The Passing of Risk under English Law, INCOTERMS and UN Convention on Contracts for the International Sale of Goods: A Critical Discussion

by

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Abstract

In legal history, the United Nations Convention on Contracts for the International Sale of Goods (CISG) has been the most effective standard private law Convention. The main aim of CISG is to make the procurement and selling of materials, services, and manufactured goods in foreign trade simpler and more economical. This Convention made trade easier, without this, there would be more conflicts and confusion in the international trading system. The sale of the contract plays a vital role differently in different legal systems. Therefore, the diversity of the system leads to many other dimensions. The passing of risk is an important concern in international contracts because it can lead to many disputes between the parties. When goods suffer any loss or damage by accident (not by any fault of either party) the time in between the contract and its performance, the seller is discharged from its obligation to deliver the goods which have been lost or destroyed. To answer the questions and clarify the issues, specific points will be discussed in this article. It will evaluate the meaning of the term 'passing of risk' and will critically discuss how 'passing of risk' is established under English Law, INCOTERMS 2010, and UN Convention on Contracts for the International Sale of Goods (1980). It intends to discuss the passing of risk in the contract of the carriage of goods as provided for in the Convention.

Keywords: CISG, CESL, International sales contract, UNCITRAL, Passing of Risk, English Law, INCOTERMS, UN Convention on Contracts, International Sale of Goods, etc.

Introduction:

International trade must go through many risks. The risk might be of any type, for e.g. the goods might get stolen, the carriage of the goods might catch fire, or even the goods might evaporate due to extreme heat. There is always a risk remaining until the buyer receives the goods, and the payment is made in full (iContainers, 2020). This is when the 'passing of risk' comes into question.

The ideology of the passing of risk is one of the most challenging areas regarding the contract of sales law. It has been the most difficult legal issues related to international sales law. However, it is seen that the primary concern with the significance of the accurate meaning of 'passing of risk' is yet to be determined (StuDocu, 2020).

While discussing the meaning and analyzing the concept of 'passing of risk', the most vital issue that comes in question is when does the risk pass from the seller to the buyer? In the sale of goods contracts, the risk either lies on the buyer or the seller.

Meaning of Risk:

The meaning of 'risk' in a contract of sales of goods varies differently, such as goods lost, deteriorated or goods damaged (Roth, 1979). In other words, 'risk' as a permissible concept refers to accidental injury to the goods. The loss or damage which have occurred must be accidental and not by any act or omission of the parties to the contract. There are several criteria under the word 'risk' such as theft, overheating of the goods, spoiled goods, evaporation, or careless handling of the goods from the carrier (Goodfriend, 1983).

The statutory provision of the term 'risk' is embodied under Sec. 20, Sec. 32, and Sec. 33 of the Sale of Goods Act 1979 (SGA 1979) along with the rules of frustration under Sec. 6 and Sec. 7. Before considering which party, buyer or the seller holds the risk, it is particularly important to note the meaning of the term 'risk'. As Professor Sealy (1972) remarked :

> "The truth is that risk is a derivative, and essentially negative, concept – an elliptical way of saying that either or both of the primary obligations of one party shall be enforceable, and that those of the other party shall be deemed to have been discharged, though the normally prerequisite conditions have not been satisfied."

There are two scenarios where the risk may occur, i.e. when the goods are at the seller's risk and when the goods are at the buyer's risk. When the goods are at the seller's risk, this means that goods if accidentally lost or damaged, it is not possible to recuperate the price given from the buyer and must pay back any part of the price paid in advance (Goode, 2004). When the goods are at the buyer's risk, this means he must pay the price even though the goods have been lost or damaged, before or after the buyer has taken possession of the goods but before the property has passed to him.

In such a case, *Sterns v. Vickers (1923)* in which there is a sale of a different part of bulk in a warehouse and the seller gives to the buyer a delivery order entitling him to collect the appropriate quantity immediately. This case is a mixture of when to pass on the risk. In one point of the case, it is said that risk should pass at once and on another point, it is said that risk would not pass until there has been some act of identification. This conflict seems to be due to a drafting oversight, and the problem is best expressly dealt with as was mentioned:

> "Where unascertained goods are of such a kind that the seller cannot set aside a part of them until the buyer takes delivery, it shall be sufficient for the seller to do all acts necessary to enable the buyer to take delivery "

Meaning of Passing of Risk:

The passing of risk plays a significant role in international legislation concerning sales contracts. This is one of the significant components of a contract of sale between parties, whether nationally or internationally. Although this situation differs in international contracts of sale because of bulk consignments, multimodal transport, or loss of goods. The passage of risk during a transaction is a phase in which the risk of damage or loss passes from the product seller to the purchaser. For different products/items, the passage of risk occurs at distinct phases in its transaction.

There are mainly three ways at which the passing of risk may occur.

i. When the contract is concluded,
ii. Transfer of ownership from the vendor to the purchaser,

iii. Transfer of physical property from the vendor to the purchaser (Hoffmann, 1986).

Effect of Passing of Risk:

The Common European Sales Law (CESL) regulates the passing of risk and distinguishes expressly between business to consumer (B2C) and business to business contracts (B2B). It identifies two general rules governing any sale: the effect of the passing of risk (Art. 140) and the identification of goods or digital content to contract (Art. 141). Under Art. 140, CESL determines the legal effect of risk transfer as follows:

> "Loss of, or damage to, the goods or the digital content after the risk has passed to the buyer does not discharge the buyer from the obligation to pay the price unless the loss or damage is due to an act or omission of the seller."[1]

This rule is entirely logical and relevant as the seller shall be liable for any non-conformity that exists at the time the risk passes to the buyer. At first, it must be considered that the rule visibly regulates the 'price risk' and implies that the buyer must pay the price of the goods once the risk is passed. The crucial part here is the time of passing of risk, and it depends on the kind of contract of sale, therefore, implies that the buyer has to pay the price of the goods once the risk has passed. Even though they have been lost or damaged, the buyer must pay the price of the goods and the digital content (Passing of Risk, 2019).

On the contrary, the buyer will not be bound to pay the price to the seller if the loss or damage is due to an act or omission of the seller. In general, the seller is responsible for the loss or damage if he has packed the goods in any inappropriate way. The seller will be likewise obliged for acts and omissions by the persons for whom the seller is responsible for selling the goods. If any breach of contract is found, the buyer may invoke all the remedies (Passing of Risk, 2019).

The Meaning of the Contract of Sale of Goods:

The "Sale of Goods Contract" is a legal contract and is the most common and significant contract in commercial contracts. There will be no transaction between parties without a contract and contracts cannot be formed without an agreement. Under s. 4 of the Sale of Goods Act, a contract for the sale of goods is a contract whereby the seller agrees to transfer to the buyer the ownership of the goods, services and property in return for a price, i.e. agree to pay in cash.[2] It can either be implied or express or maybe either written or oral.

The Characteristics of the Contract of Sale of Goods:

The contract of sale of goods plays a crucial role in the international contract and has different legal relations in different legal systems. A sale of goods contract is governed by the Sale of Goods Act 1979 (SGA 1979). The characteristics of the contract of sale are elaborated under Section 2 of the SGA 1979 and the sub-sections like s. 2 (3) about the conditional sale, s. 2 (5) about the future sale, and s. 2 (6) about the agreement to sell. There are specific requirements to fulfil when entering a sale of goods contract which are delineated below:

[1] Common European Sales Law, Art 140.
[2] Sale of Goods Act 1979, s 4.

i. **The parties:** The first essential requirement of a contract is that there must be two parties to the contract of the sale, i.e. a buyer and a seller. Both the parties must be capable of entering into the contract and must be committed to buying and selling. There must also be an intention to pass the property under the contract from one party to another. In *Weiner v Harris* (1910) the court determined the basic principles as to how to define whether the parties are buyer and seller and also that the transfer of the property will only come into effect when the payment has already been made ("5 Essential Elements of a Valid Sale or a Contract of Sale", 2019). The decision of the *Helby v Matthews* (1895) case was criticized and condemned because the form of contract was changed from hiring to ownership on completion of the instalment payment. The House of the Lords decided that the hirer under such terms could not transfer the title to a bona fide purchaser.

ii. **The agreement to transfer property or transfer of ownership:** Transfer of property is another essential feature of the contract of sale of goods. 'Property' here means 'ownership' and 'property in goods' means 'all ownership rights.' In this contract, a simple transfer of the possession of the goods cannot be termed as a sale because the ownership of the goods must be transferred from the seller to the buyer or there must be an agreement to transfer the ownership from the seller to the buyer. In cases, *South Australia Insurance v Randell* (1869) and *Mercer v Craven* (1994), the courts had to decide whether the full legal title or a mere possessory interest was transferred.

iii. **Money consideration:** Money here means the currency which is used to buy goods. It cannot be mistaken by the term exchange. Problems arise where goods are sold for other than money, i.e. Goods cannot be exchanged for any other good or product. In the cases, *Esso Petroleum v Customs & Excise Commissioners* (1976), the court held that even though there was an intention to create legal responsibility, but there was no consideration to transfer the money ("Esso Petroleum v Commissioners of Customs and Excise," 2019). In the case, *Aldridge v Johnston* (1857) it was held that there were two separate contracts of sale rather than one *and Flynn v Mackin* (1974) the case was a case on the barter system where no monetary value attached to the sale.

iv. **A price:** The price is a significant contract term and failure to agree on the price may show that the contract was concluded. Under section 8(1) the parties fix the price of the contract, and section 9 determines when a price is set out by a third party. In cases *May v Butcher* (1934) *and Foley v Classique Coaches* (1934) where the courts had to decide if the parties had fixed a contract price or not.

v. **Goods**: Section 5 of SGA distinguishes goods in different ways, such as existing goods (the goods which are in the possession of the seller at the time of the contract), future goods (the goods which have to be manufactured by the seller), specific goods (the goods which are identifiable and are complete at the time of the contract) and unascertained good (the goods that are not specific and are sold by a generic description). Section 61 defines the types of goods that fall within the above classifications. The case of *St. Albans CC v International Computers Ltd*.

The Passing of Risk under English Law:

The Sale of Goods Act 1979 (SGA 1979) is an Act of Parliament in the United Kingdom, and under this Act, all the commercial contracts are being regulated. The SGA 1979 does not list all the provisions on which the risk falls nor does it define what risk is about it merely states a presumptive rule for its transfer (Bridge, 2007). Commonly, under this law risk is understood in the sense that who will bear the risk when goods are lost or damaged. When one party discharge himself from his obligations to perform the contract, the other party bears the risk. Therefore, the shape of which party carries the risk depends on the actual timing of the risk transferred. In this Act, there is a vast difference revealed between specific goods and ascertained goods. Specific goods are those who are identified and agreed on at the time a contract of sale is made, and ascertained goods are those who are not specific ("The Sales of Goods Act," 1979).

In the case, *Pignataro v Gilroy* (1919) the defendant sold 140 bags of rice to the plaintiff. The goods however were unascertained goods by description, but the bags were not ascertained. The defendant failed to send 15 bags because they were stolen before the date of delivery. The question aroused whether the 15 bags of rice became the property of the buyer or not. The court held that if it relies on the fact that 'the risk was passed with the property', the plaintiff was involved that the subject matter involved unascertained goods and also there was no proper evidence of appropriation by either party. Therefore, the property had not been passed to the plaintiff at the time of the loss. Hence the seller bore all the risk involved.

The sections which include the passing of risk are Section 20(1) which states that unless the parties agree otherwise, the risk will follow ownership, cases involve *Stern v Vickers* (1923) *and Healy v Howlett* (1917). Section 20 (2) states that the general rule on risk will be displaced where the goods are damaged as a result of the delay of one of the parties in the case of *Demby Hamilton & Co v Baren* (1949). Section 29 (3) &Section 37 states that the transfer of risk does not affect the rights and obligations of the seller or buyer as a bailee of the goods. Section 32 deals with the passing of risk while goods are in transit to the buyer.

The passing of risk means that the responsibility for loss of or damage to the goods passes from the seller to the purchaser. The result of that transition is that the buyer bears any loss or damage relating to the sold goods. Different trading terms have different points where the passage of risk occurs. In FOB terms (Free On Board or Freight On Board) for example, it occurs when the shipment reaches its destination; in CIF terms (Cost, Insurance, and Freight) it occurs when the shipment is delivered to the carrier ("What Is Passage of Risk? Definition and Meaning," 2019).

The process 'delivery risk' or 'risk of performance', however, here, is the risk about the 'price risk' or the 'risk of payment'. Therefore, the question here is, does the buyer have an obligation to pay the price remain, or does it transfer to the seller?

If the answer to this question is definite, the buyer shall bear the risk of the loss or damage done. In this situation, if accidentally lost or by partial damage, the buyer does not receive the goods then he will only take over the damaged goods because the seller is excused from the obligation to deliver other conforming goods. Besides, the buyer must fulfil the obligation to pay the full price under the contract, provided that the risk has passed. Conversely, if the seller losses the right to obtain the agreed price of the goods that have been lost or partially damaged, the seller shall bear the risk of loss or damage. When the risk is on the buyer, the seller is released from his duty to deliver the goods, and if the goods are damaged, the seller is entitled to take care of the goods. The buyer, on the other hand, is obliged to accept the goods and pay the full price as it was said in the contract. In simple words, the concept of risk deals with the question of who between the buyer and the seller must bear the loss.

The case *Mitsui & Co. Ltd v. Flota Mercante Crancolumbiana* (1989) concerns the passing on the shipment of FOB contract but the courts looked at the intention of the parties to the contract and found that there should be an intention to pass the goods at some later date when the money is paid in full.

The Passing of Risk under INCOTERMS:

The International Chamber of Commerce (ICC) has created a widely accepted, voluntarily understandable set of terms known as the INCOTERMS 2010. What these terms define are the responsibilities that both the buyer and the seller hold in the various transportation options. However, INCOTERMS 2010 is not related to the body of the law. It is an international agreement upon protocol to get to understand what consumers are paying for, when risk transfers, and where the goods need to be delivered. There are eleven types of INCOTERMS, among them, CIF (Cost, Insurance and Freight), FOB (Free on Board) is the most common.

INCOTERMS are not to recognize where the transfer of the title occurs. It covers the basic terms of the movement of the cargo such as Documentation, Costs, Control and Liability.

i. **Documentation:** Which party needs to arrange the documentation?
ii. **Costs:** Which party needs to bear the various costs involved?
iii. **Control:** Which party possesses the control of the items that are being transported during the journey?
iv. **Liability:** Which party is to bear the economic loss if the cargo gets damaged?

INCOTERMS come with a clause that risk of damage or loss to the items, and the obligation to bear any costs relating to the goods, passes from the seller to the buyer while the seller has fulfilled his obligation to deliver the goods.

One way the gatherings to an agreement of offer can veer off from the guidelines of the CISG is by including three-letter INCOTERMS by the International Chamber of Commerce (ICC) in their agreement. By alluding to the ICC INCOTERMS, the gatherings incorporate a lot of principles that organize conveyance, going of hazard, the commitment to take protection, carriage, and so forth.

It will investigate the history and field of use of the UN Convention on Contracts for the International Sale of Goods. From that point forward, a similar will be accomplished for the INCOTERMS. The development of the INCOTERMS will be depicted, beginning with the primary form in 1936 till the last form distributed by the ICC in 2010. Section three will clarify what is incorporated into the term ‘chance’ and will quickly look at changed frameworks of hazard passing. Section 4 arrangements with the going of hazard as per the guidelines of the CISG. Each angle and article of the Convention worried about the death of the hazard will be analyzed. The standards given by the INCOTERMS 2010 are the subject of part five. The INCOTERMS will be partitioned into gathering and contrasted and their conceivable identical in the CISG. Given the discoveries of this exploration and the ends made all through the thesis the last end in transit, the hazard is moved in the CISG, and the INCOTERMS will be made.

The risks are typically managed through a Marine insurance policy. It includes a “Warehouse to Warehouse clause”. The simple meaning of insurance coverage on cargo extends during the customary and ordinary course of transit to its destination. Transit does not occur until the goods are adequately packed for export. Insurance acts in force for 15 days after discharge (30 days if the destination is out of the limits of the port of discharge while waiting for the standard clearance for transit to its final destination).

Any individual who has an insurable enthusiasm for a load shipment (i.e., any individual who might endure a misfortune if the payload were harmed or obliterated or who might profit by the sheltered entry of the freight) may protect the payload. Marine Insurance covers in case of loss or damage to products because of a secured hazard protected against while in danger under the strategy. Marine protection reimburses the holder paying little mind to the transporters furthest reaches of risk. INCOTERMS, insurable intrigue, and exchange of title all may not match with the expected state of the business exchange. Likewise, the danger of non- instalment of the receipt esteem is a significant thought. Think about the accompanying proposals: Measurement and acknowledgment of hazard are essential strides in a store network. INCOTERMS must be unmistakably expressed inside or on the business receipt/contract. Remember that INCOTERMS are inconsistent with the chosen method of transportation. Guarantee your payload. The Insurance arrangement consequently covers endorsed products under the supposed 'stockroom to distribution centre provision' to secure your venture right to the goal. If you safeguard under your very own arrangement, talk about the inclusion impediments with your protection specialist.

They additionally suggest that the decision of INCOTERMS perceive this. The load is assessed at the time of conveyance at the goal to check for any undeniable in-travel harm. That title exchange is explicitly spelt out in the agreement. That thought is given to credit protection to secure the absence of instalment due to an outlandish or out of line debate with the client. Letters of Credit can be beneficial in controlling the danger of installment (M. E. Dey & Co., 2019).

The Passing of Risk under UN Convention on Contracts for the International Sale of Goods (CISG):

The provisions of the passing of risk are under Chapter Four Article 66 to 70 of the Convention. Before the UN Convention on Contracts of the International Sale of Goods was enacted, two previous conventions were formed in Hague; they were the Uniform Law on International Sale of Goods (ULIS) and the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF). Years later, the United Nations Commission on International Trade Law (UNCITRAL) was established to intricate the unification of international sales law (Nicolas, 1989).

The consequence of the passing of risk under CISG:

Under the CISG, even if the goods are accidentally lost or damaged, the buyer is obliged to pay the price of the goods as if he had received the goods mentioned in the contract of sale. The main issue which arises here is that whatever the condition of the goods will be, the buyer will receive it anyway and he will be the one in the position to check the goods and handle them in the best possible way. If in case, the loss or damage of the goods occurs, then neither party is responsible for the occurrence.

On the other hand, if theft, deterioration, damage, or improper packaging, the purchaser shall accept the goods and pay the price without having the rights and remedies at his disposal. If the loss was accidental, then the buyer cannot accuse the seller of non-performance of the contract or it denies any fulfillment of the obligations made in the contract. Therefore, under Art. 66, it is stated that the buyer is obliged to pay the price when the risk passes on to him. However, there is an exception to this rule, i.e. if the accident is caused by the seller, then the seller will bear the risk, and the buyer will not be obliged to pay the price. In such circumstances, the buyer may refuse to take the damaged goods and can avoid the whole or part of the contact (Valioti, 2003).

When the goods were supposed to be delivered on a specific date and the buyer takes them in his possession then the risk passes on when the goods are accepted. In some circumstances, if the buyer takes possession of the goods before the agreed date of delivery, the risk will only pass on to the buyer when he actually accepts the goods and takes them into his possession.

Critical Analysis of 'Passing of Risk':

After observing the different aspects of the rules on the passing of risk, under the three most important instruments of international contracts, the overall assessment regarding the competence and capability can be made quickly. All the instruments are formed to promote a global unification for the international commercial arena of sales.

One of them was the United Nations Convention on Contracts for the International Sale of Goods (CISG). After the League of Nations, the said Convention was well paid off in 1980 and is now globally accepted by the international community regarding the subject of the interest of the states. Unfortunately, the uniformity of international trade laws nevertheless lacks various steps to complete the aims of the Convention. On the other hand, CISG has helped in the interpretation of the international sales law as well as of the domestic sales law. The CISG bears a two-fold territorial scope in respect of different states and the contract of sales of goods between states. This scope has been extended to contracts not covered by other laws and plays a key role in eliminating ambiguities in the various states' relevant laws. However, there are questions over CISG by many of the states because of their self-interests, but in general, it has been valued. Hence, CISG is a success in an endeavor towards the amalgamation of sales law on an international level.

The rules allocated in the CISG are practical but lack clarity and generality, e.g. the Convention does not define the essential concepts of "delivery", "first carrier" etc., and does not provide any rules on the passing of risk on bulk goods. Furthermore, the Convention also fails to disclose the modern development in practice such as a rule on "containerization" despite knowing the increasing growth of the use of containers in shipping and delivering. These lead to confusion and misunderstanding. Nonetheless, it is true that relating to the issue of passing of risk. They do not manage to give obvious and give crystal clear answers to specific questions that are essential and usually encountered.

CISG and INCOTERM both provide the parties with the freedom to change the terms in the contract. This is a positive sign for both parties since with the new technology necessities in international trade keep on evolving, and it will give a response to the matters. In spite of the weaknesses of CISG, it cannot be forgotten that CISG is a global document which was a result of the cooperation of many countries with different legal backgrounds, history, culture, and it is predicted and released for containing compromises and unresolved issues.

In addition, it may be stated that INCOTERMS do not address all the issues that may arise in a sales contract and generally deals only with risk transfer and payment of price aspects (McMahon, 2010). INCOTERMS have tried and flourished to succeed in the harmonization and safety in international sales law. INCOTERMS has allowed and considered the latest practices in international trade, which can be applied in multimodal and container transport too. It has also included terms like FAS (Free Alongside Ship), CPT (Carriage paid to) and CIP (Carriage and Insurance Paid To) and alongside INCOTERMS established practices like 'ship rail' criteria under the CIF and FOB terms.

Under INCOTERMS, the seller has a duty to notify the buyer that the goods are available to him for delivery, if the seller fails to do so it would be considered as a breach of contract, entitling the buyer to the remedies for breach of contract under the CISG.[3]

In English law, less attention is given regarding the proof of the products. The whole approach is inconsistent with English law where the risk would be transferred irrespective of goods being identified. This means that English law connects the issue with the transfer of property and that the prima facie case is with the risk of passing off, where no property passes in the case of uncertain goods. In that sense, it is hard to assign the danger of misfortune and harm.

Conclusion:

As seen above, the theory of the passing of risk was discussed in three different categories, such as The Sale of Goods Act, Convention on International Sale of Goods (CISG), and INCOTERMS, which are the essential instruments that arrange contracts and sale between buyers and sellers. The legal instruments give the parties the freedom to adjust the terms of the contract accordingly. This is a positive sign in international trade, and it makes the parties avoid legal disputes.

Over a long time studying and researching, the author stated above that there is a space in the international sales law which need to be fulfilled. Several attempts have also been made to achieve that space, such as the United Nations Convention on Contracts for International Sale of Goods (CISG) which seizes much significance in respect of international sales law since 76 States have ratified it.

In cases of INCOTERMS, they supplement rules to the Convention effectively and productively. This essay has revealed that INCOTERMS are not in harmony with the CISG rules, and the regulations which are imposed are not clearly expressed. It has been finely expressed under Art. 9 (2) of CISG that INCOTERMS are not fully compatible with CISG rules. However, INCOTERMS are used in practice and are a codification of the customs and usages in international sales. They denote the consistency practiced in international trade regarding the delivery of goods and all associated duties with it.

After discussion and illustration on the legal instruments, this dissertation concludes that CISG has provided a more explicit rule in the provisions relating to the passing of risk than English law. English law does not address the issue of passing of risk separately in cases of unascertained goods while CISG states that the issue of passing of risk does not pass on to the buyer until it is acknowledged in the contract.

To conclude, it can signify that INCOTERMS do not, in any circumstance replace CISG rules but they do supplement it. The Convention, on the other hand, provides answers that are not answered by the INCOTERMS. Concerning these two instruments of standardization, it can provide the parties to an international sales contract with a legally valid and economically efficient sales law system.

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