

# **Risky business: distribution of risk in contracts for international sales of goods**

Associate professor **Bazil OGLIND**<sup>1</sup>  
Lawyer **Cristina OLARIU**<sup>2</sup>

## **Abstract**

*Identifying the best legal and business solution, especially in the case of an international sale of goods contract can become a real challenge for the parties involved. In addition to CISG, which generally governs these type of contracts, choosing the Incoterms option which best suits the needs of the parties involved can represent the significant difference between a successful business or the appearance of disputes between the parties. Which are the options for the distribution of risks? What should the seller and the buyer pay special attention to? How does the CISG and Incoterms harmonize with the national legislation regulating the risk in the sale contract? Our objective in this paper is to present the scenarios and find possible solutions to all these issues.*

**Keywords:** *the risk in sale-purchase contracts, CISG, Incoterms, international sales of goods.*

**JEL Classification:** K12, K15, K33

## **1. Introduction**

In sales of goods contracts, especially in those with a foreign element, perhaps one of the greatest challenges is the distribution of risk between seller and buyer. From a legal perspective, the options for the allocation of risks are very diverse, from balanced alternatives which divide the risk between the contracting parties, to alternatives which impose the risks of the sales contract exclusively on one of the parties.,

Often, this choice, which sometimes may seem purely legal or formal, can also influence the economic aspects of the contract, such as the price, or other essential conditions of the contract.

Moreover, the problem of risk becomes even more relevant and decisive for the fate of the contract, when the latter is a long-term contract. The international context, when compared to the internal context, entails a significantly greater probability that events which perturb the contractual balance established by the parties at the conclusion of the contract may occur. These events have been classified by case law and scholarly writings in the category of risks.

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<sup>1</sup> Bazil Oglindă - Romanian American University of Bucharest, Lawyer in Bucharest Bar Association, Oglindă&Partners, bazil.oglinda@oglindalawyers.ro.

<sup>2</sup> Cristina Olariu - Lawyer in Bucharest Bar Association, Oglindă&Partners, cristina.olariu@oglindalawyers.ro.

An unfortunate choice in risk allocation or even ignoring this aspect altogether at the moment of negotiation and conclusion of the contract can later lead to numerous disagreements.

Contextualizing risk in international commercial contracts, some authors<sup>3</sup> state: “*All international commercial contracts, and especially mid and long-term ones, are to be found in the area of risk. The omnipresence of risk in international commercial relationships makes it to be a factor of delay of commercial expansion. There is a permanent impact between the force of expansion of exports and the force of risk. It is an impact which must not get out of control, as if it remains unchecked it negatively influences the decisional process of the participants to international commerce and it determines a noticeable limitation of the volume of business. The participants must feel protected against the negative consequences which may rise from decisions taken in the context of the uncertainty of the occurrence of a risk and especially in conditions which render uncertain the possibility of avoiding the risk.*”.

## 2. Practical applications of the importance of risk allocation in international sales of goods contracts

A first recurrent example found in the matter of international commercial contracts, is the case of a sale of goods with transportation by sea, where part of the goods perishes during transit due to unpredictable physical conditions which determine much higher levels of humidity than could have been foreseen by the seller at the moment of packaging, and as such, the goods have not been properly packaged for transport in conditions of high humidity.

In this first practical hypothesis, in order to choose a method of risk allocation, the parties could consider the nature of the goods and the means of transportation used. For instance, in the case of perishable goods which will be transported by sea, it could be recommended to choose an allocation of risk where the risk is assumed by the seller until the goods reach the port of destination.

A second practical application used especially in the case of sale of generic goods from the food industry or from wholesale commerce is represented by the case in which the port of origin is from a third-party country.

In this case, the choice of risk allocation could be made in relation to the **control that the parties have over the transportation**. Considering that, in the present situation, it is probable that one it cannot be determined that one of the parties exerts more control over the transportation than the other, the optimal alternative could be an equal allocation of risk between the parties to the contract.

A third example entails the case in which, for various reasons, even free of any liability, the buyer refuses or is not able to take over the goods in the port of destination.

In this case, the choice of risk allocation should be made considering the **characteristics of the buyer**. In some situations, aspects such as trust in the

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<sup>3</sup> M.N. Costin, *Dicționar de drept internațional al afacerilor*, Vol. III, Ed. Lumina Lex, Bucharest, pp. 153-154.

contractual partner, his reputation, his country of origin, or other such partially subjective criteria may be relevant, in accordance to which the seller could want to enjoy a higher level of protection, by ensuring the passing of risk to the buyer, for example, from the moment of the loading of the goods in question onto the ship.

The diversity of the situations in which risk may appear in the performance of an international sale of goods contract, without limiting ourselves to the risk that the goods might perish (these might be economic risks, currency related or not, political or sociological risks or natural events<sup>4</sup>), has generated, at the international level, the need to ensure a common context and legislative framework to which both natural persons and legal persons which enter into international commerce relationships can appeal, with the purpose of higher protection, and also in order to compensate the significant differences in legal regime between the various legal systems worldwide.

As an answer to all these concerns, which are absolutely vital for the survival and development of international commerce worldwide, came the adoption of the United Nations Convention on Contracts for the International Sale of Goods signed in Vienna in 1980 (CISG).<sup>5</sup>

Of course, the applicability of the CISG does not exclude the applicability of internal law concerning sales contracts and the issue of contract risk, just as it does not exclude the application of international commerce trade usages relating to sales contracts. On the contrary, they complement each other.<sup>6</sup>

The order of application of different legal instruments which concern contractual relationships between seller and buyer with a foreign element is oftentimes discussed. In this vein, scholarly writings<sup>7</sup> have suggested that “*if uniform law, which contains imperative norms, is applicable, its rules prevail; the next tier is the contract, which represents the law of the parties, which usually contains codified terms, such as the Incoterms; trade usages apply as a third tier; the 1980 Vienna Convention has its own rules of applicability. The UNIDROIT Principles and the Principles of European Contract Law play a complementary or confirmative role*”.

### 3. Provision of risk in the CISG

#### 3.1 The applicability of the CISG

The CISG applies to contracts for the sale of goods if the parties to the contract have their place of business in different states<sup>8</sup> and:

- a) the states are Contracting States to the CISG or

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<sup>4</sup> R. Gh. Geamănu, *Clauza de hardship în contractele comerciale internaționale*, 2<sup>nd</sup> edition, revised and added, Ed. Hamangiu, Bucharest, 2015, p. 13-16.

<sup>5</sup> O. Puie, *Dreptul comerțului internațional în contextul noului Cod civil, a noului Cod de procedură civilă și al actelor europene în materie*, Ed. Universul Juridic, Bucharest, 2015, p. 477-481.

<sup>6</sup> Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coord.), *Noul Cod civil. Comentariu pe articole*, Ed. C.H. Beck, Bucharest, 2012, p. 1734 et seq.

<sup>7</sup> C. Kessedjian, *Droit du commerce international*, Ed. P.U.F., Paris, 2013, p. 274.

<sup>8</sup> I. Macovei, *Tratat de drept al comerțului internațional*, Ed. Universul Juridic, Bucharest, 2014, p. 337.

- b) the rules of private international law lead to the application of the law of a Contracting State.

In order to establish the applicability of the CISG, it is necessary to choose the place of jurisdiction which is relevant in this situation, even if the CISG represents substantial law and not private international law.<sup>9</sup>

The Vienna Convention seeks to establish a legislative framework for international sale of goods contracts, with the exception of the following situations:<sup>10</sup>:

- a) where the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production;<sup>11</sup>
- b) where a preponderant part of the obligations of the party who furnishes the goods consists in the supply of labor or other services;<sup>12</sup>
- c) where the object of the contract refers to certain types of sale and certain goods.<sup>13</sup>

Although international rules cover aspects such as the formation of the contract for international sale of goods, or the rights and obligations of the parties, other relevant aspects have not been provided for, such as the validity of the contracts or the effects that it may have over the right of property of the goods sold.<sup>14</sup>

### 3.2 The passing of risk in the CISG

For the purposes of the present paper, we will limit our analysis to the rules expressed in Chapter IV – Passing of risk, although we must note that the Convention contains other provisions which refer to different aspects of contractual risk.

As such, with regard to the passing of risk between the seller and the buyer, we shall take into consideration in the framework of our analysis, the provisions of arts. 66 – 70 CISG<sup>15</sup>:

**Article 66 CISG:** *“Loss of or damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price, unless the loss or damage is due to an act or omission of the seller.”*

We can observe, as a starting point in the provision of passing of risk, the situation of loss or damage to the goods after the transfer of the risk, regardless of when it occurs, in accordance with the will of the parties. In this vein, we note that the rule is that each party is liable for the period in which they bear the contractual risk.<sup>16</sup>

<sup>9</sup> T. Mrejeru, B.C. Mrejeru, M.G. Mrejeru, *Neexecutarea contractului de comerț internațional*, Ed. Rosetti, Bucharest, 2001, pp. 26-30.

<sup>10</sup> R. Gh. Geamănu, *op. cit.*, p. 151.

<sup>11</sup> Art. 3 alin. (1) CISG.

<sup>12</sup> Art. 3 alin. (2) CISG.

<sup>13</sup> Art. 2 CISG.

<sup>14</sup> R. Gh. Geamănu, *op. cit.*, p. 152.

<sup>15</sup> United Nations Convention on International Carriage of Goods, Vienna Convention of 1980 (CISG), available online at <https://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf> (last consulted on. 1.10.2017).

<sup>16</sup> C.T. Ungureanu, *Dreptul comerțului internațional. Contracte de comerț internațional*, Ed. Hamangiu, Bucharest, 2014, p. 60.

Article 66 institutes an apparent exception from said rule, namely, the situation where the materialization of the risk takes place as a result of an action or omission on the part of the seller, which originates in the period when they bore the risk of the contract.<sup>17</sup> We believe that this provision is only in appearance an exception, due to the fact that, in reality, the generating factor of the risk takes place at a time when the risk still belonged to the seller. It is therefore not relevant to the issue of liability that the effects of the risk take place after the passing of the risk to the buyer.

**Article 67 CISG:** *“(1) If the contract of sale involves carriage of the goods and the seller not bound to hand them over at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract of sale. If the seller is bound to hand the goods over to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place. The fact that the seller is authorized to retain documents controlling the disposition of the goods does not affect the passage of the risk. (2) Nevertheless, the risk does not pass to the buyer until the goods are clearly identified to the contract, whether by markings on the goods, by shipping documents, by notice given to the buyer or otherwise.”*

From a factual point of view, the problem of the passing of risk from the seller to the buyer becomes more complex in the situation where a carrier is interposed.<sup>18</sup> In this case, as the above-mentioned article states, the relevant issue is the method chosen by the parties, in their contract, for the delivery of the goods.<sup>19</sup>

As such, if the place of delivery is not identified in the contract, the risk passes to the buyer at the date when the goods are handed over to the carrier, and in the case where a place of delivery has been established, the risk is passed from the seller at the moment when the goods reach the place of destination as stated in the contract. In both cases, the passing of the risk will not be influenced by the seller's right to withhold certain documents regarding the goods in question, solution which is justified considering that from the moment when the goods are handed over, the obligation to conserve the goods and the buyer's diligence can be decisive with respect to the loss or damage of the goods, even in the case where the documents which the seller has withheld would prevent the buyer from disposing of the goods.<sup>20</sup>

**Article 68 CISG:** *“The risk in respect of goods sold in transit passes to the buyer from the time of the conclusion of the contract. However, if the circumstances so indicate, the risk is assumed by the buyer from the time the goods were handed over to the carrier who issued the documents embodying the contract of carriage. Nevertheless, if at the time of the conclusion of the contract of sale the seller knew*

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<sup>17</sup> H. M. Flechtner (coord.), S. Eiselen, F. Ferrari, A. Garro, U. Magnus, P.P. Viscasillas, V. Rogers, H. Sono, C. Witz, *The Journal of Law and Commerce, Uncitral Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods*, University of Pittsburgh, Volume 30, 2012, p. 319.

<sup>18</sup> *Idem* p. 321-322.

<sup>19</sup> C.T. Ungureanu, *op. cit.*, p. 55-56.

<sup>20</sup> CLOUT case no. 247 [Audiencia Provincial de Cordoba, Spain, 31 octombrie 1997].

*or ought to have known that the goods had been lost or damaged and did not disclose this to the buyer, the loss or damage is at the risk of the seller.”*

It stands to reason that the situation in which a seller purposefully omits to inform the buyer about the loss or damage of the goods, which especially result from transportation, could not be left outside the framework of the CISG.<sup>21</sup>

In the situation presented by article 68 CISG, in order to verify that the condition regarding the seller is met, we note that two factors must be taken into consideration:

- a) the subjective factor – the seller knew that the goods had been lost or damaged;
- b) the objective factor – the seller ought to have known that the goods had been lost or damaged.

With regard to the subjective factor, in the event of a dispute, the tipping point of the case may well rest in the possibility of proving that the seller had knowledge of the circumstances in question and that there was no notice given with respect to these circumstances.

On the other hand, with regard to the objective factor, the analysis will be made by reference to the standard of a diligent professional in order to determine the extent to which knowledge of the state of the goods was possible.

**Article 69 CISG:** *“(1) In cases not within articles 67 and 68, the risk passes to the buyer when he takes over the goods or, if he does not do so in due time, from the time when the goods are placed at his disposal and he commits a breach of contract by failing to take delivery. (2) However, if the buyer is bound to take over the goods at a place other than a place of business of the seller, the risk passes when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal at that place. (3) If the contract relates to goods not then identified, the goods are considered not to be placed at the disposal of the buyer until they are clearly identified to the contract.”*

As the last moment, from a chronological point of view, in which the risk may be passed from the seller to the buyer, the CISG identifies the moment of reception of the goods.<sup>22</sup>

However, even if the buyer does not respect their obligation to receive the goods, the risk passes from the date when the goods are placed at the disposal of the buyer.

This solution comes to protect the seller from a potentially abusive behavior by the buyer, who could refuse or try to unjustly delay the reception of the goods and, implicitly, the passing of the risk.<sup>23</sup>

**Article 70 CISG:** *“If the seller has committed a fundamental breach of contract, articles 67, 68 and 69 do not impair the remedies available to the buyer on account of the breach.”*

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<sup>21</sup> H. M. Flechtner (coord.) et. al., *op. cit.*, p. 324.

<sup>22</sup> *Idem*, p. 325-326.

<sup>23</sup> O. Puie, *op. cit.*, p. 497-498.

Justifiably, the breach of an essential obligation by the seller, even when the passing of the risk has occurred, should not prevent the buyer from requesting and obtaining compensation for the losses incurred as a result of such non-performance.<sup>24</sup>

As such, the problem of the passing of the risk remains at least partially independent from the one relating to the obligations assumed by contract and the liability attached to such non-performance.

To the extent that the parties consider insufficient the provisions of the CISG, or if they should wish to apply other rules regarding allocation and passing of risk, they have the option of the Incoterms rules.

It is important to note that the Incoterms rules represent soft-law, which entails that the parties, in their contract, must expressly opt for one of the rules in order to attract their applicability.

Furthermore, to the extent that the Incoterms rule chosen by the parties in their contract comes into conflict with the provisions of the CISG, by applying the rules of interpretation of contracts, the will of the parties should prevail, and the Incoterms option should be interpreted as a derogation from the general rule contained in the CISG.

#### 4 The options offered by the Incoterms

Incoterms or the *International Rules for the Interpretation of Trade Terms* (International Commerce Clauses) represents a set of alternative rules which the parties to an international sale of goods contract may choose in order to contractually establish the method of delivery, transfer of risk and allocation of costs relating to the transportation of the goods.<sup>25</sup>

The origin of this set of rules can be traced back to commercial trade usages, especially those in the matter of maritime sales, which were difficult to understand by the interested economic operators, due to the diverse situations to which they could apply.<sup>26</sup>

The purpose of Incoterms is to establish, in the relationship between seller and buyer, the following:

- a) who bears the cost of transportation?
- b) what is the location of receipt and handing over of the goods?
- c) who bears the risk in every moment of the transportation?

Presently, the 2010 edition of the Incoterms offers rules for every transportation type, ensuring coverage at a large scale of the diverse needs of economic operators who conclude contracts for the international sale of goods.

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<sup>24</sup> H. M. Flechtner (coord.) et. al., *op. cit.*, p. 327.

<sup>25</sup> O. Puie, *op. cit.*, p.46-47.

<sup>26</sup> I. Macovei, *op. cit.*, p .55-56.

In accordance with the specific details of each contract, the parties have diverse options for the allocation of risk and costs, as we shall exemplify<sup>27</sup> as follows.<sup>28</sup>

**EXW (Ex-Works)**<sup>29</sup>. The goods and risk, including payment of the carriage and the cost of insurance, is passed to the buyer from the seller's factory gates. In this case, we note that the risk of the contract is preponderantly borne by the buyer, who will be responsible for the entire shipment.

**FCA (Free Carrier)**. The seller completes their obligation to deliver at the moment when they hand over the goods for export, to the carrier nominated by the buyer, at the point or place agreed upon by the parties.

**CPT (Carriage Paid to)**. The seller pays for the carriage of the goods to the agreed upon destination. In this case, the risk of loss or damage of the goods, as well as any other additional costs caused by events that take place after the goods have been handed over to the carrier, are passed from the seller to the buyer at the moment when the goods are handed over to the carrier.

**CIP (Carriage and Insurance Paid)**. The seller has the same obligations as for the CPT option. Additionally, the seller must contract for insurance to cover the risk of loss or damage to the goods during carriage.

**DAT (Delivered at Terminal)**. The seller delivers and unloads from the means of transport in the port or place agreed upon with the buyer. The seller covers all costs for delivery and unloading of the goods at the agreed upon terminal.

**DAP (Delivery at Place)**. The seller delivers the goods at the place agreed upon with the buyer. The seller covers all the costs of delivery and unloading of the goods at the agreed upon place at destination.

**DDP (Delivered Duty Paid)**. The seller fulfills their obligation to deliver at the moment when the goods are placed at the disposal of the buyer, at the named place in the importing country. The seller bears all costs and risk related to the delivery of the goods to that place.

Usually, in order for the Incoterms to apply, the parties must insert in their contract the type of Incoterms rule for which they have opted.<sup>30</sup>

However, one can imagine practical situations in which the Incoterms would be applicable even if there is no express mention in the contract.

For instance, in the case where the parties establish in their contract the obligations which compose, for example, the DAT (Delivered at Terminal) option, without expressly naming it in the contract, but where during the negotiations phase discussions were held concerning Incoterms options, depending on the particulars of each case, it could be interpreted that the real intent of the parties was to apply the Incoterms rules.

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<sup>27</sup> I. Macovei, *op. cit.*, p. 56-59.

<sup>28</sup> C.T. Ungureanu, *op. cit.*, p. 58-60.

<sup>29</sup> The Incoterms 2010 Rules, available online at: <https://iccwbo.org/resources-for-business/incoterms-rules/incoterms-rules-2010/> (last consulted on. 1.10.2017).

<sup>30</sup> C.T. Ungureanu, *op. cit.*, p. 56-57.



Moreover, there could be situations where, from the behavior of the parties, from the usages established between the, or from all of these together, one could draw the conclusion that the seller and the buyer considered a particular Incoterms rule, under which they actually performed the contract between them. Both the CISG and the Incoterms, to the extent that they are applicable to a case, will be interpreted in accordance with the applicable national legislation, especially considering the public order rules. It is for this reason that in the next part of this paper we shall analyze the manner in which Romanian law deals with the allocation and transfer of risk in the contract for sale.

## 5 The risk in the contract for sale as established in the Romanian Civil Code

In the matter of contracts for sale, on the issue of contractual risk, we note two main aspects:

- a) the risk of fortuitous loss of the good and
- b) the contractual risk when one of the parties is prevented from performing their contractual obligation due to a fortuitous event or *force majeure*.<sup>31</sup>

The Civil Code institutes the rule that **the contractual risk is borne by the debtor of the obligation which is impossible to perform.**

With regard to contractual risk, the relevant provision is art. 1274 C.civ. which establishes that, unless otherwise agreed upon by the parties, as long as the good has not been handed over, the contractual risk stays with the debtor of the obligation to deliver, even if the right of property has already been transferred to the acquirer.

In the case of fortuitous loss, the debtor of the obligation to deliver loses the right to counter-performance, and if they had received such counter-performance, they are obligated to refund it.

Considering the rules established for the sale contract in the Civil Code, we draw attention to the provisions of art. 1674 which establish that the moment of transfer of property is at the moment of conclusion of the contract, even if the goods have not been delivered or the price has not been paid. By interpreting this text together with the provisions of art. 1274 C.civ., the solution which may arise is that the contractual risk is not borne by the party who owned the goods at the moment of the fortuitous loss (in this case, the buyer), but rather the seller, who is held by the obligation to deliver the goods, as the debtor of the obligation to deliver, which, thus, becomes impossible to perform.<sup>32</sup>

The approach of the Civil Code associates the passing of risk with the notion of contractual fault, and for this reason art. 1274 para. (2) C.civ. regulates a situation of passing of risk to the creditor in the event where a creditor is in default. In this situation, the creditor will bear the risk, even if they would prove that the goods

<sup>31</sup> M-L. Belu Magdo, *Contractul de vânzare în noul Cod civil*, Ed. Hamangiu, Bucharest, 2014, p. 383.

<sup>32</sup> M-L. Belu Magdo, *op. cit.*, p. 383-384.

would have perished even if the obligation to deliver would have been performed on time.

When looking at the CISG and the Civil Code from a comparative point of view, we observe that both give relevance to the moment of delivery/receipt of the goods which form the object of the contract.<sup>33</sup> Therefore, at least at the principle level, there does not appear to be any conflict between the two regulations.

However, in the case that a conflict would arise between the two regulations, in order to identify the prevailing rules, one must first establish if the rule set out in the Civil Code is a public order or a private order rule.

In the case of a public order rule, to the extent that it is imperative, it will remove from application the CISG rule with which it conflicts.

On the other hand, if the rule set out in the Civil Code is not mandatory, in principle, it will be considered that this is the general rule, while the one contained in the CISG is the special rule, and therefore, that it is a derogation from the general rule.

## 6 Conclusions

In contracts that have a foreign element, the establishment of passing of risk must represent a priority for the parties, who must consider carefully the options and manner in which they can agree upon this aspect.

The Vienna Convention (CISG) represents a principal instrument which regulates the issue of passing of risk, centered around the relevance of the moment of receipt of the goods.

As we have shown, born from the practical needs of economic operators, firstly materialized in commercial trade usages, came the adoption of the Incoterms rules, which represent a special instrument created with the purpose of creating a uniform practice with regard to the contract for international sale of goods and of offering within a unitary framework diverse options that respond to any specific needs of each particular case.

The nature of the Incoterms, given by the fact that it is soft-law, entails that it becomes applicable to a particular contractual relationship only if the parties express their consent to its application, which, most often, materializes in a contractual clause.

With regard to national legislation, it can be said that it is not fundamentally different from what is offered by the CISG, and as such, oftentimes the two regulations complement each other.

Otherwise, in the case where a conflict arises between the CISG, Incoterms and/or the Civil Code, firstly, starting from the provision of national law, one must determine if the rules in question is mandatory or not, in order to establish the applicability of the CISG or of the Incoterms.

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<sup>33</sup> I. Macovei, *op. cit.*, p. 349.

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