Compare the rules as to passage of risk in international sales transactions under the Vienna Convention and the English common law

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Abstract: The article is devoted to very important issue of risks in international trade while entering into contracts. The notion "risk" is considered. It correlates with the notions "damage", "loss", "partial damage". The author proves that regulatory adjustment which takes place while making international contracts in the sphere of trade, is imperfect because the moment when risk is transferred form the Seller to the Buyer is not defined clearly. The conclusion is as follows: regulatory base of international trade must be improved.
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1. Introduction

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'One of the most powerful influences on human activity is the driving force of trade' [1] People of different professions to some extent participate in trade relationships. Scientists and designers create new products that can be sold. Industrial or manufacturing engineers try to improve those invents. Drivers and carriers deliver them. Finally, doctors and factory workers buy equipment and facilities for their professional activities. All those and many others are involved in business and lawyers are not exception. Legal professionals provide legal support and assist in overcoming legal problems [2, 3, 4, 5, 6, 7, 8, 9].

Nowadays there are legal questions, which arise when a person or company sells something to others. One of them is the passing of risk from seller to buyer, which is 'one of the classic topics of sales law' [10]. It plays significant role in national and, but especially in international sales transactions due to conflicting authorities that may exist if any issue arises.

The United Nations Convention on Contracts for the International Sale of Goods ("CISG") was signed on 11th April 1980 in Vienna. More than 70 countries have ratified it, which makes it probably one of the most successful international documents. [11] Articles 66, 67, 68, 69 and 70 of the Chapter 4 of the CISG, which is called "Passing of risk", regulate passage of risk from the seller to the buyer.

It is necessary to mention the next fact, that although the CISG was adopted by economically strong nations, like the USA, China, Germany and France, the United Kingdom still has not ratified it. The UK deciding not to adopt the Convention was unexpected if one considers the fact that the UK was one of the actively involved countries in the process of drafting and negotiating of the CISG. [12]

The English Sales of Goods Act ("SGA") is an Act of the Parliament, which was passed just a year before the CISG in 1979. It is 'based on the English common law of sales' [13]. Since 1979, there have been a number of minor statutory changes and additions. It regulates questions of passing of risk in international sales transactions. Section 20 of the SGA called "Passing of Risk" establishes the rules of passing of risks.

The rules of transferring of risks in international sales transactions under the CISG and the English common law in some occasions can both differ and resemble each other. The aim of this work is to draw comparison of these similarities and distinctions. The main focus will be definition of the term "risk" and purview of the Articles 66, 67, 68, 69 of the CISG, to which some of English common law rules of passing of risk will be compared to.

2. Meaning of the "Risk" according to The CISG and English common law.

First of all, it is necessary to understand the term 'risk' in relation to contracts of sale of goods. Sealy criticizes risk as 'a derivative, and essentially negative concept' [14].

According to Guest, questions of risk occur in situations when sold goods are lost, destroyed, damaged or deteriorated, and it is demanded to determine responsibility of the parties for losses and future of the contract. [15].

Bridge describes risk as 'a proprietary notion', which 'involves the allocation of loss due to an external event for which neither party is

responsible'. Further he lists possible occurrences, like acts of God, negligence or illegal actions, interference by government and concludes that it might 'depend upon the interpretation of particular contracts of sale' [16].

'The Convention does not define'[17] the term. Under the CISG "risk" is understood as loss or damage, which is not caused by an act or omission of the seller. At least Article 66 'aims to define how the Convention understands the notion of "passing of risk" and has no separate regulatory function'. [18].

However, the CISG does not again define terms "loss" and "damage". Mazotta remarks that term "risk" is close with terms "loss" and "damage" and consider it as 'the risk of bearing the consequences of fortuitous loss or damage'. However, he also mentions that it is 'less clear whether the terms also include something more [17]. Some commentators state that:

> Those terms also cover loss of goods by theft, emergency unloading, or the carrier's negligence. The party bearing the risk of loss or damage also bears the risk of shrinkage of the goods. [18].

The SGA also, just as the CISG, does not define the term "risk", 'whether in absolute term or as a measure of the consequences of its transfer to the buyer; it merely states a presumptive rule for its transfer' [16].

3. Article 66 and English common law rules of passage of risk.

Pursuant to Article 66 of the 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. In commentary on the CISG it is fairly mentioned that the definition in Article is 'incomplete: it only comprises the description of the situation and one of the consequences'. [18]. Further, as mentioned by Mazotta, it is not explained when the risk is transferred. [17].

Professor Shlechtriem remarks that the buyer must pay. It does not matter, if after or before payment, the goods could be lost, damaged or destroyed. He adds that if the seller fundamentally breaches contract, the buyer may avoid such contract and he is not obliged to pay the price. Additionally, the seller has to deliver substitute goods or if it is impossible, he must return money [19].

However, it could be unfair to oblige the buyer to pay for lost or damaged goods if there is no specific point of time when risks pass to him. On this occasion, there are several reasons: insurance could cover losses; unpleasant consequences of delivery occur at the final destination; it is easier for the buyer neither for the seller to evaluate damages, to contact with insurer and save goods. [20].

Under English common law the rules are slightly different. According to the Section 20(1) of the SGA, the goods remain at the seller's risk until the property in them is transferred to the buyer, but when the property in them is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not, except if the parties made another agreement. In *Pignataro v Gilroy* case a seller sold to the buyer 140 bags of rice. Afterwards, a delivery order for 125 bags was sent to the buyer. The other 15 bags were ready to deliver, but they were in a different place. The buyer did not accept this and delayed collecting the bags for a month. During this time they were stolen. The court held that after an implied assent of the buyer property passed to him and, therefore, was at his risk. [21]. In another case of *Wardar's (Import and Export) v W Norwood & Sons,* the seller sold frozen kidneys. The buyer's carrier arrived at 8 a.m., when goods already were outside. After loading the goods, the kidneys were 'in soft conditions', however the carrier signed a receipt. On arrival at their destination the goods were not eatable. The court held that the risk passed to the buyer at 8 a.m. when the buyer's carrier assumed responsibility for the goods. The goods deteriorated after that hah happened. Thus the buyer bears the risk and the damages. [22]. Both cases show that the risk passes with property. It is only necessary to identify the moment when this happens.

However, as it enacted in the same Section 20(1) of the SGA, property and risk could be divided if it is agreed so by the parties. This differs the CISG rules. Additionally, the same could happen by usage. For example, in *Bevington v Dale* case the party ordered goods to be carried "on memorandum". He was liable to another party for 'loss of, or injury occurring to, the same while in the hands of the party so ordering them, before he may have signified his approval of the same' [23]. This was traditional and widely accepted in the fur trade.

There are probably three main aspects, to which the passage of risk may be related: 'the conclusion of the contract, the passing of property in the goods, or the procurement of the goods' [24]. In this case it could be possible to see difference between the rules as to passage of risk under the CISG and the English common law.

It follows from the above that according to the CISG, risk mainly 'linked not to property but to control' [1]. whilst, this is one of the main

differences, under the English common law it could pass to the buyer with property.. 'In international sales conducted on English law terms… risk only rarely passes with ownership' [16]. This rule 'has been widely criticized over the years and in practice it is often by-passed either because of the courts' willingness to find that title had not passed to the buyer or because of the use of trade terms, such as f.o.b. or c.i.f., which adopt the control test of risk of loss' [25].

A simple example: buyer Br received goods from foreign seller Sr. Br discovered that the goods were damaged and he did not own them when it happened. Under the CISG he has to pay the price, otherwise he would be in breach. Afterwards, pursuant to Article 70, he could claim losses from buyer or insurer. It might be different under the English common law, because Br could reject to pay. However, Sr could prove that at the moment when the goods were damaged property in them transferred to Br as well as the risks.

4. Articles 67, 69 and English common law rules of passage of risk.

Article 67(1) of the CISG regulates two situations when the contract of sale involves carriage of goods. Firstly, the seller is not obliged to hand them over at a particular place. In this case the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer. According to some commentaries on the CISG, it is not 'necessary to establish the precise moment at which any damage occurred' [18].

Some authors consider that 'the placing of the transport risk on the buyer after the goods have been handed over to the first carrier is in accordance with an international, widely recognized rule'. This is again for the reason that it is easier for the buyer, not for the seller to evaluate damages caused by transportation.

Secondly, the seller is forced to hand the goods over to a carrier at a particular place. In this situation the risk does not pass to the buyer till moment when the goods are handed over to the carrier at that place. Some authors believe that this rule of the passing of risk could lead to 'a splitting of the risk, which… is often a source of fruitless disputes'.

Pursuant to Article 67(1), in both occasions, the passage of the risk is not affected by the seller's retention of documents controlling the disposition of the goods.

Under English common law 'in those instances where the property in the goods passes to the buyer on delivery to a carrier, the risk passes with property [15]. In *Underwood Ltd v Burgh Castle Brick and Cement Syndicate* case the seller agreed to sell at a price free on rail in London a horizontal condensing engine weighing 30 tons, which was bolted to and embedded in a flooring of concrete. The seller was forced to detach and dismantle it. After detaching the goods the seller accidentally damaged it during loading it on a truck. As a result the buyers refused to accept the goods. In an action by the sellers for goods bargained and sold: Held the property in the engine had not passed to defendants on the ground that the circumstances showed an intention that the property should not pass until the engine was placed in safety on rail in London. The court held that the engine 'was not at the time of the contract in a deliverable state'. Thus meaning that property did not pass to the buyer as risk, which remained with the sellers. [26].

With regard to delivery of the goods to carrier above case shows that risk and property does not pass to the buyer if delivery is not completed. In other words if the goods are not handed to carrier. The same rule is provided by the Article 67 of the Convention. Thus meaning that under the CISG and English common law whether it is first carrier or a carrier at a particular place the risk does not pass if the goods are not handed or delivery is not complete.

Article 67(2) enacts that nevertheless, the risk does not transfer to the buyer if the goods are not identified to the contract. Identification can be done by markings on the goods, by shipping documents, by notice given to the buyer or in other way.

Guest writes that under English law if the contract is for the sale of unascertained goods, 'the property will normally not pass to the buyer by delivery to the carrier unless and until the goods become ascertained' [15]. Thus probably meaning the same as above Article that the goods must be identified.

Another similar rule under English common law provides that if the parties came to agreement that 'the risk is to pass to the buyer before the property, it is clear that the goods must be sufficiently identifiable as those to which the risk relates'. [15]. In *Horn v Minister of Food* case farmer sold to the Minister of Food 33 tons of Majestic potatoes. Delivery instructions were to be given by the latter during May, June or July. According to Condition 1 of the contract the seller was obliged 'to exercise all reasonable care in the storage' of the potatoes and if the goods excessively deteriorated, he would immediately inform in writing 'the appropriate area potato supervisor' about any deterioration. Condition 2 provided that the property in the potatoes was to transfer to the buyer on delivery according to his instructions. On 21st June the seller found a seam of rot in the potatoes. Later he received area

supervisor's delivery instructions. On 23rd June he gave his notice of deterioration to the supervisor. On 25th June the supervisor cancelled the delivery instructions after inspection of the potatoes, which were unfit for use. However, the farmer claimed the price of thirty-three tons of potatoes or damages. It was found that the implied rule that the potatoes should be of merchantable was not applied, because the parties expressly stipulated that before the giving of delivery instructions there might be deterioration of the potatoes. In addition, the potatoes saved their form, what allowed still calling them potatoes. The court decided that the potatoes, which were no longer, fit for human consumption had not perished and they still could be described as potatoes. It followed that the seller was entitled to succeed. [27]. In above case one of the reasons of the passage of the risk to the buyer was that the goods were identified for the purposes of contract. The Article 67(2) of the CISG provides the same the risk passes to the buyer if the goods are identified in the contract. For example, if in the same circumstances German farmer and French Minister of food concluded the same contact and the same dispute arose, court probably would hold the same decision.

It could be difficult to separately interpret Article 67. Article 67 and Article 69 must be read 'together since situations not governed by Article 67 fall automatically into Article 69' [20].

Pursuant to the Article 69(1), the risk passes to the buyer when he takes over the goods at a place of business of the seller. Even if he neglects his duty the risk passes to him from the moment when the goods are placed at his disposal. Therefore he commits a breach of contract by failing to take delivery.

In mentioned *Horn v Minister of Food* case 'a clamp of Majestic ware potatoes situated on field 298 on the seller's land'. The risk passed to the buyer when he took over the goods at a place of business of the seller. The latter was responsible for taking care in the storage till moment when delivery instructions were to be given. The buyer neglected his duty to give those instructions in May. From this time the goods should be counted as placed at the buyer's disposal. Thus meaning he failed to take delivery.

According to the Article 69(2), if the buyer is obliged to take over the goods not at the seller's place of business, the risk passes when delivery is due. The buyer must be informed that the goods are placed at his disposal at other place. This probably means the seller informs the buyer at his own risk. Hager and Schmidt-Kessel, on this case, consider a situation when the risk does not transfer to the buyer if he is acknowledged only by a delivery note, which is just an instruction. If in addition to this there is no agreement about particular time when the goods must be taken, the risk still does not pass to the buyer. In such situations it will transfer only when the buyer communicates with the seller or if the latter appropriately informs the former second time. [18].

In situations when the goods are not identified to the contract, they should be considered not to be placed at the disposal of the buyer till the moment when they are clearly identified to the contract. This rule is established in Article 69(3) and closely connected to practice. For example, when the buyer was unsuccessful to collect the goods, which he was obliged to take pursuant to Article 67(1). 'Here, the requirement that the buyer be notified follows from the fact that the goods deemed to be placed at the buyer's disposal only if he receives notification to that effect'.

Hager and Schmidt-Kessel concludes that pursuant to Article 69, the risk passes to the buyer if during agreed or reasonable time after appropriate notification he is unsuccessful to collect the goods, which are under the seller's possession. However, the latter must create circumstances, which will allow the former identification the goods and take delivery.

The similarity could be found in rules under English common law. In *Healy v Howlett& Sons* case the seller send goods to other place. The buyer was informed about place. However, the train was delayed and the goods, which in this situation were at the seller's risk deteriorated. In this case the seller did not create circumstances, which could allow the buyer take delivery. Otherwise, if there was not delay the risk would pass to the buyer under the CISG and English common law. [28].

5. Article 68 and English common law rules of passage of risk.

Article 68 'envisages the situation in which the goods are sold while already in transit and are found on arrival at the destination to have been damaged' [29]. According to the first sentence of this Article the risk passes to the buyer from the moment of the conclusion of contract. 'Damage to the goods occurring before that time raises question of non-conformity; damage occurring after that time raises a question of risk' [30]. In some circumstances, the risk passes 'retroactively from the moment the goods are handed over to the carrier'[29]. Nevertheless, if at the time of the conclusion of the contract of sale the seller knew or ought to have known that the goods had been lost or damaged and did not disclose this to the buyer, the loss or damage is at the risk of the seller.

Guest remarks that there is an implied term in contracts of sale, which include transit before use. According to it, the sold goods should be send in

circumstances, which will ensure their ordinary transportation and appropriate quality. [15]. In *Beer v Walker* case the seller imported rabbits to the buyer every week by rail. The former gave warranty that the goods would be of 'merchantable quality'. However, once the rabbits had come 'unfit for human consumption'. Court held that seller gave warranty and ought to send the rabbits of normal condition. [31]. In another *Mash and Murrell Ltd v Joseph I Emanuel Ltd*case the seller sold potatoes used for human consumption to the buyer. The goods reached the buyer in inappropriate quality. Court held that the sellers breached an implied term of the contract that the goods should be of merchantable quality; remain of merchantable quality from the time of shipment to the destination; remain of merchantable quality for a reasonable time thereafter for disposal of the goods. [32]. Both cases showed that the seller knew or ought to have known that the goods had been lost or damaged and did not disclose this to the buyer. There is a similar rule under English common law and the CISG.

'In publications on the CISG… it has repeatedly been pointed out that the passing of the risk can be linked above all three fundamental aspects'. [33]. However, previous part of the work showed that under the CISG risk passes in the next situations: when contracts involve carriage; when contracts involve carriage to a particular place; when goods sold in transit. 'The main reason for the lack of such a general rule for the passing of risk seems to be that it would be unable to cope with the practical needs of different types of international contracts involving carriage'.

6. Conclusion

Rules of passage of risks applied when something lost, deteriorated or damaged.These sets of rules could be significant in modern trade.There is no definition of the term "risk' in the CISG and the SGA. In both documents it is understood as loss or damage, which is frequently accidental. Both have rules, which regulate passage of the risk in different situations. Those could be different and similar.

The risks could pass from moment of conclusion of the contract or with the passage of proprietary rights from the owner or with the transfer of physical possession from the seller to the buyer. In this case occurs probably the main distinction, which is that under the CISG risk is linked to control, whilst under English law there is 'presumption therefore is that risk and property pass together'. [15].

Another difference is that under English law the parties have possibility to agree to divide property and the risk. Thus meaning property could pass after the risk or in opposite way.

Article 67 of the CISG regulates such situations when the contract of sale involves carriage of the goods. In this case under English common law established some similar rules. For example, risk passes to the buyer when the goods are handed over to the first carrier.

When goods are sold in transit there are again similarities, like the seller bear the loss and damages, if he knew or ought to have known that the goods are lost, damaged or deteriorated.

There are also similarities related to the rule that the goods must be identified to the contract. If this does not happen, under both the CISG and English common law the risk does not pass to the buyer.

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