

## CISG ARTICLES 66-70: THE RISK OF LOSS AND PASSING IT

*Johan Erauw\**

### I. INTRODUCTION

The CISG Articles 31 to 34, on the one hand, and 66 to 70, on the other, are related. When the seller performs in accordance with the contract of sale, the risk passes.

The discussion of Articles 66 to 70 of the Convention requires examination of several other articles of the CISG, because the notion of risk is central to the relationship between the two parties. For example, we must look at the risk the seller runs when preparing to make a conforming delivery—in particular, the mechanism whereby the risk may be rerouted back to the seller under Articles 70 and 82(2) and then may pass again to the buyer thanks to a new delivery in which the non-conformity was remedied.

A number of judicial decisions have indicated aspects of “the loss or damage” intended by Article 66 CISG as falling under the risk that passes. Courts have added elements that can not be understood as harm to the goods, such as delay in delivery after the handing over to the carrier, which will briefly be discussed.

The effect of the sales agreement on the property in the goods sold is not covered by the CISG Article 4. In case a national law would, in its sales law, make the link to the property title, this would be superseded by the CISG, where ownership is not the key to where the risk is allocated.

The parties may deviate by agreement from the default risk allocation (Article 6). An Incoterm may have been used or the applicable standard contract terms may bring about another partitioning. The parties’ intention is to be sought; which leads us to issues of interpretation. Beyond that, party practices and sectorial trade usages intervene to determine whether risk has

---

\* Johan Erauw is a professor of law at the University of Ghent, Belgium, where he is Director of the Institute for Private International Law. He is an adjunct professor at American University, Washington College of Law, Washington DC. He is an attorney at the bar; active in international commercial arbitration. He practiced business law as corporate legal counsel for seven years and is active in international licensing of technology for the Ghent University. He was advisor to the Belgian Ministry of Justice for the drafting of a code of private international law and was legal counsel to the International Trade Centre of Geneva (of WTO and UNCTAD) on licensing contracts for developing countries.

passed, or when this occurs. In this conference, the paper and the presentation of Jan Ramberg focused on those variations that come with the use of Incoterms. The burden of proof with regard to risk transfer is often connected to the problem of proving the performance of seller's obligation and the timing of this performance. But once the goods were delivered, it would be the buyer's task to prove that they were defective at that point in time.

Risk may, in the eventuality of the termination of the purchase agreement in a stage after the first passing of risk, revert back from the buyer to the seller; then this is covered by Articles 81 to 84 concerning the effects of avoidance and the manner in which restitution needs to be done.

## II. WHICH RISKS ARE TRANSFERRED TO THE BUYER?

### A. *Loss or Damage as in Physical Loss and Deterioration*

The CISG contains no definition of the types of risks covered by the rules on transfer of risk, thus leaving uncertainty. First, one must look at the risks that fall within the scope of the convention.<sup>1</sup> The Draft UNCITRAL Digest offers illustrations of this notion.<sup>2</sup> The wording used in the CISG is "loss or damage" (Articles 66 and 68) or "goods (that) have perished or deteriorated" (Article 82(2)(b)). Physical risks to the goods, including their entire destruction, are covered by the concept of "loss."<sup>3</sup>

Disappearance of the goods, including theft, misplacing the goods, their transfer to a wrong address or person, and mixing up the goods with other goods are included. That is a broad notion that encompasses:

- occurrences in transporting the goods from one party to the other;
- in handling and storage, including the risk of natural processes leading to a decline in quality (resulting from whichever cause, like lack of care, bad packaging or from melting, thawing, shrinking, loss of weight or of strength or taste, or appearance).

---

1. For example, the liability of the seller for death or personal injury is beyond the scope: CISG art. 5. In complex agreements a part concerning services may entail a certain risk in conjunction with a sale but not governed by CISG.

2. I have made more detailed comments in *THE DRAFT UNCITRAL DIGEST AND BEYOND: CASES, ANALYSIS AND UNRESOLVED ISSUES IN THE U.N. SALES CONVENTION 293 et seq.* (Franco Ferrari et al. eds., 2004) [hereinafter *DRAFT DIGEST*].

3. On a positive note: the benefit of acquiring any fruits, by-products or offspring of the goods (e.g. the right to the foal of a mare), passes together with the risk. See BARRY NICHOLAS, *AN INTRODUCTION TO ROMAN LAW* 180 (1962).

Risk of physical loss or deterioration also encompasses the risk of other persons causing damage to the goods. One must also assess the amount of compensation that will be due as a result of the risk. This might include, besides the goods, the cost of repackaging. The expense of handling, replacing and moving the goods needs to be counted.

The risk of loss of documents relating to the goods, in my opinion, passes together with the risk for the goods; and the risk-of-loss rules of the Convention apply as easily to documents as to goods. The time and place to hand over documents normally are the same as for goods (Article 34), but the Digest indicates that absent agreement, the delivery of documents may be expected just in time for their use, for taking delivery of the goods or for their import. Thus, if the documents are lost before they are delivered, the risk should or could be treated similarly as for goods. Remedies for non-conforming delivery of documents may, rather more exceptionally—says the Digest—include avoidance, which would stop risk relating to those documents from passing.

It is uncertain whether *legal risk* passes together with physical risk. Such risk comprises the chance that an authority will intervene, confiscate, or forbid the possession, intended use or further commercial exploitation of the goods. It is the risk that, through operation of the law, a party would be deprived of the right to make valuable use of the goods. I think, those risks are also to be allocated along the lines of the rules that I will discuss. It is true, that the wording of the CISG seems to exclude the literal application of its risk-of-loss rules to legal risk. Risks as to obtaining customs clearance for export and receiving import permission or customs quotas are indeed included in the agreement via the use of an Incoterm. But if the parties have not adopted a trade term to deal with those risks, they might be treated under the Convention's risk-of-loss rules.

The loss of the buyer who bears risk of loss *is limited* to the price paid or still to be paid (see the comment *infra* on Article 66). If there was also a breach on the seller's part, then the buyer's loss may be reduced (see the comment *infra* on Article 70).<sup>4</sup>

Delay in delivery (which might occur in combination with a deterioration in the quality of the goods) can constitute a breach of contract that prevents risk from passing. The possibility of delayed delivery may seem like an aspect of "legal risk," but it is not the same—it is a risk associated with contracting

---

4. Thus if the seller has breached, there may be a partial return of the goods for lack of "delivery," and speaking in terms of risk there will be less to compensate.

to perform by a particular date, and nonperformance by the date is simply a breach of contract. The same comments apply, *mutatis mutandis* to delivery at the wrong place.

*B. Economic Risk is Not Part of this Risk Passing to the Buyer*

Economic risk has to do with the fluctuation of the value of goods on the market. At the time of a conclusion of a sale, the price is fixed (or is determinable) in the currency of account. The market price of the goods, as well as the currency exchange rate, could thereafter fluctuate. Later fluctuations of the market price bring advantage either to the seller (when there is an intermediate drop in price) or to the buyer (if a price increase occurred). The terms of Articles 66 to 70 do not treat the issue of fluctuation in market price, or of exchange-rate fluctuation. I would say the risk of these events passes at the time of the valid conclusion of the agreement.

The identity of the creator of a work of art or an antique, is part of the authenticity of the good, and is as such in my view, at most an economic risk which, in the circumstances of this case, did not pass to the buyer.<sup>5</sup>

*C. Contractual Risk: Seller is Liable for Lack of Conformity—Buyer is Liable to Pay the Price*

The CISG only explicitly treats the “passing” of risk. It logically leaves us to put the risk with the seller before it passes, and subsequently with the buyer after it passes. Before a contract is concluded, all risk including legal, economic and physical risk, lies with the seller.

Perhaps the most important risk has to do with the kind of obligations a party takes on, as a result of the contract negotiations. Thus, there is the risk of non-satisfactory performance (as in choosing your business partner—insolvency, incompetence, etc.). That can be called the contractual risk, and it applies to both the buyer and seller. The CISG imposes on the seller an obligation to make a conforming delivery, generally measured as of the time the risk passes (Articles 35 to 37). That should suffice, because the

---

5. The DRAFT DIGEST describes a case in which a painting represented at the time of sale to be the work of a famous artist was later shown to be misattributed. The court, invoking Articles 69(1) and 36(1), dismissed the buyer's claim because, at the time of delivery, there were no indications that the artist was not the painter. That seems incorrect. The case points to non-conforming delivery, for which the seller should be liable. Delivering a wrongly attributed painting may be attacked under the national law governing misrepresentation or error in substance because such rules are matters of validity.

Convention is oriented towards contractual provisions and offers what the crucial performance phase of the transaction requires—namely detail as to the obligations imposed for a legally effective “delivery”—the “handing over” of the right thing. The buyer will, in exchange, have to pay good money.

The different possible deficiencies on the point of conformity are mentioned in Article 35. If there was lack of conformity at the time that risk normally passes to the buyer, seller’s “liability” for that breach does not pass to the buyer (Article 36). The rule of breach trumps the passing of risk.<sup>6</sup> Article 70 addresses the topic of the relationship between risk passing and fundamental breach occurring.

The risk of loss or deterioration of the goods covers the buyer’s risk of having to pay the price for what is either entirely not there or is not there in its full value. This price risk—the obligation to pay notwithstanding the loss or reduced value—is a negative way of defining the risk that undoubtedly does pass to the buyer. Article 66 describes the effect of this “passing,” and specifically formulates this in terms of the CISG’s choice not to discharge the buyer of his as-yet-unperformed obligation.

There may also be risk arising from the way the parties structure their legal relationship. For example, part of the risk associated with a non-conforming delivery involves the costs of transporting and insuring during transport, as well as the costs of handling and storage. Depending on what the buyer paid to the seller for the goods, which may include the cost of those services, the seller may lose that value because getting a replacement product delivered at the same place will impose costs again. These costs will be higher if the goods were to be delivered at or close to the buyer’s establishment. This risk looks to be decided by the agreement and by price negotiations. Those transport costs are a matter of contractual risks even if they were not included in the product price and needed to be contracted out to other entities. If the parties have by agreement added other financial consequences to the delivery of non-conforming goods, such as a penalty clause (which is not expressly addressed in the Convention), the contractual risk for the seller is greater.

---

6. The remedies for material defects can be cut-off (CISG Articles 38 and 39); so risk for breach can indeed effectively pass, at the deadline for giving notice of lack of conformity indicated by Article 39 (which must be read in conjunction with CISG Articles 40 and 44). See also the discussion of Article 70.

#### *D. Damage Caused by the Goods Themselves*

The risk of loss for goods sold under a sales contract is altogether different from the risk of damage later caused by the goods sold. The sold goods can deteriorate and can damage persons or other property or can in turn also disturb processes, by their failure. This other damage raises issues of contractual or tortious liability between buyer and seller, or tortious liability vis-à-vis third parties who suffer damage to their property or economic loss. With respect to contractual liability between buyer and seller, recovery for this damage is exclusively based on breach of contract (lack of conformity) and the damages fall under Article 74—the article that orders full compensation for broadly defined losses. A seller’s liability for such damages would be based on a breach by delivery of non-conforming goods even though the damage caused, shown to be within the chain of causality, might occur after the time of delivery (Article 36(2)). The appearance of such damage, of course, could be the first indication that something was wrong with the goods all along. This risk for this damage also passes to the buyer when the delivery is duly made or when the deadline for notice of non-conformity under Article 39 (see also Articles 40 and 44) runs out.

Claims under tort law, of course, are beyond the scope of the CISG and outside the possible extensions of its principles by way of gap-filling (Article 7(2)). But even contractual liability for damage caused to other property of the buyer cannot be simply identified with or subsumed under the rubric of passing of risk. The Convention’s risk-of-loss rules clearly limit their ambit to loss or damage to “the goods” (i.e., the goods sold) or “in respect of goods sold.”

### III. CONSEQUENCES OF THE PASSING OF RISK (ARTICLE 66)

#### *A. Price-Risk: The Buyer Must Pay the Price Despite Loss or Damage to the Goods*

Article 66 says that once risk has passed, the buyer has the price-risk. The article, in a sense, repeats or reaffirms Article 53, which imposes the payment obligation on the buyer. The buyer acquires the price-risk at the moment the seller is divested of the risk of loss. The rule of Article 66 is contractual by nature and relates to the performance of the buyer’s obligation to pay (Article 53). The payment obligation applies subject to Article 58,

which establishes the time of payment and which, for example, usually permits a buyer to first examine the goods (Article 58(3)).

Before the risk with regard to goods passes and in order to assure conforming delivery, the seller must procure the goods, must preserve them, repair them if necessary and duly bring them to the point of delivery; and if they are lost or undergo accidental damage during this process, he must resupply them because his obligation remains.

If the risk is still with the seller and loss occurs due to an impediment not within the seller's control (*force majeure*), then the loss is the seller's. But the seller's risk of being liable for the buyer's damages beyond the value of the goods is alleviated by Article 79.

If loss or damage to goods occurs after the parties have performed their obligations and while the goods are under the control of the buyer, the rule that the buyer loses the value is self-evident. This reflects the economic risk after purchase, a matter beyond the scope of the Convention. Once risk of loss has passed, the buyer has the price-risk, meaning the buyer must pay even though the goods in his possession are damaged or lost. Article 66 so states, but the same article also introduces the possibility of passing the performance-risk back to the seller if the loss or damage is due to the seller's "act or omission"<sup>7</sup> (see further Article 70 for the distinctive cases of breach by the seller). Thus, the seller may find its obligations to care, to repair and eventually to redeliver, all reborn again—with no clear time limit and under a vague standard.

Article 66 also covers damage or loss occurring after the passing of risk, but flowing from old defects that existed before the passing of the risk (see also, in this regard, Article 36(2)). Article 66 indeed contemplates that there may have been a breach by the seller. In that case, the rules on non-conforming delivery specify the consequences of such a breach. Article 66 only reminds us that the buyer must pay the price. The provision explains that the buyer enjoys no automatic exceptions and finds no automatic liberation from his payment obligation because of loss or damage occurring after risk of loss has passed. It could be held to influence buyer's possible use of the remedy of Article 71(1) and its *exceptio non adimpleti contractus* (recognized in Article 80). However, if the seller has committed a fundamental breach, this could be seen as punishment for the buyer. Article 66 looks like it

---

7. But what does it mean that the seller bears the risk of loss or damage due to its "act or omission?" The text of Article 66 requires clarification; this was asked in the diplomatic conference for the preparation of CISG, but not given. Previously Article 96 of the ULIS, which became CISG Article 66, was criticized.

introduces a principle of “pay first, discuss later.” The rule simply imposes the burden of proof on the buyer regarding his eventual claims for compensation.

*B. Risk Can Stay With or Return to the Seller Due to the Seller’s Act or Omission*

There is, furthermore, mitigation to the strictness of the rule of Article 66. This relief comes not from Article 70, because that deals with the effect of a seller’s fundamental breach—a matter beyond the scope of Article 66. Rather, the relief comes from the last words of Article 66, providing that the buyer is discharged from its price obligation in case “the loss or damage is due to an act or omission of the seller.” The first appearance of that phrase in the ULIS had brought surprise. It introduced something like a possible right of set-off for a tort the seller may have committed. That would be odd under the Convention, because both tort and set-off fall outside the scope of the CISG. But the vague wording seems to introduce the fault concept into the Convention’s treatment of mutual contractual obligations.

The final CISG text refers only to the seller’s own actions, and mentions the seller’s “omission” suggesting that the CISG exception merely covers—with quaint phrasing—the possibility that a seller’s breach of contract has caused the particular damage or this particular loss.

When the exception applies, presumably, the buyer’s obligation to pay the whole price or to pay part of it is postponed or even waived, and the obligations of the seller are reborn in part or entirely. It is conceivable, in this situation, that neither of the parties carries the risk. But taking a dynamic view of the “passing” of risk, it looks more logical to decide that risk simply stayed with the seller. If the seller were to cure or to replace the lost or damaged goods with substitute goods, then the obligation to pay the price would be back on the buyer.

The exception in the last words in Article 66 can be interpreted broadly or narrowly. The drafting literally allows the buyer to suspend or withhold payment for a variety of reasons connected to the behavior of the seller. In any case, it is a disturbing exception. It will be especially interesting to see whether the exception will be applied if the parties choose to use Incoterms—where the effect would again be to offer an equitable exception to the passing of price-risk.



#### IV. STRUCTURE OF THE CISG DISPOSITIONS REGARDING RISK

##### *A. Mostly Carriage Will be Involved*

Chapter IV of Part III of the CISG (Articles 66 to 70) determines the place where risk passes. It provides different rules depending on whether the sales agreement involves the carriage of the goods (Article 67), whether the sale relates to goods in transit (Article 68), or whether the transaction does not fit into the prior two categories (Article 69).

The distinctions controlling which rule applies are not clear to all, as the Draft Digest illustrates. In international sales, presumably, the large majority of transactions will involve carriage, so that Article 67 will usually be applicable. Professor Honnold intimated that sales not involving carriage were typically domestic, or were otherwise the unusual case where one may presume the seller had its own trucks for distribution. Article 67 should indeed apply whenever the goods are to be handed over to an independent carrier, including to a forwarding agent.

The Digest asserts that if the contract is silent about carriage, Article 69 rather than Article 67 will govern. The question whether the contract “involves carriage of the goods” so that Article 67 applies, turns on the parties’ agreement. In one case, a contract provision requiring the buyer “to pick up” the goods and to “take the goods to” its facilities in another country was held to mean that the contract “involved carriage of the goods” and thus was governed by Article 67 where the contract also included an “FOB” delivery term.

In this paper, I will not expand on the cases where indeed carriage was agreed and where the terms of the agreement prevail, requiring at most a complementary role for the CISG.

##### *B. Agreements Between Parties—Diversity of Standard Terms and Interpretation*

Under Article 6 of the Convention, parties have freedom of contract and they may deviate from provisions of the CISG governing the passing of risk, or, for that matter, any aspect of risk.<sup>8</sup>

---

8. In a 1995 CIETAC-arbitration, a buyer of jasmine aldehyde from China warned the seller to keep the goods cool during transport to New York. The seller took insufficient care to assure a direct transport,

Trade terms typically dictate who takes the price-risk (economic risk) of providing carriage. In the language of Article 67, contracts including such a trade term generally “involve carriage” in the contract, but by employing a trade term they at least partly derogate from the CISG. They opt out of some aspects of the rules on passing of risk and, while involving carriage, they put the application of Article 67 in doubt. That makes the application of Article 67 not straightforward at all.

The use of commercial terms for shipping is pervasive. If parties consider carriage, they very often use Incoterms or a similar shorthand reference to usages in shipping. Besides Incoterms promulgated by the ICC in Paris, with support of the world business community<sup>9</sup> and besides terms with a broad geographical range of use, there are many *local* trade usages in particular localities or trades that relate to passage of risk.

The legal effect of Incoterms in an international sales contract are not discussed in this paper. The Draft Digest illustrates however, that there is a need to know how the CISG and Incoterms interact. Incoterms import entire standardized terms into the contract by way of incorporation. But the support on such contract-based rules is neither complete nor necessarily in harmony with the provisions of law of the international CISG.

Commercial partners have, in the past, been held to Incoterms on the basis of Article 9(1), even when their contract did not expressly refer to the Incoterms. I think an Incoterm can only be relied on when the parties make a clear reference to it. Incoterm rules are neither international usages nor usages that the parties “ought to have known”; they require a contractual reference or a usage between parties.

The true content and significance of the trade terms used in a particular sale are not always clear. There are differences in the definitions of the same trade term in the various sets of trade terms. Surely, many business people are not well aware of the precise meaning or legal content of such terms, and are not familiar with the divergences among them. Perhaps the framers of the

---

and during the vessel's stop-over excessive heat accumulated causing the goods to deteriorate. The contract included the term “CIF New York.” The tribunal found that, notwithstanding the CIF clause (under which the risk passes when goods cross the ship's rail) the parties had entered into a separate agreement relating to temperature risk. The tribunal found that the seller was responsible for the damage under Article 66 CISG. China International Economic and Trade Arbitration Commission [CIETAC], Peoples Republic of China, 23 Feb. 1995, available at <http://cisgw3.law.pace.edu/cases/950223c1.html>.

9. There were other terms promoted by CMEA (1968/1976) and those of the United Nations Economic Commission for Europe. Presently American law contains, in U.C.C. § 2-319 *et seq.*, several definitions of trade terms (such as “F.O.B.”) that are explicitly intended to cover the passing of risk. Under the revised version of U.C.C. Article 2 being considered, those definitions would be deleted.

ULIS and after them the UNCITRAL Commission that prepared the CISG should have promulgated their own shipping terms, but that was not practicable. The positive side is, that this leaves the business world the chance to develop terms freely and to adapt them to changing needs. The downside is that parties' true intentions in employing a trade term are often not clear.

Therefore, when the parties have used a trade term, an important problem of interpretation arises, for which we must look to Article 8(3). It provides that, in determining the intent of the parties, all circumstances shall be considered, including negotiations, practices between the parties, usages and any subsequent conduct of the parties.

A clear contract term prevails over the rules of the CISG. When parties to a sales agreement use a standard Incoterm, the exercise of their autonomy is both narrow and clear. This calls for the full incorporation into the agreement of the definition of the particular term as "codified" trade practice.

Where the parties have used a general trade term and have used it correctly, interpretation might still be necessary. If parties have made unclear references or used confusing terms, the applicable national law must be sought to fill in the gaps regarding the terms of delivery and the passing of risk. The national law so applicable may look to the Incoterms for guidance on the meaning of trade terms.

The possible discrepancies between the CISG and Incoterms are discussed by Jan Ramberg. A separate rule exists for goods sold in transit—which is too detailed a matter for this overview. That rule also requires a comparison with the use of Incoterms (Article 68).

*C. The Residual General Rule on the Passing of Risk—No Carriage Implied (Article 69)—Where Does the Buyer Take Over?*

Article 69 covers sales *not* "involving carriage" and not relating to goods sold in transit; it is thus the residual rule for passage of risk. This would cover cases where there is use of an Incoterm. In practice, this does not look like the standard international case. It seems to cover scenarios more associated with domestic sales. The analysis of situations covered by Article 69 may be of greater value, however, because the parties are less prone to make their own arrangements in these kinds of situations.

The only distinction made in Article 69, does not turn on the party's agreement or practices or on usage of trade—the distinction focuses on the place where the buyer is to "take over" the goods:

- at a place of business of the seller (which is the result under the default rule of Article 31(c) CISG if the parties' agreement does not specify a place of delivery), producing a situation governed by Article 69(1) or
- at a place that is not "a place of business of the seller," producing a situation governed by Article 69(2).

Under Article 69(1), risk passes when the buyer either takes over control of the goods or the buyer breaches by failing to take delivery while the goods were at his disposal. If Article 69(2) applies, risk passes when delivery is due and the buyer is aware that the goods are at his disposal.

At this point, one could compare a number of the approaches of domestic rules on passage of risk. Several systems exist and they often lead to very similar results. Risk can follow ownership in systems where ownership passes at time of agreement.<sup>10</sup> Alternatively, risk can be placed with the buyer, even though title only passes to the buyer at the time of taking over the goods.<sup>11</sup> Finally, risk can follow ownership in systems where ownership passes late—indeed at the time of taking over.<sup>12</sup> This is what the ULIS adopted and the CISG, in the main, maintains. As the typical international sale is over a distance, the Convention seeks to pass the risk when the goods effectively leave the control of the seller. The focus is on actions and facts, and not on legal abstractions like title. If in the international setting, title would pass in accordance with the law applicable to property, there would be no uniform results.

The chronology of the passing of risk under Article 69 is as follows:

- (a) When the goods are taken over by the buyer at the seller's place of business (Article 69(1), first part), risk passes even if this occurs before the date by which delivery is due.

---

10. *Res perit domino* is the rule in countries of the Code Civil. This approach is too disadvantageous for the buyer in a system where property passes at time of agreement. In classical Rome, there was no insurance and sellers needed incentive to deliver to risky, out-of-the-way places. Risk was therefore shifted to the buyer at an earlier time, thus forcing the far-off buyer to insure against loss and making him pay even when delivery failed. That explains how and why in Rome property and risk were disassociated. In the civil code, however, *title* and control pass at the time of agreement and the passing of risk stayed at that early time and became concomitant to the transfer of title, although there was no longer this same pressing social need to advantage the seller.

11. *Periculum est emptoris* reflecting Roman law, the law of Switzerland and the Netherlands, and commercial law of Spain.

12. This is the approach in Germany, the Scandinavian countries and (in part) Austria. Ernst Rabel, schooled in Germany, pushed this principle in ULIS in 1939. Transfer of property interests is beyond the scope of the CISG (Article 4(b)), but passing of risk is addressed in the Convention. Formulating the general contractual rule, thus in effect disassociates risk again, for many legal systems, from the property right.

- (b) In other cases, the key element for passing of risk is the goods being at the disposal of buyer (Article 69(2), and the second part of Article 69(1)).

This necessarily means they must be identified to the contract (Article 69(3)). There are different hypotheses:

First scenario: If the buyer is to take over the goods at the seller's place of business, but the buyer delays such taking over (Article 69(1)), risk passes when buyer is in breach for not taking delivery, provided the goods have been placed at the buyer's disposal. The provision does not explicitly require the seller to notify the buyer that the goods are available. But as Article 67(2) makes clear, identification of the goods often requires communication or notice. Furthermore the agreement between the parties may require such notice.

Second scenario: If the buyer is to take over the goods at a location other than a place of business of the seller (e.g., where the seller is to transport the goods to the buyer's plant), risk passes when "delivery is due and the buyer is aware of the fact that the goods are placed at his disposal at that place" (Article 69(2)). The risk shifts more readily when the place of delivery is not at a place of business of the seller. There are several reasons for this. First, the buyer knows the place. Second, it is likely that the buyer was notified or otherwise became aware of the availability of the goods. Thus, under Article 69(2), the risk passes independently of whether the buyer has breached its obligation to take over the goods. I think indeed, Article 69(2) covers some of the situations contemplated by Article 31(b)—i.e., when the parties have not agreed on a place of delivery of specific goods, goods to be drawn from a specific stock, or goods to be manufactured or produced, and when the contract was concluded the parties knew that the goods were located (or were to be manufactured or produced) at a location that was not a place of business of the seller.

Third possibility: When the parties did not agree on the delivery at a particular place other than the seller's place of business, the seller must place them at the disposal of the buyer—by virtue of Article 31(c)—at the seller's place of business as it existed at the time of conclusion of the contract. In this conference, Professor Ronald Brand discussed the matter of the place of delivery.

V. IF THE SELLER COMMITTED A FUNDAMENTAL BREACH—BUYER'S  
REMEDIES APPLY (ARTICLE 70)

As a rule, the conformity of delivered goods must be judged at the time of the passing of the risk. This was neatly formulated in Article 97(2) ULIS, the remote antecedent of Article 70 of the CISG. Under the CISG, conformity is governed by Articles 35 and 36. Under the latter provision, “conformity” is sometimes determined as of the passing of risk (Article 36(1)); in other cases, however, defects occurring after that stage will render goods non-conforming under Article 36(2).

What effect do the articles which determine how risk for loss or damage to the goods passes have on the buyer's remedies in cases of breach of contract by the seller? Article 70 declares that Articles 67 to 69 do not impair the remedies for the seller's fundamental breach. Thus, Article 70 allows the buyer to call on the remedies available in case the seller's breach was fundamental.

The buyer's remedies for fundamental breach with respect to delivered goods are: requiring delivery of substitute goods (Article 46(2)), asking repair (Article 46(3)), reducing the price (Article 50), avoiding the contract (Article 49(1)(a)) and claiming damages (Articles 74 to 77). If a buyer either avoids the contract or demands substitute goods, the original delivered goods are returned to the seller (Articles 81(2) and 82), hence the risk also goes back to the seller.

Given the consequences on the original delivery, if a buyer avoids the contract or successfully demands substitute goods, one understands the drastic effects of these remedies. The risk goes back to the seller retroactively. And depending on the remedy used, that might, for example, mean that a substitute good is due or the contract is avoided because the original delivery was non-conforming, but the first delivery has been lost or destroyed so that only damaged goods (or perhaps no goods at all) are returned to the seller. The CISG conditions the availability of the two remedies of avoidance and demanding substitute goods, on meeting the requirements of Article 82. But a buyer who has lost the right to use those two remedies under Article 82 still retains his right for all other remedies (Article 83). For example, damages may be requested. And a reduction of purchase price pursuant to Article 50, based on proven breach, may still be imposed, even after the goods have been destroyed. These are examples of claims by the buyer who still has the obligation to pay the price; such claims result in a set-off from the price, as was recognized in a German decision. When the buyer holds goods in his

possession while waiting for substitute goods or after avoiding the contract, the buyer does not bear risk, but does have an obligation to preserve the goods pursuant to Articles 86 to 88. The risk also does not pass to a buyer to whom the seller has communicated that he will remedy a non-conforming delivery of documents or of goods tendered before the date of maturity (Articles 34 and 37).