MARCO TORSELLO©

***Obligations of the Buyer*, Excerpt from: F. FERRARI and M. TORSELLO, *International Sales Law – CISG in a Nutshell*, St. Paul, 2014, 221 ff.**

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1. Payment of the Purchase Price

The characteristic obligations of the buyer who is party to a contract for the sale of goods governed by the CISG are identified in Article 53. This provision specifies that the buyer must "pay the price for the goods and take delivery of them as required by the contract and this Convention." Article 53 CISG is therefore the counterpart of Article 30, in that the latter sets forth the main obligations of the seller, whilst the former sets forth the main obligations of the buyer. In addition to the characteristic obligations identified above, the buyer may be contractually bound to other obligations, as made clear by the language of Article 62 CISG, which refers to "other obligations" in addition to the characteristic ones, in order to specify the contents of the claims for performance granted to the seller. However, additional obligations, other than those identified in Article 53, can be binding on the buyer only to the extent that he expresses his consent to make them part of the contractual undertakings. Some possible additional obligations are referred to in other provisions of the Convention. For instance, Article 3(1) CISG refers to the buyer's obligation to supply a (non-substantial) part of the materials necessary for the manufacture or production of the goods;[1] Article 65 CISG refers to circumstances under which the buyer must submit specifications regarding the form, measurement or other features of the goods. Of course, many other obligations can be agreed upon between the parties and are common in business practice, including, to give just one example, the obligation to provide security for a postponed payment or a payment in installment.

Unlike the obligation to take delivery, which under special circumstances may not be required (*e.g.*, when the buyer has already possession of the goods sold to him), the obligation to pay the purchase price is a fundamental obligation of any sales contract. Indeed, the payment obligation is required for the very existence of a contract of "sale" and if payment is entirely missing the contract is simply not a sales contract, at least under the CISG. On the other hand, the contract remains a sale if the parties agree to substitute for part of the payment obligation a different kind of performance. Moreover, even contracts that appear to be barter or countertrade transactions may be regarded as the combination of two sales contracts, to the extent that it can be argued that the parties agreed to two reciprocal sales and to the setting-off of the reciprocal credits.

Irrespective of any possible additional obligations that the parties may have agreed upon in their contract, under Article 54 CISG the buyer's obligation to pay the purchase price "includes taking such steps and complying with such formalities as may be required under the contract or any laws and regulations to enable payment to be made." This provision deals with actions preparatory to payment and treats them as an integral part of the buyer's obligation to pay the purchases price.

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[1] For further details on this provision, *see supra* Chapter IV, para 2.

The most relevant consequence of this solution is that the failure to perform such preparatory actions can, in itself, be regarded as a breach of contract. Therefore, the seller can react to such failure by resorting not only to the remedies available for anticipatory breach of contract under Articles 71 and 72 CISG,[2] but also to the general remedies for breach of contract by the buyer set forth in Articles 61 et seq. CISG.[3] Another relevant consequence of the inclusion of preparatory actions within the framework of the buyer's characteristic obligations is that the buyer has to bear the costs implied by such activities and formalities.[4]

Article 54 CISG refers both to preparatory actions and formalities required under the contract to enable payment to be made and to those required by any laws and regulations. Preparatory actions required under the contract may include, among many others, the opening of a letter of credit,[5] and the establishment of security to guarantee payment.[6] However, actions that the buyer may be bound to perform can also include formalities required by "any laws and regulations". The provision at hand clearly makes reference to formalities under relevant domestic laws and regulations, including, for instance, foreign exchange and clearing rules. However, Article 54 CISG should not be constructed as a conflict-of-law provision, implying the application of conflict rules to determine which national legal system the parties should refer to in order to identify the formalities that the buyer is bound to fulfil. Instead, Article 54 sets forth a substantive rule, imposing on the buyer a duty to take actions so as to enable payment to be made, irrespective of the law under which obstacles to a smooth performance of payment exist. Therefore, although in most cases the relevant domestic laws and regulations that the buyer must consider are those of the buyer's home country, at times the buyer may also be required to abide by the laws and regulations of the seller's country or by those of a third country, to the extent that they govern the payment process. Furthermore, the pre-requisites of payment that must be satisfied may include both, measures of a commercial nature and administrative measures imposed by local authorities. However, with respect to the latter ones the possible liability of the buyer may be exempted under Article 79 CISG,[7] dealing with the prerequisites and effects of force majeure circumstances. In fact, to the extent that the formalities imposed by the local authorities can be regarded as an impediment to payment, which is beyond the buyer's control, unforeseeable and insurmountable, the buyer may be exempted from the liability to compensate damages for his breach of contract, although the seller's right to require performance under Article 79(5) CISG remains unaffected.

The CISG does not provide rules dealing with the currency in which payment must be made. In most cases, the currency will be indicated by the parties in the contract,[8] either by means of a

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2 For a comment on these provisions, *see infra* Chapter IX, para 4.

3 *See* Austrian Supreme Court, 6 February 1996, available in English at <http://cisgw3.law.pace.edu/cases/960206a3.html>.

4 *See* LG Duisburg (Germany), 17 April 1996, available in English at <http://cisgw3.law.pace.edu/cases/960417g1.html>.

5 *See*, *e.g.*, ICC Court of Arbitration, Arbitral Award n. 11849 of 2003, available in English at <http://cisgw3.law.pace.edu/cases/031849i1.html >.

6 *See*, *e.g.*, MKAC Arbitral Tribunal (Russian Federation), Arbitral Award of 25 May 1998, available in English at <http://cisgw3.law.pace.edu/cases/980525r1.html >.

7 For further details about this provision, *see infra*, Chapter VIII, para 6.

8 *See*, accordingly, Trib. Cantonal Valais (Switzerland), 27 April 2007, available in English at <http://cisgw3.law.pace.edu/cases/070427s1.html>.

detailed provision dealing with the currency of payment, or by means of the simple use of the symbol (*e.g.*, "$", or "€") or acronym (e.g., "USD" or "EUR") indicating the currency next to the sum indicating the purchase price. In some cases, however, the currency may be unspecified in the contract and the question arises as to whether the CISG provides rules for determining the currency. In the absence of an express rule in the Convention, the prevailing view in scholarly writing and case-law[9] is that the matter of the currency of payment is governed by the CISG, but not expressly settled in it. Therefore, under Article 7(2) CISG, the matter is to be settled, if possible, "in conformity with the general principles on which [the Convention] is based."[10] The relevant general principle applicable to the issue at hand can be drawn from Article 57(1)(*a*) CISG, under which, unless the parties differently agree, the buyer must pay the purchase price at the place of business of the seller. Hence, it can be inferred that also the currency of payment must be that of the place of business of the seller.[11] Moreover, to the extent that the currency of payment is determined on the basis of the seller's place of business, also the rule under Article 57(2) CISG may apply. Accordingly, the seller must "bear any increase in the expenses incidental to [the currency of] payment which is caused by a change in his place of business subsequent to the conclusion of the contract." The solution that has been proposed as to the currency of payment is to be preferred to the one that has been held by at least one court, albeit in more than one decision,[12] which is based on the application of domestic law identified by virtue of the conflict-of-law rules of the forum. In fact, in most cases the latter solution leads to the application of the currency of the seller, at least whenever the law of the seller is the law applicable to the contract with respect to issues not governed by the CISG. However, in some circumstances a different law may be chosen by the parties, or applicable by virtue of other objective conflict-of-law criteria. When this is the case, making the currency dependent on the law applicable to the contract may lead to results, which are both, inefficient and often inconsistent with the intent of the parties.

A different issue, which is of great practical relevance, is whether, in the presence of a contractual specification of the currency, the buyer can nonetheless discharge his debts in the currency of the place of payment. This question arises often in practice because many domestic jurisdictions set forth a similar provision and even consider it an overriding mandatory provision protecting public policy interests. However, as expressly maintained by the Austrian Supreme Court, under the CISG the buyer cannot claim his entitlement to pay the price in a currency other than that agreed upon in the contract or otherwise determinable as the currency of payment, since

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[9] *See*, *e.g.*, KG Berlin (Germany), 24 January 1994, available in English at <http://cisgw3.law.pace.edu/cases/940124g1.html>.

[10] For further details on the gap-filling rule under Article 7(2) CISG, *see supra* Chapter I, para 4.

[11] *Accord* OLG Koblenz (Germany), 17 September 1993, available in English at <http://cisgw3.law.pace.edu/cases/930917g1.html>.

[12] Trib. Cantonal Valais (Switzerland), 27 April 2007, available in English at <http://cisgw3.law.pace.edu/cases/070427s1.html>; Trib. Cantonal Valais (Switzerland), 27 October 2006, available in English at <http://cisgw3.law.pace.edu/cases/061027s1.html>; Trib. Cantonal Valais (Switzerland), 23 May 2006, available in English at <http://cisgw3.law.pace.edu/cases/060523s1.html>; Trib. Cantonal Valais (Switzerland), 27 May 2005, available in English at <http://cisgw3.law.pace.edu/cases/050527s1.html>.

the possibility to pay in an alternative currency would necessarily require an agreement to that effect in the light of the pivotal role of parties' freedom of contract within the Convention.[13]

In most cases the parties fix expressly the price in the contract, or at least they make provision for determining the price. As a specification of this common occurrence, Article 56 CISG mandates that if the price is determinable on the basis of the weight of the goods, unless differently agreed upon by the parties (*e.g.*, by means of the term "gross for net"), "in case of doubt [the price] is to be determined by the net weight." For the purpose of the provision at hand, the net weight must be calculated at the time and place of performance of the delivery obligation.

If the parties omit to include in the contract any indication regarding the price and they don't make any provision for its determination, Article 55 CISG applies. According to this provision "the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned." The issue of open price contacts is dealt with in significantly different ways in domestic legal systems, with a major distinction between legal systems that apply the principle of *pretium certum*, under which a fixed or determinable price is an essential term of the sales contract, and legal systems that provide legal criteria to supplement the contract if the price is not fixed. Article 55 CISG clearly adopts the latter solution and it refers to the price "generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned". The criterion adopted under the CISG differs from the one that was provided under Article 57 ULIS, which made reference to the price generally charged by the seller at the time of the conclusion of the contract. The change introduced under the CISG is intended to add objectivity and predictability to the rule, although its application in practice can still prove rather problematic.

Article 55 applies to the extent that a valid sales contract governed by the CISG has been concluded. Accordingly, it has been held that the provision at hand doesn't apply if the transaction is not a contract of sale within the meaning of the Convention.[14] Furthermore, it has been held also that the provision cannot be applied if there is no evidence that a valid contract for sale has in fact been concluded.[15] This is, of course, primarily a matter of interpretation of the intention of the parties, to be conducted on the basis of Articles 8 and 9 CISG. However, the assessment may be further complicated by the difficulty to reconcile the rule laid out in Article 55 with the one contained in Article 14 CISG. The latter provision sets the necessary requirements of a valid offer and includes the requirement that the proposal "expressly or implicitly fixes or makes provision for determining" the purchase price. No conflict exists between Article 14 and Article 55 whenever, in accordance with the reservation laid down in Article 92 CISG, either the application of Part II of the Convention (which includes Article 14) or the application of Part II of the Convention (which includes Article 55) is excluded. In most cases, however, the two provisions coexist and must therefore be reconciled.

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[13] Austrian Supreme Court, 22 October 2001, available in English at <http://cisgw3.law.pace.edu/cases/011022a3.html>.

[14] U.S. District Court [E.D. Pa.], 29 March 2004 (*Amco Ukrservice at al. v. American Meter Company*), 312 F.Supp. 2d 681.

[15] *See*, *e.g.*, Supreme Court of the Czech Republic, 25 June 2008, available in English at <http://cisgw3.law.pace.edu/cases/080625cz.html>.

Some court decisions have given precedence to the rule of Article 14 over that of Article 55 CISG,[16] thus affirming that a contract was not validly formed in the absence of a fixed or determinable price. Other court decisions have regarded the issue of the existence of a validly formed contract as an issue excluded from the scope of the Convention under Article 4 CISG. Accordingly, these decisions have relied on the domestic law applicable by virtue of the conflict-of-law rules of the forum.[17] However, in these authors' view neither one of the reported solutions is correct. The solution giving precedence to the rule of Article 14 is inconsistent with the intention of the parties, to the extent that the parties perform in whole or in part the contract, thus showing that they consider the contract to be in place, valid and effective. The solution leading to the application of domestic law seems inconsistent with the interpretative mandate of Article 7(1) CISG "to promote uniformity in [the Convention's] interpretation."[18] On the other hand, it can be argued effectively that Article 14 CISG sets forth the requirements for a valid offer, but, in accordance with Article 6, the parties can derogate to it expressly or implicitly. Accordingly, to the extent that the parties begin to perform the contract, although in the absence of a provision that "expressly or implicitly fixes or makes provision for determining" the purchase price, it can be argued that the parties have expressed their consensus to derogate to the rule under Article 14, thus relying on the application of the criterion laid out in Article 55 CISG.[19]

Also the issue of the means of payment is not dealt with explicitly by the CISG. Nonetheless, there should be no doubts that payments in cash always satisfy the requirements of the Convention. However, also "cashless" payments must be deemed permissible, since they can be deemed to be in conformity with a general usage of international trade. Therefore, international bank wire transfers represent a valid form of payment in international sales, permissible under the CISG, the performance of which is complete when the payment is credited to the benefit of the seller. Conversely, payment by cheque is always made on account of performance and the seller may thus legitimately reject such form of payment, unless it had been agreed upon in the contract. In any event, if the seller accepts the cheque and the cheque is thereafter cashed, payment must be deemed to have taken place upon the handing over of the cheque.

As far as the place of payment is concerned, Art. 57(1) CISG, in conjunction with Article 6, refers primarily to the particular place indicated by parties in their contract. Failing a contractual agreement on this point, the place of payment may be determined on the basis of usages or contractual practices between the parties, under Article 9 CISG. However, if "the buyer is not bound [by agreement, contractual practices or usages] to pay the price at any other particular place," Article 57(1) differentiates the solution on the basis of whether or not the payment "is to be made against the handing over of the goods or of documents."

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[16] *See*, *e.g.*, Hungarian Supreme Court, 25 September 1992, available in English at <http://cisgw3.law.pace.edu/cases/920925hi.html>.

[17] *See*, *e.g.*, MKAC Arbitral Tribunal (Russian Federation), Arbitral Award of 30 May 2001, available in English at <http://cisgw3.law.pace.edu/cases/010530r2.html>.

[18] For further details on the rule on interpretation under Article 7 CISG, *see supra* Chapter I, para 2.

[19] *See*, *e.g.*, Trib. Cantonal Valais (Switzerland), 27 April 2007, available in English at <http://cisgw3.law.pace.edu/cases/070427s1.html>; Austrian Supreme Court, 10 November 1994, available in English at <http://cisgw3.law.pace.edu/cases/940910a3.html>.

Under Article 57(1)(*b*) CISG, "if the payment is to be made against the handing over of the goods or of documents," the seller must pay the purchase price "at the place where the handing over takes place." In other words, the place of the handing over of the goods takes a bearing also as regards the place of payment. This rule applies, in particular, in conjunction with the general rule on the time of payment (Art. 58(1) CISG), under which, unless differently agreed upon, payment is to be made concurrently with the handing over of the goods or of documents. Conversely, if the parties are not bound to perform their obligations simultaneously, the rule under Article 57(1)(*b*) does not apply.[20] This is often the case in sales of goods involving carriage, where the seller typically performs his obligation by handing over the goods to the first carrier, under Article 31(1)(*a*) CISG. When this is the case, the seller's performance typically precedes payment in that, under Article 58(1) CISG, the buyer is not required to pay the purchase price until the goods or documents controlling their disposition are placed at the buyer's disposal at destination.

The alternative rule under Article 57(1)(*a*) applies to cases where the buyer is bound to pay in advance, as well as to cases where the parties agree on a postponed payment. Moreover, it also applies to the sale of goods in transit, as well as to the sale of goods to be transported by a carrier who has no authority to collect the purchase price. In all these cases, as well as in any other cases where the payment is not to be made against the handing over of the goods or of documents, the buyer must pay the purchase price "at the seller's place of business". In the event that the seller's place of business changes between the time of contract conclusion and the time of payment, the place of business at the time of payment is relevant. However, if the change in the place of payment causes an increase in the expenses incidental to payment, the seller must bear such additional expenses (Art. 57(2) CISG). In practice, it is important to notice that the rule under Article 57(2) regarding the change in the seller's place of business also applies in the event that the seller assigns his claim for the price. Accordingly, when the assignment occurs, the buyer must perform payment to the place of business of the assignee; however, if this causes an increase in the expenses, the seller must bear such increase.

As already pointed out above, Article 58 CISG, along with Article 59, sets forth rules on the time of payment. Not unlike the place of payment, the time of payment may be determined, first of all, by agreement of the parties,[21] or by any relevant contractual practices or usages. If, however, "the buyer is not bound to pay the price at any other specific time," Article 58 CISG applies. Under this provision, as a general rule the buyer must pay the purchase price "when the seller places either the goods of the documents controlling their disposition at the buyer's disposal in accordance with the contract and this Convention." Therefore, Article 58 lays out the general rule of simultaneous exchange of goods and price, applicable unless the parties make different arrangements as regards the timing for performance of the reciprocal obligations.[22] Therefore, the time when payment is due is usually dependent on the place and time of the handing-over of the goods of documents under

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[20] *See*, *e.g.*, ZG Kanton Basel-Stadt (Switzerland), 3 December 1997, available in English at <http://cisgw3.law.pace.edu/cases/971203s2.html>.

[21] This rule has been affirmed, *e.g.*, by Trib. Padova (Italy), 25 February 2004, available in English at <http://cisgw3.law.pace.edu/cases/040225i3.html>.

[22] *Accord*, among many others, Swiss Supreme Court, 18 January 1996, English abstract available at <http://cisgw3.law.pace.edu/cases/960118s1.html>; Austrian Supreme Court, 8 November 2005, available in English at <http://cisgw3.law.pace.edu/cases/051108a3.html>.

Article 31(1)(*b*) or (*c*).[23] Conversely, in the event of sale involving carriage under Article 31(1)(*a*) the seller fulfils his obligation by handing over the goods to the first carrier, but under Article 58(1) the buyer is not bound to pay the price until the goods or documents are handed over to him at destination.

In any event, the seller may make payment "a condition for handing over the goods or documents", as specified in general terms in the last sentence of Article 58(1) CISG, as well as in Article 58(2) with regard to sales of goods involving carriage. These provisions lay out a right of retention in favour of the seller, which is to be read in conjunction with the buyer's right to retain payment under Article 58(3) CISG. Under the latter provision, the buyer "is not bound to pay the price until he has had an opportunity to examine the goods." However, the buyer's right to retain payment cannot be exercised in the event that "the procedures for delivery or payment agreed upon by the parties are inconsistent with" the buyer having the opportunity to examine the goods. This is the case, in particular, where the parties have agreed on payment terms such as "cash against documents" or similar. Furthermore, it has been held that during the time necessary to examine the goods the buyer may legitimately suspend payment in light of the general principle of simultaneous exchange of goods and price.[24]

Article 59 CISG lays out the rule under which the purchase price becomes due automatically on the date set for payment, without the need for a demand on the part of the seller, or for any other formalities. In particular, it has been held that this rule implies that the obligation to pay the purchase price is not conditional on the issuance of an invoice.[25] Although this view can be shared in principle, it should also be highlighted that relevant exceptions to it exist. In particular, it has often been held that the requirement that the seller send an invoice in advance may be drawn not only from the parties' agreement to this effect, but also from contractual practices or usages.[26] This conclusion, indeed, is reinforced in light of the fact that all Incoterms require that the seller issue a commercial invoice to the buyer, a provision that may be regarded as the restatement of a general usage in international trade.

The most relevant practical implication of the rule laid out in Article 59 CISG is that upon the buyer's failure to pay at the due date, he is in breach of contract. Therefore, the seller can resort to all remedies available for the buyer's breach of contract and may claim interest accrued in accordance with Article 78 CISG.[27] In fact, many court decisions have pointed out that the interest accruing on sums in arrears begins to accumulate as soon as the sum becomes due, without the need for any demand of other formalities.[28]

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[23] *See*, *e.g.*, OLG Düsseldorf (Germany), 28 May 2004, available in English at <http://cisgw3.law.pace.edu/cases/040528g1.html>.

[24] Austrian Supreme Court, 8 November 2005, available in English at <http://cisgw3.law.pace.edu/cases/051108a3.html>.

[25] *See*, *e.g.*, Supreme Court of the Slovak Republic, 3 April 2008, available in English at <http://cisgw3.law.pace.edu/cases/080403k1.html>.

[26] *See*, *e.g.*, OLG Köln (Germany), 3 April 2006, available in English at <http://cisgw3.law.pace.edu/cases/060403g1.html>.

[27] For further details on this provision, *see infra* Chapter VIII, para 4.

[28] *See*, *e.g.*, Trib. Padova (Italy), 31 March 2004, available in English at <http://cisgw3.law.pace.edu/cases/040331i3.html>.

2. Obligation to Take Delivery

Although the obligation to pay the purchase price is arguably the most relevant obligation of the buyer, Article 53 CISG indicates also another obligation among the characteristic ones, to which the buyer is bound. It is the obligation to take delivery, which is specifically addressed by Article 60 CISG. According to this provision, the obligation to take delivery consists not only in "taking over the goods" (Art. 60(1)(*b*) CISG), but also in "doing all the acts which could reasonably be expected of him in order to enable the seller to make delivery" (Art. 60(1)(*a*) CISG).

Under the rule laid out in Article 60(1)(*a*) CISG, the buyer owes a duty to cooperate with the seller consisting in performing all acts reasonably necessary to enable the seller to deliver the goods. These ancillary obligations are often identified in the contract, either by means of tailor-made rules, or by incorporation by reference of Incoterms, which provide for several obligations of the buyer in addition to payment of the purchase price. Under "F-terms", for instance, the buyer must provide the seller with information about the carrier and the time and place of loading of the goods; under "C-terms", the buyer may be required to obtain an import license.[29] Moreover, it has been held that the obligation to perform preparatory acts enabling the seller to make delivery also includes preparatory measures for the manufacture of the goods, such as the supply of designs or data.[30] In any event, it should be pointed out that the buyer's obligation to cooperate is limited only to "acts which could reasonably be expected of" the buyer. This implies, in particular, that the seller can only expect cooperation from the buyer,[31] but he cannot expect the buyer to perform acts, which are due by the seller, in lieu of the seller. This is the case even where the buyer could perform such acts at significant lower costs than those to be borne by the seller.

Article 60(1)(*b*) CISG sets forth the buyer's obligation to take physical possession of the goods.[32] The place and time for performance of the obligation to take delivery are not specified in the CISG. This is due to the fact that these obligations are dependent on the procedures applicable to the delivery of the goods, according to the contractual arrangements or, in the absence of such arrangements, to the rules set forth in Article 31 CISG. The taking of delivery is an obligation of the buyer, to the effect that the latter has no legitimate choice as to whether or not to take delivery. As a result of this characterization of the taking of delivery, the performance of this obligation on the part of the buyer cannot be presumed to imply in itself the buyer's acceptance of the goods.[33]

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[29] *See* MKAC Arbitral Tribunal (Russian Federation), Arbitral Award of 24 January 2002, available in English at <http://cisgw3.law.pace.edu/cases/020124r1.html>.

[30] *Accord* U.S. District Court [S.D.N.Y], 10 May 2002 (*Geneva Pharmaceuticals v. Barr Laboratories*), available at <http://cisgw3.law.pace.edu/cases/020510u1.html>.

[31] *See* Austrian Supreme Court, 6 February 1996, available in English at <http://cisgw3.law.pace.edu/cases/960206a3.html>.

[32] *Accord* OLG Brandenburg (Germany), 18 November 2008, available in English at <http://cisgw3.law.pace.edu/cases/081118g1.html>.

[33] *See* KG Schaffhausen (Switzerland), 27 January 2004, available in English at <http://cisgw3.law.pace.edu/cases/040127s1.html>.

Therefore, notwithstanding the taking of delivery, the buyer retains the right to give notice of non-conformity under Article 39 CISG[34] and to resort to any available remedy for non-conformity of the goods delivered to him, including contract avoidance, or substitution of the goods, if the non-conformity amount to a fundamental breach under Article 25 CISG.[35]

Article 60 CISG clarifies that the buyer owes to the seller the obligation to take delivery of the goods. However, the provision at hand does not specify under what circumstances may the buyer reject the goods handed over to him by the seller. Other provisions of the Convention provide some guidance in this respect. Under Article 52(1) the buyer may reject the goods if they are delivered before the date fixed for delivery. Similarly, under Article 52(2) the buyer may refuse to take delivery of the quantity of goods in excess of what was contractually agreed. Other than in the foregoing circumstances, no express solution is provided in the CISG to the issue of the buyer's right to reject the goods. Therefore, the answer to the question as to whether the buyer has a right to reject the goods must be based on the analysis of the remedies available to the buyer in the given circumstances. Accordingly, it is beyond doubts that the buyer may reject the goods in the event of a delay or non-conformity amounting to a fundamental breach of contract. Indeed, under these circumstances the buyer has a right to avoid the contract, or a claim for substitute goods and it would be inconsistent with those remedies to deny the buyer's right to reject the goods delivered to him in fundamental breach of contract. Conversely, in the event of a non-conformity that does not constitute a fundamental breach, the buyer cannot reject the goods.[36] Instead, the buyer must take delivery of the non-conforming goods and resort to the remedies available to him, which include claims for repair of the goods, price reduction and damages.

It should be noted that, even if the buyer intends to reject the goods handed over to him by the seller, under Article 86(1) CISG he may be subject to the obligation to "take such steps to preserve [the goods] as are reasonable in the circumstances." This may even require that the buyer takes possession of the goods, in view of the reasonable steps necessary to preserve them. However, if this situation occurs the buyer is entitled to claim reimbursement of any expense encountered for the purpose of preserving the goods.[37]

3. Passing of Risk

The buyer owes the payment obligation to the seller in consideration for delivery of goods conforming to the contractual arrangements. However, it may happen that in the lapse of time between the conclusion of the contract and the time of dispatch of the goods to the buyer at the agreed final destination accidental events occur, which cause damage to, or even the complete loss

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[34] For further details on this provision, *see supra* Chapter VI, para 5.

[35] For further details on the notion of "fundamental breach" under Article 25 CISG, *see infra* Chapter IX, para 1; for details on the buyer's remedies of contract avoidance and substitution of goods, *see* Chapter IX, paras. 2 and 3.

[36] For a court decision supporting the view expressed in the text, *see* OLG Frankfurt (Germany), 18 January 1994, available in English at <http://cisgw3.law.pace.edu/cases/940118g1.html>.

[37] For further details on the parties' duty to preserve the goods, *see infra* this Chapter, para 6.

of the goods. The question thus arises as to whether, notwithstanding the damage or loss of the goods, the buyer is still bound to pay the purchase price. The foregoing is commonly refereed to as the issue of the passing of risk, which addresses the question of the moment in time when the risk of accidental loss of or damage to the goods passes from the seller to the buyer, and allocates the burden resulting from the accidental event on the basis of the timing of the passing of risk. The CISG devotes to this matter the rules set out in Chapter IV ("Passing of Risk") of Part III, which includes Articles 66 to 70. The issue is of great practical significance because of its potential harsh consequences. Legal rules provided for with regard to the allocation of the risk of loss of or damage to the goods determine whether the seller has to provide substitute goods or may claim payment of the purchase price from the buyer. Moreover, the same rules also determine whether the buyer has to pay the price for the goods and take delivery, despite the fact that they are partially damaged or totally destroyed. Reference is obviously made to the accidental loss or damage of the goods, since whenever the loss or damage is due to one party's breach of a statutory or contractual duty, the counterpart is granted other specific contractual remedies.

The traditional rule, which still applies in many legal systems, states that the risk of loss follows the title, according to the rule that "*res perit domino*" (*i.e.*, "the thing is lost to the owner"). However, in spite of this common link between ownership (and the passing of property) and risk (and the passing of risk), under Article 4(*b*) the CISG expressly excludes from its scope of application the issue of transfer of property,[38] whereas it provides for rules on the transfer of the risk of loss or damage of the goods. Therefore, the former matter is governed by the domestic law applicable by virtue of the conflict-of-law rules of the forum. The issue of the passing of risk, instead, is not linked to the passing of property and it is autonomously governed by the provisions in Articles 66 to 70 CISG.[39]

Article 66 CISG describes the effects of the passing of risk by specifying that "[l]oss of or damage to the goods after the risk has passes to the buyer does not discharge him form his obligation to pay the price, unless the loss or damage is due to an act or omission of the seller." The provision at hand illustrates only the effects that the rules on the passing of risk have on the buyer's payment obligation. It does not deal with when the risk passes. The time of the passing of risk is established by the CISG's provisions that follow, namely Articles 67 to 69. However, under Article 6 CISG the parties may derogate to the rules on the time of the passing of risk, and in practice commercial operators often do so by means of the incorporation into the agreement of trade terms, like the Incoterms of the International Chamber of Commerce.[40] In the presence of a contractual regulation of the time when risk passes, the parties' arrangements prevail and they exclude the application of Articles 67 to 69 CISG. On the other hand, they do not exclude, but rather trigger, the application of Article 66. Accordingly, if it is established (either contractually, or by the applicable CISG's rules) that the goods were lost or damaged before the risk passed from the seller to the buyer, the seller's failure to deliver or his delivery of non-conforming goods amounts to a breach of contract on the part of the seller.[41] Therefore, the buyer may claim any remedy available to him in

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[38] For further details on the scope of the exclusion under Article 4(*b*) CISG, *see supra* Chapter IV, para 4.

[39] *Accord* U.S. District Court [S.D.N.Y.], 26 March 2002 (*St. Paul Guardian Ins. Co. v. Neuromed Medical Systems & Support GmbH*), available at <http://cisgw3.law.pace.edu/cases/020326u1.html>.

[40] For further details, *see infra* this Chapter, para 5.

[41] *See*, *e.g.*, OLG Köln (Germany), 9 July 1997, available in English at

the given circumstances for breach of contract by the seller. Conversely, if it is established that the goods were lost or damaged after the risk passed from the seller to the buyer, the buyer is required to pay the purchase price, unless the loss or damage is due to an act or omission of the seller.[42]

The final sentence of Article 66 CISG contains an exception to the general rule laid out in that provision. Accordingly, the buyer may be discharged from his obligation to pay the purchase price if "the loss or damage is due to an act or omission of the seller". It must be noticed that the provision at hand does not refer to a breach of contract committed by the seller, but rather to his "act or omission". This suggests that even acts or omissions of the seller that do not constitute a breach of contract may nonetheless procure the discharge of the buyer from his payment obligations. This is the case, for example, with respect to seller's conducts which are unlawful in tort, although they may not be relevant in the light of the parties' contractual arrangements.

The risk dealt with in the provisions under consideration is the risk of accidental loss or damage to the goods. The notions of loss and damage are not provided in the CISG, but several decisions suggest that both notions are to be constructed in a rather extensive fashion. Accordingly, it has been held that the notion of loss also includes cases where the goods are stolen.[43] On the other hand, the notion of damage includes not only physical damages, but also complete destruction, deterioration, or shrinkage of the goods during carriage or storage.[44]

Another relevant issue on which the CISG is silent is who has the burden of proof regarding the passing of risk. There is vast consensus in legal writing that the question at hand concerns a matter governed by the CISG, but not expressly settled in it. Accordingly, the gap must be filled in accordance with Article 7(2) CISG,[45] by resorting primarily to the general principles on which the CISG is based. Two relevant general principles can be identified in this respect, which can be drawn, among other provisions, from Article 79(1) CISG: the general principle that the party who wants to derive beneficial legal consequences from a legal provision has to prove the existence of the factual prerequisites of the provision,[46] in other words, "*ei incumbit probatio qui dicit, non qui negat*," and the general principle according to which the party claiming an exception has to prove the factual prerequisites of that exception.[47] The application of the foregoing general principles to the issue of the burden of proof regarding the passing of risk leads to relevant conclusions. A seller claiming payment of the purchase price must prove that the goods were in conformity with the

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<http://cisgw3.law.pace.edu/cases/970709g3.html>.

[42] *See*, *e.g.*, District Court Comarno (Slovak Republic), 12 March 2009, available in English at <http://cisgw3.law.pace.edu/cases/090312k1.html>.

[43] *See*, *e.g.*, OLG Hamm (Germany), 23 June 1998, available in English at <http://cisgw3.law.pace.edu/cases/980623g1.html>.

[44] *See*, *e.g.*, Cámara National de Appelaciones en lo Comercial (Argentina), 31 October 1995, available in English at <http://cisgw3.law.pace.edu/cases/951031a1.html>.

[45] For further details on this provision, *see supra* Chapter I, para 4.

[46] *See* Trib. Cantonal du Valais (Switzerland), 28 January 2009, available in English at <http://cisgw3.law.pace.edu/cases/090128s1.html>; Swiss Supreme Court, 13 November 2003, available in English at <http://cisgw3.law.pace.edu/cases/031113s1.html>.

[47] *See* Trib. Vigevano (Italy), 12 July 2000, available in English at <http://cisgw3.law.pace.edu/cases/000712i3.html>.

contractual arrangements at the time of the passing of risk.[48] Conversely, a buyer claiming remedies for the seller's alleged failure to deliver the lost goods, or for alleged non-conformity of the goods delivered damaged, must prove that the accidental loss of or damage to the goods occurred before the time when risk passed to him.[49]

Some court decisions seem to suggest that under certain circumstances a shift of the burden of proof may occur. In particular, it has been held that if the buyer duly gives notice of non-conformity to the seller according to Article 39 CISG, the seller then bears the burden to prove conformity of the goods at the time of passing of risk, whereas the burden shifts back to the buyer if he accepts without complaint.[50] In these authors' view this opinion cannot be shared. The consequence of the buyer's failure to duly give notice of non-conformity under Article 39 CISG is that he loses the right to rely on the lack of conformity of the goods. Therefore, the allocation of the burden of proof regarding the alleged non-conformity at the time of the passing of risk is irrelevant. Conversely, if the buyer wants to claim any remedy for the alleged breach on the part of the seller, he must not only give proper notice under Article 39, but also prove that the non-conformity existed at the time of the passing of risk. The buyer may base his proof on presumptions in this regard; however, he cannot rely on a shift of the burden of proof on the seller.

In establishing when the risk of accidental loss of or damage to the goods passes from the seller to the buyer the CISG distinguishes between three different hypotheses. Article 67 provides rules on the passing of risk in sales involving carriage. Article 68 deals with sales of goods in transit. Article 69 provides the residual rules applicable to all cases not falling within Articles 67 and 68.

Article 67 CISG deals with sales involving carriage and makes a distinction based on whether or not the seller is bound to hand over the goods at a particular place. In both cases the risk passes when the goods are handed over to the carrier, or to a freight forwarded,[51] provided that the carrier or freight forwarder is an independent business operator and not an employee or branch of the seller. However, if the seller is bound to hand over the goods at a particular place, the passing of risk occurs upon the handing over to the carrier or freight forwarder at that place. If the seller is not bound to hand over the goods at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier or to the freight forwarder for transportation.[52] The handing over implies the transfer of custody to the carrier, thus suggesting that the transfer of risk under the CISG is linked to the physical control and custody of the goods. However, it should be noted that Article 67 CISG requires that the handing over be "in accordance with the contract of sale." This means that the rule under consideration applies only if the carriage of goods by a third party carrier was

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[48] *See*, *e.g.*, LG Bamberg (Germany), 23 October 2006, available in English at <http://cisgw3.law.pace.edu/cases/061023g1.html>.

[49] *See*, *e.g.*, U.S. Court of Appeals [7th Circuit], 23 May 2005 (*Chicago Prime Packers, Inc. v. Northam Food Trading Co.*), available at <http://cisgw3.law.pace.edu/cases/050523u1.html>.

[50] AG Bern (Switzerland), 11 February 2004, available in English at <http://cisgw3.law.pace.edu/cases/040211s1.html>.

[51] For a court decision holding that delivery to a freight forwarder is equivalent to delivery to a carrier, *see*, *e.g.*, LG Saarbrücken (Germany), 26 October 2004, available in English at <http://cisgw3.law.pace.edu/cases/041026g1.html>.

[52] See AG Duisburg (Germany), 13 April 2000, available in English at <http://cisgw3.law.pace.edu/cases/000413g1.html>.

stipulated in the contract. Conversely, it does not apply if under the contract transportation of the goods was to be performed by either one of the parties, even if, in practice, the party bound to transport the goods avails himself of a third party carrier.[53] On the other hand, the rule under Article 67 applies, and the risk passes upon the handing over of the goods to the carrier, irrespective of who is contractually responsible for arranging transport and insurance.[54]

The passing of risk under Article 67(1) is conditional upon the clear identification of the goods to the contract of sale. Indeed, under Article 67(2) CISG failure of a clear identification results in the risk not passing. Identification can take multiple forms. In a non-exhaustive list the provision under consideration mentions "markings of the goods," "shipping documents," or "notice given to the buyer." The list, however, is open, as made clear by the language of Article 69(2), which indicates that the identification can also be effected "otherwise."

Article 68 CISG provides rules on the time when risk passes from the seller to the buyer if goods are sold while in transit. When this situation occurs, risk passes at the "time of the conclusion of the contract."[55] However, the provision at hand goes on by saying 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." The precondition for the retroactive effect laid out in the second sentence of Article 68 is rather vague. Arguably, the most relevant situation where "the circumstances […] indicate" that the risk is assumed by the buyer retroactively occurs when transportation insurance exists. In fact, if transport insurance is in place, it will normally cover the period of time between the handing over of the goods to the carrier and the conclusion of the contract, thus providing indemnification to the buyer in the event that the goods were lost or damaged prior to the conclusion of the contract. In any event, the retroactive operation of the provision at hand is precluded 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."

Residual rules for cases not within Article 67 or 68 are set forth in Article 69 CISG. This provision makes a distinction based on whether or not the buyer is bound to take over the goods at the place of business of the seller. If the buyer is bound to take over the goods at the place of business of the seller, Article 69(1) CISG applies, according to which "the risk passes to the buyer when he takes over the goods." This rule applies also if the buyer arranges for a third party carrier to take over the goods, provided that the contractual agreement was that the buyer would take over the goods.[56] Article 69(1) CISG also addresses the situation where the buyer fails to take over the goods in due time. When this happens, the risk passes to the buyer "from the time when the goods are placed at his disposal and he commits a breach of contract by failing to take delivery." However, it should also be noted that under Article 69(3) CISG, not unlike under Article 67(2), the

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[53] *See*, *e.g.*, OLG Karlsruhe (Germany), 20 November 1992, available in English at <http://cisgw3.law.pace.edu/cases/921120g1.html >.

[54] Accordingly, Audiencia Provincial de Córdoba (Spain), 31 October 1997, English abstract available at <http://cisgw3.law.pace.edu/cases/971031s4.html>.

[55] *See* China International Economic and Trade Arbitration Commission (CIETAC), Arbitral Award of 1 April 1997, available in English at <http://cisgw3.law.pace.edu/cases/970401c1.html>.

[56] *See* OLG Schleswig-Holstein (Germany), 20 October 2002, available in English at <http://cisgw3.law.pace.edu/cases/021020g1.html>.

goods cannot be considered to be placed at the buyer's disposal, unless "they are clearly identified to the contract."[57]

Article 69(2) CISG deals with all cases not within Article 67 or 68, in which the buyer is not bound to take over the goods at the place of business of the seller.[58] Cases falling within the scope of Article 69(2) include sales of goods stored at a third party's warehouse, sales providing for delivery at the buyer's place of business, and sales providing for delivery to a third party.[59] When Article 69(2) CISG applies, 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."

4. Risk and Liability

The rules on the passing of risk apply to the extent that the loss of or damage to the goods is the result of an accidental event. If the loss or damage is the result of the seller's breach of contract, then Article 36(1) CISG applies, according to which the seller is liable "for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time." Moreover, under Article 36(2) the seller is also liable for any lack of conformity which occurs after the time when the risk passes to the buyer and "which is due to a breach of any of his obligations, including a breach of any guarantee that for a period of time the goods will remain fit for their ordinary purpose or for some particular purpose or will retain specified qualities of characteristics."

As already pointed out, the rules on the liability of the seller under Article 36 do not correspond exactly with the scope of the last sentence of Article 66(1) CISG, which provides that the buyer is discharged from the obligation to pay the purchase price if "the loss or damage is due to an act or omission of the seller." Indeed, the act or omission of the seller, relevant under the said provision may consist of an unlawful act or omission that, in itself, does not constitute a breach of contract. It has been held, for instance, that the distinction under consideration may be relevant in the event of a "FOB" transaction, under which the risk passes to the buyer upon the loading of the goods on the vessel at the port of shipment. If the seller damages the goods when recovering the container at the port of destination, the seller's act or omission does not constitute a breach of contract. However, not only may his conduct be relevant under the applicable domestic law of tort, but it is also relevant in that the buyer is discharged from his payment obligation, although the risk of accidental loss of or damage to the goods has already passed.

The relationship between rules on the passing of risk and liability rules may pose puzzling questions in the event that the seller delivers non-conforming goods, but after delivery and the

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[57] For a decision applying the rule in Article 69(3) CISG, although with regard to Article 69(2), rather than 69(1) CISG, *see* OLG Hamburg (Germany), 14 December 1994, English abstract available at <http://cisgw3.law.pace.edu/cases/941214g1.html>.

[58] Accordingly, U.S. District Court [Colorado], 6 July 2010 (*Alpha Prime Development Corp. v. Holland Loader*), available at <http://cisgw3.law.pace.edu/cases/100706u1.html>.

[59] *See*, *e.g.*, CJ Genève (Switzerland), 20 January 2006, available in English at <http://cisgw3.law.pace.edu/cases/060120s1.html>.

taking over of the goods on the part of the buyer (*i.e.*, after the risk passes to the buyer) an accidental event occurs, which causes the loss of the goods, or further negatively affects the fitness of the goods for the purposes envisaged in the sales contract. Under such circumstances, the application of the liability rules would give the buyer the right to retain payment of the purchase price and exercise the remedies available under the given circumstances. These remedies would include, in particular, contract avoidance, or a claim for substitute goods, provided that the failure to deliver conforming goods amounts to a fundamental breach.[60] Furthermore, they would include repair of the goods, price reduction and damages, irrespective of the fundamental or non-fundamental nature of the breach.[61] Conversely, if, in the same circumstances considered above, the rules on the passing of risk were to apply, then the occurrence of the accidental loss of the goods after the passing of risk to the buyer would cause the buyer to be bound to pay the purchase price even though the seller delivered non-conforming goods.

The relationship between rules on the passing of risk and liability rules is addressed by Article 70 CISG, which states that "[i]f the seller has committed a fundamental breach of contract, [the rules on the passing of risk] do not impair the remedies available to the buyer on account of the breach."[62] This provision provides two relevant rules, to be distinguished on the basis of whether or not the breach committed by the seller amounts to a fundamental breach of contract. On the one hand, if the seller commits a fundamental breach of contract, the rule expressly laid out in Article 70 CISG grants to the buyer the right to claim remedies resulting from that breach, irrespective of the consequences of the subsequent accidental event. Therefore, even if the goods are lost as a result of the subsequent accidental event, the buyer is not bound to pay the purchase price and may claim either avoidance of the contract, or delivery of substitute goods.[63] In this respect, the practical effect of the rule laid out in Article 70 CISG is to shift the risk of accidental loss of or damage to the goods back to the seller.

On the other hand, if the breach committed by the seller does not qualify as a fundamental breach, the operation of the rules on the passing of risk is not precluded. Accordingly, if the goods are lost because of an accidental event after the passing of risk to the buyer, the latter must pay the purchase price even though the goods delivered by the seller failed to conform to the contractual specifications. Moreover, the buyer cannot declare the contract avoided, nor can he claim substitute goods. He may claim repair of the goods, as this remedy is available also in the event of non-fundamental breaches of contract; however, the remedy of repair is highly unlikely to be beneficial in a situation where the goods are lost or destroyed due to the accidental event occurred after the passing of risk to the buyer. Conversely, as the buyer must pay the purchase price, he may have an interest in claiming price reduction, a remedy which is available to him under Article 50 CISG in the event of non-fundamental breach of contract committed by the seller.

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[60] For further details on remedies for fundamental breach of contract under the CISG, *see infra*, Chapter IX.

[61] For further details on remedies for non fundamental breach of contract under the CISG, *see infra*, Chapter VIII.

[62] Interestingly, there seem to be no reported case-law on this provision.

[63] For further details on the claim for substitute goods due to a fundamental breach of the sale contract, *see infra*, Chapter IX, para 2. For further details on contract avoidance, *see infra*, Chapter IX, para 3.

Article 70 CISG specifically addresses the issue of the relationship between rule on the passing of risk and liability rules in the event of a breach of contract committed by the seller. However, it should be noted here that also the buyer's breach of contract may affect the way in which the rules on the passing of risk operate. This is the case, in particular, when the buyer commits a breach of contract consisting of the failure to take delivery of the goods. Indeed, as an alternative to the passing of risk based on the taking over of the goods by the buyer, Article 69(1) CISG provides that the risk passes to the buyer also if he "commits a breach of contract by failing to take delivery," although the seller duly placed the goods at the buyer's disposal. There is broad consensus that the rule at hand lays out a general principle applicable also to situation that do not strictly fall within the scope of Article 69(1). The general principle posits that risk passes to the buyer if the seller cannot fulfill the requirements for the passing of risk because of the buyer's breach of contract. The said general principle may apply to situations not covered by Article 69(1) CISG, like buyer's failure to give necessary instructions for the dispatch of the goods.

5. Passing of Risk and Incoterms

It has already been mentioned that the rules on the passing of risk can be freely derogated by the parties, in accordance with the principle of supremacy of the parties' freedom of contract affirmed in Article 6 CISG. Although articulated tailored-made clauses on the passing of risk are not a rare occurrence in business practice, in a very significant number of cases parties to an international contract of sale intending to derogate to the default rules on the passing of risk do so by incorporating in their agreement one of the Incoterms drafted by the International Chamber of Commerce, whose most recent edition was published in 2010.[64] However, the relevance of the Incoterms with respect to the regulation of the passing of risk is not limited to cases where the parties have expressly incorporated by reference one of ICC's trade terms into the agreement. Indeed, the wide knowledge and regular observance of the Incoterms as a source of rules on the passing of risk in international contracts for the sale of goods has led several courts to apply them as trade usages, applicable on the grounds of Article 9 CISG,[65] irrespective of their express incorporation in the agreement.

In other cases, however, courts have regarded trade terms such as "CIF", or "FOB" included

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[64] ICC, *Incoterms®* 2010, ICC Publication No. 715E. For an overview of the impact to the Incoterms of the International Chamber of Commerce on the obligations of the seller, *see supra*, Chapter VI, para 2.

[65] For cases applying the Incoterms of the International Chamber of Commerce as trade usages under Article 9(2) CISG, in the absence of an explicit reference by the parties to that source of interpretation of the trade term used in the agreement, *see*, *e.g.*, U.S. Court of Appeals [5th Circuit], 11 June 2003 (*BP Oil International v. Empresa Estatal Petroleos de Ecuador*), available at <http://cisgw3.law.pace.edu/cases/030611u1.html> (with respect to a "*CFR*" term); Austrian Supreme Court, 6 February 1996, available in English at <http://cisgw3.law.pace.edu/cases/960206a3.html> (with respect to a "*FOB*" term).

in the contract as an agreement between the parties consistent with (rather than derogating to) the relevant CISG's rules on the passing of risk, in particular those laid out in Article 67 CISG.[66] However, although at times there may be coincidence between the rules implied by an Incoterm and the corresponding rules laid out in the CISG, this is not always the case and in many instances the inclusion of an Incoterm in the contract produces a derogation to the otherwise applicable default rule on the passing of risk set forth in the CISG. In the light of the foregoing it seems appropriate here to provide a short overview of the impact of the various Incoterms on the rules on passing of risk.

In contracts of sale concluded under "EXW" ("Ex Works") terms, the seller delivers the goods to the buyer by merely placing them at the disposal of the buyer at the named place of delivery. The time of delivery also constitutes the moment when the risk of accidental loss of or damage to the goods passes from the seller to the buyer. The rule at hand basically corresponds to the one laid out in Article 69 CISG. The rule provided in the Convention, however, contains a distinction which is unknown to the Incoterms, in that it distinguishes between situations where the the buyer is bound to take over the goods at the seller's place of business (Art. 69(1) CISG), and situations where the buyer is bound to take over the goods at a place other than the seller's place of business (Art. 69(2) CISG). In fact, an "Ex Works" sale can correspond to either one of the two cases considered by the CISG, depending on whether the named premises where the goods are placed at the disposal of the buyer coincide or not with the seller's place of business as defined under Article 10 CISG. Moreover, it should also be noted that, for the purpose of identifying the time of the passing of risk, Article 69(1) CISG refers primarily to the taking over of the goods on the part of the buyer and supplements that provision with an additional rule dealing with the buyer's failure to take delivery; the "EXW" Incoterm, instead, refers only to the placing of the goods at the disposal of the buyer for delivery on the part of the seller.

The notion of delivery is pivotal also as regards the rules on passing of risk in contracts of sale subject to an "F-term", including "FCA" ("Free Carrier") and "FOB" (Free On Board"). Indeed, under these trade terms the risk of accidental loss of or damage to the goods passes to the buyer at the time the goods have been delivered. Delivery, in turn, is completed at different times depending on the circumstances of the case. In "FCA" contracts, if the place named for delivery is the seller's premises, delivery is completed when the goods are loaded on the means of transport provided by the buyer. If the place named for delivery is another one, delivery is completed when the goods are placed at the disposal of the carrier on the seller's means of transportation ready for

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[66] *See*, *e.g.*, Shangai No. 2 Intermediate People's Court (China), 25 December 2006, available in English at <http://cisgw3.law.pace.edu/cases/061225c1.html>, interpreting a "FOB" term in the sales contract involving carriage as being consistent with Article 67 CISG.

unloading. Also in “FOB” contracts, the risk passes to the seller upon delivery, which occurs when the goods are placed on board the vessel nominated by the buyer. Moreover, in all “F-term” contracts, if the buyer fails to nominate the carrier or vessel, or if the carrier or vessel fails to arrive on time or to take the good in charge, then the risk of accidental loss of or damage to the goods passes to the buyer on the date agreed for delivery, or upon the expiry of the period agreed for delivery. The rules on the passing of risk under “F-terms” largely correspond to the rule contained in Article 67(1), second sentence, CISG. Furthermore, similar exceptions to the general rule on the passing of risk are provided with respect to the event that the goods are not “clearly identified to the contract,” a situation which prevents the risk of accidental loss of or damage to the goods from passing to the buyer.

Contracts of sale subjected to “C-terms”, including “CPT” (“Carriage Paid To”) “CIP” (“Carriage and Insurance Paid To”) and “CFR” (“Cost and Freight”), do not differ significantly from “F-term” contracts as regards the rules on the passing of risk. In fact, the distinction between these different groups of Incoterms lays in that in “C-term” contracts the seller must contract for and pay the costs of carriage, freight and possibly insurance to the named port of destination. Not unlike under “F-term” contracts, however, delivery takes place at the port of shipment and the risk of accidental loss of or damage to the goods passes to the buyer when the goods are handed over to the carrier or loaded on the vessel. Also the “C-terms” are thus consistent with Article 67 CISG, although the latter is silent on some of the costs that are allocated under “C-terms”.

If the parties to a sales contract want the seller to be bound to take care of carriage, insurance and possibly import customs formalities, they may include in their agreement one of the trade terms of the “D-term” group, which in the 2010 edition of the Incoterms of the International Chamber of Commerce consists of “DAT” (“Delivered At Terminal”) “DAP” (“Delivered At Place”) and “DDP” (Delivery Duty Paid”). “D-terms” are “destination” terms, in that delivery occurs at the named place of destination of the goods. Moreover, in “DAT” contracts (unlike in “DAP” or “DDP” contracts) the seller is also bound to unload the goods from the arriving means of transport. The risk of accidental loss of or damage to the goods passes to the buyer upon completion of delivery. This rule implies that under “D-term” contracts the seller bears the risk of loss of or damage to the goods throughout the entire transportation to the named place of destination. The cases contemplated in “D-terms” fall within the scope of Article 69(2) CISG, although the latter residual rule in the Convention also applies to cases completely unrelated to “D-term” contracts. However, it should be noted that both the Incoterms under consideration here and the said rule of the CISG provide for the passing of risk of accidental loss of or damage to the goods upon the placing the goods at the disposal of the buyer at the named place of destination.

6. Preservation of the Goods

Section VI of Part III of the CISG provides rules on "Preservation of the goods", setting forth duties of preservation, which at times are imposed on the party who is in possession of the goods when the goods should be in the hands of the other party. Therefore, a duty of preservation arises in addition to the characteristic obligations of the parties, on the grounds that, although the goods should not be in his hand, failure of the party in possession of the good to take measures to preserve them would result in the loss, damage or deterioration of the goods. Therefore, the CISG deals with the issue at hand by providing guidance with respect to both, the measures that the party in possession of the goods may adopt, and the self-defenses and claims for reimbursement of costs that he can put forward as a result of the adoption of those measures. It should be noted at the outset that the rules on preservation of the goods laid out in the CISG's Section under consideration apply by default even if the parties have not included expressly any reference to duties of preservation in their contract. Conversely, given the general prevalence of the principle of parties' freedom of contract expressed in Article 6 CISG, it must be affirmed that the parties to a contract for the sale of goods governed by the CISG may derogate from the Convention's provision on preservation of goods, or may exclude their application.

Two different situations are considered in the CISG, both of which may result from the conduct of the buyer, although one of them leads to the seller's duty to take measures to preserve the goods, and the other one leads to the buyer's duty to take such measures. The first situation is considered in Article 85 CISG and it occurs in the event of the buyer's delay in taking delivery of the goods, or his failure to pay the price, when payment of the price and delivery of the goods are to be made concurrently. Under these circumstances, it is likely that the seller finds himself either in possession of the goods or otherwise able to control their disposition. If this is the case, then the seller "must take such steps as are reasonable in the circumstances to preserve" the goods.

The foregoing, of course, does not imply that the seller cannot claim the remedies available to him for the breach of contract committed by the buyer. Indeed, the buyer's failure to take delivery and the buyer's failure to pay the purchase price constitute breaches of contract leading to the seller's right to claim performance in kind or to his right to declare the contract avoided and claim damages. However, notwithstanding the existence of a breach on the part of the buyer, the seller is also bound by the obligation indicated in Article 85, which requires that the seller take reasonable steps to preserve the goods. It should be noted that the seller's obligation to preserve the goods is conditional upon the seller's possession of the goods, or his ability to control their disposition. However, if the foregoing prerequisite is fulfilled, the seller is bound to take such steps as are reasonable in the circumstances to preserve the goods, irrespective of the express inclusion of this duty in the agreement between the parties.

Reasonable steps to preserve the goods under Article 85 CISG are identified in Article 87 and Article 88 CISG, although these two provisions do not exhaust the possible measures that may be taken to preserve the goods. Under Article 87, a seller who is bound to take steps to preserve the goods "may deposit them in a warehouse of a third party at the expense of the [buyer] provided that

the expense incurred is not unreasonable."[67] Under Article 88, in conjunction with Article 85, if the seller is bound to preserve the goods, he "may sell them by any appropriate means if there has been an unreasonable delay by the [buyer] in taking possession of the goods […] or in paying the price or the cost of preservation, provided that reasonable notice of the intention to sell has been given to the [buyer]."

Therefore, in the event of a buyer's refusal to take delivery, the seller must be held to be under a duty to preserve the goods, but he may also be held to have the right to preserve them by reselling them at market price.[68] The only prerequisite that the seller must fulfill to this effect is to give reasonable notice to the buyer.[69] Other than for the foregoing prerequisite, several court decisions have applied the provision under Article 88(1) CISG rather liberally. One court, for instance, held that the seller was entitled to resell the goods on the grounds that the buyer had unreasonably delayed acceptance of delivery in a situation where the buyer had improperly rejected the goods.[70] Other courts, however, have adopted a stricter approach, noting, for instance, that the buyer's failure to pay in full the contract price would not justify the seller's initiative to sell to a third party a key component that the seller had retained, the more so as the component in question was not subject to fast deterioration.[71]

In fact, further guidance as to the circumstances under which the seller in possession of the goods may preserve them by selling them to a third party is provided by Article 88(2) CISG. This provision deals with goods that "are subject to rapid deterioration", as well as with goods whose "preservation would involve unreasonable expense". Under these circumstances the party bound to preserve the goods has not merely an option, but rather a duty to sell the goods,[72] whereas the delivery of notice to the other party is not regarded as a precondition, but rather as an informative act to be performed only "to the extent possible."

Article 86 CISG deals with various additional situations where the duty to preserve the goods arises. Unlike under Article 85, under Article 86 CISG the party bound to take appropriate measures to preserve the goods is the buyer. This happens if the buyer has received the goods and intends to exercise any right under the contract or the Convention to reject the goods. Furthermore, this also happens if goods dispatched to the buyer have been placed at this disposal at their destination and the buyer exercises the right to reject them. Under these circumstances the buyer is

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[67] For an arbitral award applying the rules under Article 85 and 87 CISG, *see* MKAC Arbitral Tribunal (Russian Federation), decision of 25 April 1995, case No. 142/1994, available in English at <http://cisgw3.law.pace.edu/cases/950425r2.html>.

[68] *See* Second Intermediate People's Court of Shanghai (P.R. China), 22 June 1998, available in English at <http://cisgw3.law.pace.edu/cases/980622c1.html>.

[69] *See* Audiencia Provincial de Navarra (Spain), 22 January 2003, English abstract available at <http://cisgw3.law.pace.edu/cases/030122s4.html>.

[70] *See* U.S. District Court [E.D. California], 19 May 2008 (The Rice Corp. v. Grain Board of Iraq), available at <http://cisgw3.law.pace.edu/cases/080519u1.html>.

[71] TR-C Vaud (Switzerland), 17 May 1994, available in English at <http://cisgw3.law.pace.edu/cases/940517s1.html>.

[72] For a decision denying the application of the rule under consideration on the grounds that the goods (meet) could be preserved from deterioration by freezing, *see* OLG Braunschweig (Germany), 28 October 1999, available in English at <http://cisgw3.law.pace.edu/cases/991029g1.html>.

required to take such steps to preserve the goods "as are reasonable in the circumstances."[73] In particular, under Article 86(2) CISG if the goods are placed at the disposal of the buyer at destination, although he might intend to reject them, the buyer must take possession of the goods on behalf of the seller, "provided that this can be done without payment of the price and without unreasonable inconvenience or unreasonable expense." Moreover, the buyer's duty of preservation under Article 86(2) does not apply if the seller or a representative of the seller is present at destination.

Not unlike with the seller's obligation to preserve the goods under Article 85, a rejecting buyer's duty of preservation under Article 86 CISG is further detailed in Article 87 and Article 88 CISG. Therefore, most of what has been said with respect to Articles 87 and 88 in conjunction with Article 85 CISG may be applied *mutatis mutandis* to the buyer's obligation to preserve the goods under Article 86, in conjunction with Articles 87 and 88 CISG.

Thus, under Article 87, a buyer who is bound to take steps to preserve the goods "may deposit them in a warehouse of a third party at the expense of the [seller] provided that the expense incurred is not unreasonable."[74] Under Article 88, in conjunction with Article 86, if the buyer is bound to preserve the goods, he "may sell them by any appropriate means if there has been an unreasonable delay by the [seller] in […]taking [possession of the goods] back […] or in paying […] the cost of preservation, provided that reasonable notice of the intention to sell has been given to the [seller]."

In all circumstances where the goods should be in the hands of the one party to the contract, but the other party is in possession of the goods and owes a duty to take steps to preserve them, then the party in possession is entitled to retain the goods until he has been reimbursed his reasonable expenses by the other party. Moreover, if the party in charge of preserving the goods sells them, then his right of retention can no longer be exercised on the goods, but can be exercised on the proceeds of the sale of the goods. In particular, under Article 88(3) CISG, the party selling the goods "has the right to retain out of the proceeds of sale an amount equal to the reasonable expenses of preserving the goods and of selling them. He must account to the other party for the balance."

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[73] *See*, *e.g.*, Higher Court Ljubljana (Slovenia), 14 December 2005, available in English at <http://cisgw3.law.pace.edu/cases/051214sv.html>.

[74] For a court decision dealing with the allocation of costs resulting from the storage in a warehouse, *see*, *e.g.*, Trib. Forlì (Italy), 11 December 2008, available in English at <http://cisgw3.law.pace.edu/cases/081211i3.html>.