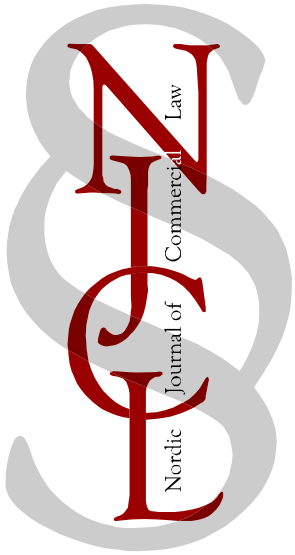

PASSING OF RISK IN INTERNATIONAL SALE CONTRACTS: A COMPARATIVE EXAMINATION OF THE RULES ON RISK UNDER THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (VIENNA 1980) AND INCOTERMS 2000

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Abstract

The allocation of risk is an issue which preoccupies equally both the seller and the buyer in an international sale contract, since it can affect the course and outcome of their transaction to a great extent. The rules on passing of risk answer the question of whether the buyer is obliged to pay the price for the goods even if they have been "accidentally" lost or damaged or whether the seller is entitled to claim their price. Because of its harsh and sometimes unfair consequences, the passing of risk forms a subject, which the parties specifically refer to in their contract in an attempt to avoid confusion and possible litigation. Owing to its importance, it could not be left out from the scope of one of the most successful attempts at unification of international sales law, which is the 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG). Analogous rules are included in the International Chamber of Commerce's standard trade terms, INCOTERMS, which are widely used by commercial men and companies around the world. The present study will commence, in the first chapter, with some remarks on the history and scope of the Vienna Convention and some thoughts on trade terms and INCOTERMS. It will also examine the notion of risk and the theories on its transfer, which have been formulated in different legal systems. Next, the second chapter will focus on the rules on risk allocation under the Vienna Convention and INCOTERMS 2000. The third chapter will concentrate on a thorough comparison between the two voices and an analysis of some intrinsic issues related to the transfer of risk, while making proposals for their most efficient settlement. Finally, the present study will conclude with an overall evaluation of the rules pertaining to risk allocation and a wish that soon satisfactory solutions will be found for the problems that trouble this area of law.

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This paper is dedicated *to my parents*, Anastasios and Anna, who always stand by me, for their encouragement and understanding.

2. Introduction

The concept of risk and which will be the party who bears it, is an issue of extreme importance, which preoccupies both parties in a contract of sale. The reason of its importance is its peculiar nature, which might lead to certain harsh and unfair effects and result in the buyer being obliged to pay the price for the goods, even if they have been lost or damaged by a cause irrelevant to the party's act or omission. Therefore, because of its nature and especially because of its consequences, normally the parties will make specific arrangements in their contract regulating the passing of risk, or make express or implied agreements on the application of standard trade terms. In the rarest case of no previous arrangement, then national laws or international conventions regulating the matter will apply. The main preoccupations of the parties are the time of passing of risk from the seller to the buyer and whether there would be any case where the consequences of the transfer of risk could be smoothed out, for example whether the party could claim any remedies for its loss despite the passing of risk.[1]

Nearly every national legal system includes rules on the passing of risk- similar rules appeared and formed a part of the Roman law of contract. Therefore, such an important chapter of sales law could not be left out of the scope of one of the most successful attempts to harmonise the law pertaining to international sale of goods, that is the United Nations Convention on Contracts for the International Sale of Goods,[2] adopted in Vienna in 1980. Furthermore, rules on the passing of risk have also been the subject of regulation in various international standard trade terms, which do not form a legal system but are rather popular among traders and businessmen due to their simplicity and lucidness. Perhaps the most popular are INCOTERMS (International Commercial Terms), which include rules on the distribution of the parties' duties, the division of costs and the allocation of risk.

The present study will examine the issue of the passing of risk in international sale contracts for the sale of movable goods, by making a comparative analysis of the rules pertaining to risk allocation under the Vienna Convention and INCOTERMS 2000. The first chapter will make an introductory reference to the history and scope of the Vienna Convention and will continue with some remarks on Trade Terms and INCOTERMS, followed by a final section on the notion of risk and the theories on its transfer. The second chapter will present the rules on the transfer of risk under the United Nations Convention on Contracts for the International Sale of Goods, highlight the policy followed by the Convention in core legal issues and the possible existing inconsistencies in its provisions, along with a critical commentary on the correctness and practicality of its rules. The second chapter will furthermore concentrate on the rules on passing of risk as these are formulated under INCOTERMS 2000, considering their strong and salient

points and clarifying the reasons of their popularity in international commercial transactions. Subsequently, the third chapter will focus on the inter-relationship of the Convention and INCOTERMS 2000, stressing their similarities and differences and examining whether and when the one prevails over the other. Moreover, the same chapter will include a careful examination of some problematic areas and propose solutions for some of the "difficult" issues that arise in situations that involve the passing of risk in international sale contracts. Finally, the conclusion will encompass a total evaluation of the Convention's rules and those of INCOTERMS 2000, regarding their practicality and effectiveness, and express a wish that there will soon be efforts for the settlement of the intrinsic problems that trouble this area of law.

3- Chapter I: The Vienna Convention in a nutshell- General remarks on Trade Terms and INCOTERMS- Risk: A polymorph notion

3.1. The Vienna Convention in a nutshell

It is true that during the last decades there have been various attempts mostly by international organisations to harmonise and unify the law of international trade.[3] It is the development and evolution of international commerce that calls for the configuration and application of a generally acceptable set of rules governing international trade.[4] Moreover, international sales have developed significantly in the last century especially due to the amelioration of modes of transport and communication systems and to the augmentation of needs and demands of the markets worldwide. Therefore, it was expected that similar attempts would be made in order to harmonise the law of international sales.[5] The United Nations Convention on Contracts for the International Sale of Goods can be considered as a respectful attempt to that effect. The Convention was adopted in a Diplomatic Conference in 1980 in Vienna, with the participation of 62 states and 8 international organisations. The CISG, which has entered into force on 1 January 1988[6] has certainly been a worldwide success; it has been ratified up to now by 62 countries and there is no doubt that it will soon be almost unanimously accepted.

The Convention was based on two previous conventions that were formed at The Hague in 1964 and resulted in the adoption of the Uniform Laws on International Sales; the Uniform Law on International Sale of Goods (ULIS) and the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF).[7] The Uniform Laws nevertheless, had not been very successful, since they were adopted by only 9 states, their biggest drawback being that they were seen as the result of cooperation among West European countries, leaving out countries from Latin America and the Third World, and therefore, were considered as failing to take into account the needs of the developing countries.[8] Some years later, the United Nations Commission on International Trade Law (UNCITRAL)[9] launched on the ambitious attempt to elaborate a text for the unification of international sales law, something that was already tried before by The Hague Uniform Laws but without success. This time though, the Commission provided a wide group of participant countries with every degree of development and from every part of the world.[10] UNCITRAL completed its task by adopting on 11 April 1980 the Convention on Contracts for the International Sale of Goods. Even though the CISG has started from The Hague Uniform Laws, it has evolved in various ways and has been considered as an independent text. And it is true that 'the new Convention, while retaining clear signs of its ancestry in ULIS and ULFIS, has

eliminated many of the more controversial concepts of the earlier uniform laws. Overall, the Convention has been an improvement on its ancestors'.[11]

The Convention is a coherent text that encompasses 101 articles, which are not detailed but are quite precise and comprehensible.[12] The Convention provides that the contract of sale is not subject to any special requirements concerning its form; according to articles 11 and 13 it can be concluded either in writing (including telegram and telex) or orally ("by word of mouth"). Additionally, according to articles 12 and 96, any state whose law requires contracts of sale to be concluded in writing has the right to make a declaration under article 96 excluding the application of article 11, where any party has its place of business in that state.

The Convention is organised into four parts. Part I deals with the scope of application and general provisions, Part II contains the rules on the formation of the contract of sale, Part III regulates the basic issues that arise in a sales contract, like the obligations of the seller and the buyer, their remedies, the passing of risk and rules that are common to the seller and buyer, and finally Part IV contains the final provisions. Part I clarifies that the CISG applies only to international sale of goods,[13] authorizes that it governs only the formation of the contract and the rights and obligations of the parties,[14] declares that the Convention constitutes *ius dispositivum,*[15] since the parties can derogate from its provisions, and contains rules for the interpretation of the Convention and for the interpretation of the contracts that it governs.[16] Part II[17] on contract formation 'adopts the traditional pattern of contact formation (offer- acceptance)'[18] and it does not contain any specific or clear rules regarding the controversial issue of the "battle of the forms".[19] Part III[20] is the most important one, since it regulates the most significant issues pertaining to the contract of sale. It contains rules on the parties' obligations, which are followed by rules on their remedies in case of the parties' failure to fulfil their responsibilities under the contract and the Convention. After these provisions the rules on the passing of risk[21] and then the rules common to both seller and buyer will follow. Finally Part IV[22] deals with issues regarding the Convention's entry into force and regarding any declarations or reservations that the states are allowed to make along with their ratification or accession to the Convention.

3.2. General remarks on Trade Terms and INCOTERMS

As it was already mentioned, due to the intrinsic importance of the rules on risk, the parties in almost every case will either have made an express agreement on the passing of risk that will govern their contract, or they will have made it clear that they agree on the application of specific trade terms commonly used in international commercial transactions. Such terms among others are INCOTERMS,[23] of which the 2000 version is currently in use.

It is interesting to note that the Vienna Convention does not contain any specific provisions on trade terms and does not give any definitions of them.[24] The reason behind that could be, firstly that the Vienna Convention is a rather minimalist text, which provides its rules not in a detailed way, but in a compact manner; therefore, it could not contain definitions or special provisions regarding trade terms, especially since there are so many of them.[25] Secondly, a possible thought of the delegates could be that trade terms used in every day commerce are constantly changing and evolving in order to keep up with the developments and needs in the field of international sales. Thus, if the Convention included any provisions on trade terms, they would soon be outdated,

since a Convention could not be revised in order to cover every development in trade customs.[26] Thirdly, it was thought that the International Chamber of Commerce and its Committees around the world would more efficiently regulate an issue like that.[27] Nevertheless, the Convention does make a reference to trade terms in article 9, which gives to the usages and practices established between the parties or to those widely known in international trade, precedence over the rules of the Convention. Since the CISG forms *ius dispositivum* the parties can agree to derogate from its rules;[28] that is further supported by article 9, which in paragraph one provides that the usages and/or practices that the parties have agreed on are binding. In paragraph two it continues that unless the parties have agreed otherwise, they are bound by usages which are widely known and used in international trade and which they knew or ought to have known. It seems therefore, that the Convention recognises the acceptance and wide use of trade terms and acknowledges their importance by considering them as superior to the Convention's provisions. This choice seems wise, since given the fact that some trade terms are used nearly exclusively in some particular types of trade, the Convention's insistence on the primacy of its provisions would have rendered them inapplicable.[29]

It is necessary to look at what trade terms are and how they are used. It can be said that the international trade terms are designed to 'define the obligations of the seller and the buyer as regards the point of delivery, procurement of transport documents, contract of insurance, and other documents necessary for the export and import of the cargo'.[30] The most popular trade terms (fob and cif) have a long history.[31] Their purpose was to allocate the responsibilities between the parties usually in carriage of goods contracts. But as it is inevitable in such situations where the various practices and usages were spread around and established by "word of mouth", differences and variations in interpretation were an "every day" phenomenon. Trade terms, especially the most common ones cif and fob, were interpreted differently in different countries,[32] creating misunderstandings, which in turn led to conflicts and problems in the performance of the contract and eventually in time and money consuming litigation.[33] But the most serious problem was that this situation was endangering the amelioration and normal development of international commerce. It is obvious that the need for the harmonisation of trade terms commonly used in international trade was urgent, since the creation of a common point of reference that would enhance the common interpretation, would minimize the conflicts and disputes between the parties and serve the unification of law in this field.[34]

Considering these circumstances, the International Chamber of Commerce (ICC) a private organisation, which is based in Paris, decided to work on the attempt towards the harmonisation of international trade terms and in 1936 it published INCOTERMS, which stands for "International Commercial Terms"; since then, the ICC[35] has published various versions of INCOTERMS in its attempt to meet the needs and follow the developments in the ever evolving area of business.[36]

The starting point of work of the ICC is traceable long before 1936; it started working during the 1920s and since then, it has published several versions of INCOTERMS.[37] An important revision was INCOTERMS 1990; the most interesting change, which they introduced, was the acceptance of electronic documents and Electronic Data Interchange (EDI). The principle of functional equivalence of paper and electronic documents was embraced by INCOTERMS, which welcomed the continuous increase of computer use in international commercial transactions and thus, met

the need for speed, ease and preciseness.[38] Moreover, '[t]he 1990 Incoterms [took] into consideration the changed techniques, particularly with respect to the use of container shipment, multi-modal transport and roll-on and roll-off traffic with vehicles and railway wagons'.[39] The latest revision is INCOTERMS 2000,[40] which since 1 January 2000 has replaced the rules of INCOTERMS 1990. It is submitted that the 2000 version is more consistent and clear than the previous one and it contains some different rules in relation to the 1990 version.[41]

The most important question that arises while studying INCOTERMS is the one regarding their legal nature and whether they form legal rules or interpretative criteria. The issue of INCOTERMS' legal framework is one of extreme importance, which affects the nature and extent of their application and use.[42] There are two different approaches answering the previous question. According to the first view, they constitute an autonomous binding system of legal rules and predominant usages, which should be applied even if the parties did not expressly refer to them in their contract.[43] Therefore, if INCOTERMS are to be considered as usages widely known and prevailing in international trade, then in conjunction with article 9(2) CISG, that would mean that the courts would be free to decide that, although the parties had not made an express reference to them, nevertheless, they had implicitly embodied them in their contract of sale.[44] The second approach supports that INCOTERMS constitute interpretative criteria for the interpretation of international commercial terms and therefore they cannot be considered as a source of law.[45] Based on that view, INCOTERMS take effect only if the parties have expressly adopted them in the contract,[46] otherwise the courts will use them as criteria for the interpretation of the parties' will. This view is reinforced by the fact that the working group of INCOTERMS 2000 in the introduction of the current version expressly states that the rules are embodied in the contract of sale with the express provision of the parties to the contract.[47] Furthermore, the approach that the ICC rules form only interpretative criteria is supported by the argument that they constitute an incomplete set of rules,[48] which results in the fact of recourse being necessary to the applicable law of the contract.[49] After all, INCOTERMS do not form the only set of rules that represent the internationally accepted commercial practice in international commercial sales.[50]

In summary, INCOTERMS and more specifically INCOTERMS 2000 provide a uniform set of rules for the interpretation of international trade terms most commonly used in international commercial contracts, trying to dissolve the ambiguities created by the different interpretations in different countries.

3.3. Risk: A polymorph notion

Before examining the specific rules on risk under the Convention and INCOTERMS 2000, a reference to the basic rules on risk seems to be necessary. The notion of "risk" has various meanings. Apart from the risk covered in the Vienna Convention and INCOTERMS 2000, which is the "price risk",[51] the notion of risk may encompass the "insurance risk", "commercial risk" and "political risk" as well.[52]

i) The meaning of Risk

The meaning of "risk" in a sales contract can cover various situations like physical loss, deterioration or damage of the goods sold.[53] The common characteristic in all these cases is that

the loss or damage should be accidental, thus not caused by an act or omission of one of the parties.[54] Hence, under the word "risk" can be included situations like theft, seawater or overheating affecting the quality of the goods, confusion of the goods (especially liquids) with other goods, spoilage, evaporation, improper stowage or careless handling of the goods by the carrier.[55] One important question is whether in the meaning of risk is included damage or loss of the goods due to acts of state, for example by reason of confiscation, import or export customs' formalities or embargos. The view, which seems to prevail, is that these acts are left outside from the notion of risk. Confiscation does not aim at the goods themselves but it creates a measure-penalty against the person who owns them.[56] After all, an act of state is a legal measure which 'has nothing to do with risk and,...it is practically impossible to obtain insurance protection against it'.[57] On the contrary, it is more convincing to consider within the rules on risk situations where the goods are damaged or lost during a period of war by acts of the enemy (ie confiscation, bombardism, capture). The reason for the adoption of that approach is that the buyer is able to ensure the goods against war risks.[58]

ii) Time and consequence of passing of risk

It is true that the goods might suffer loss or damage in various points in time from the formation of the contract of sale till the actual handing over to the buyer, since these two actions might either coincide and take place at the same time, or a long period of time might elapse between them.[59] During that time there is always the possibility- which commercial men know well- that the goods might suffer loss or damage due to a sudden and unexpected accidental event, for which neither the seller nor the buyer share any responsibility for. As a result, the goods may be lost or damaged, for example while they are packaged at the seller's warehouse, or on the way to the port where they would be exported (when there is a contract involving carriage of goods by sea), or during the sea journey or from the port of import to the buyer's premises. The question that is of importance in all these situations is a question of time: when did the risk pass? The answer is decisive since by answering this question it is determined which of the parties; the seller or the buyer will bear the risk and its consequences.[60] The rules on the passing of risk, therefore, are dealing with the issue of whether the buyer will still have to pay for the price of the lost or damaged goods even if he never received them or he received them in a poor state, and whether the seller will still be entitled to receive the price for the goods; that is called the "price risk". Some legal systems contain legal rules that regulate, apart from the "price risk", the "risk of non performance" as well. The rules regulating the latter will indicate whether the seller will have to redeliver the goods, and subsequently whether the buyer will be entitled to ask for another delivery of the goods, even if they have been accidentally lost or damaged.[61]

iii) Theories on the passing of risk

It is true that the passing of risk has always been a problematic area, which has formed a subject of regulation in almost every legal system since Roman law. Depending on the legal structures, social circumstances and background, three main theories have developed and been adopted regarding the time of passing of risk:[62] 1) The first theory links the time of the passing of risk with the time of conclusion of the contract of sale.[63] This theory is not very practical, since most of the times, especially in international sales, at the moment when the contract is concluded the goods are still in the hands of the seller and thus, under his control. A situation where the seller has the control

of the goods and the buyer has to bear the risk is hardly desirable, since the buyer will always claim that the seller did not exercise due diligence, creating serious disputes and litigation. 2) The other theory connects the passing of risk to the passing of ownership.[64] This theory is quite impractical as well, since the ownership is not at all connected or related to the notion of risk. Moreover, this theory does not correspond to the latest practices of sale of goods with retention of ownership, given that in these cases the seller maintains the ownership while the buyer possesses the goods. That means that the seller will have to bear the risk of goods that are under the control of the buyer. This result is undesirable as well, since it will certainly lead to litigation. 3) The third theory that has developed connects the passing of risk with the time of delivery of the goods.[65] That means that the party, which has physical control over the goods will be the one bearing the risk. This theory seems the most fair and reasonable since the party that possesses the goods is in a better position to guard them, take the necessary precautions for their safety, or the appropriate actions to save them after the damaging event had occurred, collect the remaining goods that escaped the damage or loss, assess the damage and turn to the insurer for indemnification where and when the goods are insured.[66] However, in the majority of cases in international sale contracts, ie cases which involve carriage of goods, the seller is supposed to hand the goods over not directly to the buyer, but to a carrier, who in turn will deliver them to the buyer. In these cases an odd situation is created, since neither the seller nor the buyer have physical control over the goods; in contrast the carrier is the one who has their physical possession. Normally, the buyer then bears the risk from the time that the goods are delivered to the carrier. That seems to be unfair for the buyer, given that the goods are as far away from his control as from that of the seller, and the buyer is not in a position to watch over their carriage. Let us confine to cases that involve carriage of goods by sea. Usually in these cases, the seller arranges for the goods to be delivered by a sea carrier under a contract of affreightment. The carrier, then, issues a document, the bill of lading, which functions as:[67] a) a receipt for the goods shipped, regarding their description, condition and quantity, b) an evidence of the contract of carriage, and c) a document of title.[68] The latter function means that the bill of lading can be considered as equivalent to possession of the goods covered by it and that the holder can take delivery of the goods at the port of destination or sell the goods while in transit by endorsing the bill.[69] Hence, even though the buyer does not literally have the physical possession of the goods, by holding the bill of lading he has the goods under his disposal. It is worth mentioning that very often the bill of lading is used for the payment of the price when a letter of credit (L/C) is involved.[70] The latter is a very popular mode of payment in international trade. Accordingly, under a L/C transaction, where the buyer and seller have previously agreed on a sale contract, the buyer will instruct a bank (Issuing Bank) to open a documentary credit in favour of the seller. The issuing bank will ask a bank in the seller's country to advise the seller of the opening of the credit (Advising Bank) and may ask for that bank's confirmation (in that case it becomes the Confirming Bank). Subsequently, the seller will be able to collect his payment from the issuing and/or confirming bank, provided that he presents, before the expiration date, all the correct documents referred to in the credit, proving that he shipped the goods.[71] One of these documents is usually the bill of lading, along with the sales invoice and a policy of insurance covering the transit goods. It seems, therefore, that the third theory is not always effective, since the buyer, in cases involving carriage, will probably bear the risk even without having physical control over the goods. However, in these cases, the bill of lading has proven to be a useful mechanism, which soothes the buyer's unfavourable position of having to bear the risk for goods that are not literally under his physical possession, by being able to dispose them at anytime.

iv) The Convention's choice

As it will be seen below,[72] the Convention adopts the third theory[73] connecting the passing of risk to delivery and possession of the goods;[74] so, under the Convention the risk passes to the buyer at the moment when the buyer or the carrier takes physical control over the goods.[75] Yet, there is one case where the Convention adopts the theory of passing of risk at the moment of the conclusion of the contract and that is the case of sale of goods during transit.[76]

The next chapter will examine the rules on risk allocation under the CISG and INCOTERMS 2000, starting with the Convention's provisions on the passing of risk, in articles 66-70. In fact, it will be seen below that '[t]he UN Sales Convention made a fresh start on the passing of risk problem with an original approach differing remarkably from conventional wisdom, yet trying to be close to practical needs'.[77]

4. Chapter II: The Passing of Risk under the Vienna Convention and INCOTERMS 2000

4.1. The passing of risk under the CISG

i) The Convention's Rules on the Passing of Risk: Articles 66-70 CISG

The Convention's provisions on the passing of risk will apply only when the parties had not made any previous express or implied arrangement on the issue, since the CISG forms positive law, which means that the parties can exclude the application of its provisions completely or vary the effect of specific articles.[78]The Vienna Convention regulates the passing of risk from the seller to the buyer in Chapter IV of Part III, in articles 66-70 CISG. Those articles deal with the allocation of "price risk" and give answers to the following questions; is the buyer in a case of accidental loss or damage of the goods still obliged to pay for their price notwithstanding their loss or damage? And does the seller still have the right to claim payment of the price?

The CISG, unlike some national legal systems, does not deal with the passing of risk of non performance (whether the seller is obliged to make another delivery to the buyer in case of accidental loss or damage to the goods) in the chapter on risk, but contains some provisions on the matter in Chapter II of Part III, which deals with the seller's obligations.[79] The passing of risk of non-performance or the passing of risk of having to redeliver is regulated in articles 31-36 CISG; according to these articles risk passes to the buyer at the moment when the seller has fulfilled his obligations to deliver or has done anything that is necessary to fulfil his obligation to deliver. Only at this point the seller will 'be discharged from the obligation to re-deliver..., since from that moment on, the buyer bears the risk'.[80] Article 36(1) provides that the seller is liable for any lack in conformity of the goods, existing at the moment the risk passes to the buyer, irrespective of the fact that the inconformity might only be apparent after that time. The second paragraph of article 36 provides that the seller is also liable when the lack of conformity is a result of a breach of any of his contractual obligations including any special guarantees. If the goods are completely destroyed, in cases of sale of generic goods it will be easier for the seller to fulfil his obligation to deliver, since he can provide others from the same kind.[81] If the goods have been lost or completely destroyed and it is impossible for the seller to redeliver, then the buyer has the

right to avoid the contract and is moreover entitled to restitution of the amount that he might have already paid.[82] Moreover, in case of accidental loss or damage articles 79 and 80 will answer the question of whether the seller will have to pay damages.[83]

ii) Consequence of the passing of risk- Article 66 CISG

The CISG does not define the meaning of "risk" in any of its articles. The Convention begins rather backwards and devotes the first article of the Chapter on risk to the consequences of its transfer and then examines the rules on risk in each individual case. Therefore, the consequence of passing of risk according to the first sentence of article 66, is that the buyer will still be obliged to pay the price of the goods, which have been accidentally lost or damaged, as if he had received goods conforming to the contract of sale.[84] The factors leading to that choice are various: the buyer will be the one who will receive the goods at the end of the day and he will be in a better position to check them and handle their possible loss or damage.[85] The meaning of risk in Chapter IV encompasses any loss or damage to the goods due to any incident for which neither of the parties is responsible. Such loss or damage could be theft, deterioration, reduction of their quality, damage due to improper storage or packaging and more.[86] The buyer will have to accept the damaged goods and pay the price, without having at his disposition the rights and remedies of Part III.[87] Since the loss was accidental, the buyer cannot accuse the seller for non-performance and deny fulfilling his obligations. This might seem a strict rule for the buyer, but in business there is always a possibility of unexpected incidents, especially in international sales, which is a quite risky field by its very nature and it is more reasonable for the buyer to be the party who suffers the loss. Therefore, Article 66 CISG clearly states that the buyer is obliged to pay for the price of the goods after the risk has passed to him. It should be noted though, that the time of passing of risk differs according to each case and is regulated by articles 67-69 CISG. Accordingly, it is interesting to see how article 66 has been interpreted in case law; in a case in the German Courts, a French seller (plaintiff) and a German buyer (defendant)- who had a long-term business relationship- had agreed on the sale of frozen chicken. The plaintiff delivered the chicken under the condition "free delivery- duty paid- untaxed" and handed the goods to a carrier. After the buyer's denial that delivery had taken place, the seller issued a receipt with the buyer's stamp, which was unsigned in order to prove delivery, but the buyer insisted on his denial to pay the price. The seller sued him for failing to pay, but whereas the court of first instance accepted the claim, the appellate court rejected it. It held that the unsigned receipt was not good enough to establish delivery and thus, the seller did not have the right to claim the price (according to articles 53 and 58 CISG). What is of interest is the second reason for dismissing the claim; the court held that the risk had not passed from the seller to the buyer when the goods were handed over to the carrier and therefore the buyer was under no obligation to pay the price of the goods (according to articles 66 and 67(1) CISG). The court decided that the term "free delivery" meant that the risk would pass when the seller delivered the goods at the buyer's place of business and thus, that the seller was bearing the risk during transport. The court's decision was reinforced firstly by the fact that the seller had previously obtained a transport insurance for the transportation of the goods and secondly by the fact that the seller had in other occasions carried goods for the buyer by his own means of transport. Therefore, the intention of the parties was that the risk would pass at the buyer's place of business. The seller failed to prove that delivery to the buyer had been completed and consequently the risk never passed to the buyer- hence, according to article 66 CISG he had no obligation to pay the price.[88]

Nevertheless, the last phrase of article 66 introduces an exception to the previous rule of the first sentence of article 66. Thus, if the loss or damage is caused by an act or omission of the seller, then the seller will be the party that will bear the risk and the buyer will not be obliged to pay the price. The buyer can refuse the delivery of damaged goods and can have recourse to the remedies of Part III of the Convention;[89] therefore, the buyer can avoid the contract in whole or in part (articles 49(1), 51), ask for substitute goods (article 46(2)) or for repair of the goods (article 46(3)) or a reduction in price (article 50) and/or damages (articles 74-77).[90] But what is the exact meaning of the phrase "act or omission of the seller"? There are two different views answering that question. The first is that by the phrase "act or omission" is meant a breach of the seller's obligations under the contract of sale or the Convention.[91] The second approach supports that the "act or omission" of the seller does not necessarily have to be of such nature in order to constitute a contractual breach, but it could be any event for which the seller is responsible, and resulted in the loss or damage. In cases like these he would be liable under either the law of contract or under the law of tort.[92] Schlechtriem and Honnold support the second view; according to the former, article 66 should be interpreted in a way to encompass cases where the seller's behaviour might not be unlawful under the law of contact (breach of obligations) but might be unlawful under the law of tort.[93] The risk then remains with the seller. Furthermore, according to Honnold 'this decision not to restrict the scope of Article 66...seems wise since the seller, by a wrongful seizure of the goods or abuse of legal process, might cause damage to the goods under circumstances that might not constitute a breach of contract'.[94] ' On the other hand, acts or omissions that are clearly lawful do not prevent the application of the provisions on risk'.[95]

A similar case was decided under the CIETAC.[96] In 1992 there was an agreement between a Chinese seller and a Californian buyer for the sale of 10,000 kg of jasmine aldehyde (jasminal), CIF New York. The buyer warned the seller of the sensitivity of the cargo to high temperatures and he asked him to make sure that it would be stored in a cool place. Furthermore, he asked him to transport the jasminal on a direct line. The seller confirmed that the temperature at the port was appropriate, but when the cargo reached New York, after passing by the port of Hong Kong, a large part of it had melted and leaked because of excessive heat during the voyage. The cargo was shipped to the final user, who rejected it. It was then that the buyer informed the seller of the damage and he had the goods examined on that day. After a settlement agreement, the seller was obliged to pay US $ 60,000 as damages, of which US $20,000 would be paid in cash and the rest would be compensated in further transactions between them. The seller did not pay the cash and the further transactions could not be concluded. The buyer claimed payment of US $60,000 plus interest and damages, upon an Arbitration Commission. The Arbitrators decided that the seller was responsible for the damage according to article 66 CISG. Even though, according to the CIF clause, the risk passes when the goods pass the ship's rail, in the present case there had been a separate special contractual agreement regarding the temperature during transport. The seller had not complied with his obligations under the special contractual agreement, since he had not given sufficient and correct directions to the carrier and instead of arranging for a direct route, he had, on the contrary, sent the cargo via Hong Kong, which resulted in its deterioration. Therefore, as provided in article 66 CISG, the damage was caused by "an act or omission of the seller" and as a result the risk had not passed to the buyer.[97]

iii) Passing of risk in cases involving Carriage of Goods- Article 67 CISG

The passing of risk in sales involving carriage of goods is regulated in the Convention in a separate article, namely article 67,[98] and since sales involving carriage of the goods is the most common situation in international sale contracts, article 67 forms the basic provision for the passing of risk under the Convention.[99] Paragraph one of article 67 establishes two rules: a) If the seller and buyer did not agree for the goods to be handed over at a particular place, then the risk passes to the buyer when the goods are handed over to the first carrier in accordance with the contract of sale. b) If the parties agreed on the handing over of the goods to the carrier in a particular place, the risk passes when the goods are handed over to the carrier at that particular place.

Firstly, it should be examined what a sale of goods that *involves carriage* means. The answer should be something more than the obvious fact that the goods will be loaded on a truck, train, ship or airplane in order to be transported to the buyer. It should additionally mean that the seller would be the one who will have the discretion or the obligation to arrange for the carriage of the goods and will take the necessary actions for their transmission to the buyer.[100] Secondly, the phrase "*in accordance with the contract of sale*" might be ambiguous in the sense that it could be interpreted to mean that the passing of risk is effectuated when there is compliance with the contract of sale. The true meaning though, is that the handing over of the goods should be in accordance with the contract.[101]

A question that arises regarding the realization of transport is connected with the notion of the *first carrier*.[102] Is it sufficient for the seller to effectuate the transport himself with his own means of transport and with his own personnel[103] or does it have to be carried out by an *independent carrier?* According to Bianca and Bonell[104] there should be carriage by a third party and thus, the cases involving carriage of the goods by the parties themselves should not be included in the scope of article 67.[105] Instead, a third party should be responsible for the carriage- ie an independent carrier, since the wording of article 67(1) "when the goods are handed over to the first carrier…If the seller is bound to hand the goods over to a carrier", expressly states that the seller is supposed to hand over the goods to a carrier, hence to a third party, because it is not possible to give the goods for carriage to himself. Schlechtriem is of the same opinion,[106] supporting the view that in order for the risk to pass to the buyer, the carriage should be made by an independent carrier and not by the seller's personnel. The policy behind this view is simple: if the seller did not bear the risk during the transport, which he effectuated on his own, then in case of accidental loss or damage of the goods, the buyer would always accuse the seller of not exercising due care, increasing the possibility of dispute and litigation between the parties.[107] Another controversial issue is whether the notion of *freight forwarder*[108] is included in the meaning of the "first carrier". According to Schlechtriem[109] freight forwarder should be considered as a first carrier and risk should pass to the buyer from the moment when the goods are handed over to him, since he forms an independent entity, which takes control over the goods.[110] Nevertheless, Flambouras makes a distinction using the "criterion of liability"; if the freight forwarder simply commissions the operation of transportation and excludes his liability, he should not be considered as first carrier within the meaning of the first sentence of article 67(1).[111] But if, on the contrary, he takes part on the carriage of the goods accepting liability,[112] then it is submitted that he should be considered as a first carrier. The same should apply for a *multi-modal transport operator (MTO)* since often the notions of MTO and freight-forwarder overlap.[113] The author's view is that since a

freight forwarder is an independent entity, which takes control over the goods, it should be considered as a first carrier.

The first rule of paragraph one is usually applied in cases of multi-modal transport, ie in cases where the goods are carried with more than one modes of transportation.[114] In most of the cases, the goods are loaded on a train or truck and carried to a near port wherefrom they are shipped to another port in the buyer's country. In a situation like this the risk will pass from the time that the goods are handed over to the first carrier, ie when loaded onto the train or truck.[115] This rule is very practical and efficient, since the splitting of transit risk is avoided and the buyer bears the risk during the whole transport in land and water. Generally the splitting of transit risk is undesirable, as it presents serious problems of proof. Hence, it is not easy to prove when the damage occurred- if it happened before or after the point of passing of risk to the buyer- especially when it was caused by a non obvious event (overheating, seawater damaging the cargo), which is normally revealed at the end of the journey. The first sentence of article 67(1) eliminates that possibility by charging the buyer with the burden of bearing the transit risk. On one hand, that is fair, since the goods are not under the seller's control anymore and he should not bear the risk of goods that are no longer in his hands. But on the other hand, the goods are not under the physical control of the buyer either- they are under the control of the carrier. Is that rule therefore far too harsh for the buyer? The answer is that the party bearing the risk should be the buyer, since the loss or damage is usually revealed at the end of the journey when the goods are in his hands. He is, thus, in an advantageous position since it is he who will have the discretion to examine them, find their possible defects, save the goods that are not completely destroyed and turn to the insurer for indemnification.[116] Furthermore, the rule in the first sentence of article 67(1) is very efficient in cases of container transport.[117]

The rule in the second sentence of article 67(1) does not present any special difficulties.[118] It applies in situations where the parties have agreed on the handing over of the goods in a specific place.[119] In these situations the risk will not pass when the goods are handed over to the first carrier, but when they are handed over to the carrier in the agreed place, and if the place is generally described, the seller will have the right to specify it.[120] It is interesting to see how the courts have interpreted this provision. Actually, a Spanish court ruled on a case of a contract involving the sale of steel profiles between an Italian seller and a Spanish buyer. The contract was in accordance with INCOTERMS 1990. When the goods arrived at their destination they were found to be defective. But when they were loaded onto the ship at the port in Italy, the captain confirmed their condition by signing the transport document bearing the remark "clean on board", which means in a perfect condition. The court decided- after taking into account the type of contract- that the risk had passed onto the buyer (according to articles 31 and 67 CISG) from the moment that the goods were loaded onto the ship at the port of origin. That was the moment when the risk passed from the seller to the buyer, irrespective of whether the buyer had insured the goods or not.[121]

The third sentence of article 67(1) stresses that even if the seller has retained any documents, with which he is able to control the disposition of the goods, this does not prevent the risk from passing. This phrase is an indicative declaration that the Convention does not connect the passing of risk with ownership. 'The purpose of the third sentence of Article 67(1) is to ensure that the rules as to risk in the first two sentences are not subverted by the common practice of sellers of retaining the shipping documents as a form of security for the payment of the price... It

guards against misunderstanding which might arise, particularly in the minds of those accustomed to legal systems in which risk and property are linked'.[122]

The second paragraph of article 67 clearly requires that the goods should be "*clearly identified to the contract*" for the risk to pass to the buyer. Through this prerequisite there is an attempt to protect the unsuspecting buyer from the seller's false claims in a partial loss or damage, that the lost or damaged goods were those that the buyer bought.[123] This provision especially refers to bulk goods and collective consignments, like wheat or oil and generally to liquid cargos. It is necessary, therefore, that the goods are identified and this happens, according to the article's wording, when the seller puts markings on the goods, when the goods are expressly indicated in the shipping documents, when the seller gives notice to the buyer, or in any other way, since the enumeration in article 67(2) is not exhaustive. Regarding the identification with a notice, its dispatch is sufficient, and it is not necessary that it reaches the buyer (art.27 CISG);[124] the risk passes when the notice is dispatched and not retroactively from the time of shipment.[125] It is submitted that the Convention's rule on passing of risk *ex nunc* in cases where the identification takes place after the goods have been dispatched is rather problematic; accepting the splitting of transit risk might lead to hardly desirable situations, since it may raise disputes and problems of proof[126] regarding the exact time that the damage or loss occurred.[127] It is submitted that the retroactive passing of risk is preferable, since it reduces relevant problems of proof considerably and minimizes the chances of litigation.

The cases of fungible[128] bulk goods and of collective consignments present a special issue because in these cases it is very difficult to ascertain the exact time of passing of risk; different opinions have been supported,[129] but there is still no definite answer. Cases of collective consignments (where this is permitted by the contract or a trade usage) include cases where there is one cargo of goods of the same kind (ie oil, wheat, natural gas), which is meant to cover several contracts of sale, by distributing parts of the cargo to several buyers. For example, let us suppose that there is a ship loaded with 5,000 tones of wheat without further identification, that were meant to satisfy several sale contracts for various buyers, and of which 3,000 tones suffered severe damage due to overheating before the division of the cargo. In situations like these one view suggests that 'the identification of the goods to the contract needs to relate only to the collective consignment. The buyers bear the risk collectively. A partial loss is borne by them *pro rata*; if the entire consignment is lost, each loses his entire share'.[130] And the second view argues that the identification takes place only when the goods are divided among the various buyers with the taking over of the goods. Thus, if the goods suffer loss or damage before their division, the buyers will not have to pay the price.[131] It is the author's opinion that if it is clear, for example that half of the wheat of quality B, which is kept in ship X and stored in part Y of the ship, is sold to buyer S and the other half to buyer T and the approximate total quantity has been calculated, then there is no reason why the risk should not pass to the buyers, even though the goods are not divided.[132] Of course this should be considered separately in each case and it should be clear from the circumstances that the parties had made an implied agreement that the risk would pass to the buyers. It is true, though that the problem of passing of risk in cases of identifiable bulk goods is an obscure one and one, which is not clearly settled by the Convention. It is truly unfortunate that the Convention does not have any specific rules pertaining to collective consignments or bulk goods, since these are common cargos in international sales. For that reason, the parties are strongly advised to provide expressly in their contract for the exact time of passing of risk when the sale involves fungible goods in identified bulks.

iv) Goods sold in transit- Article 68 CISG

The Convention has a separate article on the passing of risk of goods that are sold during transit. A sale during transit does not mean that the goods swim, fly or float, but that they are sold while usually kept in a ship or train or truck.[133] This is frequently the case where the seller has bought in advance large cargos of oil, wheat, natural gas, and metals and generally goods that are carried in bulk and starts the journey towards a destination without having previously sold the goods and without knowing the recipients. The contracts of sale will then be concluded while the goods are in transit[134] and in most cases the goods will be sold several times until their final destination. The CISG deals with this situation in article 68, which provides that the risk passes to the buyer from the moment that the contract is concluded (the rule- first sentence of art.68) and only in special circumstances does the risk pass retroactively from the moment of handing over of the goods to the carrier who issued the documents embodying the contract of carriage (the exception- second sentence of art.68).

Article 68 caused a lot of controversy and extensive discussion at the Vienna Conference.[135] This article constitutes a compromise between two opposite opinions[136] and as it happens in every compromise, some problems and inconsistencies are inevitable. The most striking drawback of the first sentence of article 68 is the fact that it allows the splitting of transit risk. In most of the cases of damage or loss it would be difficult to ascertain if the damaging event took place before or after the conclusion of the contract (unless the event is obvious, for example collision or explosion). This is quite problematic in container transport where the containers are sealed after loading and are not opened until after they reach their final destination.[137] The rules on the burden of proof will decide which party bears the risk, but it seems that disputes will be unavoidable.[138]

The approach established by the second sentence of article 68[139] as the exception, seems preferable as it diminishes the case of splitting the transit risk. The risk passes retroactively from the time the goods were handed over to the carrier who issued the documents embodying the contract of carriage. These documents should evidence the existence of the contract of carriage, since in a contrary situation the rule is inapplicable.[140] Nevertheless, notwithstanding its advantage of not splitting the transit risk, the provision requires as a "vague" precondition the existence of "indicative circumstances". This 'Delphic provision',[141] has a rather imprecise wording; the question that arises is "which are those circumstances"? Generally, the term "circumstances" should be interpreted as meaning the implied intentions of the parties,[142] but moreover, according to a very widely accepted view it should include the transfer of insurance[143] from the seller to the buyer, for example by an endorsement. 'The endorsement would make Buyer the only person who would claim under the policy and would clearly evidence an intent to transfer to buyer the total risk of the voyage'.[144] And since the transfer of insurance is very common in international sales, the exception of the second sentence of article 68 becomes practically the rule.

The third sentence of article 68 'introduces a proviso';[145] it provides that when the seller knew or was supposed to know at the moment when the contract was concluded, that the goods had suffered damage or loss and did not inform the buyer, then he bears the risk of the loss or damage. In that case the seller is punished for his bad faith; the question that arises though, is whether this sentence refers to both previous sentences or not. It is submitted that it refers only to the second

sentence, since the risk does not pass from the moment of conclusion of the contract if the loss or damage had already been effected, let alone if the seller knew about it.[146] Furthermore, the third sentence of article 68 involves further problems of interpretation; it states that the seller bears the risk of "*the* loss or *the* damage",[147] but without providing any further clarification. Is it the one which had occurred before the conclusion of the contract and the seller knew or ought to have known about, or is it also the one which had occurred before the conclusion of the contract but of which the seller had no knowledge, or maybe is it also the one which occurred after the conclusion of the contract? This issue is not completely clear and more than one view is supported.[148] According to Schlechtriem[149] the meaning of this phrase encompasses only the damage that the seller knew or ought to have known by the time of the conclusion of the contract,[150] basing his approach on the different wording of the Draft Convention, which was not finally approved and to the linkage between the second and third sentences of article 68. Nevertheless, this approach has once again the disadvantage of splitting the transit risk between the parties, something that is not at all desirable due to the problems of proof that it creates. On the contrary, Hager[151] and Honnold[152] support a different view and argue that the seller should bear the risk for the loss or damage before and after the conclusion of the contract, no matter whether the seller knew about it or not, as long as it was caused by the same damaging event as the original damage.[153]

Another unclear point of article 68 is whether it is necessary for the passing of risk in sales of transit goods, for the goods to be identified to the contract. The article does not state anything about the identification of the goods like articles 67(2) and 69(3) do, but it is submitted that the requirement of identification should be applied by analogy to these cases as well.[154] Schlechtriem argues that article 68 is indeed applicable to sales of undivided bulk goods (collective consignments) and he draws a distinction between two situations:[155] a) if the seller is entitled (by the contract or trade usage) to deliver a collective consignment, then the buyers bear the risk from the time stated in article 68 and share the risk *pro rata*.[156] b) If, on the contrary, the seller is not entitled to deliver a collective consignment, then article 67(2) is applied by analogy and the risk passes when the goods are identified.

v) The Residual Cases- Article 69 CISG

The Convention, after dealing with cases involving carriage of goods by a carrier and sale of goods in transit, deals in article 69 with the residual cases, ie those which are not covered by the previous articles. Therefore, article 69 deals with cases which involve a) taking over of the goods at the seller's premises (art.69 (1)), b) taking over of the goods at another person's premises or at a public warehouse or c) handing over of the goods by the seller to the buyer or to a carrier named by the buyer[157] (not to an independent carrier, since the latter is governed by art.67). The last two cases are covered by art.69 (2).

Article 69(1) covers cases where the buyer is supposed to pick up the goods from the seller's premises. The risk passes to the buyer from the moment he takes over the goods, which are already put at his disposal. The goods are at his disposal when the seller has made all the necessary actions in order to enable the buyer to take them over, for example packaging-identification.[158] The policy behind this provision is, that the party who has the goods under his physical control, in this case the seller, will be in a better position to look after them.[159]

Nevertheless, the seller cannot bear the risk forever. Thus, if the goods are at the buyer's disposal and he delays taking delivery for a long time, so as to commit a breach of contract by not taking them over, then the risk passes to him at the moment when the goods are placed at his disposal.[160] But when does the failure to take over the goods in due time constitute a breach of contract? According to Schlechtriem,[161] 1) if the parties have agreed on a specific date for taking over the goods, a failure to take them over constitutes a breach of contract when this time has passed, or if they did not agree on a specific date, when a reasonable period has passed after the buyer has received notice that the goods are ready for taking over. The notice is necessary only in the latter case.[162] 2) Failure to take over the goods constitutes the buyer's denial to pay the price of the goods as well. In cases like these, risk passes even though the goods are still under the custody and control of the seller.[163] The buyer is being punished for his neglectful behaviour for not taking over the goods or for not paying their price.[164]

If the place of delivery is other than the seller's place of business then article 69(2) comes into effect. This provision applies where the seller delivers the goods i) to the buyer's place of business or ii) to a particular place to the buyer or to a carrier named by him. In reality, most of the cases involve situations where the goods are stored in a public warehouse. In the previous cases the risk passes when three conditions are met:[165] 1) *delivery must be due*, 2) *the goods must be placed at the buyer's disposal*. Unlike article 69(1) the buyer does not have to actually take over the goods in order for the risk to pass. The unilateral act of placing the goods at his disposal suffices. The seller should do all that is necessary to enable the buyer to take delivery. If the goods are in a warehouse, as it will be seen below, the seller should give instructions to the warehouse keeper or should give the buyer an effective delivery order. And 3*) the buyer should be aware that the goods are at his disposal*. If the parties did not agree on the time of disposal, the seller should send a notice to the buyer, which becomes effective from the moment of receipt[166] (in contrast with art.27 CISG, which states that notification becomes effective from the time of dispatch).[167] A relevant case is the one decided by a German court pertaining to the contract between two Austrian sellers and a German buyer for the sale of furniture manufactured and stored in a warehouse in Hungary. The sellers had sent to the buyer the storage invoices, and the buyer would be entitled to partial deliveries. The goods would be loaded either on wagons or on the buyer's trucks for transmission to the buyer. The sellers issued several invoices and assigned their rights to a third party, plaintiff, who sent to the buyer his notice of the assignment, which was accepted by the buyer in writing. Nevertheless, the buyer, after not having received the furniture listed in the storage invoices, refused to pay the price for the goods. The warehouse in Hungary went bankrupt and the furniture disappeared. The plaintiff sued the buyer seeking the purchase price. The Court of first instance dismissed the claim and the Appellate Court upheld its decision. The court decided that according to article 66 CISG the buyer did not have to pay the price, since the plaintiff did not prove that the furniture was lost after the passing of risk. The passing of risk had to be determined according to article 69(2) CISG, since the parties had agreed that the buyer was bound to take over the goods at a place other than the seller's place of business. However, due delivery and the buyer's awareness that the goods were placed at his disposal, the conditions for the passing of risk under article 69(2) CISG, were not fulfilled. The Court decided that the sellers had not put the goods at the buyer's disposal pursuant to article 31(b) CISG, because they had not fulfilled the preparatory acts required by the contract of sale.[168]

More specifically, in case of goods stored in a public warehouse risk passes when the buyer is aware of the fact that the goods are at his disposal and furthermore, when he 'can require the warehouse keeper to deliver [the goods] up to him. That is the case when the warehouse keeper has acknowledged the buyer's right to possession of the goods or the seller provides the buyer with a document in which the warehouse keeper promises to deliver up the goods'.[169] The seller should give the buyer a delivery note with a fixed time for the collection of the goods,[170] since in a contrary case, a delivery note, which contains simply an instruction is not sufficient to effect the passing of risk to the buyer.[171]

The third paragraph of article 69 requires, as a prerequisite for the risk to pass to the buyer, the clear identification of the goods to the contract. A similar rule was encountered earlier in article 67(2) and therefore the same remarks apply to both provisions. Thus, the seller is expected to send a notice to the buyer to inform him that the goods have been identified and are at his disposal; he will have then fulfilled his obligation to enable the buyer to take over the goods.[172] Again, particular problems arise in cases of fungible goods sold in identified bulks (ie wheat, oil, liquids in general). How is the requirement of "identification" satisfied in these situations? The wording of paragraph three suggests that identification is achieved and the risk passes when the part of the goods sold to the buyer is actually removed or when there is for example (if the goods are stored in a warehouse) an acknowledgement on the part of the warehouse keeper that he holds the specific quantity on the buyer's behalf.[173] It is submitted, though, that the strict interpretation of the requirement of identification is not desirable and it should be sufficient that the seller acts in a way that enables the buyer to take over the goods.[174]

vi) Risk and Remedies- Article 70 CISG

Article 70 regulates the relation between the passing of risk and the buyer's remedies when the seller has committed a fundamental breach of contract. According to this article the remedies of the buyer remain intact and the rules of articles 67, 68 and 69 on the passing of risk do not prevent him from exercising his rights under the Convention. The necessary prerequisite is the commitment of a fundamental breach of contract[175] by the seller. Any other breach will not be enough. Of course it is obvious that the loss or damage of the goods should not be caused by reason of the seller's fundamental breach, but it should be accidental, because in the former case we would not be talking about passing of risk, but about a breach of contract due to an act or omission of the seller. Thus, 'the fact that the seller has committed a fundamental breach of contract as meant in article 25 CISG does not prevent the risk from passing to the buyer under the provisions of articles 67- 69 CISG'.[176]

The meaning of article 70 would be better understood by means of an example.[177] Let us suppose that the seller X in New York agrees with the buyer Y in Melbourne on the sale of 2,000 television sets. The risk would pass when the goods were handed over to the first carrier. On arrival, the buyer, upon receiving the goods, found out that 1,200 were defective due to the lack of a microchip and 750 were destroyed due to seawater. Only 50 of them were in good condition. In the above example there is a situation of fundamental breach; the seller, by sending 1,200 defective TV-sets, committed a fundamental breach of contract. The 750 sets were accidentally destroyed, since their loss was not caused by an act or omission of either of the parties. According to article 70 "if the seller has committed a fundamental breach of contract, Articles 67, 68 and 69

do not impair the remedies available to the buyer on account of the breach". That means that the buyer will have at his disposal all the Convention's remedies offered to him in case of fundamental breach, despite the passing of risk and its consequences to him. Therefore, 'the buyer's remedies on account of the seller's fundamental breach of contract take priority over the risk rules'.[178] Thus, in the previous example, the buyer will have at his discretion the following remedies:

1) The buyer can declare the contract avoided according to article 49(1)(a)- in that case the risk would be shifted back onto the seller[179] and the buyer would not have to pay the price of the goods. In the above example, the buyer will have the right to avoid the contract and not pay the price of all 2,000 television sets. On the other hand, it is submitted that according to article 51(1)[180] he can avoid the contract partially (the 1,200 television sets that were defective), keep the 50 that were conforming and bear the risk for the 750, which were accidentally destroyed.[181]

2) The buyer can ask for delivery of substitute goods, according to article 46(2). He can always claim this remedy even though the defective goods might have been destroyed. The risk in that case shifts back on to the seller just like in the case of avoidance.[182] Nevertheless, the buyer will be entitled to the substitution of the 1,200 television sets, whereas he will have to bear the risk for the other 750, which were accidentally lost. For that reason this remedy is not preferable over the previous one, since the avoidance of the contract releases the buyer from having to pay for all the goods.[183]

   Of course, the buyer in both the above cases should keep in mind that he is expected to make restitution of the goods in the condition they were, when he received them. That is required by article 82(1), which in that way restricts the application of articles 70, 49(1)(a) and 46(2). However, notwithstanding the restriction, its effect is mitigated by the exception that follows in the next paragraph, in article 82(2)(a),[184] which provides that paragraph one does not apply if the impossibility of restitution is not due to an act or omission of the buyer.[185] In other words, the buyer can avoid the contract or require substitute goods, while 'the risk remains with the seller, since the buyer is permitted to exercise those rights irrespective of the loss of or damage to the goods except where that loss or damage is due to the buyer's act or omission. (Article 82(2)(a))'.[186]

3) Another remedy that the buyer can claim despite the passing of risk to him is the repair of the goods (article 46(3))- that obviously applies only in cases where the goods were only damaged and not completely lost, since in the latter case the remedy of repair would be automatically inapplicable.[187] In the example, the buyer could request the repair of the 1,200 televisions, keep the 50 and bear the risk for the 750. If, however, the goods are destroyed before their repair[188] the buyer may resort to other remedies with respect to the seller's breach of contract because repair is no longer workable. This solution follows from Article 47(2), which applies where the buyer has fixed "an additional period of time for performance by the seller of his obligations" and maybe expanded by analogy to cases in which such period has not been fixed.[189]

4) Another remedy at the buyer's discretion is his right to ask for a reduction in the price of the defective goods. Of course, if the defective goods have been destroyed due to the

accidental event, then this remedy will have no meaning. In the above mentioned example the buyer can ask for a reduction in price regarding the 1,200 television sets, bear the risk for the 750 and keep the other 50. The buyer will rarely prefer this remedy, just like the previous one,[190] since the first two are more advantageous and even more satisfactory.[191]

5) Finally, the buyer has the right to ask for damages according to articles 74- 77 CISG, but again this right is restricted since it will only cover the damage or loss 'which occurred before the materialization of the risk'.[192] For that reason the remedy of damages is hardly satisfactory and therefore, the buyer will rarely prefer it.

In the opposite case where the breach is not fundamental, the risk passes normally to the buyer and he has at his discretion only the remedies of repair, reduction in price and damages for the goods that were defective before the passing of risk and moreover, he has to bear the risk of any damage or loss of the goods due to the accidental event. He will not have the discretion to declare the contract avoided or ask for substitute goods, since these remedies are available only in cases of fundamental breach of contract. In the above example, a small number of defective television sets would constitute a non-fundamental breach of contract. Thus, if the number was not significant, for example 15 television sets were defective, 40 were destroyed due to sea water and 1,945 were conforming to the contract, then the buyer would keep the conforming, bear the risk for the 40 and ask for repair, reduction in price or damages for the defective 15.

In summary, it is obvious that the rules in articles 66-70 of the Vienna Convention generally connect the passing of risk with delivery (the passing of physical control over the goods). The same approach is followed by INCOTERMS, the ICC's rules on the interpretation of international commercial terms, which as will be seen in the second part of this Chapter, also connect the transfer of risk to delivery of the goods.[193]

4.1. The passing of risk under INCOTERMS 2000

As it has already been mentioned above, one of the aspects that INCOTERMS deal with is the allocation of risk between the parties.[194] These international standard trade terms answer the question of who has to bear the risk in case of accidental loss or damage to the goods. Here the question of time is once again of importance. When did the damage or loss occur? That question is closely connected to the following, namely which type of INCOTERMS 2000 did the parties adopt to govern their sale contract?

i) Types of INCOTERMS 2000

INCOTERMS 2000 include a range of 13 different types of terms, which regulate different situations pertaining to the movement of goods.[195] The 13 types are formulated in a way as to satisfy the needs of the specific contract of sale, regarding the modes of transport involved and the nature of the goods, giving the parties the chance to choose the one that best suits their own agreement.[196]

ii) Risk allocation under INCOTERMS 2000

a) Meaning of risk

Just like the CISG, INCOTERMS cover only the "price risk", ie whether the buyer will be obliged to pay the price or the seller will be entitled to claim the price, in case of accidental loss or damage to the goods. Therefore, INCOTERMS do not regulate the risk of non-performance or of breach of contract for other reasons.[197] The meaning of risk under INCOTERMS 2000[198] is the same as in the Vienna Convention and covers any physical loss or damage to the goods that is "accidental" and for which neither of the parties is responsible, ie caused by "acts of God" or acts or omissions of third parties. Some examples are theft, deterioration due to overheating and bad storage.

b) Time of transfer

The transfer of risk is regulated in sections A5 and B5, which provide that the risk in every INCOTERMS term is passed to the buyer at the moment of delivery. The meaning of the moment of delivery is defined in sections A4 and B4 and it regulates the time of handing over of the goods by the seller and the taking over by the buyer.[199] The time of delivery is different in the various types of INCOTERMS and that means that the time of passing of risk varies as well.

iii) Passing of risk under the 13 terms

EXW: This term represents the minimum obligation for the seller since his only task is to place the goods at the disposal of the buyer either at the seller's premises or at another place (ie factory, warehouse).[200] Risk passes at that time, upon delivery, ie. when the seller places the goods at the buyer's disposal at the named place and on the agreed date.[201]

FCA: Under this term[202] the seller has to deliver the goods at a named place, on the agreed date, to a carrier or another person nominated by the buyer. Therefore, delivery is completed and risk passes when: i) the goods have been loaded on the means of transport at the seller's premises, when the agreed place for delivery is the seller's premises; in that case the seller is responsible for the loading.[203] ii) In the rest of the instances, risk passes when the goods have been placed at the disposal of the carrier or the person nominated by the buyer or chosen by the seller. In these cases the seller is not responsible for unloading.

FOB: Under the FOB term[204], the risk passes with delivery of the goods, which takes place when the goods pass the ship's rail, on the agreed date or time period, at the port of shipment. The FOB of the INCOTERMS was actually based on, and formed according to the classic FOB term, which first appeared at the beginning of the 19th century and is considered as 'the outgrowth of the custom and usages of merchants instead of the product of legislation'.[205] In the classic FOB term, risk passes on shipment, which means when the goods are placed on board the vessel. At that time, the title of the property usually passes as well. Nevertheless, since risk is in no way related to the title of the property, it will still pass on shipment, even if the title of the property passes later, for example when the goods are unascertained.[206] Nonetheless, the general statement that risk under a FOB contract passes on shipment is rather vague and blurred, since it does not visibly specify the exact time of shipment. The law does not clearly stipulate as to the point of the loading process at which the risk passes from seller to buyer and the issue 'has not been the subject of much judicial clarification'.[207] One relevant leading case is *Pyrene Co Ltd v Scindia Navigation Co Ltd,*[208] which involved a FOB contract for the sale of machinery. In the case, the cargo fell

from the ship's tackle and was damaged during the process of loading, but before having crossed the ship's rail. The issue was whether the carrier's liability was limited by Art. IV (5) of the Hague Rules. The shipper argued that the Hague Rules did not apply since the bill of lading had not been issued. Devlin J decided that this did not mean that the Rules were not applicable. On the contrary, the Rules did apply even before the goods had passed the ship's rail, despite the wording of Art.I(e), which provided that for their application the goods should be "loaded" on the ship. In fact in Art.2 "loading" meant the whole process of putting the goods on board the vessel.[209] For that reason the defendants' liability had commenced before the goods had passed the ship's rail. The same reasoning could apply to the issue of the passing of risk. According to Devlin J '[T]he ship's rail has lost much of its nineteenth century significance. Only the most enthusiastic lawyer could watch with satisfaction the spectacle of liabilities shifting uneasily as the cargo sways at the end of a derrick across a notional perpendicular projecting from the ship's rail'.[210] Therefore, it is suggested that the ship's rail is a quite imprecise criterion. In an attempt to clear the issue, two answers have been given to the critical question of when the goods had crossed the ship's rail. The first one supports that the goods pass the ship's rail when they actually cross the rail of the vessel. Hence, if they get damaged in the loading process, the risk will be on the seller if for example they fall on the wharf or in the water, whereas it will be on the buyer if they fall on deck.[211] The second approach suggests that the risk passes at the end of the loading process, when all the goods have already been loaded on board.[212]

Moreover, it is possible, that the parties in a FOB sale may add the words "stowed" and/or "trimmed". The former means that the seller is obliged to perform the loading at his own expense and the latter that the seller will have to pay for the storage and safe placement of the goods inside the ship. It is not certain if the words "stowed (and/or) trimmed" mean that the passing of risk takes place at a later point.[213] 'It is likely that in these cases, risk does not pass when the goods pass the ship's rail. However, no precise rules can be formulated, since it is dependant on a number of factors- for example, custom at port, terms of the contract, and whether the seller in fact has a say in how the goods are trimmed or stowed'.[214] For that reason the parties are strongly advised to make specific arrangements on that issue in order to avoid any possible disputes.

FAS: Under the FAS term[215] risk passes at the moment when the seller places the goods alongside the vessel, at the named port of shipment, on the agreed date and in the manner customary at the port.[216]

CFR: Delivery is completed and thus, risk passes at the moment when the goods pass the ship's rail at the port of shipment. The buyer bears the risk of loss or damage from the moment that the goods are placed on board the vessel on the agreed date or timely period.[217]

CIF: According to A4 and A5 the seller fulfils his obligation to deliver when the goods pass the ship's rail at the named port of shipment on the agreed date or time period;[218] it is after that moment that the risk passes onto the buyer.[219] A reference should be made again here to the classic CIF term,[220] on which CIF INCOTERMS is based. Under the classic CIF contract,[221] risk passes on shipment,[222] ie when the goods pass the ship's rail.[223] 'This is because the parties contemplate the risk of loss or damage in transit and cover it by the contracts of carriage and insurance which the seller is required to take out and transfer to the buyer'.[224] As it was successfully illustrated by Kennedy LJ in *Biddell Bross v E.Clemens Horst Co*,[225] '[t]wo further legal results arise out of shipment. [One is that] the goods are at the risk of the purchaser, against

which he has protected himself by the stipulation in his CIF contract that the vendor shall, at his own cost, provide him with a proper policy of marine insurance intended to protect the buyer's interest, and available for his use if the goods should be lost in transit'.[226]

CPT: The risk is transferred to the buyer from the moment of delivery of the goods to the carrier (with whom the seller is responsible to contract), for their carriage at the named place of destination on the agreed date or in the agreed period.[227] In case of a multi-modal transport agreement, risk passes when the goods are delivered to the first carrier.[228]

CIP: Under this term the risk is transferred to the buyer at the time of delivery of the goods to the carrier nominated by him. After that point the buyer will be responsible for any accidental loss or damage to the goods.[229] Just like in CPT, in CIP in case of successive carriers, risk passes when the goods are delivered to the first carrier.

DAF: Risk is transferred when the goods are placed at the buyer's disposal, loaded on the means of transportation,[230] at the agreed place of delivery at the frontier,[231] but not before the customs border of the country of import, on the agreed date or in the agreed period.[232]

DES: The buyer bears the risk of loss or damage to the goods from the moment that the seller places them at his disposal on board the vessel, at the named point in the named port of destination, on the agreed date or in the agreed time period, in a way that enables their unloading from the vessel by the appropriate unloading equipment.[233] The seller does not have to discharge the goods.[234]

DEQ: The risk passes when the goods are placed at the buyer's disposal, on the agreed date, on the quay at the named port of destination.[235] The seller has the obligation to discharge the goods from the vessel onto the quay (wharf).[236]

DDU: The buyer bears the risk from the moment when the seller places the goods at the buyer's (or another person's named by the buyer) disposal, on the agreed date, on the arriving means of transport not unloaded, at the named place of destination.[237] Additionally, if the buyer fails to obtain the necessary documents for the import of the goods and to complete all the customs formalities necessary for their import, then he will bear the additional risks of loss of or damage incurred thereby.

DDP:[238] The risk is passed to the buyer when the seller puts the goods at the buyer's (or another person's named by the buyer) disposal, on the agreed date or within the agreed period for delivery, at the named place of destination, on the arriving means of transport not unloaded. The seller is responsible and bears the risk of carrying out the customs formalities for import in the country of destination.[239]

iv) Premature transfer of risk

From the above, it is obvious that risk under the 13 INCOTERMS passes with delivery. However, that rule is not absolute. There is an exception, according to which the risk might be prematurely transferred to the buyer even before the seller has delivered the goods. The premature transfer of

risk and its prerequisites is dealt with in section B5. According to this section, risk is passed onto the buyer at a previous moment in time, ie from the agreed date or the expiry date of the agreed period for delivery, if:

1) The buyer fails to do what is expected in order to enable the seller to perform his delivery obligation, or
2) The buyer fails to take delivery of the goods.

The buyer should give sufficient notice to the seller of all the relevant information regarding delivery, according to section B7.[240]

Moreover, according to B5, for the risk to pass to the buyer even before delivery has taken place, it is necessary that *the goods have been appropriated to the contract of sale* or clearly set aside or identified by any other way as the contract goods. Appropriation of the goods can occur by marking the goods or by naming the addressee(s).[241] Nevertheless, sometimes things might be more complicated, in cases of *bulk goods*, where marking the goods or naming the recipients is not possible. In these cases 'the risk will not pass until effective appropriation has been made, for example, until the issuance of separate bills of lading or delivery orders for parts of the bulk consignment'.[242]

In the present Chapter, the rules on passing of risk under the Vienna Convention and INCOTERMS 2000 were thoroughly examined. Next, in the following Chapter, an analysis will be made of their similarities and differences and will be examined the relation between them in international sales contracts. Furthermore, the next Chapter will deal with some intrinsic problems, which preoccupy this area of law and proposals for their resolution will be suggested.

5. Chapter III: Comparing the Vienna Convention and INCOTERMS 2000- Some problematic issues and proposals

5.1. Comparative evaluation

i) General remarks

The Vienna Convention and INCOTERMS are both international instruments formed with the aim of unifying the law pertaining to international sales and providing a common denominator for the harmonisation of several aspects of international sale contracts. Both are quite pragmatic and practical in a way so as to help the seller and buyer to cope with several issues that arise in international sale contracts. But what is the relation between the two? Which one will apply in an international contract of sale? Is there any case of parallel application and co existence? And does the CISG contain any rules on trade terms or INCOTERMS?

If the parties expressly agreed on the incorporation of INCOTERMS in their contract, then their rules will govern the contract of sale and they will supersede the Convention's rules on the passing of risk, excluding therefore, the application of articles 66-70 CISG. That is because the

Convention constitutes *ius dispositivum*, allowing the parties to derogate from or to completely exclude the application of its provisions.[243]

If the parties did not expressly agree on the incorporation of INCOTERMS, then it remains unclear whether their rules could still be applied in the contract of sale. Can the INCOTERMS be applied through the articles of the Convention even if the parties did not refer to them? The CISG does not openly and expressly refer either to the classic trade terms or the INCOTERMS; it does not contain any articles that include specific rules on them. Nevertheless, on one hand it has been supported that INCOTERMS can be applied, if they are thought to constitute "usages" under the meaning of article 9(2)CISG;[244] "usages" on which the parties have impliedly agreed and which the parties knew or ought to have known, and are widely known and used in the particular trade. Indeed, if we accept the above mentioned approach, that would mean that INCOTERMS would take precedence over the rules of the Convention. That view has already been reflected in case law, where in a recent US case decided on 26 March 2002, the District Court of New York held that INCOTERMS constitute "usages" under the meaning of article 9(2)CISG. The parties were *St Paul Guardian Insurance Co., et al. v Neuromed Medical Systems & Support, et al.*[245] In that case a German seller and an American buyer agreed on the sale of a magnetic resonance imaging (MRI) machine, under a 'CIF New York Seaport' contract. The seller delivered the MRI on board the ship undamaged and in good condition. Nevertheless, when the ship reached USA, it was found that the MRI had sustained great damage and needed repair. According to the CIF term, risk was transferred when the goods had passed the ship's rail at the port of shipment. The American buyer- plaintiff sued the seller-defendant in a US Court in order to recover for the damage. He argued that since the title to the goods would pass only when the final payment had been made, the risk of damage or loss would remain with the seller up to the moment when the goods were delivered at the port of New York. The seller argued that according to CIF INCOTERMS, risk had passed at the port of shipment. The buyer supported that since the parties had not expressly referred to INCOTERMS in their contract, the CIF INCOTERMS would be inapplicable. The contract stated that the applicable law would be the German law. The Court decided that the CISG governed the contract. The Court rejected the plaintiff's claims that the CIF INCOTERMS did not apply because the parties had not explicitly made a reference to them. It held that article 9(2)CISG was applicable and that INCOTERMS formed "usages" widely known and used in international trade by which the parties were bound, and that the CIF term was to be interpreted according to INCOTERMS.[246] In the end, the Court dismissed the case. On the other hand, the contrary opinion has also been supported, which suggests that INCOTERMS cannot be included in article 9(2), since they are not widely used in all types of trade (for example they are not that common in the sale of dry cargo[247]) and furthermore, they may have a different interpretation in different states (for example in the USA).[248]

Moreover, another way through which INCOTERMS can be applied even though they are not expressly mentioned in the contract, is article 8(3)CISG. According to that article, the parties' intentions and statements can be interpreted in accordance with the practices and usages they have established between themselves. In consequence, INCOTERMS could be regarded as "usages" established between the parties, if they have used them in previous transactions between themselves and as a result, they will be applied to their sales contract, even though they were not expressly referred to.[249]

ii) Similarities between the two voices

The rules on passing of risk under the Convention and INCOTERMS have several similarities and common points.

The first one is their common understanding of the notion of "risk". Under both, "risk" has the meaning of any "accidental" loss or damage to the goods, caused by neither an act nor an omission of any of the parties. Furthermore, both refer only to the so called "price risk", leaving out of their ambit the "risk of non performance". Also, they connect the passing of risk to delivery, i.e. the transfer of physical control over the goods from the seller to the buyer (with the exception of art.68 CISG, where the risk passes from the time of conclusion of the contract). Finally, both instruments contain specific provisions, which require the previous identification of the goods to the contract in order for the risk to pass to the buyer.

iii) Comparison of the Convention's articles on the passing of risk with INCOTERMS 2000

a) Article 67 CISG

Article 67(1) first sentence

By comparing the Convention's rules with INCOTERMS 2000, it is easy to notice that Article 67(1) first sentence could be applied to the FCA term, which was formed in order to cover situations where multi-modal transport is involved, therefore making this term applicable in cases of successive carriers. The most appropriate rule in the Convention is article 67(1) first sentence, according to which risk passes with delivery of the goods to the first carrier for transmission to the buyer. The meaning of "carrier" is the same under INCOTERMS and the Convention.[250]

The same rule, that of the first sentence of article 67(1),[251] applies to CFR contracts as well. Under the later, risk passes when the goods cross the ship's rail at the port of shipment. The above rule of the Convention is the closest for this type of INCOTERMS, since under the CFR the seller is the one responsible to contract for the carriage and pay for the loading and unloading of the goods. Therefore, the seller is obliged to deliver not to a particular place, but to the custody of a carrier, who in that case is the sea carrier selected by the seller; the seller has to deliver the goods on board his vessel at the agreed port of shipment.

The case is the same under a CIF contract, where the seller is obliged to deliver the goods on board the vessel selected by him and to contract for the carriage of the goods. Risk passes from the moment that the goods cross the ship's rail. Under the CIF clause the port of shipment does not constitute part of the sales contract.[252] Therefore, the seller is not supposed to hand the goods over at a "particular place" thus, making the Convention's article 67(1) first sentence the most compatible provision. Under the latter, risk passes upon delivery to the first carrier for transmission to the buyer, who under the CIF term is the sea carrier; the goods will be delivered on board his vessel at the agreed port of shipment.

Furthermore, under the CPT and CIP terms, which can be used in all modes of transport including multi-modal transport, risk is transferred by handing the goods over to the carrier for transmission to the buyer or to the first carrier in case of successive carriers. It is suggested that art.67 (1) first sentence should be equated to both terms, since under the Convention "the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer".

Article 67(1) second sentence

Article 67(1) second sentence provides that where the parties have agreed on delivery of the goods to a certain place, risk passes when the seller hands the goods over to the carrier at that place. It seems that this rule could be applied to FAS contracts, where risk passes when the seller places the goods alongside the ship on the harbor. The buyer is the one who should take over the goods and load them on board the vessel; the procedure of loading is at the buyer's risk. If the goods suffer any damage while they are being loaded, the seller is absolved from any liability. The responsibility of placing the goods alongside the vessel resembles the act of handing over the goods at a "particular place". It is generally accepted that risk passes at the end of the handing over process.[253] Nevertheless, the Convention's rule differs from that of the FAS term in that, whereas under the latter the risk passes when the goods have just been placed alongside the vessel, without being necessary that the buyer takes delivery, under the Convention's provision, the risk passes when the goods are delivered to the carrier at the particular place, and not when they are merely placed at his disposal. It seems, therefore, that the Convention presumes that delivery is only valid if the goods are taken over by the other party, thus making delivery a bilateral act, which is not always the case in international trade.[254]

The same Convention's rule seems to apply to FOB contracts as well. Under the latter the seller should deliver the goods on board the vessel and risk passes when the goods cross the ship's rail. The ship's rail was seen in the old days as the border line between the seller's and buyer's territory as well as between the shipper's and carrier's or the customs agent's and captain's.[255] Nonetheless, the ship's rail is a rather controversial criterion, which may be susceptible to different interpretations.[256] Article 67(1) second sentence would apply once more in that case, since delivery on board the vessel, at the agreed port under the FOB term, equates to delivery at a "particular place".

b) Article 68 CISG

As it has already been examined,[257] article 68 CISG deals with a particularly difficult issue, ie the passing of risk in case of goods sold in transit. Usually this type of sale involves bulk goods like oil or wheat, where the seller embarks on a journey often without knowing the recipients of the cargo and arranges for its sale while it is being transported. Whereas article 68 provides that the risk, in sales involving goods in transit, passes from the time of conclusion of the contract of sale, or in special circumstances (ie where there is an insurance cover) from the time of handing over the goods to the carrier who issued the contract of carriage, INCOTERMS 2000 do not specifically provide any provision dealing with this issue. It is, therefore, suggested that in cases of sale of goods during transit, the CIF and CFR terms usually apply by adding the word "afloat" after them.[258] In that case, the risk will pass to the buyer from the moment when the goods pass the ship's rail at the port of shipment. That option has the disadvantage of the buyer having to bear any loss or damage to the goods even before the contract is concluded.[259] In order to avoid the disadvantages, 'it is recommended that parties involved in similar contracts [should] agree in advance to the point in which risk is to be passed. Relying on Article 6 of the Convention this may be done. In other words, parties should agree that risk passes either at the beginning of the contract or at the end of transit.'[260]

c) Article 69CISG

Article 69(1)

The INCOTERMS 2000 term that presents significant similarities to article 69(1), is EXW. Both provisions deal with cases that do not involve carriage of goods by a carrier. The Convention's provision regulates instances where the buyer is bound to take over the goods at the seller's premises or where he is not bound to take them over at any particular place. Risk passes when he takes over the goods, or from the moment when the goods are placed at his disposal and he commits a contractual breach by failing to take delivery. Similarly, under EXW INCOTERMS 2000 risk passes from the moment when the goods have been placed at the disposal of the buyer at the seller's premises. The two provisions differ though, in that whereas under the EXW term the seller simply has to place the goods at the disposal of the buyer in order for the risk to pass, under the Convention this is not sufficient. Under the latter, risk passes from a later point, ie when the buyer takes over the goods, and only when he commits a breach by not taking delivery does the risk pass from the moment when they are placed at his disposal. Let us now assume that a buyer in London and a seller in Athens agree on the sale of 500 washing machines under an EXW INCOTERMS 2000 term.[261] The goods would be available at the seller's premises in Athens from 1 March 2003 and for two weeks. On 1 March the seller informs the buyer that the goods are ready for taking over. On 12 March burglars break into the premises and the washing machines are stolen. Under the EXW term the buyer would have to bear the loss of the goods since the risk had passed to him from 1 March when the goods had been placed at his disposal. On the contrary, under the Convention's rule, the party bearing the risk would be the seller since the buyer had not committed a breach of contract by not taking delivery of the goods by the 12 March. If the goods were stolen on 25 March and the buyer had still not taken delivery, he would have to bear the loss since he would have then committed a breach of contract.

Article 69(2)

All D-terms can most successfully be compared with article 69(2) CISG, which provides that "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". Indeed, under DAF risk passes when the goods have been placed at the buyer's disposal at the frontier at the country of export, whereas under the DEQ term, when they have been placed on the wharf or quay at the agreed port. Under the DES term risk passes when the goods have been tendered while on board the vessel (the buyer bears the risk during the unloading procedure). And finally, the provision of article 69(2) is also appropriate for the DDU and DDP terms, where risk once more passes when the goods have been placed at the disposal of the buyer.

d) Articles 66 and 70 CISG

Finally it should be stressed that INCOTERMS 2000 deal only with "accidental" loss or damage to the goods; therefore, they do not regulate situations that involve loss or damage due to acts or omissions of the seller. In that case article 66 CISG applies.[262] Furthermore, INCOTERMS 2000 do not contain any similar provisions to that of article 70 CISG either, thus, leaving it up to the Convention to regulate cases of simultaneous "accidental" loss or damage and fundamental breach on the part of the seller.

5.2. Some problematic issues and proposals

i) The "ship's rail" criterion

As it has already been mentioned above, under the INCOTERMS 2000 CIF and FOB terms, the point of delivery and hence, passing of risk is the moment when the goods pass the ship's rail.[263] This criterion, nonetheless, is rather unsatisfactory since it can lead to a great deal of confusion and unfair results. INCOTERMS' 2000 approach was based on the classic trade terms CIF and FOB, which, since their appearance and establishment over 150 years ago, had adopted as a critical point for the passing of risk the time of shipment and the placing of the goods on board the vessel respectively. So, the answer to the question, why INCOTERMS 2000 did not change the point of passing of risk under the CIF and FOB sales,[264] is simple. Any alteration would have created lots of misunderstandings and confusion in the commercial world, since the traders for over a century had connected these trade terms with the "ship's rail" criterion.[265]

Nevertheless, this does not alter the fact that the "ship's rail" criterion has actually a lot of disadvantages. The apparent difficulty is the specification of the exact time of passing of risk. What if the goods suffer loss or damage during the loading process? Who will bear the risk then?[266] On one hand, it has been suggested that in these situations risk passes literally when the goods pass the ship's rail and therefore, the risk is on the seller if they fall on the wharf or in the sea, but it is on the buyer if they fall on deck, since they will have already passed the ship's rail. This approach, though, is simplistic, is hardly practical and involves further problems of proof.[267] On the other hand, the view has been supported that risk should pass at the end of the handing over process, when the loading operation has finished and the goods are not under the seller's possession anymore.[268] Nevertheless, it is dubious if this approach is satisfactory, since if the parties wanted the risk to pass at the end of the loading procedure, they would have expressly added that to their contract by using the terms "stowed and/or trimmed".[269]

The author is of the opinion that the "ship's rail" criterion is insufficient to address the current issues in modern sales transactions and therefore it should not be preferred. A better option would be to relocate the moment of passing of risk at an earlier point, ie at the moment of handing over the goods to the carrier, before the start of the loading operation and thus, to put the risk during loading on the buyer.[270] In that way the time and money consuming litigation would be avoided, as well as the problems of proof and examination of the exact time and place of the loss or damage.[271] Moreover, it is suggested that the proposed solution is in accordance with the Convention's rule on article 67(1) first sentence, according to which the risk is transferred when the goods are handed over to the first carrier for transmission to the buyer. The adoption of the Convention's rule avoids the vagueness and the uncertainty of the "rail criterion" and offers clear and straightforward answers. Furthermore, the view that the latter criterion should be discarded is reinforced by the fact that in some ports, the "ship's rail" criterion is not applied, where the custom practices have established a different point of passing of risk. For example in the port of Antwerp and Zeebrugge, the passing of risk under a FOB contract 'coincides with the transport agreement namely under the ship's tackle'.[272]

ii) Appropriation and the transfer of risk

An issue that is neither sufficiently nor satisfactorily settled by the Convention is the passing of risk in cases of sales of bulk cargos. The Convention in that case lacks clarity and the choice not to include a specific provision on bulk sales, which is a very common practice in international sale contracts, is one of its serious weaknesses.

Both articles 67 and 69 CISG contain specific provisions in paragraphs (2) and (3) respectively,[273] which expressly require for the goods to be clearly identified to the contract of sale either by markings, by sending appropriation notices or by any other way. If the goods are not identified to the contract, then the risk cannot pass. Article 68, dealing with goods sold in transit, does not have a similar provision, but it is accepted that the prerequisite of identification applies to that article as well.[274] Regarding the sending of a notice of appropriation, risk passes from the time of its dispatch, meaning that it does not have a retrospective power. That provision though, has certain disadvantages, since it results in splitting the transit risk and leads to further problems of proof, given that it will be difficult to ascertain the exact point of the loss or damage and if it occurred before or after the dispatch of the notice.[275] The fact that the critical point for appropriation is that of dispatch (and not that of receipt) serves the quicker transfer of risk in favour of the seller. Nevertheless, his position will be worse in case the goods are lost or damaged, as then he will have the burden of proving that the damaging event occurred after the identification.[276]

In case of sale of bulk goods while in transit, it should be stressed that in case of loss or damage, each buyer bears the risk *pro rata*, if the parties have made an express agreement on that or if it is a common practice in that type of trade, whereas in a contrary case the risk is transferred when it has been certified that the goods are those referred to the sales contract.[277] Furthermore, the Convention in article 68 adopts the "knowledge criterion"; if the seller knew or ought to have known about the loss or damage and did not inform the buyer, and then the seller will be the one who bears the risk. What will happen though, when bulk goods have been shipped, sold and *lost* before appropriation? In that case the "knowledge criterion" offers satisfactory solutions, since the seller in all likelihood will be aware of the loss. On the contrary, if the goods were shipped, sold and then *damaged* before appropriation, the "knowledge criterion" will not be enough, since it is not always easy for the seller to discover the damage or deterioration of the goods while in transit.[278]

Therefore, it is suggested that the Convention's provisions, besides being rather severe, fail to take into consideration certain very common situations in international contracts. It is the author's opinion that the retrospective passing of risk should be preferred in any case and the risk should be transferred not from the time of appropriation, but from the moment of handing the goods over to the carrier for transmission to the buyer, since in that way the splitting of transit risk will be avoided and so will the additional problems of proof. Moreover, the parties to a contract for the sale of bulk goods should specifically agree on the exact point of passing of risk in order to protect themselves from misunderstandings. The parties could additionally include out-turn clauses in their contract, the advantage of their incorporation being that the buyer will just have to pay for the price of what he finally receives at the end of the journey.[279]Containerisation and issues on risk

The passing of risk when the transport of the goods is made in containers presents certain difficulties, and for that reason it requires separate examination. Ever since the appearance of the first containers in the 1950s and the establishment of containerisation, the transport of goods in containers has been very popular. Especially during the last decades the evolution and wide use of containerisation has been impressive.[280] Nowadays, container transport is preferred especially in long distance sales due to the speed, ease and security that it offers.[281] The 'containers are basically large boxes, 8 x 8 feet in cross- section, and either 10, 20 or 40 feet long'.[282] They allow the safe storage of goods, since when loaded they are subsequently sealed and opened only at the place of destination, thus reducing the risks of theft or pilferage. Moreover, they offer great automation of loading and transhipment, saving considerable time and money during transport.[283] Shipments in containers are either Full Container Load (FCL) or Less than a full Container Load (LCL).[284] In the former case the container is loaded at the seller's premises with goods that fill the whole container, whereas in the latter case, the seller delivers the goods to a container terminal, where the goods are stowed in the container along with additional cargo, since they are not sufficient to fill a whole container.[285] Usually, where containers are used, the transport of goods is multi-modal.[286] The advantages of the latter are various,[287] since the entire transit will be covered by one transport document 'issued at the beginning by someone in a position to see what goes into the container and record the quantity and condition of the goods at that time'.[288] Consequently, it can be said that 'the advantages…of containerisation are clear: cheaper insurance and packaging derived from the protection afforded by the container, faster transit, and lower freight rates'.[289]

Conversely, despite the widely recognised advantages of container transport, there are certain problems related to containerisation and the passing of risk. It was mentioned above that the containers are usually loaded and sealed immediately, at the premises of the seller or at the container terminals before the beginning of the carriage and that they are not opened until they reach their final destination. Hence, when the goods suffer damage or loss during transport it is difficult, and most of the times impossible to ascertain the exact time when the loss or damage took place, unless it was due to an obvious external event.[290] Consequently, it will be very hard to allocate the risk between the parties.[291] It is evident that rules that split the transit risk between the parties cannot be efficient, since it will not be possible to detect the exact moment when the damaging event occurred.[292] It is suggested that the parties should expressly include specific provisions in their contract, allowing for the risk to pass at the moment when the container is sealed. In so doing they will avoid intrinsic problems of proof.[293]

It is true that the CISG fails to deal specifically with containerised cargo and does not include separate provisions on risk in cases of transport in containers, even though this mode of transport is extremely popular in international sales.[294] Nevertheless, the Convention's provisions do contain satisfactory rules, which may be successfully applied in container transport. Accordingly, in transport in containers the rule of the first sentence of article 67(1) can be an efficient proposal regarding the passing of risk issues.[295] According to the provision, the risk will be transferred when the goods are handed over to the carrier for transmission to the buyer. In that way the splitting of transit risk will be avoided and the buyer will bear the risk of loss or damage during the whole carriage.

INCOTERMS 2000, the drafters being aware of the importance of container transport in international sales, have incorporated terms, which are indeed appropriate for containerised and multi-modal transport. These terms include FCA, CPT and CIP, under which the risk passes when the goods are handed over to the carrier for transmission to the buyer.[296] These terms are efficient for transport in containers, since as it was already mentioned, once the containers are sealed there is no possibility of opening them or checking the status of the goods, thus making it impossible to certify the exact point in time that the loss or damage occurred. By using the above INCOTERMS 2000 terms any possible problems of proof are certainly abolished and the splitting of transit risk is undoubtedly avoided.

6. Conclusion

After examining the rules on risk allocation under the Vienna Convention and INCOTERMS 2000 it is now easy to make an overall assessment of the efficiency and adequacy of their provisions. They both are international instruments created for the purpose of promoting international unification in the field of commerce and they have been quite successful in fulfilling their purpose. Nevertheless, it is true that, when it comes to the issue of passing of risk, they do not manage to give completely clear and straightforward answers to certain important and usually encountered questions.

The Vienna Convention's rules on risk allocation, even though quite practical, lack clarity and comprehensiveness at some points, i.e. the Convention does not define important notions like those of "delivery", "first carrier", or "indicative circumstances", leaving it open for different and often divergent interpretations. This might lead to confusion and misunderstandings, thus putting the goal of harmonisation in danger. Furthermore, some of its provisions are rather ambiguous and vague, like for example the rule on risk allocation on sales of goods in transit and its complicated technique for the attribution of retroactive effect. Moreover, it seems that the Convention fails to take into account modern developments and practices in international trade, since it does not include separate rules on containerisation despite the immense growth of use of containers. Additionally, it does not contain any rules on the passing of risk in cases of sale of bulk goods, which is also a common practice in commercial sales. Another weak point of the CISG is its lack of reference to international trade terms commonly used in sales contracts, even though it does acknowledge and respect their importance and considerable weight in international sales law. Overall, it can be said that generally the risk allocation under the Convention consists a reasonable compromise of the seller's and buyer's interests, in a problem where any solution seems harsh for any of the parties, which will have to bear the risk of loss or damage without having committed any contractual breach.[297] Despite its weaknesses though, it should not be forgotten that the CISG is a document, which resulted from the cooperation of countries with a different legal culture, economic status, social background and political history and it is more than anticipated and excused for containing compromises and unsettled issues. What is of significance is that the Vienna Convention is a document of vast magnitude and it undeniably provides an environment that promotes and strengthens international trade.[298]

Of course, most of the times in issues concerning risk allocation the CISG will not apply, since the parties will have either made a specific agreement or will have incorporated international trade

terms in their contract, like for example INCOTERMS. The latter are preferred by a range of companies and enterprises all over the world, due to the practicality, simplicity and clarity that they offer. It should not be forgotten though, that INCOTERMS do not deal with all the issues that might arise in a sales contract and they generally only deal with passing of risk and payment of the price aspects. However, INCOTERMS have succeeded in promoting harmonisation and providing safety and certainty in international sales law. They have taken into account the latest practices in trade by including terms, which can be applied in multi-modal and container transport, like FAS, CPT and CIP and at the same time they respect long established practices, like the "ship's rail" criterion under the CIF and FOB terms, even though, as it was shown earlier,[299] this is a hardly effective or satisfactory approach.

In conclusion, it can be said that the two voices can harmoniously co exist and offer their own perspective towards the much debated issue of risk allocation in international sales. The wish expressed by the author is, for the parties in an international sales contract to pay additional attention to the passing of risk issues, since they can be of extreme importance to the outcome of their transaction, and for the legislator to act prudently and effectively in order to settle satisfactorily the intrinsic problems of risk allocation and to sort out its related vague and intricate aspects.

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(Endnotes)

[1] As it will be seen in Chapter II this is regulated in article 70 CISG. See Chapter II. A. vi).

[2] From now on "the Convention" or "CISG". The text of the Vienna Convention is available at http://www.uncitral.org/ and in I.Carr and R.Kidner, *Statutes and Conventions on International Trade Law* (London: Cavendish Publishing Limited, 3rd edition, 1999, reprinted 2000) 580.

[3] Some examples are: The UN Convention on Carriage of Goods by Sea (the Hamburg Rules, 1978), The UN Convention on International Bills of Exchange and International Promissory Notes (New York, 1988), The UN Convention on the Assignment of Receivables in International Trade (New York, 2001), The UNCITRAL Model Law on International Commercial Arbitration (1985), The UNCITRAL Model Law on International Credit Transfers (1992), The UNCITRAL Model Law on Electronic Commerce (1996), The UNCITRAL Model Law on Electronic Signatures (2001) and more.

[4] The need for these ambitious attempts was urgent in that constantly evolving field of business, law and finance, since trade is an area of extreme importance globally and certainly one of the economic indicators of the status of development in countries across the world.

[5] Some of the early attempts include "The Hague Uniform Laws on International Sales (1964)" and one of the latest consists of "The UNIDROIT Principles of International Commercial Contracts (1994)".

[6] According to article 99(1) CISG, the Convention would enter into force "on the first day of the month following the expiration of twelve months after the date of deposit of the tenth instrument of ratification, acceptance, approval or accession, including an instrument which contains a declaration made under article 92".

[7] The ULIS and ULF texts can be found in I.Carr and R.Kidner, op cit, 130 and 155 respectively.

[8] See B.Nicholas, 'The Vienna Convention on International Sales Law' (1989) 105 *Law Quarterly Review* 201, 203, M.Bridge, *The International Sale of Goods. Law and Practice* (Oxford: Oxford University Press, 1999) para 2.06 and H.van Houtte, *The Law of International Trade* (London: Sweet and Maxwell, 2nd edition, 2002) para 4.06.

[9] The United Nations Commission on International Trade Law (UNCITRAL), based in Vienna, was established in 1966 and has as its goal to promote the harmonisation and unification of various aspects of international trade law, like for example the sale of goods, carriage of goods by sea, arbitration, banking and finance. And indeed, it has been successful in almost every attempt, since most of the international Conventions and Model Laws that it has prepared were welcomed by the international community and adopted in many countries across the world. UNCITRAL consists of a number of states, both developing and developed, thus allowing states with every degree of development to be part of the legislative process. Therefore, it manages to accommodate both civil and common law rules and principles, taking into account the interests of countries of every degree of development and legal background.

[10] See B.Nicholas, op cit, 203.

[11] J.D.Feltham, 'The United Nations Convention on Contracts for the International Sale of Goods' (1981) *Journal of Business Law* 346, 347.

[12] Nevertheless, the Convention does have flaws as well; as it happens with every similar attempt at harmonisation at an international level where various practices and laws from different social, economic and legal background are coming together, some inconsistencies and problems of interpretation seem to be inevitable.

[13] Article 1(1) CISG states: "This Convention applies to contracts of sale of goods between parties whose places of business are in different States:
when the States are Contracting States; or
when the rules of private international law lead to the application of the law of a Contracting State".

[14] Article 4 CISG provides: "This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except or otherwise expressly provided in this Convention, it is not concerned with:
the validity of the contract or of any of its provisions or of any usage;
the effect which the contract may have on the property in the goods sold".

[15] Article 6 CISG states: "The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions".

[16] Articles 7-13 CISG.

[17] Articles 14-24 CISG.

[18] J.O.Honnold, *Uniform law for international sales under the 1980 United Nations convention* (The Hague: Kluwer Law International, 3rd edition, 1999) para 132.1.

[19] Nowadays, it is usual for the "offer" and "acceptance" to be sent in forms that incorporate on their back the standard trade terms of seller and buyer. Usually these general conditions will not coincide and it will be difficult to define if a contract has been concluded and under which terms. This situation is referred to as "the battle of the forms" (See L.D'Arcy, C.Murray and B.Cleave, *Schmitthoff's Export Trade: The Law and Practice of International Trade* (London: Sweet and Maxwell, 10th edition, 2000) 64). The only provision that could be applied in similar situations is art.19 CISG. According to Ma del Pilar Perales Viscasillas there are two different trends of opinions regarding the battle of the forms and the Convention. On one hand some commentators argue that the battle of the forms falls outside the scope of the Convention and the solution should be found in the applicable domestic law, in accordance with article 4(a). On the other hand, some scholars agree that the problem is within the scope of the CISG, but they disagree on the provisions that should be applied. Some hold that the solution lies in art.7 and that the general principles of the CISG should be applied in order to arrange problems that are not expressly settled by the Convention. Thus, by applying the principle of good faith, a solution can be found similar to the US "knock-out rule". Some others hold that the solution can be found under specific provisions of the Convention. This is likely to lead to the application of the "last shot rule": the last general conditions sent, prevail. On various occasions the Courts have tried to solve problems like these by applying the "last shot rule". See Ma del Pilar Perales Viscasillas, "Cross reference editorial Analysis of CISG Article 19, CISG W3 Database Pace University School of Law" December 1996, available at http://www.cisg.law.pace.edu/cisg/text/cross19.html , last accessed on 25/05/03.

[20] Articles 25-88 CISG.

[21] The CISG regulates the passing of risk in Chapter IV of Part III; articles 66-70. (In ULIS this chapter was the final one, but in the CISG it became the fourth, just after the rules on the parties' obligations, since it is closely connected to them). The CISG does not regulate in the chapter on risk the risk of non-performance, because these rules are connected with the area of breach of contract and the obligations of the parties. See A.Romein, "The Passing of Risk A Comparison between the passing of risk under the GISG and German Law", available at http://cisgw3.law.pace.edu/cisg/biblio/romein.html, last accessed on 30/05/03.

[22] Articles 89-101 CISG.

[23] INCOTERMS deal with the rights and obligations of the seller and the buyer with respect to the carriage of goods and also with issues of export and import clearance. Furthermore, they regulate the allocation of costs and risks between the parties. This paper will examine the latter issue pertaining to the division of risk. The issues that INCOTERMS do not cover are: 1) transfer of property rights, 2) relief from liability in case of unexpected events, 3) consequences of breaches of contract (apart from those related to the passing of risk and costs). See J.Ramberg, *ICC Guide to INCOTERMS 2000* (Paris: ICC Publishing S.A., 1999) 11.

[24] See J.Ramberg, *ICC Guide to INCOTERMS 2000* (Paris: ICC Publishing S.A., 1999) 10.

[25] It would not be possible to encompass every single trade term that is used in international commercial transactions all over the world- that is something that is almost impossible and certainly an issue that the Convention does not share an interest in.

[26] See P.M.Roth, 'The Passing of Risk' (1979) 27 *American Journal of Comparative Law* 291, 309.

[27] See J.Ramberg, *ICC Guide to INCOTERMS 2000* (Paris: ICC Publishing S.A., 1999) 10.

[28] Article 6 CISG.
[29] In conjunction with article 6 CISG.
[30] I.Carr, *Principles of International Trade Law* (London: Cavendish Publishing Limited, 2nd edition, 1999) 1.
[31] FOB (Free On Board) and CIF (Cost Insurance Freight) were established gradually during the 19th century and started as usages in a small scale, which, along with the development of commerce, began to develop in a much wider scale. As some early cases indicate, the fob term preceded the cif, but the latter soon became more popular especially in the second half of the 19th century. Nevertheless, it faced a severe period of decline during the First and Second World Wars and later, while the fob term recovered impressively. There is not a lot known 'of the factors which have throughout the years influenced the choice of preference for one term rather than the other' (D.M.Sassoon, 'The origin of F.O.B. and C.I.F. Terms and the Factors Influencing their Choice' (1967) *Journal of Business Law* 32, 32), but most probably their evolution, success and magnitude are mostly a result of the economic, social and technological status prevailing in the various time periods. See D.M.Sassoon, 'The origin of F.O.B. and C.I.F. Terms and the Factors Influencing their Choice' (1967) *Journal of Business Law* 32, 35-37, and see also D.M.Sassoon, *C.I.F. and F.O.B. Contracts* (London: Sweet and Maxwell, 4th edition, 1995) 347 *et seq*.
[32] Some times there could be differences in interpretation even in different ports of the same country.
[33] See D.Flambouras, 'The ICC rules on International Commercial Sale (Incoterms 2000)' 3/2000 (6th YEAR) *Law of Enterprises and Companies* 260, 260- *In Greek*.
[34] See N.G.Oberman, "Transfer of risk from seller to buyer in international commercial contracts: A comparative analysis of risk allocation under the CISG, UCC and INCOTERMS", available at http://www.cisgw3.law.pace.edu/cisg/thesis/Oberman.html, last accessed on 30/05/03.
[35] The ICC has also published another very successful set of rules, the "Uniform Customs and Practices for Documentary Credits" (UCP), dealing with Bankers' Documentary Credits. The version that currently applies is UCP 500/ 1993 Revision.
[36] And it seems that it has been rather successful in its attempt since INCOTERMS are used very often in trade and are being chosen by parties all over the world to govern their contracts.
[37] For the following see N.G.Oberman, op cit. In 1920 the ICC decided to create a working group that would examine and research the various issues connected to the parties' rights and obligations in an international contract of sale. Its first attempt took place in 1928 when it published some initial rules on commercial terms. But it was in 1936 that the ICC published what was proved in the future to be the first version of INCOTERMS, having as its goal the harmonisation of international trade terms. The next revision occurred in 1953 in a congress held in Vienna and was more detailed compared to the previous one. The next modification was in 1967 and another one took place in 1976 (the latter version adopted the term FOB Airport). The following revision was only a few years later, in 1980 due to the vast and speedy developments in the field of international business transactions. The 1980 version was very important and modern compared to the previous ones, since it took into account all the then current changes in international trade (like the new modes of transport), and succeeded in unifying the use of international trade terms to a further extent.
[38] See N.G.Oberman, "Transfer of risk from seller to buyer in international commercial contracts: A comparative analysis of risk allocation under the CISG, UCC and INCOTERMS", available at http://www.cisgw3.law.pace.edu/cisg/thesis/Oberman.html, last accessed on 30/05/03.
[39] ibid.
[40] The parties who agree on the adoption of INCOTERMS in their contract are strongly advised to refer to the year of publication (since there are various versions), in order to avoid misunderstandings and further disputes. See J.Ramberg, *ICC Guide to INCOTERMS 2000* (Paris: ICC Publishing S.A., 1999) 10.
[41] See J.Ramberg, *ICC Guide to INCOTERMS 2000* (Paris: ICC Publishing S.A., 1999) 11. The most important differences are: 1) Under INCOTERMS 2000, in the FAS term the export clearance is an obligation of the seller, whereas in the 1990 version it was placed on the buyer, 2) INCOTERMS 2000 provide that in DEQ term the import clearance is an obligation of the buyer, while INCOTERMS 1990 provided that this obligation was placed on the seller, 3) INCOTERMS 2000 regulate that under FCA the seller has the obligation to load the goods on the buyer's collecting vehicle and the buyer has the obligation to receive the seller's arriving vehicle unloaded .
[42] For a further analysis see D.Flambouras, 'The ICC rules on International Commercial Sale (Incoterms 2000)' 3/2000 (6th YEAR) *Law of Enterprises and Companies* 260, 261- *In Greek*.
[43] ibid.
[44] ibid. See also M.Bridge, *The International Sale of Goods. Law and Practice* (Oxford: Oxford University Press, 1999) para 2.48. Bridge supports this view, but not totally; it is a fact that art.9(2) CISG demands usage, which the parties "knew or ought to have known and which in international trade is widely known to, and regularly observed by parties to contracts of the type involved in the particular trade concerned". Nevertheless, according to Bridge, even though it is true that INCOTERMS are widely known and used in international commerce, this is not the case for every kind of trade. He states that they are usually adopted in the oil trade, but not very commonly used in contracts of dry cargo. Therefore, Bridge supports that INCOTERMS might be encompassed in the meaning of article 9(2) in the former situation (oil trade)- even if they were not expressly mentioned in the contract- but they should not be applied in the latter situation (dry cargo)- if there has not been an express agreement.
[45] See D.Flambouras, 'The ICC rules on International Commercial Sale (Incoterms 2000)' 3/2000 (6th YEAR) *Law of Enterprises and Companies* 260, 261- *In Greek*.

[46] See H.van Houtte, *The Law of International Trade* (London: Sweet and Maxwell, 2nd edition, 2002) para 4.58, M.Bridge, *The International Sale of Goods. Law and Practice* (Oxford: Oxford University Press, 1999) para 1.17, I.Carr, *Principles of International Trade Law* (London: Cavendish Publishing Limited, 2nd edition, 1999) 1.
[47] International Chamber of Commerce, *INCOTERMS 2000: ICC official rules for the interpretation of trade terms* (Paris: ICC Publishing, 1999) 7 para 4.
[48] They regulate only certain issues, like the parties' obligations or the passing of risk, without dealing with other basic issues, like the formation of the contract or the transfer of property of the goods.
[49] See D.Flambouras, 'The ICC rules on International Commercial Sale (Incoterms 2000)' 3/2000 (6th YEAR) *Law of Enterprises and Companies* 260, 261- *In Greek*.
[50] ibid, 261-262. A similar set of rules is encompassed in the CISG. Moreover, in some legal systems, ie USA, UK, the courts do not apply INCOTERMS often. Thus, they cannot be considered either as the only widely known and used rules in international sales or as an autonomous legal system.
[51] This will be further examined in the next chapter (Chapter II).
[52] Regarding the first, it should be pointed out that in international sales the rule is that the goods are insured during their transit from the seller's to the buyer's country (See I.Carr, *Principles of International Trade Law* (London: Cavendish Publishing Limited, 2nd edition, 1999) 223). The "insurance risk" therefore (See D.M.Day, *The Law of International Trade* (London Butterworths, 1981, reprinted 1987) on the chapter on Insurance in the International Trade Transaction, 104 *et seq*), is the risk covered by the insurance company or the insurer, who in case of realization of the risk, is obliged to indemnify the insured for his loss or damage and put him in the same position in which he would have been if the damaging event and consequently the damage or loss had never occurred. The meaning of risk and which types of it are covered under the contract is an issue on which the parties agree on, and might either include 'all risks' or specific ones, like for example fire or explosion, collision, volcanic eruption or earthquake, jettison and more. Of course the insurer will always encompass exclusions to the insurance contract, in order to exclude his obligation to indemnify the insured (for example when the loss or damage is a result of the insured's misconduct or due to an inherent vice of the subject matter). 'The question of what type of insurance needs to be obtained to cover the cargo- for example, marine insurance, air cargo insurance- depends on the mode of transport agreed by the parties in the contract of sale' (I.Carr, op cit, 223). It is true though, that '[t]he insurance of goods carried by land and air has not achieved the extent or the standardisation which has developed in marine insurance' (D.M.Day, op cit, 104). "Commercial risk" could be described as failure of one of the parties to perform its obligations under the contract due to insolvency or repudiation of the contract (See D.Flambouras, "Transfer of Risk in the Contract of Sale involving Carriage of Goods: A Comparative Study in English, Greek Law and the United Nations Convention on Contracts for the International Sale of Goods", available at http://cisgw3.law.pace.edu/cisg/biblio/flambouras.html, last accessed on 28/05/03). As regards "political risk" it can be supported that its meaning might include 'outright warfare, blockade, civil unrest, politically- inspired "retaliation" against vessels of a specific flag, terrorism, and trade union boycotts' (C.G.C.H.Baker and P.David, 'The politically unsafe port' (1986) LMCLQ 112, 113), without this list being exhaustive. The latter risks have as a common characteristic the existence of some kind of political incitement, which forms an obstacle to the performance of regular transactions.
[53] See P.M.Roth, 'The Passing of Risk' (1979) 27 *American Journal of Comparative Law* 291, 291.
[54] See F.Enderlein and D.Maskow, *International Sales Law* (Oceana Publications, 1992) 261. Also according to Bernstein and Lookofsky, the *accidental* loss or damage covers both "acts of God" and the acts of mortal third parties, but not the acts or omissions of the seller or buyer. See H.Bernstein and J.Lookofsky, *Understanding the CISG in Europe* (The Hague; London; Boston: Kluwer Law International, 1997) para 5.1.
[55] See D.Flambouras, "Transfer of Risk in the Contract of Sale involving Carriage of Goods: A Comparative Study in English, Greek Law and the United Nations Convention on Contracts for the International Sale of Goods", available at http://cisgw3.law.pace.edu/cisg/biblio/flambouras.html, last accessed on 28/05/03 and D.E.Goodfriend, 'After the Damage is Done: risk of Loss Under the United Nations Convention on Contracts for the International Sale of Goods' (1983) 22 *Columbia Journal of Transnational Law* 575, 582.
[56] See G.Hager in P.Schlechtriem(ed), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (Oxford: Clarendon Press, 2nd edition, 1998) art 66, para 4.
[57] G.Hager in P.Schlechtriem(ed), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (Oxford: Clarendon Press, 2nd edition , 1998) art 66, para 4.
[58] See G.Hager in P.Schlechtriem(ed), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (Oxford: Clarendon Press, 2nd edition, 1998) art 66, para 4 and D.Flambouras, "Transfer of Risk in the Contract of Sale involving Carriage of Goods: A Comparative Study in English, Greek Law and the United Nations Convention on Contracts for the International Sale of Goods", available at http://cisgw3.law.pace.edu/cisg/biblio/flambouras.html, last accessed on 28/05/03. Therefore, traders who have commercial relations with countries, which are under war operations or are very likely to become involved in a war, are strongly advised to insure the goods against war risks.
[59] See B.von Hoffmann, *International Sale of Goods: Dubrovnic Lectures* (P.Sarcevic and P.Volken eds, Oceana, 1986) 267, available at http://www.cisg.law.pace.edu/cisg/biblio/vonhoffmann.html.
[60] See P.M.Roth, op cit, 291.
[61] See A.Romein, op cit. As it will be seen in the following chapters, the Vienna Convention and INCOTERMS regulate only the "price risk". Indeed, the Convention in the chapter on risk (Part III, Chapter IV) regulates only the "price risk". Nevertheless, it contains rules on the "risk of non performance" in Chapter II of Part III in articles 31-36, dealing with the seller's obligations.

[62] See A.Romein, "The Passing of Risk A Comparison between the passing of risk under the GISG and German Law", available at http://cisgw3.law.pace.edu/cisg/biblio/romein.html, last accessed on 30/05/03, and B.von Hoffmann, op cit, 268-269.
[63] The theory of connecting the passing of risk to the conclusion of the contract is followed in Switzerland (Art.185 of the Swiss OR), Spain (Art. 1452 of the Spanish CC) and the Netherlands (Art.1496 of the Dutch BW).
[64] The second theory is adopted in England (SGA 1893 s 20(1), s 18 rule 1 and SGA 1979 s 20, sec.18 rule 1), France (Art.1624/1138(2) French CC) and Italy (Art.1465 Italian CC).
[65] Germany (s 446 German CC), Greece (Art.522 Greek CC), Sweden (Art. 17 of the Swedish Act 1905) and United States of America (para 2-509(3) UCC) follow the third theory and link the passing of risk with the handing/taking over of the goods.
[66] See S.Bollée, "The Theory of Risks in the 1980 Vienna Sale of Goods Convention" 247, 248 available at http://cisgw3.law.pace.edu/cisg/biblio/bollee.html, last accessed on 28/05/03.
[67] 67See J.F.Wilson, *Carriage of Goods by Sea* (Harlow: Long man, 4th edition, 2001) 122 *et seq*.
[68] 'A bill will only operate as a document of title, however, if it is drafted as an "order" bill, ie a bill under which the carrier agrees to deliver the goods at their destination to a named consignee or to his "order or assigns'". See J.F.Wilson, *Carriage of Goods by Sea* (Harlow: Long man, 4th edition, 2001) 137.
[69] See J.F.Wilson, *Carriage of Goods by Sea* (Harlow: Long man, 4th edition, 2001) 138.
[70] There is an extensive bibliography on the Letter of Credit transaction, such as: E.P.Ellinger, *Documentary Letters of Credit- A Comparative Study* (Singapore: University of Singapore Press, 1970), W.Hedley, *Bills of exchange and Bankers' Documentary Credits* (London: Lloyd's of London Press Ltd, 2nd edition, 1994), P.Todd, *Bills of lading and Banker's Documentary Credits* (London: Lloyd's of London Press Ltd, 1990), B.Wunnicke, D.B.Wunnicke and P.S.Turner, *Standby and Commercial Letters of Credit* (New York; Chichester: Wiley Law Publications, 2nd edition, 1996).
[71] See D.M.Day, op cit, 138 *et seq.*
[72] In the following chapter (Chapter II. A. iii) and v)).
[73] Articles 67 and 69 CISG.
[74] It is obvious that in articles 67 and 69, the Convention rejects the two theories on the passing of risk developed in some legal systems, which connect the passing of risk to the conclusion of the contract or to the passing of ownership. Furthermore, the Convention differs not only with the national legal systems, but also with the approach adopted in ULIS as well, which in article 97(1) connects the transfer of risk with the notion of "délivrance". According to art.97(1) ULIS, risk passes only when there has been a delivery of conforming goods to the contract. That means that when the delivered goods do not conform to the contract, the risk does not pass to the buyer but is still on the seller.
[75] See B.von Hoffmann, op cit, 270. The Convention generally embraces the view that the party which should bear the risk of accidental loss or damage to the goods should be the buyer, since the loss or damage is usually revealed at the end of the day when the goods are in the buyer's hands.
[76] See Chapter II. A. iv).
[77] B.von Hoffmann, op cit, 266.
[78] In accordance with article 6 CISG.
[79] See A.Romein, op cit.
[80] A.Romein, op cit.
[81] See S.Bollée, op cit, 273.
[82] See S.Bollée, op cit, 273.
[83] See A.Romein.
[84] The consequence is rather cruel for the buyer, but the injustice is mitigated, since the buyer can recover the loss by turning against the insurance company, provided that the goods were insured.
[85] See B.Nicholas in C.M.Bianca and M.J.Bonell (eds), *Commentary on the International Sales Law. The 1980 Vienna Sales Convention* (Milan: Giuffrè, 1987) art.66, para 3.3, and J.O.Honnold, *Uniform law for international sales under the 1980 United Nations convention* (The Hague: Kluwer Law International, 3rd edition, 1999) para 361, and S.Bollée, "The Theory of Risks in the 1980 Vienna Sale of Goods Convention", available at http://cisgw3.law.pace.edu/cisg/biblio/bollee.html, 245, 248, last accessed on 18/05/03. Nevertheless, the fact that it is easier for the buyer to discover any possible loss or damage to the goods after their arrival, does not constitute an efficient explanation for the passing of risk. It is true that during carriage, the goods are not under the control of either the seller or the buyer and the buyer is not in a position to control their transport. In fact, in cases involving carriage, the seller is not obliged to deliver to the buyer's place of business; for that reason it is logical to accept that the seller's obligation to deliver ends when he hands the goods over to the carrier. Therefore, he is not responsible for their accidental loss or damage after the fulfilment of that obligation; this latter argument seems more convincing. See further K.Pantelidou, 'Issues from the allocation of risk under the Vienna Convention for the international sale of goods', (2002) *Private Law Chronicle* 97, 98- *In Greek*.
[86] For the meaning of risk see Chapter I. C. i).
[87] See B.Nicholas in C.M.Bianca and M.J.Bonell (eds), op cit, art.66, para 2.1.
[88] See CLOUT Database, Case Abstract no 317, Germany 20 November 1992, Appellate Court Karlsruhe, available at http://www.uncitral.org/english/clout/abstract/abst-30.pdf last accessed on 01/06/03.
[89] See B.Nicholas in C.M.Bianca and M.J.Bonell (eds), *Commentary on the International Sales Law. The 1980 Vienna Sales Convention* (Milan: Giuffrè, 1987) art 66, para 2.2.
[90] The buyer can claim these remedies only if the act or omission of the seller constitutes a fundamental breach of contract. If it is a non fundamental breach, he can claim only repair of the goods, reduction in price and/or damages.

[91] See F.Enderlein and D.Maskow, op cit, 262.
[92] See B.Nicholas in C.M.Bianca and M.J.Bonell (eds), op cit, art.66, para 2.2.
[93] See G.Hager in P.Schlechtriem(ed), op cit, art.66, para 6 and J.O.Honnold, op cit, para 362.
[94] J.O.Honnold, op cit, para 362.
[95] S.Bollée, op cit, 275. According to A.Romein (op cit) two opinions are supported; a) the first one is that in case of lawful conduct of the seller, the risk is passed back to him, whereas b) the second one, on the contrary, supports that the risk is not passed back to him. Romein suggests that the second view is preferable, since the seller's lawful conduct does not release the buyer from paying the price.
[96] CIETAC is the acronym for China International Economic and Trade Arbitration Commission.
[97] See UNILEX Database, 1995- CIETAC (China International Economic and Trade Arbitration Commission), available at http://www.unilex.info/dynasite.cfm?dssid=2376&dsmid=13356&x=1, last accessed on 16/06/03.
[98] It should be noted that article 67 CISG differs from ULIS article 97(1), which connected the passing of risk to "delivery" ("délivrance"). The latter article's problem was that the same term was used in order to define several notions: a) the sellers' obligations, ii) the point of passing of risk, iii) the time and place of payment and iv) the moment of identification of unascertained goods to the contract, rendering the provision far too complicated and impractical, and thus, making it the object of severe criticism. See B.Nicholas in C.M.Bianca and M.J.Bonell (eds), op cit, art.67, para 1.1, G.Hager in P.Schlechtriem(ed), op cit, art. 67, para 1 and B.von Hoffmann, op cit, 276.
[99] See D.E.Goodfriend, op cit, 589.
[100] See F.Enderlein and D.Maskow, op cit, 264.
[101] See B.Nicholas in C.M.Bianca and M.J.Bonell (eds), op cit, art.67, para 1.4. According to Hager (See G.Hager in P.Schlechtriem(ed), op cit, art.67 para 5a), 'the reference to the contract of sale means only that the contract must provide for carriage of the goods. It does not make the passing of risk dependent on the observance of all the provisions of the contract'. The article uses the term "hand over", which appears in other articles of the Convention as well (31(a), 34, 58(2), 68, 71(2)) and with it, is expressed the taking over of control of the goods by the carrier. It would be best to accept that the risk passes to the buyer at the end of the process of handing over the goods. And as Enderlein and Maskow suggest (See F.Enderlein and D.Maskow, op cit, 266), the INCOTERMS rules on this matter should be followed directly or by analogy; thus, it should be accepted that the handing over has ended when the goods have been placed on the carrier's vehicle, or when they were ready for loading or when the goods were under the carrier's surveillance.
[102] According to von Hoffmann (See B.von Hoffmann, op cit, 287), the notion of "*first carrier*" does not include the notion of "*local transportation*" and thus, handing the goods over to local means of transportation cannot have the effect of passing of the risk to the buyer. Enderlein and Maskow (See F.Enderlein and D.Maskow, op cit, 265) disagree with the previous opinion and support the view that local carriers should not be treated differently in comparison with international carriers and thus, the handing over of the goods to them should cause the risk to pass to the buyer. Goodfriend shares the same view with Enderlein and Maskow. See D.E.Goodfriend, 'After the Damage is Done: risk of Loss Under the United Nations Convention on Contracts for the International Sale of Goods' (1983) 22 *Columbia Journal of Transnational Law* 575, 595.
[103] von Hoffmann (See B.von Hoffmann, op cit, 288) submits that the prevailing view is that the seller's personnel is not considered as first carrier, but he believes that when the carriage is effected by the seller's staff the risk should not stay with him, since he is providing lots of advantages to the buyer by doing the transportation quicker and cheaper than the existing carriers. Therefore, he argues that the seller should, in the event of damage or loss, have the chance to prove that the damage or loss did not occur due to an act or omission of his personnel, but due to an accidental event and consequently, he should be relieved from the burden of bearing the risk.
[104] See B.Nicholas in C.M.Bianca and M.J.Bonell (eds), op cit, art.67, para 2.2.
[105] 105See F.Enderlein and D.Maskow, op cit, 265, who share the same opinion, and also D.E.Goodfriend, 'After the Damage is Done: risk of Loss Under the United Nations Convention on Contracts for the International Sale of Goods' (1983) 22 *Columbia Journal of Transnational Law* 575, 593.
[106] See G.Hager in P.Schlechtriem(ed), op cit, art.67, para 5. Honnold shares the same view as well (see J.O.Honnold, op cit, para 369.1).
[107] See B.Nicholas in C.M.Bianca and M.J.Bonell (eds), op cit, art.67, para 2.2, and G.Hager in P.Schlechtriem(ed), op cit, art 67, para 5. Flambouras (See D.Flambouras, "Transfer of Risk in the Contract of Sale involving Carriage of Goods: A Comparative Study in English, Greek Law and the United Nations Convention on Contracts for the International Sale of Goods", available at http://cisgw3.law.pace.edu/cisg/biblio/flambouras.html, last accessed on 28/05/03) makes an interesting distinction; he agrees that the carrier should be an independent entity and not the seller himself but he suggests that before concluding whether the carrier is an independent entity or not, the "control criterion" should be applied, especially in cases where the seller might own a company, which effectuates transport operations and forms a part of his firm. Therefore, in similar cases it should be examined whether the seller exercises sufficient control over his subsidiary freight company. If the subsidiary is only formally independent and in reality the seller exercises strict control over it, then the risk should be on the seller. If on the other hand he is not closely connected to the subsidiary company, then the buyer should bear the risk during transport, since the goods are not substantially under the seller's control.
[108] 'A freight forwarder (*spediteur, commissionaire de transport)* is an operator, which acts as an agent of the seller and undertakes to arrange for the carriage of goods by entering into a series of individual carriage contracts with separate carriers by rail, road or sea and by restricting himself to this function. He does not carry out the actual carriage and normally excludes any personal liability

for damage or loss during carriage and transhipment from one mode to the other'. D.Flambouras, "Transfer of Risk in the Contract of Sale involving Carriage of Goods: A Comparative Study in English, Greek Law and the United Nations Convention on Contracts for the International Sale of Goods", available at http://cisgw3.law.pace.edu/cisg/biblio/flambouras.html, last accessed on 28/05/03.

[109] See G.Hager in P.Schlechtriem(ed), op cit, art.67, para 5.

[110] A.Romein as well, op cit supports the same opinion.

[111] See D.Flambouras, "Transfer of Risk in the Contract of Sale involving Carriage of Goods: A Comparative Study in English, Greek Law and the United Nations Convention on Contracts for the International Sale of Goods", available at http://cisgw3.law.pace.edu/cisg/biblio/flambouras.html, last accessed on 28/05/03. Likewise, Enderlein and Maskow (See F.Enderlein and D.Maskow, op cit, 265) are of the opinion that *forwarding agents* are not considered as carriers only when they have not taken over obligations by self-execution of the contract of carriage.

[112] Some indications that he accepts carrier's liability are for example if he is presented as a carrier, if he quotes his own freight, if he issues a forwarders Bill of Lading or a CMR Bill in his own name.

[113] See D.Flambouras, "Transfer of Risk in the Contract of Sale involving Carriage of Goods: A Comparative Study in English, Greek Law and the United Nations Convention on Contracts for the International Sale of Goods", available at http://cisgw3.law.pace.edu/cisg/biblio/flambouras.html, last accessed on 28/05/03.

[114] See J.O.Honnold, op cit, para 369.2 and D.Flambouras, "Transfer of Risk in the Contract of Sale involving Carriage of Goods: A Comparative Study in English, Greek Law and the United Nations Convention on Contracts for the International Sale of Goods", available at http://cisgw3.law.pace.edu/cisg/biblio/flambouras.html, last accessed on 28/05/03.

[115] For example a seller in Boston and a buyer in Madrid agree on the sale of 5,000 videos which ought to be delivered to the port of Barcelona; the videos are loaded on trucks for carriage from Boston to the port of New York and from there they are shipped to Spain. The risk will pass to the buyer from the time that the goods have been handed over to the first carrier, ie the truck carrier.

[116] Nevertheless, a more satisfactory argument would be that in cases involving carriage, the seller has no obligation to deliver to the place of business of the buyer and therefore, the seller's obligation for delivery ends when he hands over the goods to the carrier and he does not share any responsibility for their accidental loss or damage after he had fulfilled that obligation. For that reason, the party who should bear the transit risk should be the buyer. See K.Pantelidou, 'Issues from the allocation of risk under the Vienna Convention for the international sale of goods, (2002) *Private Law Chronicle* 97, 98- *In Greek*.

[117] See B.Nicholas in C.M.Bianca and M.J.Bonell (eds), op cit, art.67, para 3.1. This issue will be further examined in the next Chapter (Chapter III. B. iii)).

[118] This rule forms an expression of the principle of freedom of contract. In this rule there are usually included cases where the parties agree on the adoption of international trade terms, which deal with the loading of the goods in a specific place. See D.Flambouras, 'International Sales of Goods. Practical Issues concerning the passing of risk under the Vienna Convention (1980)' (March- April 1998) *Synigoros* 26, 27- *In Greek*.

[119] See G.Hager in P.Schlechtriem(ed), op cit, art 67, para 6.

[120] See G.Hager in P.Schlechtriem(ed), op cit, art 67, para 6. Lets suppose that a seller in Athens agrees to sell 1,000 refrigerators to the buyer in Paris. They agree on the handing over of the goods at the port of Piraeus where they should be shipped to the port of Marseille. The goods would be transferred to Piraeus from Athens by truck. Since there is an agreement for the goods to be handed over to the carrier in Piraeus, the risk will pass to the buyer at that place, applying the second sentence of art.67(1). If on the contrary there was no such agreement, then the first sentence of art.67(1) would apply and the risk would pass when the goods were handed over to the first carrier, ie the truck carrier in Athens for transport to the port of Piraeus.

[121] See CLOUT Database, Case Abstract no 247, Spain 31 October 1997 Appellate Court Cordoba, available at http://www.uncitral.org/english/clout/abstract/abst-24.pdf, last accessed on 02/06/03.

[122] B.Nicholas in C.M.Bianca and M.J.Bonell (eds), op cit, art.67, para 2.6.

[123] See B.Nicholas in C.M.Bianca and M.J.Bonell (eds), op cit, para 2.7and S.Bollée, op cit, 256 and J.O.Honnold, op cit, para 371.

[124] See G.Hager in P.Schlechtriem(ed), op cit, art.67, para 10.

[125] See G.Hager in P.Schlechtriem(ed), op cit, art.67, para 9.

[126] It is true that a lot of problems of proof can arise, as is demonstrated by a case in the Swiss courts. In that case, a Swiss seller and an Italian buyer agreed on the sale of 300 tons of cocoa beans, which were supposed to contain fat of at least 45% and acidity up to 7%. The cargo was shipped from Ghana and payment was made against documents, which included a certificate of conformity, according to the sales contract. When the cargo arrived in Italy, it was revealed that the beans were not of the agreed values. When the case reached the Swiss courts it was not possible to ascertain if the goods were defective before or after the handing over to the carrier. Regarding the issue of the burden of proof and which of the parties had to bear it, the court decided that it should be determined by the law applicable on the merits, which in that case was the Vienna Convention. The court after highlighting that the Convention does not contain any special rules on the burden of proof as to the conformity of the goods, noted that the opinions pertaining to this issue are divided; others support that the Convention should be interpreted as attributing the burden of proof to the buyer and others support that the burden of proof was an issue that should be decided by the domestic law. The court left the issue open since under both the law of the forum and the CISG the buyer was the party bearing the burden of proof. See CLOUT Database, Case Abstract no 253, 15 January 1998, Switzerland: Republica e cantone del Ticino. La seconda Camera civile del Tribunale d'appello, available at http://www.uncitral.org/english/clout/abstract/abst-25.pdf, last accessed on 05/06/03.

[127] The CISG does not have any rules on the allocation of the burden of proof- nevertheless this is an issue that falls within its scope. Therefore, 'the gap should be filled in conformity with article 7(2) applying the general principle that a person who relies on a rule in his favour must prove that the preconditions for the application of that rule are satisfied'. G.Hager in P.Schlechtriem(ed), op cit, art 67, para 11.
[128] The meaning of "fungible goods" is provided in Article 415 (Definitions) of the North American Free Trade Agreement (NAFTA) in Chapter Four (Rules of Origin), according to which 'fungible goods or fungible materials means goods or materials that are interchangeable for commercial purposes and whose properties are essentially identical'. NAFTA (1992) *32 ILM 289 (1993)*.
[129] See P.Schlechtriem, op cit, art.67, para 10a, S.Bollée, op cit, 256 and F.Enderlein and D.Maskow, op cit, 269.
[130] G.Hager in P.Schlechtriem(ed), op cit, art.67, para 10a. See also S.Bollée, op cit, 256.
[131] See F.Enderlein and D.Maskow, op cit, 269.
[132] See J.O.Honnold, op cit, para 371.
[133] See K.Pantelidou, 'Issues from the allocation of risk under the Vienna Convention for the international sale of goods' (2002) *Private Law Chronicle* 97, 97- *In Greek*. Goods afloat are a quite special category that needs a separate regulation, since they are several times exposed to unusual circumstances, like perils of the sea, risks of war, piratery and more. See H. de Vries, 'The Passing of Risk in International Sales under the Vienna Sales Convention 1980 as compared with Traditional Trade Terms' (1982) 17 *European Transport Law* 495, 507.
[134] By sending to the buyers the relevant documents, for example the bill of lading (when there is carriage of goods by sea), the invoice, the insurance contract, the certification of quality etc.
[135] A reference to some points of the provision's history (See J.O.Honnold, op cit, para 372.1) is necessary in order to understand the reason for the conflict it had created. This article was based on ULIS article 99, which provided that the risk passed retroactively from the time that the goods were handed over to the carrier (like the provision of the second sentence of art.68). The same was the wording of art.80 of the Draft Convention as well, but both the First Committee and the Plenary Sessions, notably the delegates of the developing countries, opposed to its text (See S.Bollée, op cit, 261). The latter supported the view that it would be unfair to shift the risk to the buyer before the buyer even contracts to buy the goods. They claimed that this was irrational since the buyer was held responsible for the loss or damage of the goods, which might not have even been his at the moment when the damaging event occurred (See B.Nicholas in C.M.Bianca and M.J.Bonell (eds), op cit, art.68, para 1.1), rendering the provision unfavourable for the buyer, who would usually be represented by the developing countries (See B.Nicholas, op cit, 239). Of course on the other hand, there were arguments that supported this provision, which can be summarized as follows: firstly, this mode of risk allocation was common in international sales. Secondly, it formed a clear issue of insurance technique (See B.Nicholas, op cit, 239) and thirdly and most importantly, this rule did not favour the splitting of transit risk, which was extremely important, especially in a situation where the goods were in transit and it would be extremely difficult to ascertain the exact moment of damage or loss (See B.Nicholas in C.M.Bianca and M.J.Bonell (eds), op cit, art 68, para 1.1). The final text of art.68 was approved by a majority and the once rule in the Draft Convention became the exception in the final Convention's text.
[136] See previous footnote.
[137] See Chapter III. B. iii).
[138] See G.Hager in P.Schlechtriem(ed), op cit, art.68, para 3.
[139] It is the same under ULIS article 99, and Draft Convention article 80.
[140] See S.Bollée, op cit, 263.
[141] See J.D.Feltham, 'The United Nations Convention on Contracts for the International Sale of Goods' (1981) JBL 346, 357.
[142] See B.Nicholas in C.M.Bianca and M.J.Bonell (eds), op cit, art.68, para 2.2, and S.Bollée, op cit, 262.
[143] See B.Nicholas in C.M.Bianca and M.J.Bonell (eds), op cit, art 68, para 2.2, g.Hager in P.Schlechtriem(ed), op cit, art.68, para 4, J.O.Honnold, op cit, para 372.2, F.Enderlein and D.Maskow, op cit, 271, B.von Hoffmann, op cit, 295, H.De Vries, op cit, 508.
[144] J.O.Honnold, op cit, para 372.2.
[145] B.Nicholas in C.M.Bianca and M.J.Bonell (eds), op cit, art.68, para 2.3.
[146] See B.Nicholas in C.M.Bianca and M.J.Bonell (eds), op cit, art.68, para 2.4, J.O.Honnold, op cit, para 372.2, S.Bollée, op cit, 264, F.Enderlein and D.Maskow, op cit, 271.
[147] Emphasis added.
[148] It should be noted that the wording in the Vienna and New York Drafts was: "...*such* loss or damage", whereas the French wording was different as well: "*la* perte ou *la* deterioration" (Emphasis added).
[149] See G.Hager in P.Schlechtriem(ed), op cit, art.68, para 5.
[150] Enderlein and Maskow share the same opinion (See E.Enderlein and D.Maskow, op cit, 272).
[151] See B.Nicholas in C.M.Bianca and M.J.Bonell (eds), op cit, art.68, para 2.3.
[152] See J.O.Honnold, op cit, para 372.2 and also see A.Romein, op cit.
[153] Additionally, according to Honnold (See J.O.Honnold, op cit, para 372.2 and S.Bollée, op cit, 264) the non disclosure of the damage to the buyer constitutes or closely approximates fraud; by not revealing the damage, the seller commits a serious breach of contract and for that reason the buyer has at his discretion the Convention's remedies for fundamental breach of contract, including among others his right to avoid the contract (articles 25 and 49(1)(a)). But what is the situation when the parties conclude a contract for the sale of goods that do not exist anymore, and that being so without the parties' knowledge? (Some national legal systems provide for the voidness of such a contract. See for example the German law). The question is related to the issue of validity of the contract, which according to art.4 is outside the Convention's scope, but from the wording of art.68 it seems that such a contract would be valid (See B.Nicholas in C.M.Bianca and M.J.Bonell (eds), op cit, art.68, para 3.1).

[154] See S.Bollée, op cit, 265.
[155] See G.Hager in P.Schlechtriem(ed), op cit, art.68, para 6.
[156] Goodfriend also supports this view. See D.E.Goodfriend, op cit, 587.
[157] See B.Nicholas in C.M.Bianca and M.J.Bonell (eds), op cit, art.69, para 3.3.
[158] See S.Bollée, op cit, 267.
[159] See B.Nicholas in C.M.Bianca and M.J.Bonell (eds), op cit, art.69, para 2.2.
[160] See B.Nicholas in C.M.Bianca and M.J.Bonell (eds), op cit, art.69, para 2.2. For example the seller X and buyer Y agree on the taking over of the goods at the seller's warehouse on 16 May. The seller packages the goods and places them at his warehouse on 13 May, where the goods are accidentally destroyed by fire on 15 May. Who will bear the risk in that case? The risk would be on the seller, since the buyer, regardless of the fact that the goods were at his disposal, was not in breach of his contractual obligation to take delivery, since the agreed day of taking delivery was on 16 May. If the fire had occurred on 21 May and the buyer had not taken delivery yet, then he would be in breach of his obligation to take delivery of the goods and he would bear the risk of loss. 'Therefore, the risk remains with the seller during the time period the buyer is permitted but not contractually bound to take over the goods' (B.von Hoffmann, op cit, 295).
[161] See G.Hager in P.Schlechtriem(ed), op cit, art.69, para 4.
[162] See S.Bollée, op cit, 267. F.Enderlein and D.Maskow are of the opinion that for the passing of risk, the notice containing the information that the goods are ready for taking over, should reach the addressee (in contrast with the rule of article 27 CISG, according to which the dispatch of the notice is sufficient), just as it is provided in art.69(2) by analogy. (See F.Enderlein and D.Maskow, op cit, 275).
[163] This is a situation very likely to create disputes between the parties, since in case of loss or damage of the goods while they are under the seller's custody, the buyer will always accuse the seller of not exercising due diligence for protecting the goods efficiently.
[164] It seems that the "breach of contract" referred to in paragraph one, should be interpreted broadly in order to encompass not only situations where the buyer fails to take delivery, but other situations, which also constitute breaches of contract and cause the failure of taking delivery. For example when the buyer does not give instructions for the dispatch of the goods or refuses to pay for the price. However, the contrary opinion has also been supported, which suggests that these situations are not encompassed in the meaning of "breach of contract" under paragraph one and thus, do not affect the passing of risk. (See B.Nicholas in C.M.Bianca and M.J.Bonell (eds), op cit, art.69, para 3.4). Nevertheless, it is the author's opinion that the rule should be interpreted broadly and encompasses the above-mentioned situations, since it would be unfair to leave the risk with the seller in cases where the fact of not taking delivery is the buyer's fault.
[165] See G.Hager in P.Schlechtriem(ed), op cit, art.69, paragraphs 6-7.
[166] For the risk to pass "positive knowledge" is required from the part of the buyer. See F.Enderlein and D.Maskow, op cit, 277 and A.Romein, op cit.
[167] At this point some differences between the two first paragraphs of art.69 are noticeable; according to the first paragraph the risk passes when the buyer commits a breach of contract by not taking delivery of the goods, whereas that is not necessary under the second paragraph. Furthermore, under paragraph one, when the parties have agreed on a specific date, the buyer does not have to be notified that the goods are at his disposal. On the contrary, under paragraph two, the buyer should actually be aware that the goods are ready to be taken over by receiving a notification. The policy behind this is that in these cases the goods are under the control of neither of the parties and therefore none is in a better position to look after them- the risk, in that case, should pass to the buyer as soon as he is in a position to take delivery of the goods. Concluding, we notice that the risk under paragraph two passes to the buyer at an earlier point in time than under paragraph one (See B.Nicholas in C.M.Bianca and M.J.Bonell (eds), op cit, art.69, para 2.3 and also G.Hager P.Schlechtriem(ed), op cit, art.69, para 6 and also J.O.Honnold, op cit, para 377 and also S.Bollée, op cit, 268).
[168] See CISG Pace University Database, Case: Germany 23 June 1998, Appellate Court Hamm, available at http://cisgw3.law.pace.edu/cisg/wais/db/cases2/980623g1.html, last accessed on 17/06/03.
[169] G.Hager in P.Schlechtriem(ed), op cit, art.69, para 7. Furthermore see A.Romein, op cit.
[170] See P.M.Roth, op cit, 307.
[171] See G.Hager in P.Schlechtriem(ed), op cit, art.69, para 7.
[172] See B.Nicholas in C.M.Bianca and M.J.Bonell (eds), op cit, art.69, para 3.1 and G.Hager in P.Schlechtriem(ed), op cit, art.69, para 8.
[173] See B.Nicholas in C.M.Bianca and M.J.Bonell (eds), op cit, art.69, para 3.1. It would be interesting to note what ULIS article 98(3) provided on the matter: "Where unascertained goods are of such a kind that the seller cannot set aside a part of them until the buyer takes delivery, it shall be sufficient for the seller to do all acts necessary to enable the buyer to take delivery".
[174] See B.Nicholas in C.M.Bianca and M.J.Bonell (eds), op cit, art.69, para 3.1, and S.Bollée, op cit, 270.
[175] The Convention gives the definition of "fundamental breach" in article 25 CISG, according to which: "A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result."
[176] A.Romein, op cit.
[177] See B.Nicholas in C.M.Bianca and M.J.Bonell (eds), art.70, para 2.2 *et seq.*
[178] G.Hager in P.Schlechtriem(ed), op cit, art.69, para 2.
[179] See D.E.Goodfriend, op cit, 601.

[180] The partial avoidance is established in article 51(1) CISG, according to which articles 46- 50 apply to the missing or not conforming part, in situations where the seller delivers only a part of the goods or if only a part of the goods is conforming to the contract.
[181] See S.Bollée, op cit, 284.
[182] See J.O.Honnold, op cit, para 382.1.
[183] Those that were lost or damaged because of the fundamental breach of contract, those that were accidentally lost or damaged and those that conformed to the contract.
[184] Article 82(2)(a) states: "The preceding paragraph does not apply: if the impossibility of making restitution of the goods or of making restitution of the goods substantially in the condition in which the buyer received them is not due to his act or omission".
[185] See G.Hager in P.Schlechtriem(ed), op cit, art.69, para 2 and S.Bollée, op cit, 283.
[186] G.Hager in P.Schlechtriem(ed), op cit, art.69, para 4.
[187] See G.Hager in P.Schlechtriem(ed), op cit, art.69, para 2.
[188] See G.Hager in P.Schlechtriem (ed), op cit, art.69, para 7.
[189] S.Bollée, op cit, 287.
[190] Regarding the third and fourth remedy it should be noted that 'in case the goods are damaged by accident before the price reduction or remedy by repair has been exercised, the buyer can only reduce the price to the extent of the original breach of contract and also only for the part asking for remedy by repair, but not for damages which occurred afterwards. The buyer bears the risk for this when he chooses not to declare the contract avoided'. A.Romein, op cit.
[191] See G.Hager in P.Schlechtriem(ed), op cit, art.69, para 5a, and S.Bollée, op cit, 286.
[192] G.Hager in P.Schlectriem(ed), op cit, art.69, para 2.
[193] Nevertheless, in some cases there might be a situation of premature passing of risk to the buyer, ie before delivery takes place. These cases will be examined below in Chapter II. B. iv).
[194] Furthermore they deal with the parties' obligations, the division of costs and the documentation required in global trade, indicating which party is responsible for which document.
[195] It should be stressed that INCOTERMS deal exclusively with the contract of sale and not with the other contracts needed in an international sales transaction, like the contract of insurance, carriage and finance. See International Chamber of Commerce, *Incoterms 2000: ICC official rules for the interpretation of trade terms* (Paris: ICC Publishing S.A., 1999) 5, para 1.
[196] EXW is the acronym of Ex Works, FCA (Free Carrier), FAS (Free Alongside Ship), FOB (Free On Board), CFR (Cost and Freight), CIF (Cost Insurance and Freight), CPT (Carriage Paid To), CIP (Carriage and Insurance Paid To), DAF (Delivered At Frontier), DES (Delivered Ex Ship), DEQ (Delivered Ex Quay), DDU (Delivered Duty Unpaid), DDP (Delivered Duty Paid). INCOTERMS 2000 can be listed in four categories depending on the common obligations of the seller. The first group (E- term) includes only one term EXW, where the seller just places the goods at the disposal of the buyer at the seller's premises without any further obligation. The second group (F- terms) encompasses the FCA, FAS and FOB terms, where the seller does not have to pay the costs for the main carriage, but only those for the transport of the goods until the delivery point when they are handed over to the international carrier in the country of export. The third group (C-terms) includes four terms: CFR, CIF, CPT and CIP, the common characteristic of which is that the seller has the obligation to pay the costs for the main international carriage, without bearing the risk for the loss or damage of the goods during the main carriage. Finally, the fourth group (D- terms) includes five terms; DAF, DES, DEQ, DDU and DDP, where the seller is obliged to place the goods at the buyer's disposal on the contractually agreed place of destination. Furthermore, INCOTERMS 2000 can be categorised in two groups depending on the transportation mode used for the transfer of the sold goods. The first category encompasses the terms which allow the transport of the sold goods with any mode of transport separately or in combination with others (multi-modal transport); EXW, FCA, CPT, CIP, DAF, DDU, DDP. The second category includes the terms that allow the transport of the goods only by sea or inland waterway transport and these are: FAS, FOB, CIF, CFR, DES and DEQ.
[197] See J.Ramberg, *ICC Guide to INCOTERMS 2000* (Paris: ICC Publishing S.A., 1999) 60. INCOTERMS deal only with the price risk, but it should be noted that the passing of risk of non-performance is linked with delivery of the goods as well. Thus, if the goods are accidentally lost or damaged before delivery takes place, the seller will have to provide substitute goods, ie he will be obliged to redeliver.
[198] INCOTERMS 2000 are written in a very minimalist but straightforward manner, in the form of an extended diagram; they are formed in two series, series A and series B, each of which encompasses ten articles. Sections A1- A10 regulate the seller's obligations, the rules on the allocation of costs and risks and details on documentation, whereas sections B1- B10 regulate the same issues on the part of the buyer.
[199] Nevertheless, as it will be seen further below, there are occasions of premature passing of risk in certain cases before delivery takes place. See Chapter II. B. iv).
[200] If the parties wish that the seller would be responsible for loading the goods, they should expressly make a reference to that in their contract.
[201] If, at the usual time of delivery of such goods there is no agreed date. The seller should give the buyer sufficient notice informing him on the exact time and place of delivery.
[202] This trade term is usually used in cases where multi-modal transport is involved, ie where the goods are carried by more than one modes of transport (for example truck and train and/or plane and/or ship).

[203] On that point the FCA term differs from the EXW term, since in the latter delivery is effected and risk passes when the goods have been placed at the carrier's or buyer's disposal, without having been loaded on the means of transport. The practical significance of that difference is obvious especially in cases where the loading process is quite long and thus more risky.
[204] This term is used only for sea or inland waterway transport. It should not be used in cases of loading on train (FOR), truck (FOT), plane (FOB airport) or in container transport. In these cases FCA should be preferred. See D.Flambouras, 'The ICC rules on International Commercial Sale (Incoterms 2000)' 3/2000 (6th YEAR) *Law of Enterprises and Companies* 260, 264- *In Greek*.
[205] D.M.Sassoon, *C.I.F. and F.O.B. Contracts* (London: Sweet and Maxwell, 4th edition, 1995) 350.
[206] See *Stock v Inglis* (1884) 12 QBD 564. In that case the agreement was about a FOB contract for the sale of sugar. A common usage to sugar trade was that the cargo was not supposed to be appropriated at the time of shipment, but only after the seller had obtained the bill of lading. Consequently, the vessel was lost before appropriation and the defendant, an underwriter with whom the plaintiff had an insurance contract, refused to honour the contract, claiming that since the property did not pass, he did not have an insurable interest in the goods. Brett MR proclaimed that in a FOB contract, risk passed on shipment and the buyer was obliged to pay the price in any case (no matter if he received the goods or not) and despite the fact that the property in the goods had not passed before the cargo was lost. See also other relevant case law: *Joyce v Swann* (1864) 17 CV (NS) 84, *The Parchim* [1918] AC 157, *Browne v Hare* (1858) 3 H&N 484, *Frebold and Sturznickel (Trading as Panda O.H.G.) v Circle Products Ltd* (1970) 1 Lloyd's Rep 499.
[207] B.Reynolds, 'Stowing, trimming and their effects on delivery risk and property in sales "f.o.b.s.", "f.o.b.t." and "f.o.b.s.t."' (1994) LMCLQ 119, 125.
[208] *Pyrene Co Ltd v Scindia Navigation Co Ltd* (1954) 2 QB 402.
[209] See P.Sellman, *LLB Law of International Trade Casebook* (London: HLT Publications, 5th edition, 1994) 39, and see P.Sellman and J.Evans, *Law of International Trade. 150 Leading Cases* (London: Old Bailey Press, 2002) 17, and also see M.Bridge, op cit, para 10.43.
[210] *Pyrene Co Ltd v Scindia Navigation Co Ltd* (1954) 2 QB 402, 419.
[211] See D.M.Sassoon, *C.I.F. and F.O.B. Contracts* (London: Sweet and Maxwell, 4th edition, 1995) 463.
[212] See A.Romein, op cit.
[213] See B.Reynolds, 'Stowing, trimming and their effects on delivery risk and property in sales "f.o.b.s.", "f.o.b.t." and "f.o.b.s.t."' (1994) LMCLQ 119, 125 and also J.Ramberg, *ICC Guide to INCOTERMS 2000* (Paris: ICC Publishing S.A., 1999) 32.
[214] I.Carr, op cit, 41. Nevertheless, Romein suggests that the risk still passes at the point when the goods pass the ship's rail like in a classic FOB contract, even though the parties have agreed on a FOB stowed and/or trimmed type of contract (See A.Romein, op cit). Furthermore, A.Raty is also of the opinion that these variants do not affect the point of passing of risk. See A.Raty, 'Variants on Incoterms' in C.Debattista (ed), *Incoterms in practice* (Paris: ICC Publishing S.A., 1995, reprinted 1996) 155.
[215] The FAS term has been changed in INCOTERMS 2000 regarding the export clearance, which in the 2000 version burdens the seller. In the previous versions it was the responsibility of the buyer. This term should be used only for sea or inland waterway transport.
[216] Generally, in the FAS term apply the same rules as for the FOB term- that term is also only used for sea or inland waterway transport. They only differ on the time of passing of risk, since in FOB sales delivery takes place and the risk is transferred at a later point, ie when the goods pass the ship's rail.
[217] Once again this term should be used only for sea or inland waterway transport.
[218] Exactly like under the CFR term.
[219] CIF can be used only in sea and waterway transport and it means that the seller has to pay the costs, insurance and freight for the transport of the goods at the named port of destination. Furthermore, the seller has to provide to the buyer at his own expense the minimum cover of marine insurance against the buyer's risk of loss or damage during the sea carriage of the goods.
[220] It should be mentioned that pertaining to the passing of risk under a CIF contract, the rules of Sale of Goods Act 1979, s 20 do not apply. According to s 20 "risk passes with property" (See case *Healey v Howlett* (1917)1 KB 337), "unless otherwise agreed" (See case *Bonington & Morris v Dale &Co Ltd* (1902) 7 Com Cas 112). In truth, in CIF risk and property are treated differently.
[221] Generally under a CIF contract risk and property do not pass at the same time. Property usually passes later, when the shipping documents are tendered to the buyer. See J.C.T.Chuah, *Law of International Trade* (London: Sweet and Maxwell, 1998) 139, I.Carr, op cit, 23, Lord Templeman and D.Holloway, *Commercial Law* (London: Old Bailey Press, 1997, reprinted 1999 and 2001) 164, D.M.Sassoon, *C.I.F. and F.O.B. Contracts* (London: Sweet and Maxwell, 4th edition, 1995) 224, L.D'Arcy, C.Murray and B.Cleave, *Schmitthoff's Export Trade. The Law and Practice of International Trade* (London: Sweet and Maxwell, 10th edition, 2000) 38.
[222] See cases *Johnson v Taylor Bros* [1920] AC 144, *Law and Bonar Ltd v British American Tobacco Ltd* (1916) 2 KB 605, *Tregelles v Sewel* (1862) 7 H&N 574.
[223] See J.C.T.Chuah, op cit, 139, I.Carr, op cit, 23, D.M.Day, op cit, 77, P.Sellman, *Law of International Trade* (London: HLT Publications, 2nd edition, 1995) 48, M.Bridge, op cit, para 10.50, D.M.Sassoon, *C.I.F. and F.O.B. Contracts* (London: Sweet and Maxwell, 4th edition, 1995) 224, L.D'Arcy, C.Murray and B.Cleave, *Schmitthoff's Export Trade. The Law and Practice of International Trade* (London: Sweet and Maxwell, 10th edition, 2000) 38.
[224] T.Portwood, revised and updated by A.Odeke, *Commercial Law Textbook, Volume II- International Trade* (London: HLT Publications, 3rd edition, 1992) 63.
[225] *Biddell Bross v E.Clemens Horst Co* (1911) 1 KB 934, 937.
[226] See D.M.Day, op cit, 77.

[227] CPT can be used in all modes of transport and also in multi-modal transport.
[228] In INCOTERMS 2000 '"Carrier" means 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'. See International Chamber of Commerce, *Incoterms 2000: ICC official rules for the interpretation of trade terms* (Paris: ICC Publishing S.A., 1999) 33.
[229] Nevertheless, the seller will be responsible for paying the cost of carriage to the named destination and furthermore for the insurance premium covering the carriage of the goods.
[230] The parties can expressly agree that the seller will be responsible for the unloading of the goods at his own risk and expense.
[231] If the parties have agreed generally that the agreed place of delivery is the frontier of a country, the seller will have the opportunity to select the specific point at the frontier that will serve him better. See J.Ramberg, *ICC Guide to INCOTERMS 2000* (Paris: ICC Publishing S.A., 1999) 139.
[232] The seller, at the buyer's request could arrange for the carriage of the goods to their final destination named by the buyer, in the country of import, at the latter's cost and risk.
[233] This term should only be used when there is delivery of the goods by sea or inland waterway or multi-modal transport on a vessel in the port of destination.
[234] If the parties wish the seller to bear the costs and risks of discharging, then they should prefer the DEQ term.
[235] This term should only be used when the goods are to be delivered by sea or inland waterway or multi-modal transport on discharging from a vessel onto the quay (wharf) at the port of destination.
[236] It should be noted that under INCOTERMS 2000 the DEQ term requires the buyer to be the one who is responsible for the clearance of the goods for import, whereas the previous versions put this burden on the seller.
[237] This term can be used in every mode of transport.
[238] The DDP term can be used in every mode of transport and it represents the maximum of the seller's obligations, in contrast with the EXW term, which represents the minimum obligation for the seller.
[239] If the parties want to exclude some of the costs paid upon import by the seller, they should expressly indicate their will in the contract of sale. Additionally, if the buyer fails to render to the seller- after his request, risk and expense- assistance in order to obtain import licences or other official documents for the import of the goods, he should bear the additional risks incurred thereby.
[240] The buyer should specify for example the time and place for taking delivery under the EXW term, name the carrier and specify the time and place of handing the goods over to him under the FCA term, give sufficient notice to the seller of the vessel's name, loading point and required delivery time under the FOB and FAS terms. Furthermore, under C-terms and D-terms the buyer is obliged to give the seller the necessary information pertaining to the time of dispatching the goods and/or their destination, whenever he is entitled to determine them.
[241] See J.Ramberg, *ICC Guide to INCOTERMS 2000* (Paris: ICC Publishing S.A., 1999) 61.
[242] J.Ramberg, *ICC Guide to INCOTERMS 2000* (Paris: ICC Publishing S.A., 1999) 61.
[243] See article 6 CISG.
[244] See M.Bridge, op cit, para 2.48. To avoid repetition see Chapter I. B. and also footnote 44 of the present study.
[245] See case *St Paul Guardian Insurance Co., et al. v Neuromed Medical Systems & Support, et al*, available at http://www.unilex.info/article.cfm?pid=1&pos=67&iid=486&cid=44#IID486, last accessed on 23/07/03.
[246] The plaintiff further argued that the retention of title to the goods modified the CIF term regarding the passing of risk. The Court, however, decided that this clause, according to articles 67(1)(third sentence) and 4 (b)CISG, does not affect the transfer of risk to the buyer (the CISG does not connect the transfer of risk to the transfer of ownership).
[247] By the term "dry cargo" is usually meant grain, iron ore, coal, natural gas, sand or raw materials. The view that INCOTERMS are not commonly used in sales of dry cargo is supported by some commentators (see D.Flambouras, "Transfer of Risk in the Contract of Sale involving Carriage of Goods: A Comparative Study in English, Greek Law and the United Nations Convention on Contracts for the International Sale of Goods", available at http://cisgw3.law.pace.edu/cisg/biblio/flambouras.html, last accessed on 28/05/03, and M.Bridge, *The International Sale of Goods. Law and Practice* (Oxford University Press, 1999), para 2.48), but in reality there are no statistics that confirm this opinion. On the contrary, it seems that in most of the relevant case law involving sales of dry cargo, INCOTERMS had been chosen by the parties to govern their sales contract. To avoid repetition see the analysis made above in Chapter I. B. and also see footnote 44.
[248] See D.Flambouras, "Transfer of Risk in the Contract of Sale involving Carriage of Goods: A Comparative Study in English, Greek Law and the United Nations Convention on Contracts for the International Sale of Goods", available at http://cisgw3.law.pace.edu/cisg/biblio/flambouras.html, last accessed on 28/05/03.
[249] See J.D.Feltham, 'C.I.F. and F.O.B. Contracts and the Vienna Convention on Contracts for the International Sale of Goods' (1991) *Journal of Business Law* 413, 416.
[250] Let us assume that the seller S in Madrid and the buyer B in Rome agree on the sale of 2,000 tons of apricots FCA INCOTERMS 2000. The goods should be shipped from the port of Barcelona on 19 March 2003 and be carried from Madrid to Barcelona by truck. The goods are loaded on the truck but on their way to Barcelona they are damaged due to a road accident. Who will bear the risk of damage under the INCOTERMS and the Convention? The goods were damaged after the handing over to the first carrier, ie in the present situation the truck carrier; consequently, under both INCOTERMS and the Convention, the buyer B will have to bear the risk of damage.
[251] According to the first sentence of article 67(1) CISG, risk passes when the goods are delivered to the first carrier for transmission to the buyer.

[252] See H .de Vries, op cit, 521.
[253] See N.G.Oberman, op cit.
[254] See H .de Vries, op cit, 519.
[255] See H .de Vries, op cit, 520.
[256] This will be examined below in Chapter III. B. i).
[257] See Chapter II. A. iv).
[258] See N.G.Oberman, op cit.
[259] By way of an example, let us suppose that the seller X ships 5,000 tons of grain and sells them while in transit to buyer Y, who in his turn sells them to buyer Z and Z again sells them, while in transit, to buyer W. When W takes over the goods he realises that the goods have deteriorated due to water sea page. Who will bear the risk of deterioration? The seller X or any of the subsequent buyers Y, Z or W? Under the Convention's rule in art.68, risk passed from the time of conclusion of the contract of sale. That means that the buyer W would have to bear the risk of loss if the goods deteriorated after the conclusion of his contract. Nevertheless, in that case the parties would have to deal with some difficult problems of proof, since it would be very hard to determine the exact time of deterioration. If, however, there had been an insurance coverage, the risk would pass from the moment when the goods were handed over to the carrier who issued the contract of carriage. If the seller X or any of the subsequent buyers-sellers knew about the deterioration, then the loss would be at his risk according to the Convention's article 68 third sentence. On the contrary, if INCOTERMS 2000 CIF or CFR "afloat" applied, risk would pass from the moment that the goods had passed the ship's rail at the port of shipment.
[260] N.G.Oberman, op cit.
[261] See N.G.Oberman, op cit.
[262] See A.Romein, op cit.
[263] See Chapter II. B. iii).
[264] In order to establish another point of passing of risk that would be more efficient and practical.
[265] See J.Ramberg, *ICC Guide to INCOTERMS 2000* (Paris: ICC Publishing S.A., 1999) 14.
[266] See relevant case *Pyrene Co Ltd v Scindia Navigation Co Ltd* (1954) 2 QB 402, examined above in Chapter II. B. iii).
[267] It will be difficult to examine every time the exact time and place where the goods had landed.
[268] See A.Romein, op cit.
[269] See D.Flambouras, "Transfer of Risk in the Contract of Sale involving Carriage of Goods: A Comparative Study in English, Greek Law and the United Nations Convention on Contracts for the International Sale of Goods", available at http://cisgw3.law.pace.edu/cisg/biblio/flambouras.html, last accessed on 28/05/03.
[270] ibid.
[271] Examination of whether the goods were damaged before or after they passed the ship's rail and whether they fell on the wharf, sea or deck.
[272] C.Gelens, 'Incoterms and contracts of carriage in liner terms' in C.Debattista (ed), *Incoterms in practice* (Paris: ICC Publishing S.A., 1995, reprinted 1996) 140.
[273] See Chapter II. A. iii) and v).
[274] See Chapter II. A. iv).
[275] See D.Flambouras, "Transfer of Risk in the Contract of Sale involving Carriage of Goods: A Comparative Study in English, Greek Law and the United Nations Convention on Contracts for the International Sale of Goods", available at http://cisgw3.law.pace.edu/cisg/biblio/flambouras.html, last accessed on 28/05/03.
[276] The seller will have to prove that the goods were destroyed or lost after they were identified to the contract of sale, since in that case the general principle of article 7(2) CISG applies, according to which a person who relies on a rule in his favour must prove that the preconditions for the application of that rule are satisfied. See D.N.Tzouganatos, 'The passing of risk under the articles 66-70 of the United Nations Convention on International Sale of Goods' (1995) *Commercial Law Review* 509, 523- *In Greek*.
[277] See D.N.Tzouganatos, 'The passing of risk under the articles 66-70 of the United Nations Convention on International Sale of Goods' (1995) *Commercial Law Review* 509, 524- *In Greek* and also see D.E. Goodfriend, op cit, 588.
[278] See D.Flambouras, "Transfer of Risk in the Contract of Sale involving Carriage of Goods: A Comparative Study in English, Greek Law and the United Nations Convention on Contracts for the International Sale of Goods", available at http://cisgw3.law.pace.edu/cisg/biblio/flambouras.html, last accessed on 28/05/03.
[279] See N.G.Oberman, op cit.
[280] See D.E.Goodfriend, op cit, 579.
[281] See D.M.Day, op cit, 94 and J.C.T.Chuah, op cit, 29.
[282] G.Jiménez, *ICC Guide to Export- Import Basics, the legal, financial and transport aspects of international trade* (Paris: ICC Publishing S.A., 1997) 181.
[283] See G.Jiménez, *ICC Guide to Export- Import Basics, the legal, financial and transport aspects of international trade* (Paris: ICC Publishing S.A., 1997) 181.
[284] See J.Ramberg, *ICC Guide to INCOTERMS 2000* (Paris: ICC Publishing S.A., 1999) 15.
[285] See G.Jiménez, *ICC Guide to Export- Import Basics, the legal, financial and transport aspects of international trade* (Paris: ICC Publishing S.A., 1997) 182.
[286] See D.E.Goodfriend, op cit, 579 and D.M.Day, op cit, 94.

[287] The advantages of multi-modal transport are various and can be summarised in that there is only '*one* carrier, *one* document and *one* responsibility covered by a *total price* from *point of origin to point of destination*'. J.Ramberg, 'The implications of new transport technologies' (1980) 15 *European Transport Law* 119, 129 and see also D.M.Day, op cit, 94.
[288] M.Clarke, 'Containers: Proof That Damage To Goods Occurred During Carriage' in C.M.Schmitthoff and R.M.Goode (eds), *International carriage of goods: some legal problems and possible solutions*, The International Commercial Law Series, Volume 1, ([London]: Centre for Commercial Law Studies, 1988) 88.
[289] K.M.Johnson and H.C.Garnett, *The Economics of Containerisation* (London: George Allen & Unwin LTD, 1971) 89.
[290] See A.Romein, op cit.
[291] See D.E.Goodfriend, op cit, 579.
[292] See D.M.Day, op cit, 95.
[293] See D.Flambouras, 'International Sales of Goods. Practical Issues concerning the passing of risk under the Vienna Convention (1980)' (March- April 1998) *Synigoros* 26, 28- *In Greek*.
[294] See D.E.Goodfriend, op cit, 594.
[295] See D.Flambouras, "Transfer of Risk in the Contract of Sale involving Carriage of Goods: A Comparative Study in English, Greek Law and the United Nations Convention on Contracts for the International Sale of Goods", available at http://cisgw3.law.pace.edu/cisg/biblio/flambouras.html, last accessed on 28/05/03.
[296] See A.Romein, op cit, G.Jiménez, op cit, 181 and S.Bollée, op cit, 254.
[297] See K.Pantelidou, 'Issues from the allocation of risk under the Vienna Convention for the international sale of goods' (2002) *Private Law Chronicle* 97, 102.
[298] See M.T.Murphy, "United Nations Convention on Contracts for the International Sale of Goods: Creating Uniformity in International Sales Law" 727, 750, available at http://cisgw3.law.pace.edu/cisg/biblio/murphy.html, last accessed on 28/04/03.
[299] See Chapter III. B. i).