Part III, Chapter IV

Passing of risk (articles 66-70)

OVERVIEW

1. Chapter IV of Part III of the Convention deals with the passing to the buyer of the risk of loss of or damage to goods. The first article of the chapter (article 66) states the consequences for the buyer after such risk passes to the buyer. The following three articles (articles 67-69) set out rules for when the risk passes to the buyer. The final article of the chapter (article 70) states the allocation of the risk of loss or damage if the seller commits a fundamental breach.

2. As a general rule, a seller that satisfies its obligation to deliver goods or documents (see Section I of Chapter II of Part III (articles 31-34), entitled “Delivery of the goods and handing over of documents”) will cease to bear the risk of loss or damage. The language used in chapter IV and in articles 31-34 is often identical. One decision therefore concludes that the same interpretation should be given to the word “carrier” in articles 31 and 67.1

3. The rules in chapter IV apply without regard to whether the seller or the buyer owns the goods.2 Chapter IV therefore displaces domestic sales law that allocates risk to the “owner” of the goods, although the outcome may be the same in any particular case under both the Convention and the domestic law.3

NATURE OF RISK

4. Chapter IV deals with loss of or damage to the goods sold. This is stated expressly in the first clause of article 66 and implicitly in the other articles. The loss of goods includes cases where the goods cannot be found,4 have been stolen, or have been transferred to another person.5 Damage to the goods includes total destruction, physical damage,6 deterioration,7 and shrinkage of the goods during carriage or storage.

5. Several courts have applied provisions of Chapter IV to the passing of risks other than the risk of loss of or damage to goods. These risks include the risk of delay by the carrier after the seller has handed over the goods to the carrier4 and the risk that the attribution of a painting is incorrect.9

PARTIES’ AGREEMENT ON PASSING OF RISK

6. The seller and buyer may agree on when the risk of loss or damage passes to the buyer. They will frequently do so by expressly incorporating into their agreement trade terms, such as the International Chamber of Commerce’s Incoterms.10 They may agree to vary a standard trade term,11 adopt a trade term that is local,12 or use a trade term in connection with the price rather than delivery.13 The parties may also agree to the allocation of risk by incorporating the standard terms or general business conditions of the seller or buyer.14 In accordance with article 6, the parties’ agreement will govern even if it derogates from the provisions of Chapter IV that would otherwise apply. Notwithstanding article 6, however, a German court interpreted a trade term set out in a French seller’s general business conditions in accordance with German law because the seller had used a clause common in German commerce, drafted in the German language, and the buyer was German.15

7. The Convention’s rules in article 8 on the interpretation of statements and acts of the parties apply to agreements relating to risk. Thus, one court found that the parties had agreed that the seller would deliver the goods at the buyer’s place of business because, in accordance with article 8 (2), a reasonable person in the same circumstances as the buyer would understand use of the German term “frei Haus” (“free delivery”) to mean delivery at the buyer’s place of business.16

OTHER BINDING RULES ON PASSING OF RISK

8. Article 9 (1) provides that parties are bound by any practices, including those allocating risk of loss or damage, that they have established between themselves. Courts have occasionally looked to the prior practices of the parties for evidence of the parties’ intent with respect to risk of loss.17 One court has concluded, however, that conduct by one party with respect to risk on two prior occasions is insufficient to establish a binding practice.18

9. The seller and buyer may also be bound by trade usages with respect to risk of loss or damage. Under article 9 (1), they are bound if they agree to a usage, whether international or local. They are also bound under article 9 (2) by widely-observed international usages which they know or should know unless they agree otherwise. If the parties expressly incorporate an incoterm into their contract, article 9 (1) makes the definition of the term by the International Chamber of Commerce binding, but the Incoterms are so widely-used courts may enforce the ICC’s definition of a term even absent express incorporation of those definitions.19
BURDEN OF ESTABLISHING
THE PASSING OF RISK

10. Article 66 and the other provisions of Chapter IV are silent on who has the burden of establishing that the risk of loss or damage has passed to the buyer.20 One court has endorsed the view that the burden is on the party that argues that the risk has passed.21 The issue of who bears the risk arises, however, in the context of actions to enforce obligations of the seller (e.g. to deliver conforming goods) or buyer (e.g. to pay for the goods) under other provisions of the Convention.

11. The cases place the burden upon a seller that brings an action to recover the price in accordance with article 62. In several cases sellers failed to establish that they had delivered the goods and therefore the buyers were found not to be obliged to pay. In one case, the court found that a bill of lading that accurately described the goods sold but did not indicate the name of the buyer as the recipient was insufficient proof.22 In a second case, the court found that a stamped but unsigned receipt was not sufficient proof of delivery at the buyer’s place of business as required by the contract of sale.23

12. Where damaged goods are delivered and there is a dispute over whether the damage occurred before or after the risk of loss passed to the buyer, the buyer has the burden of establishing that the damage occurred before risk passed to it. Thus, where a seller produced a bill of lading with the master’s annotation “clean on board” and the buyer produced no evidence that deterioration occurred before the seller handed over the goods to the carrier, the buyer bore the risk of the deterioration.24

RISK OF LOSS OR DAMAGE FOLLOWING TERMINATION OR AVOIDANCE

13. If the parties agree to terminate the contract after the risk has passed to the buyer, it has been held that the risk rules implicit in the Convention’s provisions on the effects of avoidance of contract (Section V of Part III, Chapter V, articles 81 through 84), including the rules with respect to restitution following avoidance, supersede the risk provisions of Chapter IV.25 When the goods are returned following termination of the contract, the obligations of the parties should mirror the obligations of the parties in the performance of the terminated contract: if the seller agreed to deliver goods “ex factory”, then when goods are returned following termination the risk passes to the seller when the buyer hands over the goods to a carrier at the buyer’s place of business.26 It has also been held that, where the seller was responsible for carriage of the goods, the principle of article 31 (c) determined when risk of loss passed back to the seller for nonconforming goods that the buyer was (with the agreement of the seller) returning to the seller; thus risk returned to the seller when the buyer placed the goods at the seller’s disposal, properly packaged for shipment, at the buyer’s place of business.27

Notes

1CLOUT case No. 360 [Amtsgericht Duisburg, Germany, 13 April 2000] (see full text of the decision).
3CLOUT case No. 163 [Arbitration—Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 10 December 1996] (Yugoslav law that risk passes with title and that title passes on handing over goods yields same result as Convention) (see full text of the decision).
4See, e.g., CLOUT case No. 338 [Oberlandesgericht Hamm, Germany, 23 June 1998] (goods could not be found at insolvent warehouse).
5See, e.g., CLOUT case No. 340 [Oberlandesgericht Oldenburg, Germany, 22 September 1998] (insolvent processor of raw salmon transferred processed salmon to other customers)
6See, e.g., CLOUT case No. 360 [Amtsgericht Duisburg, Germany, 13 April 2000] (physical damage).
7See, e.g., CLOUT case No. 377 [Landgericht Flensburg, Germany, 24 March 1999] (deterioration); CLOUT case No. 191 [Cámara Nacional de Apelaciones en lo Comercial, Argentina, 31 October, 1995] (deterioration).
8CLOUT case No. 219 [Tribunal Cantonal Valais, Switzerland, 28 October 1997] (buyer bears risk of subsequent delay) (see full text of the decision).
10Not all trade terms address the issue of risk of loss or damage. See, e.g., CLOUT case No. 247 [Audiencia Provincial de Córdoba, Spain, 31 October 1997] (“CFFO” allocates cost of shipment to the destination, but has no relevance to passing of risk).
11See, e.g., CLOUT case No. 191 [Cámara Nacional de Apelaciones en lo Comercial, Argentina, 31 October 1995] (“C & F”) (see full text of the decision).
13See, e.g., CLOUT case No. 283 [Oberlandesgericht Köln, Germany, 9 July 1997] (“list price ex works”).
14See, e.g., CLOUT case No. 317 [Oberlandesgericht Karlsruhe, Germany, 20 November 1992] (French seller’s general business conditions enforced). Whether the parties have agreed to standard terms or general conditions is left to the applicable rules on contract formation and the validity of such terms and conditions.
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15 CLOUT case No. 317 [Oberlandesgericht Karlsruhe, Germany, 20 November 1992].


17 CLOUT case No. 317 [Oberlandesgericht Karlsruhe, Germany, 20 November 1992] (seller’s practice of delivering in its own trucks used to interpret parties’ agreement).

18 CLOUT case No. 360 [Amtsgericht Duisburg, Germany, 13 April 2000] (practice permitting buyer to offset value of physical damage).


20 CLOUT case No. 253 [Cantone del Ticino Tribunale d’appello, Switzerland, 15 January 1998] (finding it unnecessary to decide whether to apply CISG general principles, which would place burden on buyer, or to apply national law because the result was the same under each alternative).

21 CLOUT case No. 338 [Oberlandesgericht Hamm, Germany, 23 June 1998].

22 CLOUT case No. 283 [Oberlandesgericht Köln, Germany, 9 July 1997].

23 CLOUT case No. 317 [Oberlandesgericht Karlsruhe, Germany, 20 November 1992].

24 CLOUT case No. 247 [Audiencia Provincial de Córdoba, Spain, 31 October 1997].

25 CLOUT case No. 422 [Oberster Gerichtshof, Austria, 29 June 1999], available on the Internet at www.cisg.at/1_7499k.htm.

26 CLOUT case No. 422 [Oberster Gerichtshof, Austria, 29 June 1999], available on the Internet at www.cisg.at/1_7499k.htm.

27 CLOUT case No. 594 [Oberlandesgericht Karlsruhe, Germany 19 December 2002] (see full text of the decision).