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PASSING OF RISK UNDER CISG AND INCOTERMS 2020 RULES: LEGAL FRAMEWORK AND CONTRACTUAL AUTONOMY

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Abstract This article examines the relationship between CISG and Incoterms as key instruments regulating international sales contracts. Both frameworks reflect party autonomy, enabling parties to adapt contractual terms to the needs of modern global trade. CISG applies by default to international sales contracts under Art. 1 CISG, unless expressly excluded, while Incoterms apply through contractual incorporation or established usage. The article examines that Incoterms do not replace CISG but function alongside it, particularly regarding delivery and transfer of risk. Because Incoterms connect risk transfer to logistical events and CISG relies on legal criteria, inconsistencies may cause disputes when contracts are poorly drafted. In such cases, courts and tribunals interpret the parties' agreement through Arts. 8, 9 CISG rather than redefining obligations. The article emphasizes that, despite some ambiguities in CISG's risk provisions, it remains a major achievement in harmonizing international sales law. When combined with Incoterms, it provides a more effective framework for allocating risk and responsibilities. The article concludes that disputes are best avoided through clear drafting that regulates CISG's role, the relevant Incoterms rule, and defines the parties' obligations.

Keywords international sale of goods, commercial practice, CISG, party autonomy, trade usages, passing of risk, carriage contracts, delivery terms, Art. 9 CISG, Incoterms 2020.

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1 Introduction

One of the fundamental characteristics of international sale of goods is the territorial distance between the parties entering into a transaction. Thus, issues related to the organization of transporting goods from the seller to the buyer and the allocation of associated transportation risks are inherently connected to international sales. As a result, instances where goods must be transported according to the contract are of utmost importance in international business practice and serve as the foundation for the regulation of CISG (Djinović, Rižnik, 2009: 133).

It is important to note that parties frequently utilize international commercial terms such as Incoterms to govern certain aspects of the contract. A key issue that arises is whether the parties intended for Incoterms to override CISG rules (Çakirca, 2012: 96). When making this determination, courts and tribunals should note that while discrepancies between the results under CISG and Incoterms are possible, the International Chamber of Commerce (ICC) has aimed to align Incoterms with CISG and has issued updated versions approximately every ten years to reflect developments and changes in trade practice. As outlined in Art. 6 CISG, courts regularly recognize the parties' freedom to contract and form their contractual relationship in accordance with their intentions. Courts should also rely on Art. 8 CISG, which governs the interpretation of the parties' conduct relating to the contract. If the parties do not specify Incoterms rules in the contract, courts must carefully assess whether, in compliance with Art. 9 CISG, the conduct in question has been an established practice between the parties or if it falls within the scope of trade usage (Mazzotta, 2010: 779). Here, the question arises whether parties may exclude the application of Incoterms, despite their widespread use and prevalence in international trade.

Through descriptive and dogmatic analysis, this article examines the relevant legal framework and interplay between the CISG's application in international sales contracts and the adoption of Incoterms clauses. Although Incoterms frequently displace CISG default rules on delivery and risk, their interpretation and effect remain fundamentally dependent on CISG's framework of party autonomy and trade usages. The article is divided into six sections. The first section establishes an overview of the provisions listed in CISG that cover passing of risk, namely Arts. 66-70 CISG. The second section examines CISG's approach to party autonomy, as well as the meaning of trade usages and established practices under contracts

governed by CISG, in relation to Incoterms and their applicability. The third section provides background on Incoterms, explaining their function, meaning and impact on international trade. The fourth section offers insight into the Incoterms clauses and eleven terms governing the obligations, costs, and risks arising from the delivery of goods from sellers to buyers. The fifth section analyses potential issues, discrepancies, and challenges that may arise when incorporating Incoterms into contracts governed by CISG. It highlights differences between the two legal instruments and their practical implications, particularly where parties adopt only certain rules. Lastly, the sixth section summarizes the key findings and reflects on the use and development of both CISG and Incoterms in harmonizing international sales law.

2 The conceptual framework for passing of risk under CISG

Arts. 66-70 CISG address the consequences of accidental loss or damage to the goods that occurs between the conclusion of the contract and its completion. These provisions essentially establish which party is responsible for loss or damage to the goods involved in a transaction. Similar to CISG, those rules related to the passing of risk apply only if the parties have not addressed or modified the issue differently. In international sales, parties also commonly refer to Incoterms when regulating the passing of risk under the contract (Mazzotta, 2010: 779).

Passing of risk refers to the point in the contract's performance when the buyer is obligated to pay the purchase price, even if the goods may be lost or damaged. Although risk is typically covered by insurance, it is essential to determine which party bears the risk from what point onwards, when loss or damage occurs. This is important because the party bearing the burden of asserting a claim against the insurer faces a reduction in current assets throughout the settlement process (Lookofsky, 2019: 108). Arts. 66-69 CISG outline which party should bear the economic consequences if the goods are accidentally lost, damaged, or destroyed. Specifically, Art. 66 CISG addresses the effects of transferred risk of loss or damage of the goods from the seller to the buyer, while Arts. 67-69 CISG provide rules on when that risk passes to the buyer (Schwenzer, Fountoulakis, Dimsey, 2019: 538).

Under CISG, risk generally passes when physical possession of the goods is carried out, i.e. upon delivery to a carrier, transfer to the buyer, or when the buyer takes the goods. The notion is based on the concept that the party in control of the goods is best positioned to prevent damage, minimize potential loss, and handle any claims. Yet, CISG does not make the passing of risk dependent on the ownership of the

goods. This is confirmed by Art. 67(1) CISG, which allows the seller to keep documents governing the disposition of goods as security for payment without affecting the passing of risk. Any rule to the contrary could result in risk being split during transit if the documents are transferred after shipment has already begun (Coetzee, 2010: 228).

While some authors argue that the issue of burden of proof falls outside the scope of CISG, the majority contends that it is indeed covered by CISG. As some suggest: '*the issue of burden of proof is a matter governed by CISG, albeit not expressly settled in it. Like all internal gaps, this one has to be dealt with by means of the general principles underlying CISG. This solution is preferable to the other, whereby one should resort to domestic law, since it is the only one that promotes uniformity - the ultimate goal of any uniform commercial law convention*'. Based on the legislative history of Art. 66 CISG and international practice, it can be deduced that the party seeking a benefit from a provision must provide the grounds for its claim. The buyer wishing to avoid the application of Art. 66 CISG to the contract must present evidence that the damage resulted from an act or omission by the seller. Given the potential difficulties in establishing this, it is recommended that parties insert a contractual provision in the contract for examination of the goods at the time they are handed over to the carrier (Mazzotta, 2010: 781-782).

The final provision of Chapter IV is Art. 70 CISG, which governs the allocation of risk in the event that the seller commits a fundamental breach of contract. The rules in this Chapter IV apply regardless of when title transfers from the seller to the buyer, as outlined in Art. 4(b) CISG. It is important to note that the domestic rules that assign the risk to the owner of the goods are irrelevant if the contract is governed by CISG (Schwenzer, Fountoulakis, Dimsey, 2019: 538).

2.1 Rules on passing of risk under Art. 66 CISG

Art. 66 CISG states that: '*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*'. Art. 66 CISG is the first provision in Chapter IV Part III that addresses the consequences once the risk of loss or damage has passed to the buyer, while the following Arts. 67-69 CISG establish the rules determining when the risk passes to the buyer (Schwenzer, Fountoulakis, Dimsey, 2019: 538). It deals with the 'passing' of risk and implies that once the risk has transferred to the buyer,

it is obligated to fulfill its contractual obligations unless the loss or damage was caused by the seller (Schwenzer, Fountoulakis, Dimsey, 2019: 539).

Similarly, Art. 36 CISG distinguishes that the seller remains responsible for any non-conformities that existed when the risk passed to the buyer (Schwenzer, Fountoulakis, Dimsey, 2019: 539). Even though Arts. 36, 66 CISG are complementary, the latter has a broader scope. It does not require a breach of the contract, but omissions or actions of the seller, thus covering a wider range of situations. It imposes a continuing duty on the seller to refrain from any conduct that could defeat the purpose of the contract, such as obstructing proper delivery or causing damage to the goods (Hachem, 2022: 1191). Nevertheless, the key question is how to determine the concepts contained in Art. 66 CISG that are not defined in CISG (Mohs, 2022: 784).

Given that CISG does not provide a definition of 'risk', it is necessary to clarify which risks fall within the scope of its provisions governing the passing of risk. Under the prevailing view, the notion of risk is uncontroversial and encompasses only accidental loss of or damage to the goods. This also includes acts of government, but does not extend to economic risks, i.e. decrease in demand, fluctuation of currency or changes in market conditions that affect the buyer's ability to resell the goods (Hachem, 2022: 1187). Pursuant to Arts. 66, 68 CISG, the concept of risk thereby relates to the 'loss or damage' and situations where goods have 'perished or deteriorated'. These descriptions imply that the notion of risk primarily encompasses physical risks to the goods and affects their integrity, including their destruction (Erauw, 2005: 204; Drev, 2016: 42; Schwenzer, Hachem, Kee, 2012: 1294). The concept of 'loss' must be interpreted broadly. For instance, cases of theft, misplacement of goods, transfer to the wrong place or person, mixing up with other goods or their disappearance fall within the construct. It does not only include the external incidents but also occurences that affect the condition of the goods involving handling and storage, risk of natural processes leading to a lower quality such as lack of care, poor packaging, melting, thawing, shrinking, loss of their taste, original appearance or the like (Erauw, 2005: 204).

Art. 66 CISG does not specify when the risk of loss or damage of the goods passes to the other party (United Nations Commission on International Trade Law, 2016: 307). Arts. 67-69 CISG provide definitions of the moment at which risk passes, whether it be the moment of concluding the contract, passing of ownership, or the moment when the goods are handed over (Çakirca, 2012: 96). Nonetheless, once the risk passes to the buyer, loss or damage of the goods do not discharge it from its obligation to pay the price. In this way, Art. 66 CISG reaffirms the underlying rule

of Art. 53. CISG, which is that the buyer is responsible for fulfilling its payment obligation (United Nations Commission on International Trade Law, 2016: 208). This is clearly demonstrated in the *Art paper case II*, where a Korean seller concluded a contract with a Chinese buyer for the sale of art paper. After the buyer issued a letter of credit, the vessel transporting the goods sank, resulting in the total loss of the cargo. Subsequently, the seller's bank received a notice refusing payment on the grounds that the documents did not comply with the terms written in the letter of credit. Relying on Art. 67 CISG, the Tribunal determined that the seller fulfilled its obligations and that the risk passed to the buyer once the goods passed the ship's rail. It stressed that the letter of credit constituted merely a payment mechanism arranged by the buyer. Even though the letter of credit expired before payment was affected, the buyer remained bound to pay the purchase price. Based on Arts. 30, 53 CISG, the buyer was required to pay before obtaining the documents from the issuing bank. The buyer could not refuse payment on the basis that it had not received the bill of lading. Finally, as there was no evidence regarding the fact that the loss resulted from any act of the seller, the Tribunal held that under Art. 66 CISG, the buyer was obliged to pay the price after the risk had passed (*Art paper case II*, 1997, CIETAC).

In connection to this, the general rule that the buyer must pay the price even if the goods are lost or damaged after the risk passed to it is subject to an exception, as can be deduced from the case discussed above. Where the loss or damage is caused by an act or omission of the seller, then the seller, rather than the buyer, will be the party that bears the risk and the buyer is not obliged to pay for the goods (Valioti, 2004: 12). It needs to be established what does the phrase 'an act or omission' entail. The wording of the provision seems to suggest that the exception covers situations where a seller's breach causes damage or loss. This reflects any act of the seller causing destruction, loss or damage, irrespective of whether it amounts to a breach of contract of sale (Djinović, Rižnik, 2009: 132). In the *Wine bottles case*, the court decided that the seller remained responsible for damage resulting from inadequate packaging, especially where such deficiency arose prior to the transfer of risk to the buyer or to the carrier designated by the buyer. Even where risk passes, the seller cannot rely on this shift, if the deterioration of the goods is rooted in its own failure to comply with contractual obligations. CISG prevents the seller from claiming the full purchase price in circumstances where the goods are defective due to its own breach. The damage to the bottles in the mentioned case was the consequence of a

fundamental breach committed by the seller, before the risk had shifted to the buyer. By the time the goods reached their destination, they had lost all economic value. Under these circumstances, a complete reduction of the purchase price was justified (*Wine bottles case*, 2006, Court of Appeal Koblenz, 2 U 923/06).

Consequently, the buyer may refuse delivery of damaged goods and resort to remedies available to it in Part III CISG (Valioti, 2004: 12). Namely, the buyer can avoid the contract in its entirety or partially according to Arts. 49(1), 51 CISG, require delivery for substitute goods based on Art. 46(2) CISG, or repair of the goods in line with Art. 46(3) CISG or demand a reduction in the price provided under Art. 50 CISG and/or damages governed in Arts. 74-77 CISG. When the exception applies, the buyer's obligation to pay is postponed or ultimately waived, while the seller's obligation still stands and the risk remains with it (Valioti, 2004: 12; Erauw, 2004: 316).

2.2 Passing of risk involving carriage of goods – Art. 67 CISG

Art. 67 CISG governs the transfer of risk to the buyer if the contract of sale includes carriage of goods. In practice, such carriage of goods is typically done through the inclusion of trade terms, such as Incoterms, which define which party must arrange the carriage of goods (United Nations Commission on International Trade Law, 2016: 309). Once incorporated into the contract, Art. 67 CISG will be overridden by virtue of party autonomy under Arts. 6, 9 CISG (United Nations Commission on International Trade Law, 2016: 310). Nevertheless, in order for Art. 67 CISG to apply to the contract, three requirements must be met. Namely, a sales contract must expressly or implicitly indicate that the goods will be transported by a carrier, the latter must fulfill the criteria to be considered as one, and the parties need to specify that the goods will be handed over to it (Hachem, 2016: 1318).

Within the meaning of Art. 67 CISG, a carrier has to be an independent third party (United Nations Commission on International Trade Law, 2016: 310). Art. 67 CISG is inapplicable where the transportation is undertaken by the seller or the buyer (Djinović, Rižnik, 2009: 133). Generally, the seller's own employees or subsidiary company do not classify as a 'carrier' within the meaning of Art. 67(1) CISG (Erauw, 2004: 307; Hachem, 2022: 1197). Some authors maintain that risk should return to the seller where transportation is carried out through its own staff in a chain of transport after an independent carrier has been involved. This way of handling transportation could open up problematic gaps of abuse. This is because the seller could otherwise rely on an independent carrier for part of the journey in order to

shift the risk, while subsequently using its own personnel to complete the transport and thereby retain physical control over the goods. In such cases, Art. 66 CISG should remain applicable in order to protect the buyer and ensure that the seller exercises its due diligence in handling the goods, even if it has no specific economic interest in the goods' arrival (Hachem, 2016: 1319).

In cases of carriage of goods, the risk passes to the buyer when the seller hands the goods to the first carrier (United Nations Commission on International Trade Law, 2016: 310). The provision uses the term 'handed over' rather than 'delivered' the goods, reflecting that under Art. 31(a) CISG the seller's obligation to deliver is fulfilled once the goods are handed over to a carrier (Bridge, 2021: 679). Handling over the goods is complete with the shift of physical custody of them to the carrier (*Foil case I*, 1998, German Supreme Court, VIII ZR 259/97). As one court explained, this means that an actual surrender of the goods must occur, and it is crucial that the seller loads the goods onto the respective means of transport. Only then the loading is complete, the risk is passed to the buyer. It also stressed that it can be disputed whether the passing of risk in international contracts should occur only after the completion of loading the goods. In practice, the seller's obligation to deliver the goods does not always include the duty to load them onto the specified means of transport. Accordingly, if the parties agree that a carrier will load the goods at a particular place, risk may then pass when the goods are handed over for transport, regardless whether the loading has been completed (*Italian plants case*, 2006, District Court Bamberg, 2 O 51/02). The meaning of Art. 67 CISG can be illustrated through a case in which the parties concluded a contract for the sale of cars to be shipped in accordance with Incoterms 1990 rules. Upon discovering that the steel had oxidized, the buyer initiated legal proceedings, alleging that the seller bore responsibility for damage occurring prior to loading of the steel profiles. The Appellate Court applied Arts. 31, 67 CISG and held that the risk passed to the buyer upon delivery of the goods to the carrier. The carrier also issued a 'clean on board' document, indicating that the goods were in good condition at the time of loading, and since the buyer failed to demonstrate that the damage occurred earlier, the seller was not liable for the deterioration of the goods (*CLOUT case no. 247*, 1997, Audiencia Provincial de Cordoba).

Furthermore, under Art. 67(1) CISG, a distinction is made between two situations. First, where the contract involves carriage of goods but does not require the seller to deliver them to a carrier at a particular location. This framework reflects the

worldwide accepted approach that the buyer assumes the risk of loss or damage to the goods for the entirety of the transportation process. Once the seller transfers the goods to the first carrier, control over them passes to the buyer. In the event that the goods are damaged during transport, the buyer can determine it and address the matter with the carrier itself (Hachem, 2016: 1318). Second, where the seller must hand the goods over to a carrier at a particular place in accordance with the contract (Djinović, Rižnik, 2009: 133-134). This situation embodied under Art. 67(1) CISG stipulates that if the seller must hand the goods over to a carrier at a particular place, the risk passes to the buyer once the goods are handed over at that named place.[1] In one case, a dispute revolved around the burden of proof regarding the place of delivery. The German buyer purchased pizza cartons from an Italian seller. Later on, the buyer refused to pay for an October shipment, withholding payment for subsequent delivery, asserting a set-off based on prior damage and relying either on the alleged established practice or an agreement that it was agreed that Duisburg was the place of delivery. Meaning that the risk passed only at that place, so the seller would be held liable for the damage caused by the carrier. The court held that the buyer failed to substantiate these claims. In such absence, Art. 31(a) CISG applied, whereby the seller's obligations were fulfilled upon delivery to the carrier. Pursuant to Art. 67(1) CISG, the risk passed at that point when the goods were handed over to the carrier. Thus, the buyer bore the loss or damage to the goods (*CLOUT case no. 360*, Amtsgericht Duisburg, 49 C 502/00).

If the goods are handed over at a carrier at the wrong place, the risk does not pass to the buyer unless it waives its right to reject the goods. It is the seller's burden to prove physical handover of the goods (Erauw, 2009: 308). It must be noted that risk may not transfer to the buyer, if the seller fails to provide proper transportation documents within the contractual agreement (*CISG online no. 2446*, 2013, Regional Court of Darmstadt, Germany). The seller may retain certain documents even after the goods have been handed over to the carrier, for instance to fulfill conditions of a letter of credit issued for its benefits. A typical example would be a letter of credit, a document controlling the disposition of the goods. However, the passage of risk is not linked to the seller's possession of documents controlling the disposal of the goods, as indicated in the last sentence of Art. 67(1) CISG (Erauw, 2009: 308).

Lastly, Art. 67(2) CISG provides an important factor that must be satisfied, in order for the risk to pass to the buyer. The goods sold must be '*clearly identified to the contract,*

[1] Art. 67(1) CISG.

whether by markings on the goods, by shipping documents, by notice given to the buyer or otherwise.[2] The seller must provide the buyer with all information to use certain goods in fulfillment of the contract (Drev, 2016: 44). If identification of the goods cannot be made, the seller bears the risk until they are properly identified under the contract (Buydaert, 2014). When sellers ship large quantities of goods for multiple buyers, this raises practical issues. According to CISG, the buyer only bears the risk of loss for the goods if they are clearly marked as theirs. When the sale involves a carriage of goods sold in bulk, a buyer bears risk only for its undivided share it has been identified for the purposes of the contract. If partial damage or loss to the goods occurs, various buyers share the loss in proportion to the quantities that the seller owes to each in that one shipment or carriage (Lookofsky, 2019: 111; Bridge, 2021: 683).

Although CISG does not expressly regulate the allocation of burden of proof, it falls within its scope and must be resolved in accordance with Art. 7(2) CISG. This means that the party invoking a rule in its favor bears the responsibility of establishing the grounds for its application. The seller will have to demonstrate that the requirements under Art. 67(1) CISG are satisfied, and that the goods were properly identified pursuant to Art. 67(2) CISG. In contrast, when the loss or damage of the goods occurs between the seller's place of business and the place of shipment, the buyer must establish that a particular place of shipment had been agreed in the contract in accordance with Art. 67(2) CISG. Accordingly, the seller bears the risk until the goods are handed over at the agreed place (Hachem, 2022: 1207).

2.3 Passing of risk regarding the goods sold in transit – Art. 68 CISG

Art. 68 CISG addresses the issue of passing of risk from the seller to the buyer in cases the goods are sold while already in transit (Djinović, Rižnik, 2009: 136). In such transactions, the buyer typically does not inspect the goods until they are discharged at the location of delivery. Any loss or damage will become apparent upon unloading, except in situations that involve external incidents such as storms, collisions, etc. For these reasons, it is commercially reasonable to presume that the seller's knowledge of the condition of the goods cannot extend beyond the point of shipment (Grewal, 1991: 97). In practice, the provision has limited importance due

[2] Art. 67(2) CISG.

to the widespread use of Incoterms or equivalent contractual terms (Hachem, 2022: 1208).

Art. 68 CISG reads as follows: '*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 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.*'

The general rule embodied in first sentence of Art. 68 CISG is that the risk passes from the time of the conclusion of the contract (Bridge, 2021: 684). This rule is subject to an exception, laid down in the second sentence, where the circumstances so indicate, the risk passes to the buyer when the goods are handed over to the carrier who issues '*the documents embodying the contract of carriage*'. One example of such document is a bill of lading, a legal instrument that refers to a concluded contract of carriage, confirms ownership of the transported goods and the terms of its transport (Vlačič, 2019: 863). When dealing with an exception, the risk shifts retroactively to the buyer, even prior to the conclusion of the contract. Circumstances that would allude to such transfer would be if the seller provided the arrangement of transport insurance, which would be an obligation stipulated in the contract itself (Valioti, 2004: 16). Nevertheless, in cases where the parties mistakenly assume that the goods are sold in transit, risk passes only upon the actual handing over of the goods to the carrier (Hachem, 2022: 1208).

The third sentence of Art. 68 CISG stipulates that the seller carries the risk of the goods if, at the time of the conclusion of the contract, it knew or ought to have known that the goods have been lost or damaged and did not notify the buyer. The seller would also be liable for any damage that is causally connected to the original one (Grewal, 1991: 100). In such cases, the question arises as to whether this provision refers to the first or second sentence of Art. 68 CISG. The prevailing view is that the provision relates only to the second sentence, given that the risk cannot pass at the time of the conclusion of the contract if the goods had already suffered loss or damage, especially if the seller was aware of it. However, the second sentence allows the transfer of risk to pass from a point prior to the formation of the contract. This could result in the buyer bearing the loss even though the damage would occur before the contract was concluded. In this way, the third sentence of Art. 68 CISG addresses this issue by ensuring that the seller bears the risk in cases of such bad faith (Valioti, 2004: 16; Hachem, 2022: 1213).

In the *Hoogendik Import/Export B.V. et al. v. Bluemarine Fish International, S.L. case*, the court examined whether Art. 68 CISG applied to the contract to determine the passing of risk. It found that the goods had already been damaged before the contract was concluded, meaning the issue was not primarily one of risk transfer but of pre-existing lack of conformity**.** The seller argued that Art. 68 CISG should apply, which would normally shift the risk to the buyer at the time of contract conclusion, or even earlier if circumstances indicate. The court rejected this stance, noting that the sale was not a sale in transit. Even if Art. 68 CISG had applied, its exception would have been relevant. Namely, if the seller knew or ought to have known that the goods were already damaged and failed to inform the buyer, the risk remains with the seller. The case illustrates that Art. 68 CISG does not relieve the seller liable where the goods were already defective before the conclusion of the contract and the seller could have been aware of this (*Hoogendik Import/Export B.V. et al. v. Bluemarine Fish International, S.L. case,* 2014, Court of Appeal Pontevedra 251/2013/569/2014).

Unlike Art. 67 CISG, the provision in question does not expressly state whether the passing of risk in sales of goods regarding transit requires that the goods be identified. Identification of the goods should apply by the same analogy as under Art. 67(2) CISG. Schlechtriem maintains that Art. 68 CISG is also applicable to the bulk goods and distinguishes between two hypotheses. First, if the seller is entitled to deliver a consolidated shipment, including undivided bulk delivery, the buyers bear the risk from the time stated in Art. 68 CISG and share the risk according to the proportionate distribution. On the other hand, if the seller is not entitled to deliver a consolidated shipment, Art. 67(2) CISG applies by same analogy and risk shifts to the individual buyer when the goods are identified (Valioti, 2004: 17; Hachem, 2022: 1215).

2.4 Residual general rule on the passing of risk – Art. 69 CISG

Art. 69 CISG is applicable where the sale of goods neither involves their carriage nor concerns goods sold in transit, both of which are regulated by Arts. 67, 68 CISG. Therefore, it functions as a residual rule or a 'catch-all' provision for non-carriage cases (Erauw, 2004: 311).

Pursuant to Art. 69(1) CISG, the risk passes to the buyer once the goods are taken over, or when the goods are placed at the buyer's disposal and it fails to take delivery,

thereby breaching the contract. CISG does not clearly define when goods are considered to be placed at the buyer's disposal, nor does it expressly require the seller to notify the buyer of their availability. It is generally understood that goods are at the buyer's disposal when they are ready for immediate collection without further preparation, and that the buyer must be aware of this fact. Even if a general duty to notify is not expressly imposed, some form of notice will be necessary in practice, since the goods are not considered to be placed at the buyer's disposal until they have been identified (Bridge, 2021: 686).

Moreover, Art. 69(1) CISG is primarily intended to cover cases in which no independent carrier is involved. In such cases, the buyer will collect the goods directly from the seller's premises or receive them at its own premises where the seller undertakes to perform the carriage. Nevertheless, Art. 69 CISG has been applied in cases where the goods were handed over at the seller's premises to a carrier engaged by the buyer, even though such cases could have equally been resolved under Art. 67(1) CISG, without affecting the outcome (*Mobile grain dryer case*, 2004, Randers City Court, BS 2-2229/2002). However, a difference becomes apparent where the buyer breaches the contract by failing to send a carrier. In this scenario, Art. 67(1) CISG delays the passing of risk until delivery to a carrier is made, whereas Art. 69(1) CISG shifts the risk at the moment the buyer commits a breach of the contract. In this regard, Art. 69(1) CISG should be viewed as *lex specialis*, given that the seller is unable to perform delivery of the goods due to the buyer's omission to send a carrier (Bridge, 2021: 686).

Applying Art. 69 CISG, one court dealt with assessing the sale of a mobile grain dryer, and it held that risk passed to the buyer at the moment the goods were taken over, namely when the buyer's personnel unloaded the dryer from the seller's truck. Specifically, the chain used during unloading the dryer broke, causing significant damage, including hidden deformations that rendered the dryer unusable. The buyer later on refused to pay for it, so the seller brought a claim against the buyer. The court concluded that delivery was completed when the buyer took over the goods, and since the damage was not caused by the seller or its employees, the buyer was found to bear the risk and remained obliged to pay for the purchase price (*Mobile grain dryer case*, 2004, Randers City Court, BS 2-2229/2002).

In cases where the contract does not fix a specific time for delivery, CISG provides that the seller must perform within a reasonable time but does not give guidance on the buyer's corresponding duty to take delivery. Nonetheless, this obligation is likewise governed by a standard of reasonableness. The buyer must take over the goods within a reasonable time after becoming aware of their availability. When the

buyer fails to do so within a certain period, a breach arises. The determination of what constitutes a reasonable time, and when breach occurs, is not precisely regulated by CISG and depends on the circumstances of the case, including the need for examination of the goods or practical arrangements for their collection (Bridge, 2021: 686-688).

When the buyer must take over the goods at a place other that the seller's place of business, Art. 69(2) CISG stipulates that the risk passes when the buyer should have taken the delivery and is aware of the fact that the goods were placed at its disposal.[3] This Art. is primarily directed at cases involving the sale of warehoused or stored goods, while also being relevant to situations where the seller must deliver the goods to the buyer or where performance of the contract is not carried out at the seller's place of business (Hachem, 2022: 1222). This could include cases where the buyer must take over the goods directly at the place of the manufacturer. When warehoused goods are sold, they are placed to the buyer's disposal once it can actually claim possession of them (Hachem, 2022: 1223). In addition, it must be stressed that passage of risk does not occur neither under Art. 69(1) nor Art. 69(2) CISG, until the goods are sufficiently identified.[4]

2.5 Passing of risk and the buyer's remedies when the seller commits a fundamental breach of contract – Art. 70 CISG

Art. 70 CISG governs the interplay between the passing of risk in cases of accidental loss, destruction, or damage of the goods and the remedies available to the buyer in the event of a fundamental breach by the seller. The provision ensures that the seller remains responsible for a fundamental breach, even when later events, that are unrelated to the breach, contribute to the loss or damage to the goods. For instance, if grain is not packaged properly and succumbs to moisture during shipment, the buyer may still rely on the remedies available for the seller's breach, notwithstanding subsequent emergency actions by the carrier to unload the goods (Hachem, 2022: 1226).

In essence, the provision clarifies that the buyer may exercise any remedies provided under CISG for a fundamental breach, regardless of the passage of risk rules

[3] Art. 69(2) CISG.
[4] Art. 69(3) CISG.

encompassed in Arts. 67-69 CISG. Therefore, Art. 70 CISG should be read alongside CISG's provisions concerning the buyer's remedies for such breaches of contracts (Djinović, Rižnik, 2009: 166-167).

3 Application of Incoterms rules to the contract governed by CISG

In international sales contracts governed by CISG, the rights and obligations of the contracting parties are primarily determined by the provisions listed in it. In practice, the contractual framework rarely relies on CISG alone. Commercial parties frequently incorporate standardized trade terms, most notably the Incoterms rules developed by the ICC (Mohs, 2016: 1301). Furthermore, these terms are designed to clarify important logistical aspects of the transaction, including delivery of goods, allocation of transport-related responsibilities, and the distribution of costs between the seller and the buyer. It should be noted that a reference to commercial usages or terms such as Incoterms does not exclude CISG in its entirety but only the areas covered by the mentioned usages or terms. A reference to Incoterms does not amount to a complete exclusion of CISG, but rather limits its application only in respect of matters governed by it (*Glass fibre case II*, 2009, Court of Appeal Canton Valais, C1 08 45). In the context of CISG, Incoterms play an important role in determining how the sales contract functions in practice (Johnson, 2014: 391).

3.1 Overview of the development and legal nature of Incoterms

The first version of the Incoterms was published in 1936 by the ICC in Paris. It developed detailed legal rules that would be commonly used in international contracts of sale. Following the studies conducted in 1923, which examined six frequently used terms in thirteen countries, they revealed that there were inconsistencies in their interpretation. The aim was to standardize clauses that had been widely used since the middle of the 19th century. Specifically, clauses such as CIF and FOB were commonly used. Although their interpretation was generally consistent, certain differences still remained between the countries. For this reason, the ICC decided to refine these widely used rules with the aim of establishing common trade terms, eliminating discrepancies, and ensuring greater uniformity in their application. Since then, the ICC has issued updated versions approximately every ten years to reflect developments and changes in trade practice. Amendments and additions to Incoterms were made in the years 1953, 1967, 1976, 1980, 1990, 2000 and 2010 (Magnus, Piltz, 2021: 323).

The current ninth version of Incoterms 2020 came into effect on January 1, 2020. These rules address recent developments, including increased attention to security in the transportation of goods, the need for greater flexibility in insurance coverage depending on the nature of the goods and transport, and banks who issue letters of credit to call for an on-board bill of lading in certain financed sales contracts conducted under the FCA rule. In addition, they provide a clearer structure, including revised language, an expanded introduction and explanatory notes, and a reordering of provisions to better reflect the logic of a sales transaction. Incoterms 2020 rules are also the first edition of the ICC's Incoterms rules to adopt a 'horizontal' presentation, structuring corresponding provisions together to provide clear differences in how specific issues are addressed among the eleven three-letter trade terms (International Chamber of Commerce, 2019: 5).

It should be noted that Incoterms do not apply by default, since they are not a statutory law enacted by any legislative authority. They function as a set of rules developed by an international commercial organization. Its provisions serve as optional contractual rules that are binding only when expressly incorporated into the contract or when they qualify as trade usages (Magnus, Piltz, 2016: 323).

3.2 Principle of party autonomy regulated under Art. 6 CISG

In contracts that are governed by CISG, trade usages are of considerable importance. The reason lies in the fact that, in drafting such contracts, it is difficult for the parties to anticipate all potential situations and regulate the required conduct exhaustively. Even within the sale of goods, many differences and variations exist depending on the type of goods involved in the specific transactions, for instance wine, oil, wool, etc. Excessive regulation on such matters is neither practical nor desirable, as it may result in rigid rules that are incapable of adapting to the dynamic commercial transactions. This could hinder the development of business practices. Balance should be achieved between general principles and specific obligations that need to be determined in a contract. The former is addressed by CISG itself, while the latter is left to trade usages. Trade usages contribute significantly to the standardization of contractual relationships and promote efficiency (Djinović, Rižnik, 2009: 39-40).

With regard to the passing of risk, CISG's rules are of limited relevance due to the widespread use of trade usages, namely the Incoterms. Based on Art. 6 CISG, the parties may exclude CISG's application, totally or partially or, subject to Art. 12

CISG, derogate from its provisions. Any term chosen by the parties takes priority over the default rules provided in CISG (Mohs, 2016: 1301). By virtue of party autonomy, the parties may deviate from CISG's provisions on passing of risk, or any matter relating to it (Erauw, 2005: 204). When the term chosen covers a particular subject matter, they prevail over CISG's provision in that matter. It is important to note that Incoterms do not override all of the provisions set out in CISG, they merely supplement it. Given that Incoterms regulate a narrow range of issues, they cannot by themselves objectively manifest a clear intent to exclude the entire CISG. Rather, their incorporation generally indicates a derogation from specific CISG's provisions, such as those concerning risk, documentation, and payment terms (CISG Advisory Council, 2014). The scope and prevalence over CISG rules must be determined through the interpretative set of rules listed in Arts. 8, 9 CISG (Mohs, 2016: 1301; *Y. I. & T. CO v. Przedsiębiorstwo Przemysłu Chłodniczego F. S.A. case*, 2008, Poland Supreme Court, V CSK 261/08).

3.3 Incorporating Incoterms into contracts under Art. 9 CISG

To establish whether Incoterms are incorporated into a contract of sale governed by CISG, and thereby govern the allocation of risk in transit as well as responsibility for customs formalities, courts should follow the framework set out in CISG. According to Art. 9 CISG, contractual parties are bound by usages either through an express agreement or through the implicit acceptance of these usages into their contractual relationship (Djinović, Rižnik, 2009: 40).

Under Art. 9(1) CISG, the parties are bound by any usage to which they have agreed and by any practices which they have established between themselves (United Nations Commission on International Trade Law, 2016, p. 63). In essence, CISG adopts usages as a broad concept that reflects commercial conduct adopted by contractual parties. By contract, the concept of practices which the parties have established between themselves is narrower, relating to a conduct that is developed between those parties over a certain duration of time involving specific transactions (Graffi, 2011: 275; *CLOUT case no. 750*, 2005, Oberster Gerichtshof, 7 Ob 175/05v). Furthermore, CISG does not define the term 'usage', thereby ensuring that the concept is autonomously interpreted, without the recourse to specific national legal concepts, in line with the objective of promoting uniformity under Art. 7(1) CISG. Such an approach is necessary since definitions of usages may vary within national systems, and such strict definitions could lead to uncertainty in interpretation and could prevent certain usages from being applicable to the contract (Bout, 1998: 3).

Pursuant to Art. 9(1) CISG, an inclusion of Incoterms in a contract can be made by specifying the full name of the chosen clause or by using the abbreviation which consists of three letters. Generally, Incoterms apply where the contractual parties have clearly and expressly agreed to their use, unless there is an established practice between them (Bout, 1998: 6). For instance, for an express agreement to be valid, the parties could expressly reference to a specific Incoterms rules, such as FOB or CIF (*St. Paul Guardian Insurance Co. & Travelers Insurance Co. v. Neuromed Medical Systems & Support, GmbH case*, 2002, District Court for the Southern District of New York, No. 00 CIV. 9344(SHS)), or to clauses that are widely recognized within a particular line of trade. Where such express provisions are incorporated into the contract, issues relating to the place of delivery and the passing of risk are governed by those trade usages rather than by CISG (Pamboukis, 2005: 112; *CLOUT case no. 425*, 2000, Oberster Gerichtshof, 10 Ob 344/99g). In the *Cedar Petrochemicals case*, the parties specifically incorporated Incoterms by reference, meaning that the court applied Art. 9 CISG and confirmed that the agreed terms are binding to the contract (Johnson, 2014: 422). The same applies for cases such as *Bravo Barros v. Martinez Gares case*, 2007, National Commercial Court of Appeals, 87484 / 102.876/2002, *Wacker-Polymer Systems GmbH v. Quiesbra v. Glaube S.A. case*, 2003, Juzgado Comercial de Primera Instancia Buenos Aire, and *Autoservicio Mayorista La Loma S.A. v. Quiesbra v. Incidente de Verificación case,* 2003, Juzgado Comercial de Primera Instancia Buenos Aires. Here, the court also determined that the parties have relied on their autonomy under Art. 9(1) CISG by expressly integrating Incoterms into the contract, thereby reinforcing their effect (Kiene, 2014: 382-383).

In line with Art. 9(1) CISG, the parties can also be bound by the established practice between them. They are binding even when there is no express agreement made, as this follows both from the wording of the provision and from the fact that the practice is formed through the parties' own conduct (Djinović, Rižnik, 2009: 40). This indicates that a usage does not have to be internationally accepted in order to be binding. Unlike Art. 9(2) CISG, Art. 9(1) CISG permits the parties to be bound by agreed usages irrespective of whether they are local or international (United Nations Commission on International Trade Law, 2016, p. 63). This is further supported by one court that held that Art. 9(2) CISG should not be understood as preventing the application of domestic or local usages, even in the absence of an explicit reference in the contract. It observed that the applicability of a usage does not depend on its international character. Accordingly, local commercial practices,

such as those prevailing in exchanges, trade fairs, or storage facilities, may bind the parties where they are regularly observed in dealings involving foreign parties. This may also extend to usages limited to a specific country, particularly where the party from another country has established a pattern of business activity there and has entered into similar transactions on multiple occasions (*CLOUT case no. 175*, 1995, Court of Appeal Graz, 6 R 194/95).

In addition, like the term 'usages', CISG does not provide the definition as to what constitutes an 'established practice'. In practice, the determination of when a particular pattern of conduct may be regarded as an established practice remains a frequently discussed issue which need to be settled on a case-by-case basis. It is necessary to differentiate such practice from conduct that is merely occasional or coincidental (Djinović, Rižnik, 2009: 42). According to some courts, practices are repeated forms of conduct that take place repeatedly over a certain period of time set by the parties, enabling them to assume in good faith that such conduct will continue in future occasions (*CLOUT case no. 750*, 2005, Oberster Gerichtshof, 7 Ob 175/05v). Accordingly, one or two isolated instances are generally considered insufficient to establish a binding practice (*Sluiter Ellwood II et al. v. Blumenerdenwerk Stender GmbH case*, 2004, Rechtbank Arnhem, the Netherlands, 107309 /HA ZA 03-2099; *Ethyl acetate case*, Landgericht Zwickau, Germany, 3 HK O 67/98). Nevertheless, a practice may be established even at the beginning of the parties' contractual relationship within the meaning of Art. 9(1) CISG, and become part of the parties' contract, if intentions expressed by one party during negotiations are understood by the other party as setting the terms of their contractual relationship. Ultimately, this is only possible if the other party was aware of such intentions of the first party, which must be determined in accordance with Art. 8 CISG (*CLOUT case no. 176*, 1995, Austrian Supreme Court, 10 Ob 518/95). In terms of burden of proof, the party asserting the existence of such practice bears the responsibility of proving it (Djinović, Rižnik, 2009: 40).

On the other hand, in line with Art. 9(2) CISG, Incoterms rules may be applicable as a trade usage that may be binding upon the parties, even in the absence of an express agreement in the contracts to its application (United Nations Commission on International Trade Law, 2016, p. 65). Since there would be a risk that the parties may become bound by certain trade usages that they were not aware of at the time the contract was concluded, Art. 9(2) CISG sets forth certain requirements. In order to determine whether Incoterms could be deemed implicitly incorporated into the contract, three cumulative prerequisites must be met.

Firstly, the Incoterms rules must be known to the parties or they ought to have known about them. This criterion is met when the parties either have places of business in the geographical area where the Incoterms are established or regularly conduct business in that area for a certain duration of time. Secondly, the Incoterms as a usage are generally recognized in international trade and lastly, they are regularly observed by parties to contracts of the type involved in the particular trade. When all three conditions are fulfilled, Incoterms fall within the type of usage specified under Art. 9(2) CISG (Djinović, Rižnik, 2009: 42; United Nations Commission on International Trade Law, 2016, p. 65). Under both Arts. 9(1), 9(2) CISG, the burden of proof is allocated in the same manner, as the party claiming the existence of Incoterms as a binding usage bears the responsibility of proving the necessary requirements (United Nations Commission on International Trade Law, 2016, p. 65; Johnson, 2014: 424). In addition, it is important to assess whether the parties have agreed not to incorporate the relevant usage into their contract. If Incoterms qualify as a usage within the meaning of Art. 9(2) CISG, the burden shifts to the party seeking to avoid its application to demonstrate that the parties have opted out of the relevant Incoterms rule (Johnson, 2014: 425).

With regard to the relationship between usages and practices that are applicable between two parties to the contract, it must be assumed that the silent practices take prevalence over silent usages, as they are more detailed and reflect the context of the individual contractual relationship. When a usage is expressly agreed upon by the parties, it takes prevalence over any pre-existing silent practice, as the explicit agreement reflects an intentional exclusion of the conflicting practice (Pamboukis, 2005: 115).

In conclusion, Incoterms apply to the contract when the parties expressly agree to their use, unless a practice has been established between them under Art. 9(1) CISG. The party arguing for application of Incoterms bears the burden of proving that they have been incorporated into the parties' contract. In the absence of such agreement, Incoterms may still be applicable by the virtue of Art. 9(2) CISG, since they are widely recognized and regularly observed usages in international trade. They are only applicable, if the specific Incoterms clause is relevant to the contractual relationship in question. In short, the court should first consider whether the parties have incorporated Incoterms into their agreement by selecting a delivery term by an express reference to them. The party arguing for application of Incoterms bears the

burden to show that they have been incorporated by reference into the parties' agreement (Johnson, 2014: 422).

4 Passing of risk under Incoterms 2020 rules

The Incoterms rules govern the following aspects: the place of performance of specific obligations, the method of delivery of the goods, the time at which the risk passes, and the allocation of certain costs relating to the performance of obligations under the sales contract (Kranjc, 2006: 309). Specific duties of both parties are laid down in ten single rules under each Incoterms clause which describe obligations of the seller (A1-10) and of the buyer (B1-10) (Magnus, Piltz, 2021: 324).

Under Incoterms, if the contract requires the goods to be transported, the risk passes when the goods are physically handed over to the carrier (Kranjc, 2006: 309). For a clause to apply to the contract, the relevant set of rules and a designated geographical location must be identified. If the latter is not sufficiently specified, the contracting party may choose the location most favorable to it (Kranjc, 2006: 307). To ensure that the Incoterms apply to the contractual relationship, parties should expressly refer to the chosen Incoterms and its version when drafting the contract. For instance, 'FCA Incoterms 2020' should be used, together with a specification of the relevant place required for each Incoterm. Without such specifications, ambiguous terms may be subject to interpretation under the applicable law to the contract (Magnus, Piltz, 2021: 334-335).

Where a specific place of delivery is agreed, the risk passes upon delivery of the goods to the buyer, or another third-party acting on its behalf. The risk passes from the seller to the buyer even prior to delivery, if the buyer is in breach or fails to perform its obligations that enable the seller to deliver the goods. Nevertheless, the risk passes from the seller to the buyer once it has performed its delivery obligations, which differ depending on the chosen clause (Kranjc, 2006: 309).

Incoterms 2020 clauses are categorized both by mode of transport and by mutual characteristics. In terms of transport, some clauses apply to all modes of transport, specifically, EXW, FCA, CPT, CIP, DAP, DPU and DDP, while others are restricted to water transport, those are clauses FAS, FOB, CFR and CIF. Regarding functionality, they are divided into four groups. Under E-terms, EXW, the buyer is responsible for collecting the goods. Under F-terms, FCA, FAS, FOB, the seller must deliver the goods to a carrier. Under C-terms, CPT, CIP, CFR, the seller shall deliver the goods to a carrier, and arrange and pay for carriage to the agreed destination. Lastly, under D-terms, DAP, DPU, DDP, the seller is obligated to

deliver the goods at the agreed destination (Magnus, Piltz, 2021: 325). The following chapter will present an overview of the eleven single terms, mainly in relation to the point of passing of risk from the seller to the buyer.

4.1 EXW – Ex Works

When the parties incorporate Incoterms EXW term into the contract, the seller is obliged to place the goods at the buyer's disposal at a specified location, properly packed and marked but not loaded, either at its place of business or at another agreed upon place, like a factory or a warehouse, at which point the risk transfers to the buyer (Kranjc, 2006: 309; Mohs, 2022: 782). It follows that the seller is not required to take part in the sending of goods (Coetzee, 2010: 207). Incoterms EXW do not regulate how the goods reach the agreed place of delivery, nor do they govern the buyer's obligations after it takes delivery. In particular, the provision does not expressly state that under EXW the buyer is required to arrange carriage for the goods. It is on the buyer to choose either to let the goods remain at the place where the seller is domiciled or to transport them to a location elsewhere (Coetzee, 2010: 207). Any possible organization of the export clearance or clearance within third countries through which the goods should be transported is on the buyer (Schroeter, 2022: 1738).

Furthermore, this rule is comparable to the Art. 69(1) CISG. Yet, the provisions differ slightly, as Art. 69(1) CISG provides that the risk passes at the later time, i.e. when the buyer takes over the goods at the seller's premises or, where the goods are placed at its disposal at another location, when the buyer becomes aware of this fact and fails to take delivery in breach of contract. Under EXW, the risk transfers once the goods have been placed at the buyer's disposal at the designated delivery location, irrespective of whether the buyer is aware of their availability or that failure to take delivery constitutes a breach of contract (Karibi-Botoye, Enwukwe, Amiesimaka, 2022: 96). The act of placing the goods at the buyer's disposal could also entail that it is in a position to take possession of them. The buyer should ensure adequate insurance for the goods if the immediate collection of them is not possible (Coetzee, 2010: 271). Differences between the two provisions can be illustrated on a practical example: '*Belgian seller and the Norwegian buyer agree on the sale of 5000 boxes of chocolate under the Incoterms 2010 rule EXW. The contract states that the goods are available for the buyer to pick up at the seller's place of business from the 1st of August till the 14th of August.*

On the 1st of August the buyer is informed that the load of chocolate is ready, but on the 5th of August the chocolate melts by a malfunctioning cooling system, caused by an 'act of god'. Under EXW, the buyer will have to bear the loss of the goods since the risk passes the moments the goods are placed at his disposal, ready to be picked up. The Convention, however, lets the risk pass to the buyer the 14th of August, when the buyer commits a breach of contract by his failure to take delivery of the goods; consequently, the seller will bear the risk of loss under the Convention' (Karibi-Botoye, Enwukwe, Amiesimaka, 2022: 97).

In the event that the buyer fails to notify the seller of the exact delivery place, the risk passes on the agreed date. If the buyer does not give a notice of the precise delivery date within the agreed timeframe, the risk thereby passes on the day after the agreed period has elapsed (Mohs, 2022: 792).

4.2 FCA – Free Carrier

Under Incoterms FCA term, the seller fulfills its delivery obligations by handing over the goods to the buyer's nominated carrier or another person. In connection to this, two situations may arise. First, if the agreed place of delivery is the seller's premises, the goods are delivered when they are loaded onto the transport appointed by the buyer. Second, when the agreed place is another location, delivery occurs when the goods are loaded on the seller's means of transport, arrive at the specified place at the disposal of the carrier and are ready for unloading (Schroeter, 2022: 1741).

In essence, the seller bears the risks of loss or damage to the goods until the delivery has been made to the buyer in compliance with the chosen option as established above. The agreed place of delivery, selected from the two situations presented, shall define when risk passes to the buyer and from which point on the buyer covers all costs (Schroeter, 2022: 1741). The rule can be equated to the concept of 'first carrier' of Art. 67(1) CISG, given that under FCA the risk also passes on delivery to 'a carrier' (Coetzee, 2010: 271). In line with this, it is generally accepted that the 'carrier' is '*any person who, in a contract of carriage, undertakes to perform or to procure the performance of transport by rail, road, air, sea, inland waterway or by a combination of such modes'*. The term 'carrier' has the same meaning as under CISG (Buydaert, 2013). The difference between Art. 67(1) CISG and Incoterms FCA lies in situations where the delivery has to be made at a location different than the seller's place of business. Under CISG, the seller must hand the goods to the carrier at that location, while FCA merely require that the seller has to place the goods at the carrier's disposal (Buydaert, 2013). If the buyer has not specified a point where the goods will be received within the named place of delivery, the seller may then select the point that best suits purposes

where several options exist. In instances where the buyer fails to nominate a carrier or other person to take delivery in due time, notify the seller of the chosen carrier, or fails to take charge of the goods, the risk passes earlier. Even if the nominated carrier or the other person fails to take charge of the goods, the buyer shall assume all risks of loss or damage from the agreed date or, in absence of such date, from the designated time by the buyer under B10(b) FCA, or, if no time has been notified, from the end of any agree delivery period, provided that the goods are clearly identified for the purposes of the contracts (Schroeter, 2022: 1744). FCA is the relevant term where the buyer is responsible for arranging and paying for carriage and assumes the risk if transport is not secured (Buydaert, 2013).

4.3 CPT – Carriage Paid To

The Incoterms CPT term is structured around the seller's obligation to hand over the goods to the carrier and to cover the costs of their transportation to the agreed destination. The risk therefore passes the moment the seller hands the goods to the first carrier. For instance, when the contract of sale is concluded between the Belgian seller and a Danish buyer, and they rely on the Incoterms CPT Aarhus, the seller fulfills its obligation when it hands the goods to the carrier in Belgium (Buydaert, 2013).

Furthermore, once the seller delivers the goods to the buyer in accordance with CPT, the seller does not guarantee that they will arrive to the destination in sound condition, in the agreed quantity, or at all. This follows the concept of the provision explained. However, the seller must enter into a contract for the carriage of goods from the place of delivery to the agreed destination (Schroeter, 2022: 1747). It is crucial to understand that 'place of delivery' and 'place of destination' are not the same. Place of delivery refers to the place where the seller hands over the goods to the carrier. This could include seller's warehouse, a departure airport, a port of shipment, or a rail terminal. Usually, these are located in the seller's country. On the other hand, place of destination relates to the point where the goods are ultimately transported to. This could be a port, airport or terminal in the buyer's country. Distinction is important since the risk transfers at the point of delivery. To illustrate, if the sales contract states "*English cashmere, CPT International Airport of Dubai, Cargo Mega Terminal, UAE, Incoterms 2020*", the transfer of risk occurs when the goods are handed over to the carrier, prior to transportation to the named destination of

Dubai, such as at Emirates SkyCargo at London Heathrow Airport. Although the seller pays for the carriage to Dubai, responsibility for any loss or damage after the goods are transported from Heathrow falls upon the buyer (Bustamante, 2025). It is important to note that early transfer of risk is also possible under the same conditions listed under the E- and F-terms (Buydaert, 2013).

4.4 CIP – Carriage and Insurance Paid To

Pursuant to the Incoterms CIP term, the seller undertakes to deliver the goods and transfers the risk to the buyer by handling them over to the carrier, which is contracted by the seller, or by procuring the goods so delivered. Moreover, CIP and CPT term apply regardless of the chosen mode of transport and is applicable when multiple modes of transport are used. Under CIP, emphasis is placed on two locations, the place at which the goods must be delivered to in order to determine when the risk passes, and the agreed destination, which represents the point to which the seller needs to contract for carriage (Schroeter, 2022: 1752-1753). Risk of loss or damages transfers to the buyer at the place of delivery, not upon arrival of the goods to the agreed destination. Namely, if the sales contract stipulates '*Cellulose Pulp, CIP Tianjin Xingang, Beijiang Area, China, Incoterms 2020*', the seller delivers and transfers the risk to the buyer when the goods are handed over to the carrier before they have been transported to the agreed destination, i.e. Tianjin, China. For instance, the risk passes when the goods are handed to the carrier in Urugway, but seller still covers transportation and insurance costs to Tianjin, China (Bustamante, 2025).

Unlike CIP, this condition imposes an additional duty on the seller to provide insurance coverage for the goods. Under the current version of Incoterms, the seller is required to obtain extensive insurance cover in accordance with Institute Cargo Clauses (A) or a comparable clause, rather than the more restricted cover under Institute Cargo Clauses (C). However, the parties remain free to agree on a lower level of cover (Schroeter, 2022: 1753).

4.5 DAP – Delivered at Place

Incoterms D-terms may be compared with Art. 69(2) CISG, which states that when the buyer is required to take delivery of the goods at a place other than the seller's place of business, the risk passes when delivery is due and the buyer is aware that the goods have been placed at its disposal at that location. In a case involving an

Austrian seller and a Bulgarian buyer, the seller was obliged under Incoterm DAF (Delivery At Frontier, now incorporated into DAP) to deliver the goods at the Austrian–Hungarian border. The Tribunal relied on Art. 69 CISG to decide that the seller had neither delivered the goods nor placed them at the buyer's disposal, with the consequence that risk had not passed. Accordingly, the buyer was not held liable for damage to the goods caused by their prolonged storage in a warehouse (*CLOUT case no. 104*, 1993, International Chamber of Commerce, International Court of Arbitration).

The key difference from the previously examined Incoterms rules is that delivery and destination under Incoterms DAP term take place at the same time. Consequently, the seller bears all risks associated with transportation of the goods to the designated place of destination or to the agreed point within that place (Schroeter, 2022: 1758). If the parties agree on DAP Adolfo Suarez Madrid-Barajas Airport Spain, Incoterms 2020, this stands as the place of delivery and destination of the goods, where the risk transfers from the seller to the buyer. Responsibility for unloading the goods from the aircraft, as well as any import formalities, rest with the buyer, who bears all related risks and costs (Bustamante, 2025).

4.6 DPU – Delivered at Place Unloaded

Pursuant to Incoterms DPU term, all risks relating to the carriage and unloading of the goods at the named place of destination are assumed by the seller. Similar to the Incoterms DAP term, 'delivery' and 'destination' refer to the same concept. It needs to be stressed that this is the only Incoterms rule which stipulates that the seller needs to unload the goods at destination. If the parties do not wish the seller to assume the risk and cost of unloading the goods, DPU should be avoided and replaced with DAP term (Schroeter, 2022: 1762).

In relation to export and import clearance, DPU obliges the seller to clear the goods for export where applicable, but imposes no duty to clear the goods for import, to manage transit through third countries after delivery, to pay import duties, or to perform import customs formalities. The question is, who bears the risk of any loss when the goods are held up due to the lack of import clearance? In such cases, the buyer bears the risk of any resulting loss or damage, since delivery has not yet occurred and, pursuant to risk remains with the buyer until transit to a named inland point can resume. Should the parties wish to allocate import clearance obligations

to the seller, including payment of duties and completion of customs formalities, they may opt for DDP term (Schroeter, 2022: 1762-1763).

4.7 DDP – Delivered Duty Paid

In contrast to Incoterms EXW, DDP entails an opposite allocation of responsibilities, risks and costs. Before choosing this rule to govern certain aspects of the contractual obligations, the parties must be aware that Incoterms impose on the seller the maximum level of obligation of all eleven rules listed in it (Schroeter, 2022: 1767). The seller assumes all risks associated with transportation of the goods to the named place of destination or to the agreed point within that location. Under DDP, delivery and destination are identical (Schroeter, 2022: 1766). Therefore, the seller fulfills its delivery obligation by making the goods available to the buyer at the destination. For DAP and DDP, the seller delivers the goods without unloading them, whereas under DPU the seller must unload the goods (Kranjc, 2006: 314).
The risk passes to the buyer when the goods are in its disposal at the destination. It has no obligations and bears no costs in connection to loss or damage to the goods. In instances when the seller does not fulfill its obligations under the sales contract, the buyer may insist on performance of the contract or avoid the contract due to seller's non-performance (Kranjc, 2006: 315).

4.8 FAS – Free Alongside Ship

According to Incoterms FAS rule, the seller is obliged to deliver the goods either by placing them alongside the vessel selected by the buyer at the loading point in the named port of shipment or by procuring the goods so delivered (Schroeter, 2022: 1771). This rule applies only to sea or inland waterway transport where the parties intend delivery by placing the goods alongside a vessel. Accordingly, FAS is not suitable where the goods are handed over to the carrier before being placed alongside the vessel, such as when the goods are handed over to a carrier at a container terminal. In such cases, the parties should consider using the FCA term instead (Schroeter, 2022: 1770).
The buyer assumes all risks of loss or damage to the goods from the moment they are delivered alongside the ship. It can be derived from the term that the buyer must nominate the carrier and pay freight, cover loading costs at the port and handle any import clearances and any equired transit customs (Bustamante, 2025). Where the buyer fails to give notice in accordance with the location where the goods need to

be delivered or where the nominated vessel fails to arrive in time in order for the seller to comply with its obligations, fails to take them, or closes for cargo earlier than notified. The buyer shall bear the risk from the agreed date, or if no such date has been agreed, from the date chosen under the contract or otherwise from the expiry of the agreed delivery period, provided that the goods are clearly identified as the contract goods (Schroeter, 2022: 1772).

4.9 FOB – Free on Board

To briefly outline, in contracts involving the carriage of goods by sea, the revisions introduced in Incoterms 2010 and retained in Incoterms 2020 indicate that the seller bears the risk until the goods are successfully loaded onto the vessel. Under the CIF, FOB, and CFR terms, the relevant A2 and A3 clauses no longer link the transfer of risk to the moment the goods pass the ship's rail, but instead to the point at which they are placed on board the vessel. An exception applies to FAS, where delivery is completed once the goods are placed alongside the ship, as reflected in the term itself. Accordingly, in maritime contracts, it should be presumed that, for the purposes of Art. 67(1) CISG, the goods are handed over when they are placed on board the vessel, without requiring their placement within the ship's hold (Hachem, 2022: 1203).

FOB stipulates that the seller is obligated to deliver the goods to the buyer on board the vessel chosen by it at the named port of shipment or by procuring goods that have already been so delivered. From that point, risk of loss or damage to the goods transfers to the buyer, who also bears all costs (Schroeter, 2022: 1775). If the seller is unable to load the goods on board at the specified time due to no vessel being available, and the nominated ship is delayed by days or even weeks, the buyer bears the risk and cost of storage at the port until the vessel is available (Bustamante, 2025). This rule is intended for sea or inland waterway transport where the delivery is made by loading the goods onto a vessel. It is not appropriate in situations where the goods are handed over to a carrier before loading. In such instances, FCA should be applied instead. Regarding the parties' obligations under FOB, the seller is responsible for export clearance where required, while the buyer is responsible for import clearance, transit through third countries, to pay for any import duty or handle any import customs formalities (Schroeter, 2022: 1775).

In practice, when dealing with containerized goods, the seller usually delivers them to the container terminal and not on board the vessel. Since containers may remain at the terminal for several days before loading, FCA is generally more suitable option (Bustamante: 2025).

4.10 CFR – Cost and Freight

Incoterms CFR term states that risk passes to the buyer once the goods are loaded onto the vessel, or by procuring the goods already so delivered, meaning the seller fulfills its obligations even if the goods do not arrive in proper condition, in the agreed quality, or at all (Xianwei, 2024). In both situations presented, the seller is required to deliver the goods on the specified date or within the agreed timeframe, in accordance with the usual practices of the port (International Chamber of Commerce, 2020: 128). This rule applies only to goods transported by sea or inland waterway. It is suitable when the goods under the contract do not need to be secured by extensive insurance and the seller can load them directly onto the vessel. This is usually the case with bulk cargo, raw material, or non-containerized goods. Under CFR, the seller can limit its transport risks, whereas the buyer gains greater control over the shipment and lower costs (Xianwei, 2024). Given that the seller is not obligated to secure any insurance cover, the buyer should nevertheless purchase some cover for itself (Schroeter, 2022: 1779).

4.11 CIF – Cost, Insurance and Freight

Pursuant to Incoterms CIF term, the seller must deliver the goods to the buyer on board the vessel or procure the goods already so delivered. The risk passes to the buyer when the goods are placed on board the vessel, meaning the seller's obligation to deliver is fulfilled even if the goods do not actually arrive at their destination intact, in full, or fail to arrive altogether (Schroeter, 2022: 1783).

The rule involves both a port of shipment and a port of destination of the goods. It is crucial to distinguish that risk passes from the seller to the buyer once the goods are delivered to it by placing them on board at the shipment port or are procured already in that state. Nevertheless, the seller must still arrange carriage of the goods to the stipulated destination. For instance, goods placed on board a vessel in a port in Shanghai for carriage to a port in Southampton are considered delivered in Shanghai, with risk passing to the buyer at that location. Still, the seller must contract for carriage from Shanghai to Southampton (Schroeter, 2022: 1784).

CIF imposes nearly the same obligations on both parties as CFR. Similar to CFR, CIF is intended for sea and inland waterway transport and is appropriate when the seller can load goods directly onto the ship, such as bulk cargo or non-containerized raw materials. The key distinction between the rules is that, unlike CFR, CIF requires the seller to arrange insurance on the buyer's behalf to cover the risk of loss or damage to the goods during transit from the port of shipment to the port of destination. Thus, the buyer may opt for CFR if it is more acquainted with local insurance practice and can obtain insurance cover at lower premiums (Xianwei, 2024).

5 Comparison between the CISG and Incoterms rules 2020 regarding passing of risk

In international trade, the point at which risk passes from the seller to the buyer is of crucial importance. CISG establishes a set of default rules regulating this matter, primarily in Arts. 66-70 CISG, while on the other hand, Incoterms provide eleven commercially developed standards that parties incorporate into their contracts. Assessing how these two legal instruments complement each other and differ from one another clarifies their application for the international contracts for the sale of goods.

An examination of CISG and Incoterms demonstrates a number of differences in their approach to the passing of risk. Specifically, Incoterm's definition of the term place of 'delivery' is comparable to the place of 'handing over' the goods under Art. 67(1) CISG, often linking it to the physical loading of goods onto a means of transport. CISG stipulates additional requirements regarding conformity, meaning that the goods must conform to the contract. With regard to the timing of the passing of risk, CISG adopts a different approach from commonly used Incoterms such as FCA, FOB, and CIF in contracts involving carriage, primarily due to differing concepts of delivery. Under Incoterms, passing of risk is generally linked to the loading of goods onto a vessel, whereas CISG ties it to the handling over the goods to a carrier. By incorporating Incoterms to the contract, the parties exclude CISG for the issue of passing of risk, thereby altering the point of 'handing over' the goods. This means that by including them, strict identification of the goods as stipulated under Art. 67(2) CISG is not required or is at least diminished. Furthermore, what differs between the rules provided under CISG and Incoterms is

the relation between the passing of risk and other elements of the sales contract. This includes the place of performance, definition of non-delivery, and breach of contract. Specifically, under Incoterms, 'delivery' triggers the transfer of risk, but does not strictly coincide with the place where the seller must perform its delivery obligation under CISG. However, it is true, that this may not even be the same place under CISG itself. As established above, Incoterms deal only with specific aspects of the contractual relationship regarding allocation of obligations, risks, and costs of the seller and the buyer. Moreover, they do not govern the consequences of a non-conforming delivery to the passing of risk, whereas on the other hand, CISG addresses the effects of a breach harmoniously in line with the rules of transfer of risk. For instance, Art. 70 CISG regulates the passing of risk and the buyer's remedies that are available to it in cases of a fundamental breach. It must be noted that Incoterms are therefore not sufficiently comprehensive regarding the passing of risk, making the supplementation of CISG's provision necessary. As noted by Piltz, Incoterms were supplemented by national law, but are not effectively complemented by uniform sales law rules. This remains necessary, as Incoterms regulate only specific obligations of both parties, and do not provide detailed provisions on the time of delivery or the buyer's obligation to pay for the goods. They do not address potential exceptions to the parties' duties, nor do they govern contract formation or even consequences of non-performance (Erauw, 2004: 304-306). This can be solved through the inherent connection between the chosen trade terms and the rules governing the breach. Consequences of such breaches are determined by the applicable law, if the parties have not agreed otherwise (Coetzee, 2013: 17).

In addition, Incoterms do not embody any terms similar to Arts. 66, 70 CISG. As mentioned, Incoterms do not relate to the concept of delivery with the requirement of conformity of the goods. As a result, discrepancies between the results under Incoterms and CISG are possible. Even though risk may appear to have passed to the buyer under Incoterms, the seller may still be in breach of contract under CISG, with the consequence that the risk remains with it (Erauw, 2004: 305-306).

By contrast, Incoterms may supplement CISG's provisions where they remain silent. CISG does not regulate cases where the buyer fails to provide necessary carriage instructions or does not cooperate within the delivery process. With the exception of Art. 69(1) CISG, which governs the passing of risk when the buyer fails to take delivery, such failures are generally treated as breaches of contract (Coetzee, 2013: 19). Under Art. B3 of Incoterms 2020, earlier transfer of risk is possible where the buyer fails to assist the seller as stipulated under Arts. B7 or B10 Incoterms. This

concept serves as a stronger and practical incentive for the buyer's cooperation than traditional remedies for breach.

Art. 60 CISG outlines the buyer's obligation to cooperate in delivery in order to enable the seller to fulfill it. Incoterms serve to concretize these obligations. Namely, Arts. A7, B7 Incoterms of every term impose duties regarding export and import licenses, official authorizations, security clearances and custom formalities. Furthermore, Art. B5 Incoterms of the CPT, CIP and CIF terms require that the buyer must provide the seller with the information to obtain insurance policy or to procure additional insurance requested by the buyer. Similarly, Art 32(3) CISG stipulates that the seller needs to provide the buyer with all information necessary for insurance where needed. In connection to this, Arts. A10, B10 of every Incoterms rule state that both parties should aid in obtaining documents and information necessary for export or import of goods.

Listed examples provide an insight to cases where interplay of CISG and Incoterms may take place. Both legal instruments can operate together as complementary frameworks. This may be possible, as each addresses gaps left by the other, and their interplay ultimately strengthens and harmonizes regulation of international commercial law (Coetzee, 2013: 21).

6 Conclusion

As the analysis of this article shows, CISG and Incoterms constitute an important framework for regulating international sales transactions. They both display contractual freedom, enabling the parties to adjust the terms to their demands in an evolving global trade. This is paramount for addressing challenges posed by new practices and evolving technology in the international sale of goods.

CISG applies to the contracts of sale of goods that comply with the internationality requirement stipulated in its Art. 1. It is applicable by default, unless the parties expressly exclude its application. In contrast, the applicability of Incoterms depends entirely on contractual incorporation, whether through an explicit reference by the parties or because the relevant terms can be established as a usage or established practice between them. When used, they prevail over CISG's provisions on delivery and passing of risk. This means that Incoterms do not override all of the provisions set out in CISG, and function as contractual tools. As such, both instruments work in tandem, which can be seen from the fact that courts and tribunals use Incoterms

and CISG as complementary sources to solve disputes between the parties under international contracts for the sale of goods.

Regarding the practical issues with risk and delivery of the goods, Incoterms generally connect risk transfer to logistical events, such as delivery to a carrier, loading on board a vessel, or arrival at the agreed destination. CISG approaches risk through legal criteria, including identification of goods to the contract and transfer to the first carrier. When those elements do not coincide, disputes are almost inevitable. As outlined above, different situations may arise. For instance, goods may be loaded in line with a specific Incoterms rule, while the documents identifying them to the contract remain incomplete. Or another example, goods are handed over to a carrier even though Incoterms rule is poorly drafted. Insurance is arranged, thinking that the risk had already passed, when legally it has not, etc. These problems occur when the parties fail to specify clearly which rules govern the contract. When courts or tribunals deal with this kind of issues, it is not on them to rewrite or redefine the obligations of the contractual parties. They merely interpret the clauses to which the parties actually agreed in line with the rules and mechanism available under Arts. 8, 9 CISG.

Even though CISG's rules on passing of risk lack clarity in some aspects, it should be noted that CISG represents an important step in overcoming differences in national legal systems and influenced the development in international trade of goods. It serves as a consensus and compromise, balancing different national approaches to contract and sales law. By relying on Incoterms, it enhances practical reach of uniform law. When Incoterms are incorporated into a contract governed by CISG, they can help define the allocation of risk, clearly outlining the responsibilities of the parties. In matters where Incoterms remain silent, CISG provides legal framework for addressing and resolving disputed in instances of non-performance by one of the parties (Karibi-Boyote, Enwukwe, Amiesimaka, 2022: 104-105).

The most effective way to avoid disputes between the use of CISG and Incoterms is to establish a clear hierarchy and allocation of obligations under both rules. The contract in question should address the use of CISG expressly or exclude it, include the use of specific Incoterms rules, specifying the relevant term, the named place, and edition of the Incoterms. The parties should clearly define which matters are governed by each regime. Doing so preserves the integrity of both systems, prevents unnecessary overlap and ambiguity, and reduces uncertainty in the day-to-day delivery process, allowing commercial, financial, and operational teams to work efficiently and with clarity as to when risk transfers. All in all, even though merchants

would be more likely to prefer Incoterm, this does not diminish the CISG's importance. Both can be seen as coexisting and contribute to the unified international commercial law (Coetzee, 2013: 21; Schwenzer, I., Kee, C., 2011: 447).

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Povzetek članka v slovenskem jeziku (abstract in Slovene language):

Članek obravnava razmerje med CISG in Incoterms kot ključnima instrumentoma mednarodne prodaje blaga. Oba odražata avtonomijo strank, saj omogočata prilagoditev pogodbenih določb potrebam konkretnega razmerja in zahtevam sodobne svetovne trgovine. CISG se na podlagi 1. člena CISG uporablja za mednarodne prodajne pogodbe, razen če je izrecno izključen, Incoterms pa veljajo, kadar se stranki nanje sklicujeta izrecno ali molče. Avtorica analizira njuno razmerje in medsebojni vpliv ter poudarja, da Incoterms CISG ne nadomeščajo, temveč ga dopolnjujejo, zlasti glede izročitve in prehoda nevarnosti naključnega uničenja, izgube ali poškodovanja blaga s prodajalca na kupca. Ker Incoterms prehod nevarnosti vežejo na logistične dogodke, CISG pa na pravna merila, lahko nejasne pogodbene določbe povzročijo spore. V takih primerih sodišča določbe in namen strank razlagajo v skladu z 8. in 9. členom CISG. Avtorica poudarja, da CISG kljub nekaterim dvoumnim ali splošnim določbam o prenosu rizika ostaja pomemben

dosežek na področju harmonizacije mednarodne prodaje blaga. Skupaj z Incoterms zagotavlja učinkovitejši okvir za presojo tveganj in odgovornosti. Stranke naj v izogib nejasnostim in morebitnim sporom pogodbe oblikujejo jasno in določno ter natančno opredelijo uporabo klavzul Incoterms in obveznosti po CISG.