from the bulk and carry them away, for there will normally be an appropriation by actual delivery.⁶⁸ Such an act of selection in fact, may occur by the action of delivering the goods. In this sense, the seller's delivery of the goods to the buyer, which is in conformity to the contract described, would be regarded as identification, which is assumed to be unconditional and subject to the consent of the buyer. Logically, this is because the buyer received the goods and therefore the goods have become known and clearly defined.

However, although sometimes the intended concept of delivery which can be effective in making them the goods identified goods is the physical delivery concept, this is not always the case. Other methods may include putting the goods at the buyer's disposal, as the seller's duty with respect to performance of the contract. This is due to the fact that in many situations the buyer is not named as consignee in the bill of lading. For example, the

⁶⁴ *Cantone del Ticino Tribunale d'appello*, Switzerland, 253.15 January 1998.

⁶⁵ *Amtsgericht Duisburg*, Germany, 360 .13 April 2000.

⁶⁶ Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry (Russian Federation) 30 December 1998, Arbitral Award no. 62/1998, <http://cisgw3.law.pace.edu/cases/981230r1.html>. See Also Bernd von Hoffmann, 'Passing of Risk in International Sales of Goods' (1986) Ch. 8, 265-303

⁶⁷ (n 27)238

⁶⁸ *R. v. Tideswell*, [1905] 2 K.B. 273, 277

seller often prefers to send the goods to himself as the consignee at the port of arrival. This is particularly true in situations in which payment has not been received by way of letter of credit. Then the seller wants to maintain the possibility of disposing of the goods in case the buyer does not procure payment on the presentation of the bill of lading. Consequently, the bill of lading may not be a suitable means of identifying the goods to the contract.⁶⁹ Therefore, Gustin has suggested that the notice given to the buyer is not a prerequisite to identification.⁷⁰

Moreover, such a notice of dispatch provides identification of goods to the contract after the risk has passed from the seller to the buyer: when handing the goods over to the first carrier or to the sea carrier. The question arises whether or not such identification has retroactive effect. In fact, many laws support the viewpoint that an identification of goods to the contract that took place after the goods had been lost does not have retroactive effect.

6.3.4.2 Issue of retroactive passing of risk

The use of notice to the buyer as a means of ascertaining goods can raise the issue of retroactive passing of risk imposed on the buyer. Actually, in answering this question, the reference to “notice to the buyer” in art 67(2) should be read in conjunction with art 27 of the CISG. According to art 27, in the post-contractual communications, any communication including a notice given in an appropriate manner entitles the dispatching party to rely on its content. Consequently, according to art 27 of the CISG, dispatching such a notice to the buyer is sufficient to identify the goods, so long as it has been properly dispatched by the seller, in sense that the risk passes when the notice is dispatched and not retroactively from the time of shipment.⁷¹

Indeed, like the CISG, several legal instruments support the viewpoint that an identification of goods to the contract that took place after the goods have been lost does not have retroactive effect, but with different emphasis. The opposite view, however, has been defended in, art 100 of the Hague Sales Convention, which states that: *If, in a case to which paragraph 3 of Article 19 applies, the seller, at the time of sending the notice or*

⁶⁹ (n 18) . 8, 291

⁷⁰ Manuel Gustin, ' Passing of risk and impossibility of performance under the CISG ' (2001) International Business Law Journal 1,3

⁷¹ (n 49)99,15

other document referred to in that paragraph, knew or ought to have known that the goods had been lost or had deteriorated after they were handed over to the carrier, the risk shall remain with the seller until the time of sending such notice or document. Clearly, art 100 of the ULIS emphasises the importance of the buyer's knowledge in terms of the notice and the passing of risk from the seller to the buyer only in those situations in which the buyer knew or should have known at the time of sending of the document that the goods handed over to the carrier have been lost or damaged. This implies that, according to the Hague Convention, identification of goods to the contract generally has retroactive effect.⁷²

The approach adopted by the Working Group in the CISG in drafting a statement of this issue was clearly completely different from that of the ULIS. Article 67 (2) of the CISG employs unambiguous language, where the risk only passes when the seller gives notice to the buyer and not with retrospective effect. It is true that such use of language may possibly avoid dispute and undesirable situations with regard to whether or not the seller was *bona fide* in sending the notice. It also encourages the seller to send the notice to the buyer without delay, and normally it should be possible for the seller to send the notice of dispatch immediately after he has handed over the goods to the carrier⁷³ In general, it may reduce the relevant problems considerably and reduces the chances of litigation.⁷⁴ On the other hand, it has been argued that, it may possibly lead to the probability of dispute and problems of proof regarding the exact time that the damage or loss occurred, and whether or not the damage occurred before sending notice, especially, with respect to the issue of good faith and problems of proof regarding the exact time that the damage or loss occurred,⁷⁵ in the case if the buyer did not receive such notice.

6.3.4.3 Principle of dispatch and receipt

The use of notice cannot be discussed separately from the principle of dispatch and receipt. The last part of art 27 of the CISG states that, *a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication.* In fact, this part of art 27 can raise the issue of whether such notice has to

⁷² (n 18) 292

⁷³ Ibid.

⁷⁴ (n 49)99,15

⁷⁵ Zoi Valiotti, 'Passing of Risk in international sale contracts: A comparative examination of the rules on risk under the United Nations Convention on Contracts for the International Sale of Goods (Vienna 1980) and INCOTERMS 2000' (2003) Pace Law School Institute of International Commercial Law NO99,15. See Also Bernd von Hoffmann, 'Passing of Risk in International Sales of Goods' (1986) Ch. 8, 265-303

be received by the buyer or not. Although, it can never be concluded that art 27 establishes the general dispatch principle for the whole CISG, it can be said that art 27 applies to Part III of the CISG. Unlike the declarations covered in Part III, Part II declarations are, for the most part, expressly regulated under the receipt theory.⁷⁶ In other words, during the contract's performance, the risk that a communication will be delayed is governed by art 27. Any delay of communication will not deprive the sender the right to rely on the communication as if it was received. Thus, even though art 27 does not expressly state that the communications are effective from their dispatch, the result is the same because even if the communication never arrives, it is still deemed to be effective.⁷⁷

Despite the fact that it is unfair for the buyer to bear the risk when the notice was never received, it has been considered that the general rule that the risk of delay, error or loss in respect of a communication is to be borne by the addressee arises out of the consideration that it is desirable to have, as far as possible, one rule governing the risks of transmission. Although the Convention contains exceptions to this rule, in cases where it was considered that a communication ought to be received to be effective,⁷⁸ the rule in art 27 of the CISG as can be interpreted as an instance of the dispatch theory, where it is not necessary that the notice reaches the buyer, at least with respect to part III of the CISG, regarding passing of risk.⁷⁹ Practically, the German court referred to art 27 of the CISG and rejected the receipt principle in a case where the defendant, as the seller (a German intermediary), claimed that it had given notice of non-conformity to the claimant the buyer (a Hungarian company) via fax, while the claimant alleged that it had never received such a fax.⁸⁰

On the other hand, while the CISG adopts the dispatch principle with regard to identification of goods to the contract by the notice, several other legal instruments follow the viewpoint that the notice must be received by the addressee in order to identify the goods to the contract. Under English statutory, law the act of appropriation whether by

⁷⁶ Chengwei. 'Comparison of CISG Article 27 and counterpart notice provisions of the UNIDROIT Principles and PECL' (Pace Law School Institute of International Commercial Law 2004). Available at <http://www.cisg.law.pace.edu/cisg/biblio/liu1>

⁷⁷ M^a del Pilar Perales Viscasillas, 'Contract Conclusion under CISG' (1997) *Journal of Law and Commerce* 315-344. Available at <http://www.cisg.law.pace.edu/cisg/biblio/perales5.html>

⁷⁸ Secretariat Commentary on Art. 25 of the 1978 Draft [counterpart of CISG Art. 27], Comment 4. Available online at <http://cisgw3.law.pace.edu/cisg/text/secomm/secomm-27.html>

⁷⁹ Chengwei. 'Comparison of CISG Article 27 and counterpart notice provisions of the UNIDROIT Principles and PECL' (Pace Law School Institute of International Commercial Law 2004). Available at <http://www.cisg.law.pace.edu/cisg/biblio/liu1>

⁸⁰ T-Shirts case 19 October 2006 (Germany) (OLG Koblenz [OLG = Oberlandesgericht = Provincial Appellate Court]). Available at <http://cisgw3.law.pace.edu/cases/061019g2.html>

notice or otherwise, has no legal consequences, unless it has been assented by another party in the contract. Consequently, the party with assent of appropriation will in effect be an offeror.⁸¹ Furthermore, both the UNIDROIT Principles and the Principles of European Contract Law PECL, for example, adopt the receipt principle as a general rule. Article 1.9(2) of the UNIDROIT Principles stipulates that [a] *notice is effective when it reaches the person to whom it is given*. In the same way, art 1:303(2) of the PECL states pertinently that *any notice becomes effective when it reaches the addressee*. In this respect, both these articles follow, in substance, the rule in Part II of the CISG.⁸²

Nevertheless, it has to be mentioned that art 27 of the CISG is optional and subject to the party autonomy principle, where the parties are also at liberty to set other requirements according to their intention, such as receipt being necessary for communications to be effective. In the absence of an explicit agreement, usages or practices established between the parties can modify the principle stated in art 27 of the CISG.⁸³

6.3.5 Risk and identified bulk of goods

Practically, the provision provided in art 67(2), requires the identification to be clear, that is, specific and precise, before the risk is passed. This requirement may create difficulties of interpretation regarding the nature of shipment of bulk goods, together with goods designated to other buyers of the same kind (unascertained goods forming part of an identified bulk). This is because the nature of the shipment may not allow the goods to be ascertained before being distributed among various buyers, for instance, in the cases of transportation of wheat or oil and generally of liquid cargos. An interesting point is whether the requirement of identification is satisfied in the case of shares of fungible goods contained in an identified bulk. Issues such as the ascertaining the goods and the timing of the risk being passed from the seller to the buyer have to be examined in the compliance of art 67 (2).

⁸¹ P S Atiyah, John N Adamss, Hector Macqueen, Atiyah's Sale of goods, (11th edition ,pearson education limited, 2005) ,342

⁸² (n 76)

⁸³ Chengwei. 'Comparison of CISG Article 27 and counterpart notice provisions of the UNIDROIT Principles and PECL' (Pace Law School Institute of International Commercial Law 2004). Available at <http://www.cisg.law.pace.edu/cisg/biblio/liu1>. See Also Article 6 of CISG

The cases of fungible bulk goods and of collective consignments present a special issue, not only in the CISG but in most legal systems as well, due to the difficulties in determining the exact time of the passing of risk in such shipments. In fact, different opinions and possibilities have been envisaged, with an attempt to find solutions to this issue. Enderlein argues that the identification takes place only when the goods are divided among the various buyers, with the taking over of the goods. In the sense, the designation of the shipment in bulk is not sufficient for there to be a clear identification to allow the risk to be passed. He suggests that the risk should pass with the taking over of the bulk which is destined for several named addressees, because it is clear that the goods intended for every one of these buyers is contained in it. Consequently, in the case of an accident, the issue of identification will arise if the bulk is damaged or lost. However, in the event that only part of the bulk is damaged or lost, it has to be assumed that the buyers, who are not identified yet, bear the risk *pro rata* of their part in the delivery and the remaining goods would have to be delivered accordingly.⁸⁴

On the other hand, Honnold argues that the buyers should not be held to have agreed to loss sharing in an identified bulk unless this result is clearly indicated by the contract; further the situation should be considered separately in each case and it should be clear from the terms of the contract: for instance, heating oil loaded onto the ship designated to buyer A and the sale of the other half to party B, where such a contract would normally state the price per unit (e.g., barrel) and the approximate total quantity. Then, if the contract provides that risk in transit falls equally on buyers, the risk will be passed equally, as long as that is indicated by the contract. In other words, there is no reason the risk cannot be passed to the buyer, even though the goods are fungible bulk goods, as long as the approximate total quantity has been calculated clearly and the parties have agreed that the risk would pass to the buyer.⁸⁵

However, according to Gustins, there are two possibilities regarding identification of the goods to the contract relating to the collective consignment. According to the first, the designation of the shipment in bulk is not sufficient to constitute a clear identification; the risk therefore remains with the seller. Another interpretation suggests that there is sufficient identification if the buyer is given notice that the goods acquired are in a

⁸⁴ Enderlein & Maskow, *International Sales Law*, Oceana Publications, (1992) available online at <http://cisgw3.law.pace.edu/cisg/biblio/enderlein-art06.html> at 269

⁸⁵ John O. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (3rd edition edn Kluwer Law International, 1999) ,408

specifically ascertained cargo, even if such goods are mixed up with other goods. In fulfilment of these criteria, the risk of partial loss is borne proportionally by each buyer⁸⁶. In the case of partial loss, the risk is borne by each buyer proportionally (*pro rata*). In the case where the entire consignment is lost, each individual buyer or consignee will bear the losses equally.⁸⁷ Thus the *pro rata* solution may work in a total loss.

Nevertheless, the *pro rata* solution has been criticised in the case of deterioration in goods shipped. The criticism is centred on the potential in legal battles, which can be time consuming in the world of trade, where speed is the essence, simply due to the seller's failure to clearly appropriate the goods, or where the carrier has not delivered the goods to a particular buyer.⁸⁸

This issue is avoided in a different way under the English law, in the amended Sale of Goods (Amendment) Act 1995, which is aimed to the *pro rata* division solution in situations regarding the undifferentiated part of an identified bulk and the risk then passes to the buyer retroactively.⁸⁹ The situation under the CISG seems ambiguous, where the Convention does not have any specific rules pertaining to these kinds of goods. This opens the door for different interpretations as none of the above theories is adopted by the CISG.

This situation can be seen in Honnold's attempt to invoke the amendment of the second paragraph of the provision in the 1978 Session of the UNCITRAL Working Group. He argued that the existing text laid undue emphasis on identification by specifying that goods should be marked with an address. That was not the most usual means of identification and was unworkable for bulk goods in practice. For the reason of clarification, he proposed a more flexible formulation, which would be more in tune with commercial

⁸⁶ Manuel Gustin, ' Passing of risk and impossibility of performance under the CISG ' (2001) International Business Law Journal 1,3. See Also Zoi Valioti, 'Passing of Risk in international sale contracts: A comparative examination of the rules on risk under the United Nations Convention on Contracts for the International Sale of Goods (Vienna 1980) and INCOTERMS 2000' (2003) Pace Law School Institute of International Commercial Law NO99,15

⁸⁷ Paul Dobson, *Sale of Goods and Consumer Credit* (Sixth edn Sweet & Maxwell Limited, London UK 2000).P46. See Also Manuel Gustin, ' Passing of risk and impossibility of performance under the CISG ' (2001) International Business Law Journal 1,3. See Also Zoi Valioti, 'Passing of Risk in international sale contracts: A comparative examination of the rules on risk under the United Nations Convention on Contracts for the International Sale of Goods (Vienna 1980) and INCOTERMS 2000' (2003) Pace Law School Institute of International Commercial Law NO99,15

⁸⁸ Benjamin's, *Sale of Goods* (by Guest and Others) (5th edn.,1997) 246. See also P. S. Atiyah, John N. Adams, Hector MacQueen, *Atiyah's Sale of Goods*, (12th ed., London: Pearson 2011), 332-40

⁸⁹ Benjamin JP, *Benjamin's sale of goods* (Sweet & Maxwell 2010) Paragraph 5-109. See also Sale of Goods (Amendment) Act 1995 S 20A

practice. However, the drafters of the convention disregarded this idea and the ambiguous article remained unchanged and subject to different interpretations.⁹⁰

Further interpretation is suggested by Ramberg, following comments made on the article, who holds the view that no cases have provided guidance on the issue. However, he suggests that in addition to a *pro rata* solution, another solution for the passing of the risk would be to keep the original seller at risk until the goods have arrived at the destination. He further argues that the risk should not pass until effective appropriation has been made, in order to seek consistent interpretation between art 67(1) of the CISG and Clause B5 of the INCOTERMS 2000,⁹¹ which reads: '*that the goods have been duly appropriated to the contract, that is to say, clearly set aside or otherwise identified as the contract goods.*'⁹² This does not differ in substance from the latest version of Clause B5 INCOTERMS 2010 which reads: *The buyer must bear all risks of loss of or damage to the goods from the time they have been delivered in accordance with A4.*⁹³

Furthermore, such a view is supported by the Secretary-General, who suggested that such transactions would be subject to the basic principle that the risk cannot pass until the goods in question are identified. Accordingly, once the bulk was identified, the risk would pass with respect to a share in the bulk.⁹⁴ In support of this view, it has been stated that provision of art 67(2) refers particularly to bulk goods and collective consignments. According to the wording of the provision, such types of goods can only be identified when the seller puts markings on the goods, when the goods are expressly indicated in the shipping documents, when the seller gives notice to the buyer, or in any other way,⁹⁵ To sum up, the CISG considers fungible bulk goods as unascertained goods, and thus the risk

⁹⁰ Secretariat Commentary on article 67 of the CISG 1978 Draft. Official records of the united nations conference on contracts for the international sale of goods, Vienna, •10 March-II April 1980,at 402

⁹¹ Jan Ramberg, 'To what extent do incoterms 2000 vary Articles 67(2), 68 and 69?' (2005) 25:219 Journal of law and commerce ,221

⁹² INCOTERMS 2000, supra note 1, s B5

⁹³ Ibid, s B5.

⁹⁴ Shivbir S. Grewal, ' 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) 14:93 Loyola Marymount University and Loyola Law School 97. See Also 5 UNCITRAL Y.B. 92, U.N. Doc. A/CN.9/SER.A/1974

⁹⁵ Zoi Valiotti, 'Passing of Risk in international sale contracts: A comparative examination of the rules on risk under the United Nations Convention on Contracts for the International Sale of Goods (Vienna 1980) and INCOTERMS 2000' (2003) Pace Law School Institute of International Commercial Law. See also Heidelberg, 'The Passing of Risk A comparison between the passing of risk under the CISG and German law' (1999) Pace Law School Institute of International Commercial Law. See Also Gustin Manuel ' Passing of risk and impossibility of performance under the CISG ' (2001) International Business Law Journal 4

does not pass to the buyer until the goods are clearly identified to the contract. This interpretation could indicate that art 67(2) covers both types of goods.

Although, there are several interpretations regarding this issue, it seems there is no definite answer, at least under the CISG. It has been said that as the Convention did not contemplate such difficulties, parties are strongly advised to expressly provide the exact time of the passing of risk in their sale of goods contracts when the sale involves fungible goods in identified bulks under arts 6 and 7 of the CISG.⁹⁶ Additionally, it has been noted that with respect to the discussions leading to the final draft, although the drafters made a few references to the passage of risk in a fraction of a larger bulk, they did not incorporate a specific provision on the subject in the final draft.⁹⁷ Such gaps mean the provisions remain ambiguous.

6.4 The passing of risk with goods in transit- Article 68 CISG

Risk in the goods in transit was provided in art 68 of the CISG⁹⁸ which stipulates:

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.

This provision clearly deals with goods sold in transit, no matter whether it is carried out by road, rail or sea transportation. This usually occurs where the seller has bought in advance large cargos of oil, wheat, natural gas, and metals and generally goods that are carried in bulk and start these goods on their journey towards a destination without having previously sold the goods and without knowing the recipients, as well as where the goods have passed through several hands until reaching their final destination. Under these

⁹⁶ (n 49) 99,15

⁹⁷ Shivbir S. Grewal, 'Risk of loss in goods sold during transit: a Comparative study of the UN Convention on Contracts for the international sale of goods, the U.C.C., and the British Sale of Goods Act' (1991) 14:93 Loyola Marymount University and Loyola Law School 97

⁹⁸ Sylvain Bollée, 'The Theory of Risks in the 1980 Vienna Sale of Goods Convention' (1999-2000 Pace Law School Institute of International Commercial Law 245-290. See Also Heidelberg, 'The Passing of Risk A comparison between the passing of risk under the CISG and German law' (1999) 2,3,4

circumstances, the contracts of sale will be concluded while the goods are in transit process.⁹⁹ According to art 68, the risk passes to the buyer at the time of the conclusion of the contract.

However, this rule is qualified in the same article by the second part of the provision, which 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. Nevertheless, the buyer's burden in terms of risk will not be passed if the seller knew or ought to have known that the goods had been lost or damaged and did not disclose this to the buyer. In such a case, the risk remains with the seller who fails to exercise due diligence or acted in bad faith.

Clearly, this article allows flexibility and party autonomy, where the risk of goods sold in transit could be borne by the buyer or the seller or by both, according to the accompanying conditions and circumstances of the contract. In other words, in principle, the risk could be borne by the buyer from the time of the making of the contract and by the seller if the seller knew or ought to have known that the goods had been lost or damaged and did not disclose this to the buyer. It could be also borne retroactively by the buyer, from the time the goods were handed over to the carrier, or loss or damage can be at the risk of the seller before and after conclusion of the contract, according to part three of the article.

6.4.1 The buyer bears of risk at the time of conclusion of the contract

The first sentence of art 68 appears to be clear and unambiguous, where, the risk of the goods sold in transit passes to the buyer only at the time of conclusion of the sales contract.¹⁰⁰ In that sense, the seller disposes with the risk once the contract is concluded and then the buyer will bear the risk of the goods. It appears that, the drafters see the risk in stages: before the goods were purchased and after the conclusion of the contract.¹⁰¹

⁹⁹ (n 49)99,16

¹⁰⁰ (n 97) 98

¹⁰¹ (n 1)586, (1983)

Critically, the passing of risk from the time of conclusion of the contract of sale may create difficulties with regard to determining the time when damage occurred to the goods in transit, especially when damage results from processes like water seepage or overheating, where the problem may be more serious.¹⁰² Thus, such a rule may lead to disputes between the parties and be further complicated by insurance issues. In this regard Mr. Rognlien, the delegate to the Vienna Conference from Norway, argued that the passing of risk rule had to be founded on purely practical considerations. For example, 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 the successive buyers to take out additional insurance, because the risk would in fact pass while the goods were in transit. In terms of costs, the buyer pays the costs of insurance twice; once through the price of the sale and once from the moment the purchase is completed. Consequently, he argued that the time of passing of risk should not take place while the goods in transit process.¹⁰³

Furthermore, it has been argued that, the buyer who examines the goods is in a better position to claim against the insurance company or the carrier. Therefore, the risk should be borne by the buyer from the time the goods were handed over to the carrier.¹⁰⁴ This is the position is taken by art 99 of the Hague Convention (ULIS)), which reads: '*Where the sale of goods in transit by sea, the risk shall be borne by the buyer as from the time at which the goods were handed over to the carrier.*'¹⁰⁵

Nevertheless, the 1978 draft gave rise to further controversy and caused some delegates of the developing countries to voice their uneasiness with the idea of risk passing retroactively to the buyer.¹⁰⁶ Those delegates highlighted the issue of unfairness caused by placing the risk on the buyer before the time of the conclusion of the contract, especially, in CIF contracts, where placing the risk on the buyer from the time of shipment would

¹⁰² (n 85)409-412

¹⁰³ United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980. Official Records,221

¹⁰⁴ (n 18)265-303

¹⁰⁵ United Nations Conference on Contracts for the International Sale of Goods, Official Records, II, 213-215; 403-406. Such controversy can be seen in its drafting process. Under the 1978 draft 'the risk is assumed by the buyer from the time the goods were handed over to the carrier. Where this draft apparently, reproduced the substance of art 99 of the ULIS according to which the risk was assumed retroactively by the buyer from the time the goods were handed over to the carrier

¹⁰⁶ United Nations Conference on Contracts for the International Sale of Goods, Official Records,213

mean the buyer would have to pay for goods that were already damaged or lost, which was usually covered by seller's insurance.¹⁰⁷

In this regard, the researcher is of the opinion that the meaning of '*goods sold in transit*' deserves further examination in relation to risk. It was said that the word '*sold*' cannot have the technical meaning that it has in some legal systems, connoting goods the property of which has passed to the buyer. With no express provision dealing with the passing of property in the CISG, a more logical interpretation should only refer to goods made the subject of a contract of sale after they have been shipped and are on their way to the destination.¹⁰⁸ Moreover, the buyer could not have any insurable interest until he contracted to buy the goods. Additionally, such a provision has led to mandatory insurance of the goods, resulting in a further transfer of resources from Third World to developed countries,¹⁰⁹ since the insurance market has generally been controlled by the developed countries. Such a result was also unfair to buyers in developing countries, who would often prefer not to insure the goods but rather to bear the risk themselves.¹¹⁰

Moreover, such an interpretation would not add much to what is likely to follow from the application of the rules governing the burden of proof, since, in most cases, the buyer bears the burden of proof and, consequently, if he fails to establish the proof, that of the loss. In short, if the time when the loss or damage occurred cannot be established, it is likely to be assumed by the buyer.¹¹¹ Considering the issues of fairness, insurance practice and burden of proof, modification was made the first part of the draft provision allowing the risk to pass generally when the contract is concluded. Furthermore, art 68 would not work for CIF and CFR terms where the risk will pass to the buyer from the moment when the goods pass the ship's rail at the port of shipment. Apparently, this option creates an unfair situation regarding the buyer, where the buyer has to bear any loss or damage to the goods even before the contract is concluded, i.e., from the moment when the goods pass the ship's rail at the port of shipment.¹¹²

¹⁰⁷(n11)

¹⁰⁸ Michael Bridge, 'The Transfer of Risk under the UN Sales Convention 1980 (CISG)' (2008) Pace Law School Institute of International Commercial Law 94

¹⁰⁹ (n 14)

¹¹⁰ D.L.Perrott, The Vienna Convention on contracts for the international sale of goods, L. Fin. Rev. 582 (1980)

¹¹¹ (n 14) 262

¹¹² (n 49)259

It has been suggested that, in order to avoid such situations, it is recommended that parties, involved in such contracts, applying party autonomy, should agree in advance to the point in which risk is to be passed.¹¹³ In other words, parties could agree that risk passes either at the beginning of the contract or at the end of transit;¹¹⁴ consequently, the issue could be avoided.¹¹⁵

6.4.2 Passing of risk at the time the goods are handed over to the carrier

The second sentence of art 68 stipulates that, if the circumstances indicate otherwise, the buyer will bear the risk of loss from the time the goods were handed over to the carrier who issued the documents embodying the contract of carriage. The approach established by the second sentence of art 68 appears to be the exception to its ambiguity in definition.¹¹⁶

Generally, the term ‘circumstances’ seems here to refer to the intention of the parties, expressed, implied or inferred from the circumstances of the contract.¹¹⁷ In other words, such circumstances very often are associated with the intention of the parties, where the parties intend to pass documents embodying the contract of carriage to the carrier at the time the goods were handed over to the carrier. Consequently, it is reasonable to require the buyer to assume the risk. Due to the importance of party autonomy, the reading may also imply that the risk can be passed retroactively even before the conclusion of the contract, if the parties so wish.

¹¹³ Thomas J. Drago, Esq. Alan F. Zoccolillo, Esq, 'Be Explicit: Drafting Choice of Law Clauses in International Sale of Goods Contracts' (2002) Pace Law School Institute of International Commercial Law No 17

¹¹⁴ N.G.Oberman, Transfer of risk from seller to buyer in international commercial contracts: A comparative analysis of risk allocation under the CISG, UCC and INCOTERMS, available at

<<http://cisgw3.law.pace.edu/>> and <<http://www.cisgw3.law.pace.edu/cisg/thesis/Oberman.html>

¹¹⁵ (n 85) 409-412

¹¹⁶ Henry Deeb Gabriel, *Contracts for the Sale of Goods: A Comparison of U.S. and International Law*, (2nd edn, Oxford University Press 2009) 209-10. See Also J.D.Feltham, 'The United Nations Convention on Contracts for the International Sale of Goods' (1981) JBL 346, 357

¹¹⁷ B.Nicholas in C.M.Bianca and M.J.Bonell (eds), *Commentary on the International Sales Law. The 1980 Vienna Sales Convention* (Milan: Giuffrè, 1987) art. 68, para 2.2. See Also Sylvain Bollée, 'The Theory of Risks in the 1980 Vienna Sale of Goods Convention' (1999-2000 Pace Law School Institute of International Commercial Law 245-290

It has been widely argued that this pre-condition should include the transfer of the insurance policy to the buyer¹¹⁸ or the buyer takes out a retroactive insurance cover to cover the risk, which is possible if he is not yet aware of the loss.¹¹⁹ Nevertheless, Heidelberg has defined such circumstances as objective circumstances, independent of any legal arrangements.¹²⁰ He further rebutted the argument that cases where the insurance only insures the risks from the time of conclusion of the contract or when the goods are not insured at all should fall into the scope of the first part of art 68 of the CISG and the risk should pass at the time of conclusion of the contract.¹²¹ Here, the reason that an insurance considered an objective circumstance, indicates that the risk is assumed to pass to the buyer from the time of the conclusion of the contract, according to part one of art 68 of CISG.

In this regard, the Russian court held that the risk in respect of goods sold in transit passes from the time the goods were handed over to the carrier who issued the documents embodying the contract of carriage,¹²² when the goods were purchased on CFR and CPT in Petersburg. To be precise, the court viewed the actual timing of the risk passing to the buyer being the time when the goods have been delivered to the first carrier at the ship's rail in the port of shipment (St. Petersburg). Furthermore, this risk was passed to the buyer retroactively, before the conclusion of the contract.

It has been suggested that the second sentence of the rule should be applied when the precise moment when the loss or damage occurred cannot be established, to avoid the difficulties of proof which arise from splitting of risk and to prevent disputes between the parties.¹²³ Furmston argues that this view is grounded on the basis that the risk will be

¹¹⁸ B. Nicholas in Bianca & Bonell, *Commentary on the international sales law - the 1980 Vienna Sales Convention* 490 (Giuffrè, Milan, 1987). 498. See Also G. Hager in Schlechtriem, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, (Clarendon Press, Oxford,1998). 510. See Also Honnold, *Uniform Law for the International Sales under the 1980 UN Convention*, at n.372-2

¹¹⁹ G. Hager in Schlechtriem, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, (Clarendon Press, Oxford,1998),510

¹²⁰ (n 2)

¹²¹ Ibid.

¹²² Federal Arbitration Court for the Northwestern Circuit, Russian Federation, 3 June 2003, (Russian Federation) (Dmitriev V.V. (chairman), Zubareva N.A. and Kocherova L.I. (judges)). available on the Internet at <http://cisgw3.law.pace.edu/cases/030603r1.html>

¹²³ Gustin Manuel, ' Passing of risk and impossibility of performance ' (2001) *International Business Law Journal* ,4. See Also Heuzé, *La vente internationale de marchandises* no.370

passed onto the buyer at the same time of his reasonable physical possession of the goods, since the buyer can take care of the goods as the actual holder of the goods.¹²⁴

Although, such a construction would certainly have practical advantages, it cannot be reconciled with the legislative history of art 68, especially in that the CISG, generally, is not concerned about preventing the problems arising from splitting of risk. However, it appears that such a construction would not add much to what is likely to follow from the application of the rules governing the burden of proof.¹²⁵

On the face of it, the transferring of risk retroactively seems unfair for the buyer, where the buyer bears the risk of the goods before the contract or even before the passing of property. On the other hand, this rule is clearly consistent with the view which places the risk upon the party who is in physical possession of goods, as well as following principle of delivery which adopted by the CISG. In other words, the buyer rather than the seller has a practical and immediate interest in the goods, and as long as 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, since the buyer is bound to take reasonable care of the goods, hence bearing the risk.¹²⁶ Apparently, the physical possession and taking care of the goods by the buyer is the crucial factor under this rule, where the goods are regarded as being in physical possession of the buyer from the time the goods were handed over to the carrier who issued the documents embodying the contract of carriage.

Although, the first sentence of art 68 stipulates that where the goods are sold while they are in transit, the risk normally passes to the buyer at the time the contract is concluded, there is a discrepancy with terms where the risk passes to the buyer from the moment when the goods pass the ship's rail at the port of shipment. The second sentence clearly provides some exceptions, allowing space for party autonomy, and falls in line with such terms where risk passes on conclusion of the contract retrospectively, as from ship's rail at the port of shipment, if the circumstances so indicate (e.g. if the insurance policy is to the order of the assured or has been endorsed to the buyer). Obviously, the party autonomy

¹²⁴ Professor Michael Furmston, *Principles of Commercial Law* (Second edition edn Cavendish Publishing Limited, London UK 2001)

¹²⁵ Sylvain Bollée, 'The Theory of Risks in the 1980 Vienna Sale of Goods Convention' (1999-2000 Pace Law School Institute of International Commercial Law 245-290. See Also Heidelberg, 'The Passing of Risk A comparison between the passing of risk under the CISG and German law' (1999) 2,3,4

¹²⁶ Professor Michael Furmston, *Principles of Commercial Law* (Second edition edn Cavendish Publishing Limited, London UK 2001),70. See also *Stock v. Inglis*, 12 Q.B.D. 564 (1884)

principle plays significant role under the second sentence of art 68, where the risk passes to the buyer retroactively, from the time of the handover to the carrier, based upon the parties' agreement, which takes priority over the typical rule of the first sentence of art 68.¹²⁷ Nevertheless, the retroactive passing of the risk under the second part of art 68 ought to apply only in favour of a seller who acts diligently and in good faith.

¹²⁷ Peter Schlechtriem and Petra Butler, UN law on international sales: the UN Convention on the International Sale of Goods (2008). See Also Honnold J, *Uniform Law for International Sales* (3rd edn, 1999), 371

6.4.3 Exception to retroactive assumption of risk - the seller's actual or presumed knowledge

The third part of art 68 states that there is no retroactive assumption of risk 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. Accordingly, if the seller fails to disclose the loss or damage, the loss or damage is at the risk of the seller, meaning the seller is punished for his bad faith.¹²⁸ This sentence acts as an exception to the general rules in allocating risk in the goods in transit. However, the question that arises is whether this sentence refers to both previous sentences or not?

In this regard, it has been argued that it refers only to the second sentence, since the risk does not pass from the moment the contract is concluded if the loss or damage had already been affected, if the seller knew or is supposed to have known about it¹²⁹. Furthermore, it has been submitted that, such interpretation would not add anything to what the first sentence itself provides. Since the risk passes to the buyer at the time of the conclusion of the contract, it is immaterial whether the seller was then aware of the loss or not, where in both cases the risk is with the seller.¹³⁰ Accordingly, it can be said that this provision restricts the application of the second sentence of art 68. Thus, the passing of risk cannot have retroactive effect, even when the circumstances so indicate, if the seller acted in bad faith at the time of the sale.¹³¹

Nevertheless, the question that arises with respect to interpretation of the provision of the third sentence is whether the seller should bear only the damage or loss that he knew about at the time of the sale, or does his obligation extend to any possible damage existing at the time of the sale and in respect of which he had no knowledge? Additionally, it needs to be established whether the seller is liable for damage which, even though caused after the sale, is caused by circumstances which were concealed from the buyer at the time of the conclusion of the contract? The history of the third sentence of art 68 of the CISG does not

¹²⁸ (n 85)410,411

¹²⁹ B.Nicholas in C.M.Bianca and M.J.Bonell (eds), *Commentary on the International Sales Law. The 1980 Vienna Sales Convention* (Milan: Giuffrè, 1987), art.68, para 2.4, See Also John O. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (3rd edition edn Kluwer Law International, 1999).410,411

¹³⁰ Heuze, Vincent. *La vente internationale de marchandises: droit uniforme*. LGDJ, 2000. 54,315 . See also Sylvain Bollée, 'The Theory of Risks in the 1980 Vienna Sale of Goods Convention' (1999-2000) *Pace Law School Institute of International Commercial Law* 245-290

¹³¹ (n 82) 4

provide any guidance. Initially a conscious decision was made to adopt a rule which, unlike the rule in ULIS, placed the entire risk on a seller who was not acting in good faith.¹³² This creates a loose definition which can be subject to different interpretations.

According to Schlechtriem, the meaning of this sentence encompasses only the damage that the seller knew or ought to have known about by the time of the conclusion of the contract. In this sense, the seller is only liable upon the risk occurring before the time of the conclusion of the contract; otherwise, the risk is with the buyer. Clearly, this approach was not adopted to emphasise the link between the second and third sentences of art 68, and suffered a further setback in terms of the issue of burden of proof.¹³³

In contrast, after a review of suggestive legislative history, Nicholas supports a different view and argues that the seller should bear the risk for the loss or damage before and after the conclusion of the contract, and that the seller's knowledge is immaterial, as long as it was caused by the same damaging event as that which caused the original damage.¹³⁴ Nicholas noted that such an interpretation has the advantage of avoiding a splitting of the transit risks as well as addressing the difficulties arising from the burden of proof.¹³⁵ Honnold warmly welcomes this approach as far as it supports holding the transit loss on the seller but is doubtful about the basis and advisability of a "causally connected" limitation. As suggested, under the final version of art 68 the provision concerning the effect of seller's knowledge relates only to the second sentence, in which retroactive passing of risk depends on "circumstances", such as shipping documents and policy of cargo insurance. These circumstances dividing the loss can involve complications in sharing responsibility for salvage and in sharing claims under one policy of insurance. When a seller knows of the loss and does not disclose this to the buyer, the seller's conduct constitutes or amounts to fraud.

Consequently, it has been argued that, non-disclosure of the loss when the seller was aware of it amounts to fraud and constitutes a serious breach of contract.¹³⁶ Therefore, the main

¹³² Progress report of the Working Group on the International Sale of Goods on the work of its fifth session ' (1974) 81 92

¹³³ P.Slechtriem, *Commentary on the UN Convention on the International Sale of Goods (CISG)* (2nd edition, Oxford: Clarendon Press, 1998). op cit, art.68, para 5. See Also F.Enderlein and D.Maskow, *International Sales Law* (Oceana Publications, 1992) 272

¹³⁴ B.Nicholas in C.M.Bianca and M.J.Bonell (eds), *Commentary on the International Sales Law. The 1980 Vienna Sales Convention* (Milan: Giuffrè, 1987) op cit, art. 68, 2.3

¹³⁵ Ibid 499–500.

¹³⁶ (n 85)

protection for the buyer against the seller's bad faith lies in the remedies. Hence, such conduct by the seller allows the buyer to avoid the contract; in that sense arts 67, 68 and 69 do not impair the remedies available to the buyer on account of the breach.¹³⁷ Besides, the *lex contractus* may provide that in such circumstances the contract can be void.¹³⁸ In the sense, if the seller knew or ought to have known that the goods had been damaged, he should have communicated this fact to the buyer so that the buyer could decide whether to buy into such a situation. In other words, the loss or damage is at the risk of the seller, meaning that the buyer can exercise all remedies available in case of breach of the contract, according to arts 45 and 70 of the CISG,¹³⁹ to be examined later.

Indeed, although art 68 has been cited in several reported decisions, these decisions failed to interpret its meaning.¹⁴⁰ Apparently, interpretation of the third sentence in this article is still ambiguous and contentious, where there seems to be another gap within the CISG framework. Consequently, interpretation and settling of this issue seems to be referred to art 7(2) of the CISG, in conformity with the general principles which it is based on, or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law. Consequently, art 7 of the CISG could play a significant role with respect to determining which risks should be borne by the seller. Apart from this, art 68 also remains unclear as to whether it is necessary for the passing of risk in sales of transit goods for the goods to be identified to the contract. This will be discussed in the next section.

6.5 Identification of the goods under article 68 of the CISG

As has already been examined, art 68 CISG deals the passing of risk in the case where goods are sold in transit. This type of sale can involve bulk goods where the partitions of the goods remain unknown at the pre-shipping and shipping stages.¹⁴¹ What can be argued

¹³⁷ CISG art, 70

¹³⁸ (n 14)

¹³⁹ Ingeborg Schwenzer, Christiana Fountoulakis, Mariel Dimsey, *International Sales Law A Guide to the CISG* (2nd edn Hart Publishing, Oxford 2012),499

¹⁴⁰ Oberlandesgericht Hamm, Germany .338, 23 June 1998. See also c 170 Landgericht Trier, Germany, 12 October 1995.

¹⁴¹ Zoi Valiotti, 'Passing of Risk in international sale contracts: A comparative examination of the rules on risk under the United Nations Convention on Contracts for the International Sale of Goods (Vienna 1980) and INCOTERMS 2000' (2003) Pace Law School Institute of International Commercial Law ,99. 16. See Also Shivbir S. Grewal, '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 , 102 (1991) 14:93 Loyola Marymount University and Loyola Law School 97

is that this provision clearly does not require goods to be identified before the time of the passing of risk. This may be adduced by the reading of the Convention itself, in the case of identified goods before shipment. While arts 67 (2) and 69(3) require identification for risk allocation, this element is clearly absent from art 68.¹⁴²

It has been argued that even though art 68 does not explicitly require the goods to be clearly identified for the passage of risk to occur, its general view is referring to art 67, where the goods must be clearly identified.¹⁴³ Nevertheless, nothing in the text of art 68 would justify interpreting these words so as to cover the case of goods that are already appropriated or identified after the start of the transit to a contract concluded before the start of that transit. This demonstrates the absence of a definition in art 68 CISG corresponding to the requirement of clear identification in art 67 (2) of the CISG.¹⁴⁴ It has been submitted that, under this article the risk in respect of goods sold in transit would not pass on shipment if the shipment was of unascertained or unidentified goods for transmission to various consignees.¹⁴⁵

However, such a view may face problems arising from bulk goods designated to several buyers, as art 67 itself fails to provide a definite answer to this issue. Attempting to resolve this problem, Schwenger states that two different situations must be distinguished. If the contract entitles the seller to deliver a collective consignment, risk passes to the buyers at the time laid down in art 68 and they bear any loss *pro rata*,¹⁴⁶ as discussed. In this case the risk should pass with the taking over of the bulk which is destined for several named addressees, because it is clear that the goods intended for every one of these buyers is contained in it.

¹⁴² Harold J. Berman & Monica Ladd, Risk of Loss or Damage in Documentary Transactions Under the Convention on the International Sale of Goods, 21 CORNELL INT'L L.J. 423, 430 (1988). See Also Shivbir S. Grewal, '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 ,102 (1991) 14:93 Loyola Marymount University and Loyola Law School 97. See Also Neil Gary Oberman, 'Transfer of risk from seller to buyer in international commercial contracts: A comparative analysis of risk allocation under the CISG, UCC and Incoterms' in (LLM edn 1997). Available at <http://cisgw3.law.pace.edu/cisg/thesis/Oberman.html#fn120>

¹⁴³ Heidelberg, 'The Passing of Risk A comparison between the passing of risk under the CISG and German law' (1999) 2,3,4. See Also Gustin Manuel, ' Passing of risk and impossibility of performance under the CISG ' (2001) International Business Law Journal ,4. See Also Ingeborg Schwenger, Christiana Fountoulakis, Mariel Dimsey, '*International Sales Law A Guide to the CISG*' in (2nd edn Hart Publishing, Oxford 2012),936

¹⁴⁴ (n 108)

¹⁴⁵ United Nations commission on International Trade Law YEARBOOK VIII: 1977,125 n 54.63 n540,541

¹⁴⁶ D.E.Goodfriend, 'After the Damage is Done: risk of Loss Under the United Nations Convention on Contracts for the International Sale of Goods' at 589. (1983) Columbia Journal of Transnational Law. See Also Ingeborg Schwenger, Christiana Fountoulakis, Mariel Dimsey, '*International Sales Law A Guide to the CISG*' in (2nd edn Hart Publishing, Oxford 2012),936

On the other hand, if the seller is not entitled to deliver a collective consignment, the basic principle underlying art 67 (2) means that risk should pass to the buyer only when the goods have been clearly identified to the contract. From the buyer's point of view, the simplest solution is to shift the transit risk onto the seller by means of a special clause, such as the out-turn clause used in the oil trade. Indeed, according to this view, the rule of art 67 is applicable upon the situation in art 68, even though that art 68 does not explicitly require the goods to be clearly identified.¹⁴⁷ In support of that, The United Nations Secretary-General suggested that such transactions would be subject to the basic rule that the risk cannot pass until the goods in question are identified. It was argued that once the bulk was identified, the risk would pass with respect to a share in the bulk.¹⁴⁸

On the other hand, there is no provision which prevents the passing of risk in the case of unascertained goods under art 68 of the CISG. Although some interpretations have linked the passing of risk in unascertained goods under provisions of art 68 to the provisions of art 67(2), where the goods must be ascertained before the risk passes, such views did not make their way into the Convention. Therefore, the priority will be given to the legal provision of art 68, which is devoid of this requirement. In other words, depending on the literal interpretation of legal provisions, art 68 must be applied literally, even in absence of the requirement. Accordingly, it may be acceptable for the risk to be passed even if the goods are not identified, which may create problems and disputes because of the lack of explicit provision regarding identification of the goods. Thus, it would be worthwhile to put an explicit provision requiring identification of the goods on the lines of articles 67 and 69 of the CISG.

6.6 The passing of risk in contracts not involving carriage of goods (the residual cases) Article 69 CISG

Article 69 of the CISG provides that:

(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

¹⁴⁷ Heidelberg, 'The Passing of Risk A comparison between the passing of risk under the CISG and German law' (1999) 2,3,4. See Also Ingeborg Schwenzer, Christiana Fountoulakis, Mariel Dimsey, 'International Sales Law A Guide to the CISG' in (2nd edn Hart Publishing, Oxford 2012),936

¹⁴⁸ United Nations Conference for the International Sale of Goods, Official Records,U.N. Doc. A/Conf. 97/18, Annex I, 92 (1981)

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.

After dealing with cases involving carriage of goods by a carrier and sale of goods in transit, the convention deals with the residual cases in art 69, covering those potential situations which are not covered by the previous articles.¹⁴⁹ This provision applies to all contracts that do not involve carriage of the goods by a carrier¹⁵⁰ and is intended to make a distinction between art 67 involving carriage of the goods and art 68 involving goods being handed over to a carrier.

The distinction can be seen in the interpretations given by the courts and tribunals, where the German court concluded that a contract term “list price ex works” was not inconsistent with art 67, on the ground that the goods were to be taken by a third party carrier from Japan.¹⁵¹ A similar logic was also applied by an arbitral tribunal which applied art 67(1) to a contract that provided that “the buyer has to pick up the fish eggs at the seller's address and take the goods to his facilities in Hungary” and that the price was FOB Kladovo.¹⁵² On the other hand, an arbitral tribunal found that art 69 (2) rather than art 67 governed the passing of risk, in terms of a contract where the seller agreed to deliver the goods under the “DAF” (“Delivery at Frontier”) INCOTERMS.¹⁵³ Accordingly, by deciding that in cases not within art 67 and 68, 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 when delivery is due and he is aware of the fact that the goods are placed at his disposal.

¹⁴⁹ ICC Arbitration case n.7197 of 1992

¹⁵⁰ Sylvain Bollée, 'The Theory of Risks in the 1980 Vienna Sale of Goods Convention' (1999-2000 Pace Law School Institute of International Commercial Law 245-290. See. Also . Amtsgericht Duisburg, Germany, 360. 13 April 2000

¹⁵¹ (n 50)

¹⁵² Arbitration Court attached to the Hungarian Chamber of and Industry, Hungary, 163 ,10 December 1996

¹⁵³ Barry Nicholas, 'The Vienna Convention on International Sales Law' (1989) Pace Law School Institute of International Commercial Law 201-243. Also see case No. 104 Arbitration International Chamber of Commerce ,7197 1993

Similarly, under EXW contract risk passes from the moment when the goods have been placed at the disposal of the buyer at the seller's premises and requires notice to be given.¹⁵⁴ However, under the CISG, if the parties have agreed on a specific date for taking over the goods, a failure to do so constitutes a breach of contract when the agreed time has passed, or if they did not agree on a specific date, when a reasonable period has passed after the buyer has received notice that the goods are ready for taking over, as will be seen later.¹⁵⁵

Indeed, within this residual provision, the first paragraph of art 69 is itself residual on risk¹⁵⁶. The second paragraph of art 69 applies when the buyer is bound to take the goods at a place other than a place of business of the seller,¹⁵⁷ taking over of the goods at another person's premises or at a public warehouse or handing over of the goods by the seller to the buyer or to a carrier named by the buyer.¹⁵⁸ This provision refers to the situation where the buyer is bound to take over the goods at a place other than the seller's place of business. This narrows the scope of paragraph (1) to sales where the taking of possession must occur at the seller's place of business,¹⁵⁹ where the first case is covered by art 69(1) and the last two cases are covered by art 69(2). The conditions which need to be fulfilled for the application of art 69 will be critically examined below.

6.6.1 Taking over goods at seller's place of business

Article 69 covers the passing of risk in cases outside the scope of arts 67 and 68. The primary condition for its application is that 'the goods are placed at his [the buyer's] disposal'. The term "disposal" actually indicates the actions of the goods have been delivered at the seller's premises and the buyer is in the actual or "presumed ought to" position to take over the goods and exercise custody of the goods. However, these two premises are subject to the condition of "packaging identification", added in art 69(3).¹⁶⁰

¹⁵⁴ (n 15)

¹⁵⁵ G.Hager in P.Schlechtriem(ed), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (2nd edition Oxford: Clarendon Press, 1998) art 69, 4

¹⁵⁶ Nicholas in Bianca & Bonell, *Commentary on the international sales law - the 1980 Vienna Sales Convention* 490 (Giuffrè, Milan, 1987), 502

¹⁵⁷ (n 14)

¹⁵⁸ Nicholas, 'The Vienna Convention on International Sales Law' (1989) 105 *Law Quarterly Review* 201-243. See also C.M.Bianca and M.J.Bonell (eds), *Commentary on the International Sales Law. The 1980 Vienna Sales Convention* (Milan: Giuffrè, 1987)

¹⁵⁹ (n 82,1)388

¹⁶⁰ (n 14)

Once all three conditions are established, the risk is deemed to be passed from the seller to the buyer from the moment he takes over the goods, as the buyer is viewed as the party in the best position to arrange insurance covering any loss to the goods due to the fact of “being put at his disposal”.

The presumption and later policy underlying this rule is that the party in custody of the goods is in a better position to look after them, protect them and take out an insurance cover, providing that the parties did agree on a specific time for the buyer to be in custody of the goods or the buyer has received a notice of readiness. As the goods are very likely to be in the seller's premises which is likely to be covered by a standard building and contents insurance policy,¹⁶¹ there will be few difficulties in establishing the buyer's actual awareness of the delivery of the goods.

However, the words “buyer's presumed knowledge of the delivery” may cause further issues in international trade, as no requirement of notice is imposed on the seller. Complications may arise with the potential combination of seller's negligence and the passing of risks. In particular, the burden of proof placed on the buyer to prove that damage to something which is in the seller's custody was caused by the latter's negligence is unreasonable.¹⁶²

6.6.1.1 Risk and the issues of buyer's actual or presumed taking over the goods

According to Heidelberg, the meaning of “taking over the goods” means taking actual physical possession of goods. This can be effected by the buyer and the representatives of the buyer, such as a forwarding agent carrier. Placing the goods only at the buyer's disposal does not suffice.¹⁶³ In other words, the rule is that the risk passes to the buyer when he takes actual physical possession on delivery of the goods, and not placing the goods at the disposal of the buyer. However, a unilateral act of the seller does not suffice. The

¹⁶¹ John O. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (3rd edition edn Kluwer Law International, 1999), t n375. See also Nicholas, ‘The Vienna Convention on International Sales Law’ (1989) 105 *Law Quarterly*

Review 201-243. See also C.M.Bianca and M.J.Bonell (eds), *Commentary on the International Sales Law. The 1980 Vienna Sales Convention* (Milan: Giuffrè, 1987)

¹⁶² (n 14)

¹⁶³ (n 2)

reasoning behind this is that the seller should assume the risk as long as the goods are under his control.¹⁶⁴

Moreover, if the buyer bore the risk while the goods are in the seller's custody, the latter would be exempted from duty of care towards the safekeeping of the goods, which would cause further disputes.¹⁶⁵

Furthermore, it has been argued that the CISG does not permit an interpretation that art 69(1) does not specify physical handling of the goods as the time when risk passes. Over and above this, the second part of art 67(1) clearly distinguishes between the activities of making the goods available and taking control of them, which makes such a construction dubious. Hence, “taking over” by the buyer implies that the buyer or his agent has actual control of the goods. This interpretation is consistent with the policy underlying the first part of art 67(1), in that the seller should bear the risk as long as he has control of the goods and therefore the means of protecting them.¹⁶⁶

However, the researcher is of the view that the interpretation of art 69(1) should not be limited to the actual knowledge but other factors as well. Insisting on the interpretation of “actual knowledge” under art 67 (1) would fail to consider the possibilities of buyer’s actions, which amount to the knowledge or the buyer’s reluctance in taking over the goods for other reasons. In the former case, one may wonder whether the buyer should be considered as having the knowledge of the delivery and having taken over the goods as soon as he is handed over documents of title, such as a bill of lading. Moreover, the focus of art 69 concentrates on the actual activities of making the goods available and taking control of them leaves some room for factual disputes over whether such transfer of control had actually occurred.

This view is also supported by Bollée who states that buyer’s taking over the goods as soon as the exchange of documents is completed is essential for the rule that the goods are taken over as soon as they are placed at the buyer's disposal.¹⁶⁷ Furthermore, according to a residual character of art 69(1) the risk passes anyway, as soon as the seller has placed the

¹⁶⁴ (n 82, 1)t 388

¹⁶⁵ (14)

¹⁶⁶ Ibid.

¹⁶⁷ (1) 584

goods at the buyer's disposal at his place of business. The buyer's failure to take over the goods (default of acceptance) would amount to a breach of contract. Consequently, the second part of art 69(1) provides that if the buyer fails to take delivery in due time, the risk passes to the buyer from the time when the goods are placed at his disposal and such delay amounts to a breach of contract.¹⁶⁸

In this context it has been argued that a failure to take over the goods in due time constitutes a breach of contract if the agreed time for taking delivery has passed, or if no time has been agreed or a reasonable period has expired after the buyer has received notice that the goods are ready for delivery.¹⁶⁹ In the case where a notice was issued by the seller or in the form of a *de factor* notice being provided in a sale of goods contract,¹⁷⁰ it may be reasonable to see the buyer being punished for his non-diligent behaviour for not taking over the goods, thus the latter bears the risk following a breach of contract.¹⁷¹

However, the non-requirement of notice under art 69(1) would see the risk being passed even though the goods are still under the custody and control of the seller, as long as the agreed time for taking delivery has lapsed. Moreover, such a result would obviously be contrary to the general policy of the CISG. When the risk passes at delivery time, in the sense of physical possession, it is very likely to create disputes between the parties, particularly in case of loss or damage of the goods while they are under the seller's custody, as discussed. Under these circumstances, the issue can be further obscured with the buyer's possible accusation of the seller's failure to exercise due diligence to protect the goods diligently.¹⁷²

In this regard, the debates took place over the proposal made by the Australian delegation to amend art 67(1) to consider the exchange of documents as controlling the disposition of the goods sold, which was rejected at the Conference, with the Norwegian delegation emphasizing that "placed at his disposal" covers only the goods as such and not any

¹⁶⁸ Heidelberg, 'The Passing of Risk A comparison between the passing of risk under the CISG and German law' (1999). available at <http://cisgw3.law.pace.edu/cisg/biblio/romein.html>. See also B. Nicholas in Bianca & Bonell, Commentary on the international sales law - the 1980 Vienna Sales Convention 490,498 (Giuffrè, Milan, 1987)

¹⁶⁹ (n119)513

¹⁷⁰ (n 14)

¹⁷¹ (n134) art.69, para 3.4

¹⁷² (n 49)

documents.¹⁷³ Goodfriend lent his weight to the Norwegian view and supports the view that a better interpretation of art 69 (1) is that there can be no “taking over” by the buyer until the buyer or his agent has the actual control of the goods. This also comports better with the policy underlying the first part of art 69(1) that the seller should have the risk of loss as long as he has control of the goods as well as the means of protecting them, which amounts to “disposal”.¹⁷⁴

However, the researcher holds the view that the issue does not lie in the physical taking over of the goods, but the buyer must be aware. In other words, unilateral disposal by the seller is not sufficient, the buyer must be aware that the goods are at his disposal whether by notice or by any other act that would render the buyer aware. According to Schlechtriem,¹⁷⁵ notice is necessary only in the case where no date is agreed and reasonable time is presumed¹⁷⁶ and the case where the buyer is bound to take over the goods at the seller's place of business. However, different rules will be applied when the buyer bound to take over the goods at a place other than a place of seller's premises.

6.6.2 Taking over goods at other locations

In contrast with art 69 (1), the emphasis under art 69(2) is on “the place other than the seller's premises”. Accordingly, if the place of delivery is other than the seller's place of business then art 69 (2) comes into effect. Paragraph (2), however, is a special provision for cases where the buyer is to take over the goods from a place other than a place of business of the seller. Different places of delivery determine the application of paragraph (1) or paragraph (2) of art 69, in the sense that the provision under paragraph (2) applies where the buyer is bound to collect the goods at a place of delivery other than the seller's place of business, such as a public warehouse or another party's manufacturing premises where the finished goods are located.

In such cases 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. Here the policy considerations are different from the one underlying art 69(1). The policy underlying art 69(2) is based on the

¹⁷³ United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980. Official Records, 407,408

¹⁷⁴ (n 1)585

¹⁷⁵ (n 140)

¹⁷⁶ (n 14)

consideration that the seller is in no better position than the buyer to protect and insure the goods or to pursue any claims arising from them, when the goods are placed at a place other than the seller's premises.¹⁷⁷

The same paragraph also applies to the case in which the contract of sale involves the carriage of goods but outside the scope of art 67(1). Although the applicability of art 69(2) to the public warehouse has been noted earlier, the duty to hand the goods over to the buyer at the destination port does not imply handing them over to a carrier there. Indeed, under international practice, the seller's obligation ends when the goods are unloaded from the transnational carrier. Therefore, the second sentence of art 67 (1) does not apply to such a contract, even in the unusual case where the contract of sale provides for the subsequent inland transport, since the seller is not "bound to hand the goods over to a carrier". Hence, art 69 (2), rather than art 67 of the CISG, would logically apply.¹⁷⁸

Employing the same argument, it may be also applied to the case in which the contract of sale involves the goods being carried by the seller or by a carrier belonging to the seller himself. In other words, the seller bears the risk under the term of free delivery, where the seller is bound to deliver the goods at the buyer's place of business at his own risk, simply because the combined effects of arts 6 and 31 of the CISG would see the exclusion of art 67(1) and the residual effect of art 69(2) which allows these types of contracts to be interpreted accordingly, as one sees in the *Frozen Chicken* case,¹⁷⁹ where the destination contract was seen as falling outside the scope of the provisions of either the first or second sentence of art 67(1). Accordingly, art 69 (2) should apply and the buyer would not assume the risk of loss until the goods arrived and the seller would retain the risk of loss until that point.¹⁸⁰

6.7 The Relationship between Articles 67(1) and 69(2)

Despite the efforts to distinguishing the different situations by the application of arts 67 (1) and 69(2) respectively, at this juncture, it is worth examining the inter-relationship and difficulties which may arise from these two provisions. An interrelationship between arts

¹⁷⁷ The United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) 'The Commonwealth Secretariat (London,) 0 85092 382 4 26,27, accessed 12/11/2014

¹⁷⁸ (n1) 597

¹⁷⁹ (n 21)

¹⁸⁰ (n1) 598

67(1) and 69(2) of the CISG may, in fact, create difficulties with regard to interpretation of art 67(1) and the scope of the coverage of art 69(2) in terms of their applicability.

Arguably, in the absence of a clear indication of “the particular place”, such as *other than the destination* in the second sentence of art 67(1), it may be possible to interpret that sentence as applying to a destination contract. In terms of the scope of coverage, the provision of the first sentence of art 67(1) would be read as relating to shipment contracts, while the second sentence relates to destination. Article 69(2) would thus be restricted in its application to situations in which the buyer takes over the goods at a public warehouse. In its plain meaning, the second sentence of art 67(1) may be interpreted to apply to a destination contract to include an obligation by the seller to hand over the goods to an inland carrier at the buyer's port. Since neither the buyer nor his place of business is usually at the port itself, this would not be an unreasonable obligation. In particular, the overall objective of the CISG is to provide efficient provisions with broad coverage of typical contracts involving carriage of goods.

The different scope of the application can also be observed from the perspective of international practice. Indeed, under international practice, the seller's obligation ends when the goods are unloaded from the transnational carrier. Consequently, the second sentence of art 67(1) apparently does not apply in the situation covered by art 69(2), where the contract of sale provides for the subsequent inland transport, since the seller is not bound to hand the goods over to an inland carrier. In keeping with regular commercial practice and trade usage, this interpretation of art 67(1) above should be rejected and art 69(2) should apply.¹⁸¹ Furthermore, the conditions of “delivery must be due”, “the goods must be placed at the buyer’s disposal” and “the buyer must be aware that the goods are at his disposal” act as the positive conditions which must be fulfilled in the application of art 69(2), where see the risk passes only when delivery is due and the buyer is aware of the fact that the identifiable goods are placed at his disposal.

¹⁸¹ (n 1)

6.8 Conditions to be fulfilled in the application of art 69(2)

6.8.1 Delivery must be due

Under article 69(2), the buyer's liability for the risk of loss does not arise until delivery is due. In other words, the seller has to fulfill his obligation to deliver the goods at the due time, whether at the agreed time or within a reasonable period of time.¹⁸² It is worth noting that the maturity of delivery under art 69(2) should be understood in conjunction with art 33 of the CISG which states that:

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.

Under art 33 of the CISG, the seller has to place the goods at the buyer's disposal at that time (art 33(a)) or within that period (art 33(b)) when a fixed date was specified in the contract or when the period for delivery was assumed from usage or practice. If there is no such agreed provision, the seller has to place the goods at the disposal of the buyer at a warehouse, a place of manufacturing or at a place of destination within a reasonable time after the conclusion of the contract.

As stated, the buyer's failure to take delivery would constitute a breach of contract on the buyer's part. Such a breach would still see the risk of non-performance remaining with the seller until he has placed the goods at the disposal of the buyer. When the goods are placed at the buyer's disposal earlier than the due time, the risk does not pass to the buyer until delivery is due.¹⁸³ It has been argued that, the delivery becomes mature at the time in which the seller is obligated to deliver and the buyer has the right to claim the delivery.¹⁸⁴

Nevertheless, the difficulty arises when the seller delivers the goods earlier than the due time. In other words, when the goods are prematurely placed at the buyer's disposal, before

¹⁸² (n 520)112

¹⁸³ (n2)

¹⁸⁴ Musielak. H-J, *Grundkurs BGB*, (5edAuflage, München 1997), 449

delivery is due. In such a hypothetical scenario, it has been well argued that, in principle, the buyer is not bound to take delivery but may choose to do so. However, if the buyer opted for the taking of delivery, then he should bear the risk.¹⁸⁵

In a case involving a Norwegian seller (the plaintiff) selling raw salmon to a Danish company, it was further sold to a German buyer (the defendant) after being processed. The Norwegian seller sent a confirmation order to the buyer. Pursuant to this, under the DDP contract, the seller had to deliver the raw salmon to a specified delivery address, which was other than the company's place of business. Upon receipt of the confirmation order, the buyer signed and returned this order to the seller, through the Company. Subsequently, the seller delivered the raw salmon to the Company and sent the invoices to the buyer. The invoices indicated the Danish company's place of business as the delivery address. As a result of the bankruptcy of the Danish company, the buyer did not receive the raw salmon and refused to pay the purchase price.

The court applied art 69(2) which states that: *if the buyer is bound to take over the goods at a place other than a place of business of the seller, the risk passes when delivery is due*, and further found that the risk of loss had passed when the seller delivered raw salmon to a third party processor, because the buyer acquiesced in the delivery and delivery was due. In other words, the seller discharged its delivery obligation, although delivery occurred at a place other than the place stipulated by the contract and the DDP contract, as the buyer was named as recipient of the raw salmon in the delivery note.¹⁸⁶

On the other hand, it has been suggested that such a strict and literal interpretation of art 69(2) might see that the risk remaining on the seller, even if the buyer picks up the goods. Nevertheless, the present researcher would argue against such a suggestion as it obviously is contrary to the general policy of the Convention. Therefore, it is argued that the risk should pass to the buyer when the buyer accepts to take over the goods prior to the scheduled date.¹⁸⁷

¹⁸⁵ (n14)

¹⁸⁶ Oberlandesgericht Oldenburg, Germany, 340, 22 September 1998

¹⁸⁷ Gustin Manuel, 'Passing of risk and impossibility of performance under the CISG' (2001) *International Business Law Journal*. 389. See Also, Sylvain Bollée, 'The Theory of Risks in the 1980 Vienna Sale of Goods Convention' (1999-2000) *Pace Law School Institute of International Commercial Law* 245-290

6.8.2 The goods must be placed at the buyer's disposal

The second condition employing a different approach from the general policy rule in art 69(1), is the passing of risk under the provision of art 69(2), which does not depend on the buyer's taking possession of the goods. In other words, the risk does not pass only at the time at which the goods are actually taken over by the buyer, but could be passed at the time at which the goods are placed at the buyer's disposal, when delivery is due.¹⁸⁸ Goods are placed at the disposal of the buyer once the seller has done what is necessary for the buyer to be able to take possession of the goods. Normally, this would include the identification of the goods to be delivered, the completion of any pre-delivery preparation to be done by the seller, such as packing, and the giving of such notification to the buyer as would be necessary to enable the buyer to take possession.¹⁸⁹ Unlike the provision in art 69(1), the goods are not delivered at the seller's place of business and the practical considerations involving insurance practices, mentioned above, do not apply under art 69(2); consequently, there is no reason for risk to remain with the seller, as long as he has fulfilled all his obligations required.¹⁹⁰

This view remains consistent with commercial practice embodied in INCOTERMS (2000), where under a sale "Delivered Ex Ship" risk passes to the buyer when the goods are placed at the disposal of the buyer (A4, A5, B5), where the seller has fulfilled his obligation to deliver when he has made the goods available at his premises (i.e. works, factory, warehouse) to the buyer.¹⁹¹

Hager has argued that, while the unilateral act of placing the goods at the buyer's disposal would be seen as sufficing for the purpose of art 69(2), the seller should do everything necessary to enable the buyer to take control of the goods. For instance, if the goods are in a warehouse, the seller should give instructions to the warehouse keeper or should give the

¹⁸⁸ Sylvain Bollée, 'The Theory of Risks in the 1980 Vienna Sale of Goods Convention' (1999-2000 Pace Law School Institute of International Commercial Law 245-290. See also Heidelberg, 'The Passing of Risk A comparison between the passing of risk under the CISG and German law' (1999)

¹⁸⁹ Guide to cisc article 69 secretariat commentary (closest counterpart to an official commentary) Pace Law School Institute of International Commercial Law, available at <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-69.html>

¹⁹⁰ (n 16)

¹⁹¹ Ibid.

buyer an effective delivery order and the goods are at the buyer's disposal if he can require the warehouseman to deliver them to him.¹⁹²

This view also corresponds well with the issue of insurance. Placing the goods at buyer's disposal under art 69(2) is actually justified by the argument that the seller normally does not insure goods which are not in his care, or at least when the seller is not in a more favourable position than the buyer to insure the goods, to watch over them, and to claim damages from the insurance company. In case of a long-distance sale of goods, the seller placing the goods at the disposal of the buyer at the place of business of the buyer or at a third place would see the seller being unable to be in any better position to exercise the duty of care, hence an unreasonable burden on the seller. In such case, it would be more reasonable to place the risk upon the buyer. In the case where transport documents are required for handing over the goods, the goods are not placed at the disposal of the buyer until these documents have been handed over to him.¹⁹³

6.9 3. The buyer must be aware that the goods are at his disposal

The buyer must be aware of the fact that the goods are placed at his disposal. This awareness must be positive and can be brought about by the handing over of documents or by any other (informal) message.¹⁹⁴ Without such knowledge, it would be difficult to contemplate a case where the buyer is in breach of contract for not taking over the goods.¹⁹⁵ The requirement of buyer's awareness is supported by Bridge, who argues for the seller's positive duty to ensure the arrival of the notice at the buyer's end, on the grounds that the reasonableness of the imposition of the duty lies in the fact that the seller is placed in the best position in terms of the awareness of the dispatch of the notice. Bridge's view corresponds with a ruling of a German court, where the German buyer did not receive the 'positive notice' sent by the seller advising the storage of the furniture delivered to a

¹⁹² G. Hager in Schlechtriem, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, at 514 (Clarendon Press, Oxford, 1998). See also Zoi Valioti, 'Passing of Risk in international sale contracts: A comparative examination of the rules on risk under the United Nations Convention on Contracts for the International Sale of Goods (Vienna 1980) and INCOTERMS 2000' (2003) Pace Law School Institute of International Commercial Law, 18

¹⁹³ (n 2)

¹⁹⁴ Ibid.

¹⁹⁵ Michael Bridge, 'The transfer of Risk under the UN Sales Convention 1980 (CISG)' (2008) Pace Law School Institute of International Commercial Law 94. 77-105

Hungarian warehouse, in which the furniture subsequently disappeared after the bankruptcy of the warehouse owner. The court held that the buyer was not obliged to pay the price according to art 66 CISG, because the seller failed to persuade the court on the point of the arrival of the notice at the buyer's end. The failure of ensuring the arrival of the notice at the buyer's end would not see the conditions of "the buyer's awareness" and "being placed at his disposal" being fulfilled.¹⁹⁶ However, the seller may be exempted of the duty for sending the positive if the parties have agreed on the timing for placing the goods at the buyer's disposal in the contract, for the reason that the buyer should already be aware of the time when the goods will be placed at his disposal.

At this juncture, it is worth noting the differences between the notice requirements under art 69(1) and (2). According to art 69 (1) the risk passes when the buyer commits a breach of contract by not taking delivery of the goods, whereas that is not necessary under art 69(2) of the CISG. Moreover, under paragraph one, when the parties have agreed on a specific date the buyer does not have to be notified that the goods are at his disposal. In contrary, under paragraph two, the buyer should actually be aware that the goods are ready to be taken over by receiving a notification. Seemingly, the policy behind this is that in these cases the goods are under the control of neither of the parties and therefore none is in a better position to look after them - the risk, in that case, should pass to the buyer as soon as he is in a position to take delivery of the goods. On the other hand, in the absence of such an agreement, the seller must notify the buyer that the goods have been placed at his disposal. As awareness implies actual knowledge, it is essential that the notice is not effective unless received by the buyer.¹⁹⁷

The interpretation of the action of sending notice will be construed by the general rule of art 27 CISG, which states that notification becomes effective from the time of dispatch. On the other hand, art 24 of the CISG, which expressly relates to the conclusion of the contract, thus has to be applied to other cases where the receipt or similar conditions are required. Therefore, in this regard, it has to proceed on the assumption that a notice was

¹⁹⁶ Oberlandesgericht Hamm, Germany, 338,23 June 1998. Available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/980623g1.html>

¹⁹⁷ F.Enderlein and D.Maskow, *International Sales Law* (Oceana Publications, 1992). 277. See also Sylvain Bollée, 'The Theory of Risks in the 1980 Vienna Sale of Goods Convention' (1999-2000) *Pace Law School Institute of International Commercial Law* 245-290. See also Zoi Valioti, 'Passing of Risk in international sale contracts: A comparative examination of the rules on risk under the United Nations Convention on Contracts for the International Sale of Goods (Vienna 1980) and INCOTERMS 2000' (2003) *Pace Law School Institute of International Commercial Law*,18

received, meaning that art 24 suffices, even when, exceptionally, has not informed the buyer.¹⁹⁸

In particular, where goods are warehoused, the risk passes when the buyer becomes aware of the fact that the goods are at his disposal and requires the warehouse keeper to deliver the goods to him, if the contract demands it. Such a demand arises from the situation where the warehouse keeper has acknowledged the buyer's right to possession of the goods, or the seller provides the buyer with a document in which the warehouse keeper promises to deliver the goods'.¹⁹⁹ It has been argued that such a delivery note containing only an instruction is not sufficient to affect the passing of risk to the buyer.²⁰⁰ Roth further noted that the seller should give the buyer a delivery note with a fixed time for the collection of the goods.²⁰¹

Indeed, while the rule under paragraph one is that the risk passes to the buyer when he takes delivery of the goods either by actual, physical possession or by handing over documents, the passing of risk under the provision of art 69(2) does not depend on the buyer's taking physical delivery of the goods. It could be passed by buyer's taking physical delivery, or at the time at which the goods are placed at his disposal when delivery is due. Although the passing of risk at the time in which the goods are placed at his disposal when delivery is due may deviate from the general rule of the art 69, it can be also understood as a delivery as long as the buyer has become aware and delivery is due, where the goods are place under the buyer's control. However, the normal application of art 69 may be precluded, in certain circumstances where the goods are not identified according to the third paragraph.

6.10 Identification of the goods under art 69 of the CISG (Unascertained goods)

The third paragraph of art 69 requires, as a prerequisite for the risk to pass to the buyer, the clear identification of the goods in the contract. A similar rule was encountered previously

¹⁹⁸ F.Enderlein and D.Maskow, *International Sales Law* (Oceana Publications, 1992) at 277. See also Heidelberg, 'The Passing of Risk A comparison between the passing of risk under the CISG and German law' (1999). available at <http://cisgw3.law.pace.edu/cisg/biblio/romein.html>

¹⁹⁹ (n 119)

²⁰⁰ Ibid.

²⁰¹ Roth. P. M, 'The Passing of Risk', (1979), the *American Journal of Comparative Law*, Vol. 27, No. 2/3, *Unification of International Trade Law: UNCITRAL's First Decade* , 307

in art 67(2), and consequently the same interpretations apply to both provisions. Accordingly, the seller is expected to send a notice to the buyer to inform him that the goods have been identified and are at his disposal; he will have then fulfilled his obligation to enable the buyer to take over the goods.²⁰² Again, the same particular difficulties arise in cases of fungible goods sold in identified bulks (i.e. wheat, oil and liquids in general). It has been argued that the phrasing of paragraph three suggests that identification is achieved and the risk passes when the part of the goods sold to the buyer is actually removed or when there is, for example (if the goods are stored in a warehouse), an acknowledgement on the part of the warehouse keeper that he holds the specific quantity on the buyer's behalf.²⁰³ It is submitted, though, that the strict interpretation of the requirement of identification is not desirable, it should be sufficient that the seller acts in a way that enables the buyer to take over the goods.²⁰⁴

Although, there are several interpretations regarding this issue, it seems there is no definite and clear answer, at least under the CISG where the issue seems still ambiguous. It has been said that the Convention did not contemplate such difficulties. It may be because an identification of the goods is, for all intents and purposes, inseparable from the taking of delivery, and the goods may be considered adequately identified when the seller simplifies the taking of delivery.²⁰⁵ Yet it has been suggested that, when the sale involves fungible goods in identified bulks, the parties are strongly advised to expressly provide the exact time of the passing of risk in their sale of good contracts, in accordance with arts 6 and 7 of the CISG.²⁰⁶ Additionally, it has been noted that in the discussions leading to the final draft, the drafters made few references to the passage of risk in a fraction of a larger bulk, and did not incorporate a specific provision on the subject in the final draft.²⁰⁷ Hence, such gaps left within the CISG framework have caused ambiguities.

²⁰² Nicholas. B in C.M.Bianca and M.J.Bonell (eds), *Commentary on the International Sales Law. The 1980 Vienna Sales Convention* (Milan: Giuffrè, 1987) art. 69. See also Hager. G, in P.Schlechtriem(ed), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (2nd edition Oxford: Clarendon Press, , 1998) ,art69, 4

²⁰³ (n 134)art. 69

²⁰⁴ S.Bollée, "The Theory of Risks in the 1980 Vienna Sale of Goods Convention" 247, 248 available at <http://cisgw3.law.pace.edu/cisg/biblio/bollee.html> See also B.Nicholas in C.M.Bianca and M.J.Bonell (eds), *Commentary on the International Sales Law. The 1980 Vienna Sales Convention* (Milan: Giuffrè, 1987) art. 69

²⁰⁵ Barry Nicholas, *Goods Sold in Transit*, in *Commentary on the International Sales Law. The 1980 Vienna Sales Convention* in (Bianca and Bonell eds., 1987) ,505

²⁰⁶ (n 99) 15

²⁰⁷ (n 97)

6.11 Risk and Remedies- Article 70 CISG

When entering into a contract, the general presumption is that, as the contract is legally binding for the parties, the obligations will be met. Therefore, the rules governing the passage of the risk of loss – i.e. from the seller to the buyer - under the CISG can become complicated if, somehow, in the process of trying to meet contractual obligations, the contract is breached. Art 70 of the CISG states that: *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.*

Article 70 clearly regulates the relation between the passing of risk and the remedies undertaken by the buyer when the seller has committed a fundamental breach of contract prior to the occurrence of the damage. This also applies when the goods are lost by accident, independent of the breach of contract by the seller, and/or irrespective of whether the goods are lost or damaged by accident (as governed by the previously mentioned provisions in the of passing of risk),²⁰⁸ on the ground that the main aim of art 70 is not about the passing of risk as such, but rather any breach of contract due to the actions or omissions of the seller.²⁰⁹ However, if the fundamental breach is so serious that it entitles the buyer to the remedy of avoidance, the risk is said to be passed back to the seller retroactively.

According to the wording of this article, the remedies of the buyer remain intact and the rules of articles 67, 68 and 69 in relation to the passing of risk do not impair the remedies available to the buyer if the seller has breached any obligations under the contract, so long as the seller has committed a fundamental breach of contract. Put another way, the rule in relation to contractual breach trumps the passing of risk.²¹⁰ Nevertheless, that does not release the buyer from his obligation to pay the price, this price risks the obligation be paid, notwithstanding the loss or reduced value. The seller's obligations are deemed to be duly performed.²¹¹

²⁰⁸ (n 2)

²⁰⁹ (n 49)

²¹⁰ Gustin Manuel, ' Passing of risk and impossibility of performance under the CISG ' (2001) International Business Law Journal 1

²¹¹ CISG art 66. See Also, Johan Erauw, ' CISG articles 66-70: the risk of loss and passing it ' (2005-06) 25:203 JOURNAL OF LAW AND COMMERCE, 203

It is noteworthy that the general rule of this article allows the buyer to rely on grounds for exemption provided by the Convention in the event of a fundamental breach of contract, independently of the passage of risk. The buyer will be able to rely on such grounds for exemption despite the fact that goods suffer damage due to an accidental event after the passing of risk.²¹² In other words, a distinction must be made between two perspectives: (i) defects in the goods under a sale of goods contract and (ii) the passing of risk. It has been said that art 70 is concerned with defects to goods, and not with the passing of risk. Where the risk has already passed to the buyer, the buyer can only request remedies, such as restitution, if the seller breached any fundamental obligations under the contract.²¹³ Nevertheless, such a general rule could be exempted, in which case the risk may be transferred back to the seller retroactively, especially if the seller is in fundamental breach of the contract. This is particularly true in cases where the buyer declares the contract avoided according to art 49 on non-delivery of goods, as will be seen.

The necessary prerequisite is the commitment of a fundamental breach of contract by the seller which took place prior to the occurrence of the damage.²¹⁴ Thus, it can be said that one striking feature of art 70 of the CISG is that it is confined to fundamental breaches of contract by sellers. In contrast, any other breach will not be sufficient. Namely, the provision of art 70 is only concerned with cases in which the fundamental breach is unconnected with loss or damage to the goods.²¹⁵ Put simply, loss or damage to the goods should not be caused by any reason relating to the seller's fundamental breach, but should instead be accidental; in the case of the former, art 70 would not concern the issue of the passing of risk, but constitute a breach of contract due to an action or omission by the seller.

²¹² Johan Erauw, 'CISG articles 66-70: the risk of loss and passing it' (2005-06) 25:203 JOURNAL OF LAW AND COMMERCE, 203

²¹³ Zoi Valioti, 'Passing of Risk in international sale contracts: A comparative examination of the rules on risk under the United Nations Convention on Contracts for the International Sale of Goods (Vienna 1980) and INCOTERMS 2000' (2003) Pace Law School Institute of International Commercial Law, 19. See also, Goodfriend D.E, 'After the Damage is done: risk of Loss under the United Nations Convention on Contracts for the International Sale of Goods' (1983) Columbia Journal of Transnational Law.

²¹⁴ (n 49)19

²¹⁵ Michael Bridge, 'The Transfer of Risk under the UN Sales Convention 1980 (CISG)' (2008) Pace Law School Institute of International Commercial Law 77-105. See also, Hager .Gin Schlechtriem, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, (Clarendon Press, Oxford, 1998) ,506. See also Zoi Valioti, 'Passing of Risk in international sale contracts: A comparative examination of the rules on risk under the United Nations Convention on Contracts for the International Sale of Goods (Vienna 1980) and INCOTERMS 2000' (2003) Pace Law School Institute of International Commercial Law, 19. See also, Manuel Gustin, 'Passing of risk and impossibility of performance under the CISG' (2001) International Business Law Journal, 1

However, the question arises: how can one judge whether a fundamental breach of contract by the seller (the loss or damage) is the result of an accident, regardless of the fact that the seller has breached the contract?

6.11.1 Fundamental Breach

“Fundamental breach” is a central concept in the system of remedies under the CISG. It is a pre-requisite in the avoidance of the contract by either party.²¹⁶ However, the intention of those involved in creating the draft version was to remove the phrase “fundamental breach” from this provision, so that in any situation where a non-fundamental breach occurs, the fact that such a breach had occurred would not impair the remedies available to the buyer. However, in the final version of the Convention, the phrase “fundamental breach” was reinstated, and the legislative history does not provide any clues as to whether this inclusion was intentional or simply the failure to correct an earlier error.²¹⁷ However Roth suggests that the phrase “fundamental breach” remained in the provision due to a simple error.²¹⁸

A typical example of a fundamental breach of contract is the lack of conformity of goods which exists at the time when the risk passes to the buyer. Furthermore, it has been argued that a delay in delivery, which might occur in combination with deterioration in the quality of the goods, may also constitute a breach of contract. The possibility of delayed delivery may seem like an aspect of “legal risk”, but it is not the same. It is a risk associated with contracting to perform by a particular date, wherein non-performance by that date represents a breach of contract.

Nevertheless, the question arises as to whether such a phrase as fundamental breach can be confined to the aforementioned examples or has instead a broader application? In fact, the meaning of art 70 as it relates to (having committed) a fundamental breach of contract, should be read in conjunction with art 25 of the CISG, which reads:

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

²¹⁶ Jan Hellner, ‘The Vienna Convention and Standard Form Contracts’ in Paul Volken and Petar Sarcevic (eds), *International Sale of Goods: Dubrovnik Lectures* (Oceana 1986), 226,

²¹⁷ (n 1) 600

²¹⁸ (n 201) 305

reasonable person of the same kind in the same circumstances would not have foreseen such a result.

In reading this article, a fundamental breach means that any obligation under the contract can suffice, provided the other requirements for a fundamental breach are present, irrespective of whether the duty was specifically contracted between the parties, or if, instead, it followed from the provisions of the Convention. Even the breach of a collateral duty can give rise to a fundamental breach.²¹⁹

In practice, in one case a contract was entered into between the parties, where it was agreed that the seller would keep the goods cool (i.e. at a suitable temperature) during transport to New York. The seller took insufficient care to assure direct transport, and during the vessel's stop-over excessive heat accumulated which caused the goods to deteriorate. The tribunal found that, notwithstanding that risk passes when goods cross the ship's rail (delivery time), the parties had entered into a separate agreement relating to temperature risk. It was held that the seller breached the contract and the court granted the buyer damages to cover then responsible for the damage under art 66 CISG. Accordingly, the seller bears the risk, even after the goods are delivered.²²⁰ This means that the concept of a fundamental breach is broader, and not confined to the aforementioned examples. In *Delchi Carrier SpA v. Rotorex Corp.*, the Court of Appeals for the Second Circuit held that a fundamental breach of contract occurred when air compressors did not conform to the sample model and the accompanying specifications regarding cooling capacity and energy consumption.²²¹

Nevertheless, it has been argued that late delivery does not always constitute a fundamental breach: for example, failure to deliver goods cannot be deemed a fundamental breach in such cases where the parties have not agreed a precise date of delivery.²²² However, a delay in delivery can become a fundamental breach, especially when a timely delivery is in the

²¹⁹ (n 82, 1)118

²²⁰ Jasmine aldehyde case (Arbitration ; China) 1995/01 ,23 February 1995

²²¹ *Delchi Carrier SpA v. Rotorex Corp.*, 71 F. 3d 1024 - Court of Appeals, 2nd Circuit 1995

²²² Larry A. DiMatteo, Lucien Dhooge, Stephanie Greene, Virginia Maurer, and Marisa Pagnattaro, ' The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence ' (2004) *Northwestern Journal of International Law & Business*, 413

special interest of the buyer.²²³ Depending on the circumstances of the transaction - such as the need to fulfil an obligation - the delivery time may be considered a material term.²²⁴

Put another way, the concept of a fundamental breach, according to art 25 of the CISG, seems loose and something of a general concept, as it depends on the circumstances. In this sense, art 70 is applicable to claims for damages or loss, and these claims might arise out of a wide range of situations according to the circumstances of each individual case.²²⁵ For instance, it has been argued that the CISG does not distinguish between the breach of principal and ancillary obligations. Consequently, any breach of obligation, either a principal obligation or an ancillary one, can contribute to the prerequisite of fundamental breach stipulated in art 70,²²⁶ providing that the obligation in question is related to a fundamental breach by the seller of an international sale of goods contract subject to the CISG.²²⁷

In relation to the appropriate method of determining the loss or damage suffered as a consequence of a breach in the contract under art 70, the provision provides no guidance on this issue. Therefore, the court or arbitral tribunal need to determine the manner which is best suited to the circumstances. This makes it clear that the basic philosophy underpinning the action for damages or loss is to place the injured party in the same economic position he/she would have been in if the contract had been performed, including loss of profit – this is germane, as, the concept of loss does not include loss of profit in some legal systems. The broad and flexible concept of the provisions, as outlined in art 25, would also create greater balance, leading to compatibility with the different legal systems.²²⁸

Accordingly, once the seller has committed a fundamental breach of contract, arts 67, 68 and 69 do not impair the remedies available to the buyer on account of the breach. Thus the

²²³ OLG Hamburg 1 U 167/95, Feb. 28, 1997 (F.R.G.), CLOUT Case n. 277

²²⁴ (n 222)

²²⁵ United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980. Official Records, 59 n 4

²²⁶ Franco Ferrari, 'Fundamental breach of contract under the UN sales convention 25 years article 25 CISG' (2005) *Emergence of an international/regional business law*, 390. See also, Wilhelm-Albrecht Achilles, *Kommentar zum UN-Kaufrechtsübereinkommen (CISG) 29* (Neuwied/Kriftel/Berlin, 2000, 64

²²⁷ Franco Ferrari, 'Fundamental breach of contract under the UN sales convention 25 years article 25 CISG' (2005) *Emergence of an international/regional business law*, 390

²²⁸ United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980. Official Records, 59 n 4

buyer will have at his disposal all the Convention's remedies available to him in case of fundamental breach, which take priority over the risk rules.²²⁹

6.11.2 The buyer's remedies on account of the seller's fundamental breach

Although the risks pass to the buyer, according to art 70 he has at his disposal all the Convention's remedies offered to him in case of fundamental breaches to the contract by the seller. In fact, art 45 outlines the basic remedies available to the buyer for the seller's breach. However, art 45's remedial framework does not distinguish between material and non-material breaches.²³⁰ Consequently art 45 must be read in conjunction with the concept of a fundamental breach as described in art 25. Extending his rights to substituted goods, extension of time, and avoidance, as found in arts 46-52, does not prevent the buyer from subsequently seeking damages under arts 74-76. To this end, the following sections will review the range of buyer remedies outlined in art 45.²³¹

6.11.2.1 Right to Avoid Contract

The buyer can declare the contract avoided according to art 49 if there has been a fundamental breach of contract. If the buyer declares the contract avoided, he is released from his obligation to pay the price and is entitled to recover what he may have already paid under the contract.²³² However, it is critical to note that the buyer's remedy under art 49(1), to which he is entitled under art 70, may be limited by another provision in the Convention.

Article 51(1) provides that "if the seller delivers only a part of the goods or if only a part of the goods delivered is in conformity with the contract, Articles 46 to 50 apply to the part that is missing or does not conform". Nevertheless, art 51(2) makes it clear that the buyer may avoid the contract in its entirety if such failure to deliver the goods amounts to a fundamental breach of the contract. Thus, under art 51(2), the buyer is given an option to

²²⁹ (n 140) art.69, Para 2

²³⁰ Fritz Enderlein & Dietrich Maskow, *International sales law* 8 (1992) at 177. See also, Larry A. DiMatteo, Lucien Dhooze, Stephanie Greene, Virginia Maurer, and Marisa Pagnattaro, 'The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence' (2004) *Northwestern Journal of International Law & Business*, 401

²³¹ (n 222)401

²³² (14)

limit avoidance of the contract. It is debatable to what extent the buyer is entitled to such partial avoidance.²³³

However, one noteworthy point in this regard relates to the general rule of art 70, which is that the remedy of avoidance may result in the risk being placed retroactively back upon the seller, meaning that the seller bears any loss or damage that occurred (even after the buyer has received the goods), unless the casualty is due to an act or omission by the buyer.²³⁴ Put simply, because the contract is terminated, consequently all the obligations and the effects of the contract would be considered terminated as well. Such an interpretation may perhaps indicate that art 70 not only concerns the remedies available in relation to the defects to the goods, but also to the passing of risk, where the risk passes back to the seller retroactively. As a result, the seller might then bear the risk of goods that are under the buyer's control. However, the difficulties which result from this divorce between risk and possession are attenuated by the fact that the right to avoid the contract must be exercised within a reasonable time, as well as the actual existence of a fundamental breach of contract.²³⁵

The buyer's obligation to give notice

The issue of reasonable time highlights the limitations of the avoidance remedy, which is consistent with the underlying policy of CISG governing the contract of sale. The importance of completing transactions is based upon the recognition of the high costs incurred in international sales.²³⁶ In fact, art 49 should be read in conjunction with art 26,

²³³ Sylvain Bollée, 'The Theory of Risks in the 1980 Vienna Sale of Goods Convention' (1999-2000) Pace Law School Institute of International Commercial Law 245-290. See also, D.E. Goodfriend, 'After the Damage is done: risk of Loss under the United Nations Convention on Contracts for the International Sale of Goods' (1983) Columbia Journal of Transnational Law. note 8, n.76

²³⁴ Sylvain Bollée, 'The Theory of Risks in the 1980 Vienna Sale of Goods Convention' (1999-2000) Pace Law School Institute of International Commercial Law 245-290. See also, D.E. Goodfriend, 'After the Damage is done: risk of Loss under the United Nations Convention on Contracts for the International Sale of Goods' (1983) Columbia Journal of Transnational Law. note 8, 601-602

²³⁵ Sylvain Bollée, 'The Theory of Risks in the 1980 Vienna Sale of Goods Convention' (1999-2000) Pace Law School Institute of International Commercial Law 245-290. See also, Zoi Valiotti, 'Passing of Risk in international sale contracts: A comparative examination of the rules on risk under the United Nations Convention on Contracts for the International Sale of Goods (Vienna 1980) and INCOTERMS 2000' (2003) Pace Law School Institute of International Commercial Law NO99. See also, Larry A. DiMatteo, Lucien Dhooge, Stephanie Greene, Virginia Maurer, and Marisa Pagnattaro, 'The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence' (2004) Northwestern Journal of International Law & Business

²³⁶ Catherine Piche, *The Convention on Contracts for the International Sale of Goods and the Uniform Commercial Code Remedies in Light of Remedial Principles Recognized under U.S. Law: Are the Remedies of Granting Additional Time to the Defaulting Parties and of Reduction of Price fair and Efficient Ones?*, 28 N. INT'L L. & COM. (2003), 531

which states that, *a declaration of avoidance of the contract is effective only if made by notice to the other party*. This means that such notice is indispensable in the issue of a declaration of avoidance of the contract.

Some cases have addressed the buyer's obligation to give notice of avoidance. Taking Germany as an example, the buyer's duty to send a notice was deemed as fulfilled if the buyer could prove that notice of avoidance was sent, not that it was received.²³⁷ Also it was ruled that the notice must be explicit to the seller, as the buyer's duty is to 'expressly declare the agreement avoided vis-a-vis the opposite party; so that there are no remaining doubts such a declaration of avoidance must be explicitly recognizable and realizable to the other party.'²³⁸ Hence, an implied declaration is insufficient.

In contrast, an arbitration panel disregarded the need for such a formal declaration. It did not identify any specific action that the buyer was required to take, but instead pointed out that notification by the buyer depends on the circumstances of the case. It also allows the buyer to declare the contract as avoided by his statement of action - whether expressly or by implication²³⁹ - providing such notice occurred within a reasonable time frame.

Thus, while the Convention does not explicitly require a period of time for notifying avoidance, it could be said that identifying such a period of time may be subject to the interpretation of the court, according to the circumstances of the case. Often, decisions are based on the nature of the goods and the circumstances of the parties involved.²⁴⁰ However, the timing for making avoidance notice known to the seller must be within a reasonable time frame. Consequently, a Spanish court found 48 hours as a reasonable time for giving notice of avoidance after a fundamental breach had taken place.²⁴¹ On the other hand, it has been held that the buyer was denied the right to avoidance because the declaration of

²³⁷ OLG Naumberg (9 U 146/98) (27 April 1999) (Germany) available at <http://cisgw3.law.pace.edu/cases/990427g1.html>

²³⁸ District Court (Bezirksgericht) of Saane 20 February 1997 [T.171/95] available at <http://cisgw3.law.pace.edu/cases/970220s1.html>

²³⁹ ICA Arbitral Tribunal 2/1995, May 11, 1997

²⁴⁰ (n 222)

²⁴¹ T, SA v. E Audiencia Provincial de Barcelona, seccion 16a, Nov. 3, 1997 (Spain), available at <http://cisgw3.law.pace.edu/cases/971103s4.html>

avoidance occurred five months after the breach,²⁴² which was viewed as an unreasonable period of time; hence the risk remained with the buyer.

Thus, despite the fact that such a notice is indispensable in the issue of a declaration of avoidance of contract, it is clear that neither art 49 nor art 26 stipulates any formality required, nor do they indicate the content or period of time needed to satisfy the notice. Thus the formality and the content - as well as a reasonable time frame needed to satisfy the notice requirement under art 49 and art 26 - have not been clearly resolved.²⁴³ So it can be held that determining such issues - subject to the circumstances of each case - is important, allowing that the buyer is able to avoid the contract and consequently revert the risks and the goods to the seller. Nevertheless, returning the goods to the seller after avoidance has occurred would be subject to art 82 of the CISG.

6.11.2.2 Restitution of the goods substantially in the condition in which he received them

Essentially art 70 also should be read in conjunction with art 82, which provides in paragraph 1 that the buyer may not avoid the contract or require the seller to deliver substituted goods if it is impossible for the seller to make restitution of the goods substantially in the condition in which he received them, where the right to avoidance can be lost. Thus, the impossibility of making restitution of the goods, or of making restitution of the goods substantially in the condition in which he received them, is clearly another limitation of avoidance under art 70 which would prevent the buyer from avoiding the contract²⁴⁴ or exercising the right to substituted or repaired goods, as will be seen. Art 82(1) states that the general rule - that the two remedies mentioned in arts 49 and 46 are not available if the buyer cannot return the goods substantially in the condition he received them. Generally speaking, the remedies remain available unless the damage to the goods was due to an act or omission by the buyer. Notwithstanding this restriction, its effect is mitigated by the exception in art 82(2) (a), which provides that the buyer can avoid the contract or require substitute goods, while 'the risk remains with the seller, since the buyer

²⁴² BGH VIII ZR 18/94, Feb. 15, 1995 (F.R.G.), CLOUT Case No. 124, available at <http://cisgw3.law.pace.edu/cases/950215g1.html>

²⁴³ (n 222) 406

²⁴⁴ (n 210)

is permitted to exercise those rights irrespective of the loss of or damage to the goods except where that loss or damage is due to the buyer's act or omission'.²⁴⁵

6.11.2.3 Right to Substituted or Repaired Goods

The buyer can ask for delivery of substituted goods in accordance with art 46(2). He can always claim this remedy, even in cases where the defective goods may have been destroyed. However, this right may be limited in some legal systems by art 28 of the CISG, which relieves a court of the obligation to order a specific performance if such a remedy would not be granted under domestic law; it is noteworthy that the risk in such a case would pass back to the seller, in a manner similar to a case of avoidance.²⁴⁶ It is also subject to the limitations mentioned in arts 51 and 82, as the buyer is required to give notice under art 39 or within a reasonable period of time, as in the case of the lack of conformity of the goods.²⁴⁷ A reasonable time-frame, as well as the formality and the content, are needed to satisfy the notice requirement under art 39, which would be determined according to the circumstances of the cases, as mentioned above.

Another remedy that the buyer can claim, despite the risk being passed, is the repair of the goods under art 46(3). This provision applies only in those cases where the goods were only damaged and not irretrievably lost. Article 47(1) which offers the buyer discretion to fix an additional period of time for performance by the seller of his obligations and may be expanded by analogy to cases in which such period has not been stated. If, however, the

²⁴⁵G.Hager in P.Schlechtriem(ed), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (2nd edition Oxford: Clarendon Press, , 1998).art.69, Para 2. See also, S.Bollée, "The Theory of Risks in the 1980 Vienna Sale of Hager in P.Schlechtriem(ed), *Commentary on the UN Convention on the International Sale of Goods (Goods Convention)*", at 283. available at <http://www.cisgw3.law.pace.edu/cisg/biblio/bollee.html>

²⁴⁶ Larry A. DiMatteo, Lucien Dhooge, Stephanie Greene, Virginia Maurer, and Marisa Pagnattaro, 'The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence ' (2004) *Northwestern Journal of International Law & Business* 402. See also Zoi Valiotti, 'Passing of Risk in international sale contracts: A comparative examination of the rules on risk under the United Nations Convention on Contracts for the International Sale of Goods (Vienna 1980) and INCOTERMS 2000' (2003) *Pace Law School Institute of International Commercial Law*

²⁴⁷ CISG, supra note 4, at art. 46(2)

goods are destroyed before their repair²⁴⁸ the buyer may resort to other remedies with respect to the seller's breach of contract, because repair is no longer feasible.²⁴⁹

6.11.2.4 Right to a Price Reduction

Under art 50, pursuant to art 45(1) (a), despite the risk being passed, the buyer can request the seller to reduce the price of goods that do not conform to the contract, even if the price has already been paid.²⁵⁰ Obviously the goods must be damaged due to the omission of the seller. Thus, if the defective goods have been destroyed due to an accidental event, then this remedy will have no meaning.²⁵¹ Price reduction must logically be proportionate to the value that the non-conforming goods bore to the value of the conforming goods at the time of delivery, and it has been suggested that the assessment of the value of the goods should be at the place where the seller has to perform.²⁵² However, this suggestion is possibly subject to the interpretation of the courts and the circumstances of the cases.²⁵³ For instance, the Hungarian court held that the buyer's place of business, or the place where the goods will be directed, should be regarded as the market in which value is to be ascertained.²⁵⁴

6.11.2.5 The right to ask for damages

The buyer has the right to ask for damages according to arts 74- 77 CISG; however this right is restricted, since it will only cover the damage or loss which occurred before the risk passed. Thus, this type of remedy is the most unsatisfactory one under art 70 and therefore, the buyer rarely relies on it.²⁵⁵ However, these last two remedies could be avoided by the right of avoiding the contract, in the case where the buyer intended to avoid the contract of sale, which makes them insignificant.

²⁴⁸ (n 140)69

²⁴⁹ (n 14)

²⁵⁰ (n 222)402

²⁵¹ (n 49)

²⁵² (n 84) 555

²⁵³ (n 222)

²⁵⁴ VB/94131 Arbitration Court of the Chamber of Commerce and Industry of Budapest, Dec. 5, 1995

²⁵⁵ (n 49)

6.11.3 Conclusion

From the foregoing discussion it can be argued that, although art 70 concerns the remedies relating to a fundamental breach under the CISG, it can also be said that it concerns the passing of risk, where the risk under art 70 may pass back to the seller, in cases or remedies of avoidance the contract, and when the buyer asks for delivery of substitute goods, but only under the limitations mentioned above and in the case of fundamental breach.

However, despite the fact that the fundamental breach of contract is the basic element in the remedies offered to the buyer under art 70, it has been argued that, where the breach is not fundamental, the risk is passed to the buyer as normal, and the remedies which may be available are the remedies of repair, reduction in price and damages for the goods that were defective before the passing of risk, based on the tortious liability. The tortious liability lies in the omission of the seller depriving the buyer of what he was entitled to expect under the contract. To conclude, in a usual situation, the buyer has to bear the risk of any damage or loss of goods due to accidental events. He will not have the discretion to declare the contract avoided or ask for substitute goods, since these remedies are available only in cases of fundamental breach of contract.²⁵⁶

6.12 Party autonomy principle and the legal nature of the passing of risk rules under the CISG

In order to understand the legal nature of the rules in relation to the passing of risk under the CISG, it is necessary to analyse in depth the foundation of such rules. In this sense, the nature and basis of these rules may be said to evolve out of the general rule, and introduces the possibility of exceptions.

The passing of risk under the Convention appears to be governed by more than one provision. In the case where a contract of sale involves carriage of the goods, art 67 applies when the goods are delivered to the first carrier, at which point the risk passes at the time of delivery to the first carrier. However, the parties' agreement on handing the goods over

²⁵⁶ Ibid.

at particular place other than the seller's place, may have some effect²⁵⁷ on this rule; for instance, it is suitable to be applied for FAS contracts where the risk passes when the seller places the goods alongside the ship at the port. The second provision provided by art 68 deals with goods sold in transit, where the risk under this provision passes to the buyer at the time of the conclusion of the contract. Typically, the risk in respect of goods sold in transit passes to the buyer only at the conclusion of the sales contract (Art. 68 (first sentence)). There is, however, an important exception. The risk passes to the buyer retroactively, from the time of the handover to the carrier "if the circumstances so indicate". Thus, even in the latter case, under art 68, the basic rule is in relation to the passing of risk at the time the contract is concluded and the principle of delivery plays a significant role. Where the goods are already in transit, this indicates strongly that the goods have already been delivered to the first carrier.²⁵⁸ The third provision provided by art 69 is that risk passes from the seller to the buyer at the time when the buyer takes over the goods at the seller's place of business. This rule is limited by the exception, in the case where the buyer is to take over the goods from a place other than a place of business of the seller.²⁵⁹

Seemingly, the Convention adopts the theory of time of delivery of the goods, connecting the passing of risk to delivery and possession of the goods. Consequently, under the CISG the risk passes to the buyer at the moment when the buyer or the carrier takes delivery of the goods.²⁶⁰ The phrases "seller is bound to hand them over at a particular place", "if the circumstances so indicate" and "other than a place of business of the seller" indicate the influence party autonomy may have on the interpretation of the CISG provisions in this regard.

The multiplicity underpinning the rules relating to the passing of risk in the CISG seems at first glance to suggest that the Convention's basic rule is that risk passes when the seller hands over the goods to the first carrier. Accordingly, delivery plays a significant role in

²⁵⁷Hager, G. and Schmidt-Kessel, M., in P. Schlechtriem, and I. Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, Oxford, Oxford University Press, 2010, 928. See also, Bernd von Hoffmann, 'Passing of Risk in International Sales of Goods' (1986) Ch. 8, 265-303

²⁵⁸ Bernd von Hoffmann, 'Passing of Risk in International Sales of Goods' (1986) 294. Available at <http://www.cisg.law.pace.edu/cisg/biblio/vonhoffmann.html>

²⁵⁹ Ibid, 265-303.

²⁶⁰ Zoi Valiotti, 'Passing of Risk in international sale contracts: A comparative examination of the rules on risk under the United Nations Convention on Contracts for the International Sale of Goods (Vienna 1980) and INCOTERMS 2000' (2003) Pace Law School Institute of International Commercial Law NO99 at 10. See also, Bernd von Hoffmann, 'Passing of Risk in International Sales of Goods' (1986) Ch. 8, 270

the passing of risk under the CISG, whether the act of delivery is to the first carrier or to the buyer himself, regardless of whether the buyer has taken physical delivery of the goods, or, alternatively, at such time in which the goods are placed at his disposal, where the fact that the seller retains transportation documents (or has already passed them over), does not affect the passing of the risk.²⁶¹ It could be said that the delivery principle, whether to the first carrier or at the seller's place of business, is the general rule under the CISG, at least in relation to the aforementioned rules.

It is immaterial who the goods were delivered to, so long as they have been handed over. In other words, the principle of delivery remains the general rule in all such provisions, notwithstanding who is the recipient or where the delivery takes place; each of these rules is limited by exceptions, as well as instructions which are subject to the principle that the risk cannot pass until the goods in question are identified as seen.

It is obvious that in arts 67 and 69, the CISG rejects the definite link between the passing of property and the passing of risk as understood in the English law and the idea of the single risk at the time of the conclusion of the contracts. Ambiguities are further compounded by the different approaches taken by the CISG, different national laws and the ULIS. For instance, in terms of the concept of “*délivrance*” applied in art 97(1) of the ULIS which stipulates that the risk only passes when there has been a delivery of goods conforming to the contract. Consequently, in the case where the delivered goods do not conform to the contract, the risk does not pass to the buyer but is still on the seller.²⁶² Conversely, under the CISG, the issue of conformity comes under the scope of a fundamental breach of contract, according to art 70, where the risk has already passed to the buyer. In such cases the buyer can only request remedies if the seller has breached any fundamental obligations under the contract, as seen above. However, it is borne in mind that the legal effect of the rules concerning the passing of risk is that, as all provisions of the CISG are, non-mandatory and can be subject to the parties' agreement.

²⁶¹ Dionysios Flambouras, 'Transfer of Risk in the Contract of Sale involving Carriage of Goods: A Comparative Study in English, Greek Law and the United Nations Convention on Contracts for the International Sale of Goods' (2001) 87-149 Pace Institute of International Commercial. See Also The United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) 'The Commonwealth Secretariat (London,) 0 85092 382 4 , 26 accessed 12/11/2014. Schlechtriem, P., Uniform Sales Law: The UN-Convention on Contracts for the International Sale of Goods, Vienna, Manz, 1986, 88

²⁶² (n 49)99

6.12.1 Party autonomy principle and the rules of passing of risk under the CISG

As discussed above, the CISG is an international convention on the unification of substantial laws which act as default rules in the absence of an agreement between parties. However, such default rules are subject to the parties' agreements displaying, modifying or excluding the relevant provisions. Bearing this in mind, it is always essential to reflect all CISG provisions upon art 6,²⁶³ where one is reminded that the application of the CISG has no mandatory force on the parties in question and is subject to the party autonomy principle. Article 6 indicates the scope of the party autonomy. Generally, it is stipulated that contracting parties may exclude the application of the Uniform law in whole or they may choose to derogate only from the effect of any of its provisions. Such inference can be easily be drawn from the interpretation of CISG art. 6 and, in the case of the UNIDROIT Principles, confirmed in its Official Comments.²⁶⁴

It has been said that some general principles can be easily identified in the provisions of the CISG itself. One such principle is that of autonomy, although it has not been expressly provided by the CISG, and so it must be deduced from its specific provisions by means of an analysis of the contents of such provisions. If it can be concluded that they express a more general principle, capable of being applied also to cases different from those specifically regulated, then they could also be used for the purposes of art 7(2).²⁶⁵

Hence, the parties are given the freedom to deviate from the aforementioned rules provided, and to agree otherwise, in that they have freedom to identify the time when the risk will be deemed to have passed. For instance, the parties may incorporate into their own agreement trade terms, such as the INCOTERMS, to achieve such an effect.²⁶⁶ They may agree to vary a standard trade term, adopt a trade term that is local,²⁶⁷ or use a trade

²⁶³ Tran Quoc Thang. 'Passing of Property Under Contracts for the International Sale of Goods: Should the CISG Regulate the Transfer of Property?' (Durham University 2004)

²⁶⁴ Schlechtriem, *Uniform Sales Law - The UN Convention on Contracts for the International Sale of Goods*, (Manz: Vienna, 1986)

²⁶⁵ John Felemegas ed., *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law*, Cambridge University Press (2006) P27 note 17, available online at <http://www.cisg.law.pace.edu/cisg/biblio/felemegas14.html>

²⁶⁶ Cámara Nacional de Apelaciones en lo Comercial [Appellate Court] (Argentina) 47.448 . 1995 31 October 1995 (José Luis Monti and Bindo B. Caviglione Fraga)

²⁶⁷ (n 21)

term in connection with the price rather than delivery.²⁶⁸ The parties may also agree to the allocation of risk by incorporating the standard terms, trading customs or general business conditions of the seller or buyer.²⁶⁹

Undoubtedly, in accordance with art 6 of the Convention, the parties' agreement will govern their sale of goods contract and their intentions will take priority over any other rule,²⁷⁰ even in the possible case of derogations from the provisions of Chapter IV. However, art 6 in this regard must be read in conjunction with art 9 (1), which states that *the parties are bound by any usage to which they have agreed and by any practices which they have established between themselves*. This indicates that the parties are bound by agreed trade usages with respect to risk of loss or damage. It is also necessary to consider art 8 of the CISG, where the parties' intentions and statements can be interpreted in accordance with the practices and usages they have established between themselves. These can be applied even though they are not expressly mentioned in the contract. In consequence, INCOTERMS may be regarded as usages established between the parties, if they have used them in previous transactions between themselves and, as a result, they will be applied to their sales contract, even though they were not expressly referred to.²⁷¹ Consequently, an expressed or implied provision on the passing of risk that has been agreed upon by the parties may have legal impacts on the issue of the passing of risk.

For example, the practice of a long-term business relation between a French seller (plaintiff) and German buyer (defendant) was addressed in the *Frozen Chicken* case. The seller delivered the goods according to its general business conditions "free delivery, duty paid, untaxed" and handed the goods over to a carrier. The court employed art 8 to interpret a (franco domicile) provision in a contract, finding that the clause addressed not only the costs of transport but also the issue of the passing of risk.

The court interpreted the provision in line with the reasonable understanding of the circumstances of the contract. The court found that this clause did not merely deal with the cost of the transport but also with the passing of the risk. Furthermore, it was held that the buyer had no obligation to pay the price under arts 66 and 67(1) CISG, as the risk had not

²⁶⁸ 2 U 175/95 OLG Köln OLG Oberlandesgericht Provincial Court of Appeal (Germany) 1997 9 July 1997

²⁶⁹ (n 21)

²⁷⁰ Honnold, J. O., and Flechtner, H. M., *Uniform Law for International Sales under the 1980 United Nations Convention*, (4 edition, Rijn, Kluwer Law International, 2009), 528

²⁷¹ Feltham J.D., 'C.I.F. and F.O.B. Contracts and the Vienna Convention on Contracts for the International Sale of Goods' *Journal of Business Law*, (1991), 413, 416

passed to the buyer when the goods were handed over to the carrier for transmission to the buyer. The seller was bound to deliver the goods at the buyer's place of business, in conjunction with article 6 CISG, at its own risk. This was specified in the parties' agreement in the contract, and, consequently, it deviates from the strict interpretation of the CISG rules.²⁷² Furthermore, in the case *Jasmine Aldehyde*, where the parties entered into a separate agreement relating to temperature risk, the tribunal upheld the parties' intention in relation to the rule of passing of risk at the time of delivery.²⁷³

From the previous analysis, it would appear that the courts support the intention of the parties and its precedence over any other default rules of the CISG, which further supports the view that the agreement of the parties is the basic rule in the passing of risk. Consequently, it is appropriate to conclude that the party autonomy principle can play a significant role in the Convention's rules. Thus, this leads us back to determine the basic rule surrounding the passing of risk, in the previous comparison of the rules of the CISG. It appears that the party autonomy provided in art 6 of the CISG is acting as the basic rule in determining the contractual relationship between the exceptions laid down in the CISG discussed above. In other words, where the parties agree to pass the risk at a particular time, the interpretation of the passing of risk will lean towards the intention of the parties.

Furthermore, even in the case of partial exclusion of the Convention, the contracting parties may not derogate the application of the CISG. Firstly, these are the mandatory provisions of the CISG itself and secondly these are the mandatory provisions of the law that should regulate the contractual relation in case when the party autonomy concept was not applied.²⁷⁴ Article 6 of the CISG indicates only one prescription of the Convention that has mandatory character and therefore the contracting parties may not derogate from its application of Article 12.²⁷⁵ The mandatory prescriptions in the second hypothesis should be determined in each separate case. It is worth noting that the limitation of art 12 does not apply in the case of total exclusion of the Convention.²⁷⁶ In that case the contracting parties should act only in conformity with the mandatory provisions of the domestic law that

²⁷² (n 21)

²⁷³ *Jasmine aldehyde case* (Arbitration ; China) 1995/01 23 February 1995

²⁷⁴ (n 264)

²⁷⁵ (n 84)

²⁷⁶ Ferrari, *Specific Topics of the CISG in the Light of Judicial Application and Scholarly Writing*, 15 *Journal of Law and Commerce* (1995), pp. 1-126, available online at <http://cisgw3.law.pace.edu/cisg/text/franco6.html>

normally would regulate the contractual relation.²⁷⁷ However, it has been argued that as well as art 12 there are also other mandatory provisions of the Convention that impose a limitation on the contracting parties' freedom of choice under the provision of art 6²⁷⁸, despite not being mentioned in art 6; however, it is submitted that none of these articles restrict the parties' freedom of contract.²⁷⁹

To conclude, priority to an agreement between the parties is directly given in the wording of art 6 of the CISG: "the parties may exclude or vary the application of this Convention", where it is stated that the parties have an absolute right to create the terms of the contract according to their intention.²⁸⁰ Thus, while party autonomy can supersede the default provisions in the CISG, its interpretation must also take arts 6 and 8 into consideration, as the *Frozen Chicken* case demonstrated.

²⁷⁷ (n 264)

²⁷⁸ For example, CISG Arts. 4, 7, 28, Derogating from CISG Article 4 would make little sense, as it would lead to the Convention being applicable to questions of contractual validity and transfer of property

²⁷⁹ Ulrich G. Schroeter, Freedom of Contract: Comparison between Provisions of the CISG (Article 6) and Counterpart Provisions of the Principle of European Contract Law, notes 10, 11, 12, 13 and 14, available online at <http://cisgw3.law.pace.edu/cisg/text/peclcomp6.html>

²⁸⁰ CISG, art 6. The application of art 6 is subject to art 12 which reads: 'Any provision of article 11, article 29 or Part II of this Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under article 96 of this Convention. The parties may not derogate from or vary the effect of this article

Chapter 7 - Conclusion

Globalization is an inevitable trend nowadays, with international trade becoming more important than ever. To keep up with this trend, the function of both national and private international law is now moving from a traditional one based on protection towards one based on facilitation. As examined in the previous chapters, the rule of party autonomy is the primary one and takes priority in the application over any other rules. However, in the absence of any expressed or implied indication regarding the intention between the parties, the default rules will be applied; the default rules are statutory law, whether the SGA or the CISG.

Concerning the principles of passing of risk and property, the research has demonstrated that, apart from party autonomy the principle of *res perit domino* continues to link the transfer of risk with the transfer of property in English law, as a long established principle, where the general rule in relation to the passing of property is that the property passes at the time of the conclusion of the contract of sale, so long as the goods are ascertained and that no risk passes until the property has been transferred. Section 16 of the SGA provides the general principle and starting point when considering the passing of property and risk in relation to unascertained goods. Accordingly, where there is a contract for the sale of unascertained goods, no property - and thus no risk in relation to the goods - is transferred to the buyer unless (and until) the goods are ascertained. On the other hand, contemporary legislation, notably the CISG, segregates the notion of property from the risk, and relegates the transfer of the title to a position of less importance to the transfer of risk. Article 4 (b) of the CISG makes it clear that it does not govern the passing of property in relation to the goods sold.

In this regard, an attempt will be made in this chapter to draw conclusions from the issues arising from the passing of risk and property which have been examined throughout this work. It is also the researcher's intention to provide evaluations, suggestions and remedies in this area of law, where draft models will be presented in attempt to avoid the legislative conflicts arising from the passing of property and risk under both the CISG and English

law. Such models will be represented as Provisions to be added to the relevant provisions of the passing of property under the CISG and passing of risk under SGA.

7.1 Conclusion drawn from the issues arising from the passing of property

Section 17 of the SGA deals with the intention of the parties that the property of ascertained goods passes when the parties to the contract intend it to pass. The intention of the parties appears clearly where the parties intend to pass the property of goods at a particular time. The courts readily draw inferences as to the parties' intention from the terms used in the sales contract. Indeed, where the goods represent specific property, these will pass when the parties intend it to be transferred. On the other hand, if no intention is evident, the act sets out the rules in s.18 for determining when property will pass. However, if the contract is for the sale of unascertained goods, no property in the goods is transferred to the buyer until the goods are ascertained under s.16. It seems that the parties have a right to agree the time when the property passes, but this right of freedom has been modified by s.16 SOGA, which provides the general principle and starting point when considering the passing of property in relation to unascertained goods.

Accordingly, it can be said that there are two fundamental factors required for the transfer of property: the first, pointed out in s.16, is that the goods must be ascertained and consented, subject to s.18 (5); the second factor is the party autonomy principle, pointed out in s.17, which involves the intention of the parties to pass the property, and where the property passes at the intended time according to s.17, or even according to s.18 (5). When the parties agree on the time of assent to appropriate the goods that means they intend to pass the property at such time. For example, when the parties agree to pass the property at the time when the buyer will give consent to the seller to appropriate the goods, this could signify that they intend to pass the property at the time of consent of appropriation.

However, if no time is specified for the passing of the property, then relevant rules from s.18 should be applied for the ascertainment of the parties' intentions. With s.18, where 'there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.

To reiterate, the party autonomy principle is the primary rule which overwrites the relevant provisions in the application over any other. Accordingly, in the absence of any expressed or impliedly indication regarding the intention between the parties, the default rules will be applied.

Even though there are two basic factors which are required for the time of passing of property under English law, the party autonomy principle - which is laid out in s.17 and states that property passes at the moment specified or intended in the contract of sale - is the basic rule underpinning the passing of property. That is to say, English statutory law adopts the principle of party autonomy as a basic rule regarding the time of passing of property, with the proviso that unascertained goods must be ascertained beforehand (s. 16).

The situation under the CISG is different, since art 4(b) expressly excludes the issue of the transfer of property from the scope of the application of the convention. However, a more in-depth analysis of the reading of arts 6 and 19 of the CISG reveals the significant role played by the party autonomy principle, where, art 6 of the CISG makes it clear that contractual provisions prevail over the rules of the CISG. In this sense, as we have seen, the CISG recognises that party autonomy is the essential principle. It could even be said that it has adopted the freedom of contract principle, as well as giving express recognition which serves to protect rights in the international sale of goods. Obviously, arts 6 and 19 taken together create a freedom of contract principle under the CISG, while art 19 extends freedom to the parties in order to negotiate the terms of contract in line with their interests. Furthermore, art 6 gives the parties the freedom to reject the convention in its entirety, or derogate from or vary the effect of any of its rules.

Consequently, it is possible for the parties - either with or without choosing an applicable law to fill the gaps left open by CISG - to determine the time of passing of property autonomously and according to their own intention, due to the freedom of contract principle, and because there is no provision in the Convention which prevents the parties from shaping the agreement according to their wishes/interests. The parties can therefore determine the timing of passing of property, either through choosing an applicable law, where the property will be passed according to the rules and provisions in the chosen law, or, alternatively, by agreeing on the time of the passing of property independently (i.e. without choosing an applicable law).

It can be said that the legal nature of the CISG signifies that property in goods can be passed according to the party autonomy principle, where the intention of the parties is the main factor in identifying the time of the passing of property; this means that property passes at such times as both parties agree.

Thus, although art 4(b) of the CISG expressly excludes the issue of the transfer of property from the scope of the application of the convention, it can be held that the CISG regulates the issue of the passing of property implicitly. In other words, the exclusion of the issue of the passing of property by art 4(2) leaves the remedy of such an issue open and in many cases dependent upon the intention of the parties involved.

Furthermore, arts 6 and 19 provide both parties with the freedom to identify the terms of their contract, including the ability to determine the time at which the property is transferred from the seller to the buyer, based on the absence of any express provision regulating such issues in the CISG which would prevent the parties in the contract from identifying the time of transfer of property according to their intention.

To summarise, the Convention expressly excludes the issue of the transfer of property by art 4(b) with respect to the default rule, which means that there are no default rules regarding the issue of the transfer of property. In other words, it can be said that the CISG implicitly adopts the party autonomy principle as a basic rule in relation to the passing of property.

However, the problem lies in cases where such an agreement between the parties is absent, and where there are no default rules in place. Moreover, art 7(2) of the CISG, and the Convention's general principles must not be referred to. This is because the questions concerning the property of the goods sold, or questions concerning the validity of the contract, or of any of its provisions, must not be answered with the help of general principles, as these questions are expressly excluded from scope of art 4(2) of the CISG. Thus, the effect of a sales contract on the property in the goods is left to the party autonomy principle and the applicable national law, to be determined by the rules of private international law of the forum.

7.2 Evaluation and remedies in relation to passing of property under the English law and the CISG

Along with English law, the CISG adopts the party autonomy principle, where the intention of the parties is the basic rule in relation to the passing of property. However, although the party autonomy principle is the basic rule under English law, based on s.17 and is the basic rule under the CISG, based on arts 6 and 19, the difference lies in the default rules. In this sense, English law involves default substitutional rules, which apply in cases where there is an absence of expressed or implied indication regarding the intention between the parties. In contrast, the CISG lacks such default rules regarding the transfer of property, simply because art 4(b) expressly excludes the issue of the transfer of property from the scope of the Convention.

This thesis has argued that this exclusion represents a major drawback. It has been pointed out that the exclusion of such default substitution rules in relation to the passing of property clearly creates difficulties, especially in the absence of any expressed or implied indication regarding the intention between parties; instead, they can choose a domestic law to govern their contract. This solution has the advantage of allowing their contract to be uniformly and fully governed by a single domestic law. However, its disadvantage is that a uniform solution may not be easily achieved. As a result, efforts from nation states are needed to overcome these problems.

It is worth mentioning that the outcome of this research is that the CISG regulates the issue of the passing of property implicitly, by the party autonomy principle, but not based on express provision in the Convention. This conclusion was reached on the basis of the interpretation and analysis of some of the provisions of the Convention, as seen in Chapter Four.

Obviously, the CISG does not concern its provisions with the passing of property issue regarding the default rule, which makes it more open to criticism. In particular, the passing of property is one of the most important issues in the field of international trade. For that reason, it would certainly be beneficial for international trade if a uniform rule on the passing of property were to be included in the CISG. Although there are significant differences between legal systems, harmonization cannot be ruled out. Due to the scope of the issues involved, it will, however, take quite some time to achieve.

In contrast, the default rules in English law appear to be more pragmatic and its precise structure makes it a more efficient and better developed one than the CISG regarding the passing of property.

7.3 Conclusion drawn from the issues arising from the passing of risk

The passing of risk under English law is governed by more than one rule; according to the criteria of s.20 (1) of the SGA, English statutory law appears to have a mixed approach. Namely, the risk could be passed with the property, under the *res perit domino* rule, at the point when the property passes to the buyer, or at a different time (i.e. a time separate from the passing of the property), according to the agreement of the parties. On the face of it, the general rule is that the risk passes with the property, according to *res perit domino* under s.20 of the SGA. On the other hand, with a more in-depth interpretation of the same section, a different conclusion may be reached, which is that the basic rule is that the risk passes according to the intention of the parties. In this sense, a general rule of s20 can be modified by expressed or implied agreement. Such agreements have priority over any other rules. Accordingly, in the absence of any expressed or implied indication regarding the intention between the parties, the default rule of part two of s.20 will be applied.

Therefore, it can be concluded that the legal nature in relation to the passing of risk is the intention of the parties, where the parties have the absolute right to agree upon the time of passing of risk, according to *unless otherwise agreed* stated in part one of s.20(1). That is to say, English statutory law similarly adopts the principle of party autonomy as a basic rule regarding the time of the passing of risk. Thus, there is nothing peculiar about separating the transfer of risk from the transfer of property.

The intention of the parties is clearly respected where the parties intend to pass the risk of goods at a particular time, whether with the property or separately at a different time; the parties can separate the passing of risk and property, and such agreement will govern the issue relating to the passing of risk; in addition, the risk will be passed at the agreed time. Therefore it can be seen that determining the time at which the risk passes may be based on the issue of determining whether the passing of property occurs, according to s.17 or s.18. The risk and property will then pass at the same time, according to an agreement regarding the passing of property.

Moreover, it doesn't matter whether the parties intended to pass the risk at the same time as the property, or even before or after the passing of property, where it is expressed as "*unless otherwise agreed.*" It is therefore possible for the parties to make provisions in the contract of sale to determine that the risk passes at a different time from the property. Undoubtedly, the phrase *unless otherwise agreed* refers to the party autonomy principle, and consequently the risk could be passed before or after the property has passed, according to an agreement between the parties. Thus, the goods must be sufficiently identifiable as those to which the risk relates. It might therefore be assumed that the contract must be one for the sale of specific goods; alternatively, if it was for the sale of unascertained goods, the goods should have become ascertained before the risk could pass.

Thus, there is no provision in English statutory law highlighting the passing of risk with regard to whether the goods are specific or unascertained; it appears that the goods must be sufficiently identifiable as being those to which the risk relates. Therefore, in the contract of a sale of specific goods, the risk could be passed from the seller to the buyer separately, before or after property, especially in cases involving the passing of risk after property, as this indicates clearly that the goods are specific goods, because according to s16 of the SGA no property in the goods is transferred to the buyer unless and until the goods are ascertained. Consequently, and logically, no risk passes so long as the risk is linked to the property.

It is noticeable that English law links the issue of the passing of risk to the issue of property, and it appears that English statutory law implies that no risk is deemed to have passed until the property has passed, and no property passes until the goods are identified in the contract. Provision of s.20 (2) links the issue of risk to the rules of s.17 and s.18 of the SGA.

Put simply, when such rules govern the passing of property, so long as the risk follows, the property will be passed intuitively, according to the rules underpinning the passing of property. It can be said that s 20 does not provide any new rule; apparently it refers the issue of timing in relation to the passing of risk to the rules on the passing of property contained in s17 and s.18 of the SGA.

However, the issue arising in this context is when the parties agree to pass the risk before the property, assuming that the contract is for the sale of unascertained goods. As we have noted, there is no expressed provision in English statutory law which prevents the parties

in the contract from agreeing to pass the risk before the property, even if the goods are unascertained, whereas neither the SGA 1979 nor the Sale of Goods (Amendment) Act 1995 specifically deals with the passing of risk in relation to unascertained goods.

In this sense, there is no provision highlighting the passing of risk with regard to whether the goods are specific or unascertained. However, both acts¹ are linked to the issue – that is, the passing of risk in relation to the passing of property - where the property never to pass until goods are viewed as specific goods according to s.16 of the SOGA 1979 or a specified quantity of unascertained goods Sale of Goods (Amendment) Act 1995. Namely, the risk could be allowed to be passed in cases where the goods are unascertained based on the intention of the parties; it may occur in circumstances where the parties intend – either explicitly or implicitly - to pass the risk before the property, even if the goods remain unascertained.

Assuming that the *prima facie* of English law is that the goods which the risk relates to are sufficiently identifiable, then the contract must be one for the sale of specific goods. As a result, it is illogical to rely upon such standards, due to the fact that they are impossible to apply, because the goods remain unascertained and are not sufficiently identifiable as those to which the risk relates (unknown goods).

Indeed, it is the researcher's point of view that the absence of legal rules regulating such an issue could be considered as a weakness in English law. The law provides no answer, nor is there any exclusive rule for regulating the issue of the passing of risk before property in the case of unascertained goods, based on part one of ss.20 and 17 SGA, which cannot serve the requirements of high seas trade, and at the same time makes the rules in relation to the passing of risk under English law ineffective and therefore requiring remedy and improvement. Such rules cannot be a model for Libyan law or any other law which needs to be improved, as the model on which they would be based - i.e. English law - itself needs to be remedied with respect to the issues previously mentioned

On the other hand, the passing of risk under the CISG is different, where such issues are governed by more than one provision. In cases where a contract of sale involves the carriage of goods, art 67(1) deals with such cases and applies when the goods are delivered to the first carrier, at which point the risk passes at the time of delivery to the first carrier.

¹ SGA 1979 , Sale of Goods (Amendment) Act 1995

However, the parties' agreement to hand over the goods at a particular place other than the seller's place, may have some effect on this.²

Art 68 deals with goods sold in transit. In respect of such goods, the risk passes to the buyer from the time the contract is concluded. This is qualified in the same article by the provision that if the circumstances so indicate, the risk is assumed by the buyer from the time the goods are handed over to the carrier, retrospectively. Indeed, even in the latter case under art 68, where the basic rule is in relation to the passing of risk at the time the contract is concluded, the principle of delivery plays a significant role. In cases where goods are already in transit, it is viewed as a strong evidence that the goods have already been delivered to the first carrier.

In all other cases 'not covered by arts 67 and 68 of the convention' the Convention provides that the risk passes to the buyer when he takes over the goods at the seller's place of business. This rule is limited by the exception where the buyer is to take over the goods from a place other than the seller's place of business. The general policy in art 69(1) is once again that the seller should bear the risk so long as he has control of the goods. Paragraph (2), however, makes special provision for cases where the buyer is to take over the goods from a place other than the seller's place of business, most commonly from a public warehouse. In such cases 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 policy considerations here are different, where the seller is in no better position than the buyer to protect and insure the goods or to pursue any claims arising from them. Therefore, the buyer should bear the risk as soon as he is in a position to collect the goods. Article 69 (2) also applies to the case in which the contract of sale involves carriage of the goods, but which is not covered by art 67 because the seller is required to hand the goods over to the buyer at a particular place. Indeed, delivery plays a significant role in the passing of risk under the CISG, whether the act of delivery is to the first carrier or to the buyer himself, regardless of whether the buyer has taken physical delivery of the goods, or, alternatively, at such time in which the goods are placed at his disposal.

² Hager, G. and Schmidt-Kessel, M., in *Schlechtriem P, and I. Schwenzer, Commentary on the UN Convention on the International Sale of Goods (CISG)*, Oxford, Oxford University Press, 2010, 928. See also, Bernd von Hoffmann, 'Passing of Risk in International Sales of Goods' (1986) Ch. 8, 265-303

7.4 Conclusion drawn from party autonomy principle

The rules in relation to the passing of risk under the CISG will not always apply, since the parties may have either made a specific agreement according to party autonomy under arts 6 and 19 of the convention. In other words, according to art 6 the parties are given the freedom to over-write the aforementioned rules, provided they agree, and that they have freedom to identify the time when the risk will be deemed to have passed.

It is clear that, in accordance with art 6 of the Convention, the agreement between the parties will govern the sale of goods contracts and their intentions will take priority over any other rule;³ however, in this regard art 6 should be read in conjunction with art 19 (1) which indicates that the parties are bound by the terms agreed with respect to risk, loss or damage. It is also necessary to consider art 8 of the CISG, where the parties' intentions and statements can be interpreted in accordance with the practices and usages they have established between themselves.

Consequently, an expressed or implied provision on the passing of risk that has been agreed upon by the parties has a definite legal impact on the issue of the passing of risk. Moreover, as seen, the courts support the intention of the parties and its priority over any other default rules of the CISG, and the further reinforces the view that the agreement of the parties is the basic rule in the passing of risk. Therefore, it is appropriate to conclude that the party autonomy principle plays a significant role in the Convention's rules. In this sense, the party autonomy provided in art 6 of the CISG is the basic rule in determining the contractual relationship between the parties regarding the passing of risk. Accordingly, it can be concluded that the aforementioned rules in relation to the passing of risk provided by the CISG are default rules, and apply only in the absence of any expressed or implied indication regarding the intention between the parties. In other words, where the parties agree to pass the risk at a particular time, the interpretation of the passing of risk, will always lean towards the intention of the parties. Nevertheless, the risk does not pass to the buyer until the goods are clearly identified to the contract.

³ Honnold, J. O., and Flechtner, H. M., *Uniform Law for International Sales under the 1980 United Nations Convention*, (4 edition ,Rijn, Kluwer Law International, 2009) , 528

7.5 Conclusion drawn from the importance of identification of goods

Identification of goods to the contract is important, because the risk cannot pass to the buyer if the goods are not identified, under art 67(2) CISG. The provision provided in art 67(2) and 69, requires the identification to be clear, that is, specific and precise, before the risk is passed. This requirement actually links the passing of risk to the situation of the goods, where no risk passes until the goods are identified. This is unlike the English law, which links the risk to the passing of property as seen. Such a rule distinguishes the CISG from the English law regarding the rules of passing of risk. In other words, while the major gap in English law is lack of a rule about passing of risk in the case of unascertained goods, the CISG has avoided such difficulty by providing rules of identification of goods to pass the risk. While arts 67(2) and 69(3) require identification for risk allocation, this requirement is clearly absent from art 68.⁴ In fact, it has been argued that even though art 68 does not explicitly require the goods to be clearly identified for the passage of risk to occur, the general view is to refer to art 67(2), where the goods must be clearly identified.⁵

Nevertheless, there is no provision preventing the passing of risk in the case of unascertained goods under art 68 of the CISG. Although some interpretations have linked the passing of risk in unascertained goods under art 68 to art 67(2) where the goods must be ascertained before the risk passes, such views did not make their way to the Convention. Therefore, the priority will be given to the legal provision of art 68 which is devoid of this requirement. In other words, depending on the literal interpretation of legal provisions, art 68 must be applied literally, even with the absence of such a requirement. Accordingly, it may be acceptable for the risk to be passed even if the goods are not identified. Especially, the CISG does not provide an answer for cases where the goods sold or appropriated to a sale form part of an undivided bulk.

⁴ Harold J. Berman & Monica Ladd, Risk of Loss or Damage in Documentary Transactions Under the Convention on the International Sale of Goods, 21 CORNELL INT'L L.J. 423, 430 (1988). See Also Shivbir S. Grewal, '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' at 102 (1991) 14:93 Loyola Marymount University and Loyola Law School 97. See Also Neil Gary Oberman, 'Transfer of risk from seller to buyer in international commercial contracts: A comparative analysis of risk allocation under the CISG, UCC and Incoterms' in (LLM edn 1997). Available at <http://cisgw3.law.pace.edu/cisg/thesis/Oberman.html#fn120>

⁵ Heidelberg, 'The Passing of Risk A comparison between the passing of risk under the CISG and German law' (1999) 2,3,4. See Also Manuel Gustin, 'Passing of risk and impossibility of performance under the CISG' (2001) International Business Law Journal ,4. See Also Ingeborg Schwenzer, Christiana Fountoulakis, Mariel Dimsey, *International Sales Law A Guide to the CISG* (2nd edn Hart Publishing, Oxford 2012),936

7.6 Undesirable situations caused by the incompleteness of both instruments and remedies

A more detailed reading of the rules of the Convention indicates that there is a shortage of explanatory detail contained in it, and thus there is a lack of efficiency. This is especially the case where an absence of trade usages is noted. One of the main difficulties of interpretation emerging from art 67(1) is the ambiguity of the expression 'contract of sale involving carriage of the goods'. Apparently the CISG does not provide any specific rule of interpretation in terms of the timing in the contract of sale involving the carriage of goods.⁶ Furthermore, it does not give definitions for terms such as the 'first carrier', 'handing over', 'the act of delivery' and 'indicative circumstances'; thus, the absence of satisfactory definitions may lead to uncertainty and undesirable litigation.⁷

Nevertheless, in accordance with art 7(2) of the CISG, such questions concerning this matter have to be determined and interpreted in accordance with the general principles or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law. Moreover, although art 67 and art 69 require that identification of the goods is needed in order to pass the risk, unlike the English Sale of Goods (Amendment) Act 1995, nevertheless, the CISG does not provide an answer for cases where goods sold or appropriated to a sale form part of an undivided bulk.

Further it seems that the Convention fails to take into account modern developments and practices in international trade, since it does not include separate rules on containerisation, despite the immense growth in the use of containers. This means that unless damage or loss is due to an identifiable cause, it is difficult to assess at what stage of the transit loss or damage occurred and therefore who bears the risk.

However, the main weaknesses of the CISG lies in its lack of provision on the passing of property, which is an issue that is addressed in English law more efficiently, pragmatic and accurately. In contrast, with respect to the issue of the passing of risk, the default rules of the CISG are more efficient and pragmatic than the English law, especially with regard to the passing of risk in unascertained goods before the passing of property, as argued above.

⁶ Dionysios Flambouras, 'Transfer of Risk in the Contract of Sale involving Carriage of Goods: A Comparative Study in English, Greek Law and the United Nations Convention on Contracts for the International Sale of Goods ' ((2001)) VI 87—149.113,114 <http://www.law.pace.edu/cisg/biblio>

⁷Ibid.

Therefore, this thesis will conclude with recommendations and suggestions as simple provisions of remedies, in an attempt to contribute to the improvement of English law, the CISG and jurisdictions needing modernisation of their trade law and thereby provide a more effective model.

7.7 Draft Model Rules

7.7.1 Passing of property

Model provisions

Unless otherwise agreed, where there is a contract for the sale of specific goods, the property in the ascertained goods passes to the buyer when the contract is made.

Unless the parties agree otherwise, the property in the goods passes to the buyer at the time of taking the delivery.

The basic rule as to the passing of property under English law and the CISG is that it passes at the moment specified or intended in the contract of sale. If, however, the contract is silent, then one looks at the appropriate statutory rules for determining at what moment the parties intended the property to pass. Such default rules are regulated by English law, but are lacking in the CISG.

Property questions will of course remain very important, particularly for the purpose of determining the distinction between the sale and the agreement to sell. In the case of agreement to sell, the title of the property remains with the seller; however, in the case of the sale of the property, it passes to the buyer. Therefore, regulating such default rules in the CISG is significant. It would certainly be beneficial for international trade if a rule on passing of property were to be included in the CISG. Although there are significant differences between legal systems, greater harmonization cannot be ruled out. Due to the scope of the issues involved, it will, however, take quite some time to achieve.

Therefore, the draft model regarding the passing of property under the CISG could be inspired by the rule of the English law, where the property in the goods passes to the buyer when the contract is made, subject to s.16 of SGA, where the goods must be ascertained. The proposed draft model clause of remedies provides thus:

Unless otherwise agreed, where there is a contract for the sale of specific goods, the property in the ascertained goods passes to the buyer when the contract is made.

In fact, this model clearly contains three important elements. The first one is the party autonomy element, which presented under the phrase ‘unless otherwise agreed’, based on the importance of the party autonomy principle provided in art 6 of the CISG. Thus, the basic rule of party autonomy regarding the issue of the passing of property under the CISG could be regulated expressly rather than implicitly. The second element is the default rule itself, which presents the time of passing of property in the absence of agreement between the parties, namely that unless otherwise agreed the property under the CISG passes at the time of making the contract. However, this element must be subject to the third element regarding to situation of the goods. In other words, no property in the goods is transferred to the buyer unless and until the goods are ascertained. This provision is actually consistent with the provision made in s.16 of SGA, which restricts the goods to be specified before the property passes.

The researcher’s attempt in fact, may be applicable especially to the rules of risk under the CISG being linked to the situation of the goods not to the property. Thus, this draft model does not conflict in meaning with the rules of passing of risk under the CISG, where the property and risk can be passed separately.

On the other hand, it has been proposed that uniformity in this field of law is possible, suggesting the adoption of the delivery principle as the default rule, where the proposed draft model clause for remedies provides thus:

Unless the parties agree otherwise, the property in the goods passes to the buyer at the time of taking the delivery.

If this principle is adopted as the uniform rule with respect to the transfer of property pursuant to international sales contracts, as well as upholding party autonomy, the problem mentioned above would be avoided, especially as the risk under the CISG risk passes at the time of delivery. According to such a draft model rule on the passing of property, the transfer of property would occur at the time of delivery.⁸ However,

⁸ Ulrich Drobnig, *Transfer of Property, in towards a European Civil Code*, Arthur Hartkamp et al. eds.(Kluwer Law International 1998), 345, 360

application of such a model requires it to give sufficient definitions for the terms 'handing over' and 'the act of delivery', in order to avoid uncertainty and undesirable litigation.

Taking into account the situation of the goods, where there is a contract for the sale of unascertained goods, no property in the goods is transferred unless and until the goods are ascertained. Indeed, linking the passing of property and risk to the situation of the goods separately, where the goods must be ascertained, makes the CISG more pragmatic and efficient in the field of sale of goods contracts. Thus, it can avoid the fault which occurs in English law, as discussed above.

It is noteworthy that the regulation of the issue of passing of property under the CISG, whether in accordance with the time of making of the contract or the time of delivery, strongly requires amendment of art 4(b) of the CISG regarding the exclusion of the issue of passing of property. It requires to be amended in order to avoid legislative conflicts.

Thus, it would certainly be beneficial for international trade if a rule on passing of property were included in the CISG. Although there are significant differences the between legal systems, harmonization cannot be ruled out. Due to the scope of issues involved, it will however take quite some time to achieve, as achieved in the case of passing of risk more effectively than in English law.

7.7.2 Passing of risk

Model Provision

Unless otherwise agreed, the goods remain at the seller's risk until the property in them is transferred to the buyer, but when the property in them is transferred to the buyer the goods are at the buyer's risk, whether delivery has been made or not. Nevertheless, the risk does not pass to the buyer until the goods are clearly identified.

This thesis concludes that the CISG has provided a clearer set of rules in relation to the timing of the passing of risk than English law, as the latter does not treat the issue of passing risk separately (i.e. before the property) in the case of unascertained goods, while the CISG links the issue of the passing of risk to the situation of the goods, provided that the risk does not pass to the buyer until the goods are clearly identified in the contract.

This approach is inconsistent with English law in which risk would transfer regardless of the identification of goods. Meaning, as we have seen, that English law links the issue to the passing of property, and the *prima facie* case that the risk passes with property, where no property passes in the case of unascertained goods, instead of linking it to the situation of goods as the CISG does. Consequently, further complications may arise regarding the issue of the passing of risk when linked to the passing of property. Such complications may occur in circumstances where the parties intend explicitly or implicitly to pass the risk before the property, in the case of unascertained goods, based on s.17 and s.20 (1) part one as seen. The difficulty arising in relation to such a case regards determining which goods were sent at the buyer's risk. In that sense, it is difficult to allocate the risk of loss and damage. Therefore, the draft model regarding the passing of risk under the English law could be inspired by the rule of the CISG, where the risk is linked to the situation of goods, and does not pass to the buyer until the goods are clearly identified to the contract. Accordingly, the proposed draft model clause of remedies regarding to the issue of passing of risk under the English law can be represented by adding on a subsection to s.20(1) of SGA, as follows:

Unless otherwise agreed, the goods remain at the seller's risk until the property in them is transferred to the buyer, but when the property in them is transferred to the buyer the goods are at the buyer's risk, whether delivery has been made or not. Nevertheless, the risk does not pass to the buyer until the goods are clearly identified.

Hypothetically, English law links the risk to the situation of the goods, where no risk passes to the buyer until the goods are clearly identified within the contract, and then the risk could never be passed until the goods are ascertained. This conflict has been avoided in the CISG, which links the risk to the situation of goods, not to property. This may be due to the exclusion of the issue of property from the scope of the CISG.

However, from a general point of view, it can be said that, unlike the issue of the passing of property, the CISG is an apparently more efficient and better developed model with respect to the issue of the passing of risk than English law, for the reason that its structure appears more attuned to pragmatic situations and is more precise. This serves the trade's requirements for quick and safe reference, whereas the main difficulty which lies in English law is linking the passing of risk to the passing of property, which has created a problem with regards to the passing of risk in the case of unascertained goods; consequently, it is difficult to allocate the risk of damage and loss.

The crucial point is the term *unless otherwise agreed*, which allows the parties to agree on the time of passage of risk, regardless of whether it is restricted by the situation of the goods and whether they are unascertained goods or not, with the absence of any express provision regulating such issues. However, this term cannot be annulled, because it represents the party autonomy principle as a basic rule in relation to the passing of risk under English law. However, a subsection regarding the identification of the goods can instead be added to the SGA which is analogous to s.16. This may fill the gap and restrict the passing of risk to the situation of the goods so that no risk can then be transferred to the buyer unless and until the goods are ascertained.

7.8 Evaluation and remedies in relation to passing of property and risk under the Libyan law

The Libyan civil code requires new rules that reflect global standards of international trade, which leads to a need for an accurately drafted legal system that is able to facilitate the formation of contracts with merchants from different countries and resolve the legal problems that may potentially arise out of contracts of sale. This thesis makes a valuable contribution to address the gaps in the incomplete Libyan Civil Law through the extensive research on the provisions of both the English Sale of Goods Act and the CISG.

In the research it was intended to suggest model provisions to amend some rules of passing of property and risk that would facilitate a completion of the Libyan Civil Code in this area of law in order to reflect global standards of international trade. Therefore, this thesis will be concluded with recommendations and suggestions.

7.8.1 Remedies and suggestions concerning passing of property

It was shown above that the basic rule of passing of property under Libyan law is that it passes at the moment specified or intended by the parties of the contract in the contract of sale. On the other hand, if no intention is evident, the property passes from the seller to the buyer at the time as the contract is concluded, according to default rules provided by s 936 of Libyan Civil Code, as long as the goods are specific goods in an unconditional contract and the seller is the owner of the goods.

Obviously, the party autonomy principle in Libyan law is the primary rule which overwrites the relevant provisions in the application over any other. Accordingly, in the absence of any expressed or impliedly indication regarding the intention between the parties, the default rules will be applied.

Apparently, such rules of passing of property under the Libyan law are not very different from the rules of passing of property under the English law, where the basic rule as to the passing of property under English law is party autonomy, although in the absence of any expressed or implied indication regarding the intention between the parties, the default rules will be applied, in which case the property passes at the time as the contract is concluded, according to the rules set out the rules in s.18 of SGA, as seen above.

Arguably, the difference between the Libyan law and the English law lies in rules that would provide presumptions for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer. While the English law provides these rules clearly and in a very detailed way in s18, the Libyan law still ambiguous and lacks of sufficient details regarding such rules.

On the other hand, they both differ from the rules of passing of property under the CISG, simply because the CISG clearly excludes such default rules, taking into account the party autonomy principle as basic rule of passing of property according to art 6 of the CISG as seen above. Accordingly, the CISG cannot be a useful model for Libyan law, as the model upon which it would be based would itself need to be improved, as mentioned previously. In contrast, as pointed out, the rules of passing of property under English law appear to be more structurally pragmatic and precise, making it a more efficient and developed than the CISG regarding the passing of property. Consequently, such rules of passing of property under the English law may be a suitable model for the Libyan law.

7.8.2 Draft Model Rules of passing of property for the Libyan law

The draft model regarding the passing of property under the Libyan law could be inspired by the rules of the English law, where the property in the goods passes to the buyer when the contract is made, subject to s 16 of SGA, where the goods must be ascertained. The proposed draft model clause of remedies provides thus:

Unless otherwise agreed, where there is a contract for the sale of specific goods, the property passes to the buyer when the contract is made.

Noticeably, this draft model provided for the Libyan law is the same model provided for the CISG, which was inspired from the English law. Put simply, this issue has been addressed in the English law more efficiently and accurately, as this model clearly contains three important elements. The first one is the party autonomy element, which is presented under the phrase ‘unless otherwise agreed’, based on the importance of the party autonomy principle provided in s 147 of the Libyan law, which in general applies for all types of contracts, including sale of goods contract, whether with respect to movable goods or immovable, including the passing of property issue.

Consequently, this draft model could fill the gaps left by the incomplete Libyan legal framework involving the passing of property issue, which currently links the party autonomy principle with the time of passing of property issue. This would make it more practical, efficient and pragmatic, in order to avoid ambiguity and some misinterpretations that may occur through the application of s 147 on the passing of property issue.

The second element in this draft model is the default rule itself, which presents the time of passing of property in the case of absence of an agreement between the parties. This part of the model in fact, distinguishes between immovable (real property) and movable goods, with an intention to avoid conflicts arising from goods in transit or unascertained goods, for instance, with respect to jurisdiction, where Libyan jurisdiction differs in whether the case related too immoveable (real property) or moveable goods. In this sense, jurisdiction of the courts differs between immovable real property and the movable goods. While the jurisdiction in the cases of the movable goods is the court where the defendant is located,⁹ the jurisdiction in the cases of immoveable goods is the court where the real property located.¹⁰

However, such a model must be subject to the third element regarding the situation of the goods. In other words, no property in the goods is transferred to the buyer unless and until the goods are ascertained. This provision is provided by the Libyan law, which, at the same time is consistent with the provision provided in s 16 of SGA, which restricts the goods to be specified before the property passes.

7.8.3 Draft Model Rules for ascertaining intention

Further ambiguity of Libyan Civil Law lies in its lack of some detailed rules that would provide presumptions for ascertaining the intention of the parties as to the time at which the property in the goods is to be passed to the buyer. In other words, the rules would provide presumptions for ascertaining the intention of the parties in the case of absence of any indication of intention of the parties, where the seller is bound to measure or weigh the goods to ascertain the price and specific goods in a deliverable state.

Indeed, as noted above while the English law provides such rules clearly and in detail in s18 SGA, the Libyan law is still ambiguous and lacks of some details regarding such rules.

⁹ Libyan civil procedure code, S 53

¹⁰ Libyan civil procedure code, S 54

On the other hand, both English and Libyan law rules differ from the rules of passing of property under the CISG, simply because the CISG clearly exclude such default rules. Therefore, the CISG cannot be a model for Libyan law in this regard. Accordingly, the rules of passing of property under the English law appears to be more efficient and better developed than in the CISG. Consequently, the draft model regarding the rules for ascertaining intention under the Libyan law could be inspired by the rules of s 18 of English law; the proposed draft model clause of remedies provides thus:

Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

Rule 1. Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.

Clearly, rule 1 only applies where the contract is ‘unconditional’ and the goods in a ‘deliverable state’. In the present context, unconditional is usually taken to mean that the contract does not contain any term which suspends the passing of property until some later event. The words ‘a deliverable state’ mean that when they are in such a state that the buyer would under the contract be bound to take delivery of them, bearing in mind the situation covered by rule 2, where the goods are not defective, but need something doing to them before the buyer is required to accept delivery. This provision is proposed to remove the ambiguity over the provision of s 255 of Libyan Civil Code which is a general provision, which applies to any contract. In other words, even if the provision of s 255 of Libyan Civil Code extends to cover the contract of sale of goods, the draft model relates the situation to the contract of sale of goods and the passing of property issue.

Rule 2. Where there is a contract for the sale of specific goods, and the seller has to put the goods in a deliverable state, the property does not pass until such actions be carried out and the buyer has notice thereof.

Rule 2 applies in the case if specific actions have to be carried out on the goods, in order to make them deliverable and the property does not pass until the work is carried out. This

covers the situation where the goods are not in a deliverable state at the time of the contract and so property does not pass under rule 1, but they are later put into a deliverable state.

As noted previously, Libyan Law lacks detailed rules that would provide presumptions for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer, and among of these rules is putting the goods in a deliverable state. This provision in fact, is to remedy the lack of such rules in the Libyan civil code; thus this draft model can contribute to provide more detailed rules regarding the passing of property issue.

Rule 3. Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing be done and the buyer has notice that it has been done.

Where there is a contract for the sale of specific goods, the seller may be bound to weigh, measure, or do something to the goods to ascertain the goods to be placed in a deliverable state. The purpose of this proposed rule is to, remedy the lack of such rules in the Libyan civil code. Consequently, this draft model can contribute to provide more detailed rules regarding the passing of property issue under the Libyan Law. Thus, the property does not pass if the seller failed to weigh, measure, test or do something else required by the contract to put the goods in a deliverable state for the purpose of ascertaining the price.

Rule 4: when goods are delivered on sale or return, or on approval, property passes when the buyer adopts the transaction or fails to give notice of rejection within a reasonable time.

If the transaction is one of sale or return, the buyer loses the right to return the goods if she approves or accepts them or otherwise adopts the transaction. This means that, if the buyer does something which an honest person would not do unless he or she intended to adopt the transaction, he or she will be treated as having adopted it.

This rule covers the situations where the goods are supplied on the understanding that the sale is dependent on the person in receipt of the goods adopting the transaction. Such agreements might be entered into because of a retailer's uncertainty about demand for a product. This rule is intended to address the ambiguity over an offer and accepting or

rejecting the goods. In other words, there is no contract of sale or agreement to sell, but only an offer by the seller which the buyer may accept or reject.

Rule 5. (1) Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods then passes to the buyer; and the assent may be express or implied, and may be given either before or after the appropriation is made.

Rule 5. (2) Where in pursuance of the contract the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer and does not reserve the right of disposal, the seller is deemed to have unconditionally appropriated the goods to the contract.

While rules 1 to 4 are concerned with specific goods, rule 5 concerns unascertained goods. Once the goods are ascertained, property passes at the time the contract is made unless the parties intent otherwise. The property in the goods passes to the buyer where there is a contract for the sale of unascertained goods or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller.

Although, this rule has been addressed under s 208 of Libyan Civil Code, it is not detailed, nor does it provide any guidance regarding how such appropriation can occur, whether by the seller with the assent of the buyer or by the buyer with the assent of the seller. Consequently, the Libyan Law is in need of such a detailed rule to avoid such weakness.

7.8.4 Remedies and suggestions concerning passing of risk

As mentioned above, Libyan law appears to have a mixed approach regarding the issue of the passing of risk. That is to say, the risk could be passed at the time of delivery, at the point when the delivery passes to the buyer, or at a different time, according to the agreement of the parties, where the general rule is that the risk passes at the delivery time, under s 210. On the other hand, with a more in-depth interpretation of s 147, a different conclusion may be reached, which is that the basic rule is that the risk passes according to the intention of the parties. In other words, the general rule of s 210 can be modified by

expressed or implied agreement and such agreements have priority over any other rules. Accordingly, in the absence of any expressed or implied indication regarding the intention between the parties, the default rule of s.210 will be applied.

It is therefore possible for the parties to make provisions in the contract of sale to determine that the risk passes at a different time from the delivery. Certainly, the phrase of s 147 is the party autonomy principle; consequently, according to an agreement between the parties, logically the risk could be passed before or after the delivery time. Therefore, the goods are assumed to be sufficiently identifiable as those to which the risk relates. It might therefore be assumed that the contract must be one for the sale of specific goods, alternatively, if it was for the sale of unascertained goods, the goods should have become ascertained before the risk could pass.

However, there is no provision in the Libyan civil code highlighting the passing of risk with regard to whether the goods are specific or unascertained. It would appear that there is no problem regarding the passing of risk at the same time of delivery or even after the delivery time, because timing in relation to the passing of risk would be linked and subject to the act of delivery in the case of specific goods; where the goods already will be ascertained through the act of delivery.

However, the difficulty arising in this context lies in the case when the parties agree to pass the risk before the delivery, assuming that the contract is for the sale of unascertained goods. As we have noted, there is no expressed provision in Libyan Civil Code which prevents the parties in the contract from agreeing to pass the risk before the delivery time, even if the goods are unascertained. Moreover, there is no provision highlighting the passing of risk with regard to whether the goods are specific or unascertained. In other words, Libyan law links the issue of passing of risk in relation to the delivery time rather than linking it to the situation of the goods.

Accordingly, it can be said that the risk may pass before the delivery time, regardless of whether the goods are specific or unascertained. Based on this, further complications may arise with the issue of the passing of risk being linked with the passing of delivery. Such complication may occur in circumstances where the parties intend, explicitly or implicitly, to pass the risk before the delivery, even if the goods remain unascertained.

However, the general principle of the passing of risk issue is different between the English law and the Libyan law. While the principle under the English law *res perit domino* rule, at the point when the property passes to the buyer, the delivery time is the general principle under the Libyan law. In other words, as seen, the English law links issue of passing of risk to the property instead of the situation of the goods. Accordingly, it can be said that the risk may pass before the time of passing of property, regardless of whether the goods are specific or unascertained. On the other hand, Libyan law links the issue of passing of risk to the delivery time, regardless of whether the goods are specific or unascertained, where in both laws the risk can pass even if the goods remain unascertained according to the party autonomy principle. Accordingly, it can be said that the both laws are two sides of the same coin, where the same weaknesses are found in Libyan law and English law. Accordingly, such rules of passing of risk under the English law cannot be a model for Libyan law, as the model upon which they would be based - i.e. English law - itself needs to be remedied with respect to the issues previously mentioned.

In contrast, as pointed out previously, the rules of passing of risk under the CISG appear to have a more pragmatic and precise structure, making it a more efficient and better developed than the rules of English law regarding the passing of risk. This thesis concludes that the CISG has provided a clearer set of rules in relation to the timing of the passing of risk than the English law. While the latter does not treat the issue of passing risk separately (i.e. before the property) in the case of unascertained goods, the CISG links the issue of the passing of risk to the situation of the goods under Art 67-2, provided that the risk does not pass to the buyer until the goods are clearly identified in the contract. Therefore, such rules of passing of risk under the CISG maybe a suitable model for the Libyan law.

7.8.5 Draft Model Rules for the passing of risk

Apparently, the draft model regarding the passing of risk under the Libyan law could be inspired by the rules of the CISG, where the risk does not pass to the buyer until the goods are clearly identified to the contract. The proposed draft model clause of remedies provides thus:

Unless otherwise agreed, the goods remain at the seller's risk until the delivery time, but when the delivery has been made to the buyer the goods are at the buyer's risk notwithstanding of passing of property. Nevertheless, the risk does not pass to the buyer until the goods are clearly identified to the contract.

In fact, this draft model of Libyan law provides three important elements. The first one is the party autonomy element, which is presented in the phrase of *unless otherwise agreed*. This is based on the importance of the party autonomy principle provided in s 147 of the Libyan law, which applies in general for all types of contracts, including sale of goods contract, whether with respect to movable goods or immovable, including the passing of risk. A valuable aspect of this draft model lies in linking the party autonomy principle with the time of passing of risk issue, which makes it more practical, efficient and pragmatic, in order to avoid ambiguity and misinterpretations that may occur through applying s 147 on the passing of risk issue.

The second element in this draft model is the general rule presented in the default rule, which presents in the time of passing of risk, where the risk passes to the buyer at the time of delivery in the case of absence of agreement between the parties. Moreover, this part of the model in fact distinguishes between immovable (real property) and movable goods and links the issue of passing of risk to the movable goods.

Finally, the third element is regarding the situation of the goods. In other words, no risk in the goods is transferred to the buyer unless and until the goods are ascertained. In fact, the value of this part of the model lies in the restriction of transferring the risk only in ascertained goods. At the same time, it links the risk to the situation of the goods, where no risk passes to the buyer until the goods are clearly identified within the contract, and then the risk could never be passed until the goods are ascertained. Such conflict has been avoided in the CISG, which links the risk to the situation of goods not to property and works with the proposed rule 1 on the passing of property. Nevertheless, Libyan law still needs to bridge the gaps in the current Libyan Civil Code in providing a model to draft the suitable and detailed legal rules in line with developments in international trade.

7.8.6 Draft Model Rules for international trade

As noted previously, in its use of domestic rules in the interpretation of international sale of goods, the Libyan law fails to provide any rules in respect of passing of risk in goods sold in international transit, neither rules governing sale of goods involving carriage of goods by different modes of transportation across borders. A research study bridging the gaps in the current Libyan law in this area of law will be invaluable for Libyan legislators in providing a model to draft suitable and detailed legal rules in line with developments in international trade.

The researcher is of the view that, such provisions could be inspired by the rules of the CISG, where such issues are governed by detailed provisions. In cases where a contract of sale involves the carriage of goods, art 67(1) deals with such cases, and, applies when the goods are delivered to the first carrier, wherein the risk passes at the time of delivery to the first carrier. However, parties' agreement upon handing the goods over at particular place other than the seller's place, may have some effect on this.

In addition, art 68 deals with goods sold in transit. In respect of such goods, the risk passes to the buyer from the time the contract is concluded. This is qualified in the same article by the provision that, if the circumstances so indicate, the risk is assumed by the buyer from the time the goods are handed over to the carrier, retrospectively. Thus, even in the latter case, under art 68, where the basic rule is in relation to the passing of risk at the time the contract is concluded, the principle of delivery plays a significant role. In cases where goods are already in transit, it is viewed as a strong evidence that the goods have already been delivered to the first carrier.

On the other hand, Art 69 covers sales not "involving carriage" and not relating to goods sold in transit; it is thus the residual rule for passage of risk. In practice, this does not look like the standard international case. It seems to cover scenarios more associated with domestic sales. Accordingly, this article cannot be of value to Libyan law, put simply, the draft model of general rule mentioned above covers such situation.

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