CHAPTER V. PASSING OF RISK

Article 78

[Loss after risk has passed]

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

PRIOR UNIFORM LAW

ULIS, article 96.

Commentary

1. Article 78 introduces the provisions in the Convention that regulate the passing of the risk of loss.

2. The question whether the buyer or the seller must bear the risk of loss is one of the most important problems to be solved by the law of sales. Although most types of loss will be covered by a policy of insurance, the rules allocating the risk of loss to the seller or to the buyer determine which party has the burden of pressing a claim against the insurer, the burden of waiting for a settlement with its attendant strain on current assets, and the responsibility for salvaging damaged goods. Where insurance coverage is absent or inadequate the allocation of the risk has an even sharper impact.

3. Frequently, of course, the risk of loss will be determined by the contract. In particular, such trade terms as FOB, CIF, and C and F may specify the moment when the risk of loss passes from the seller to the buyer.[1] Where the contract sets forth rules for the determination of the risk of loss by the use of trade terms or otherwise, those rules will prevail over the rules set forth in this Convention.[2]

4. Article 78 states the main consequence of the passing of the risk. Once the risk has passed to the buyer, the buyer is obligated to pay for the goods notwithstanding their subsequent loss or damage. This is the converse of the rule stated in article 34 (1) that "the seller is liable . . . for any lack of conformity which exists at the time when the risk passes to the buyer".

5. Nevertheless, even though the risk has passed to the buyer prior to the time that the goods are lost or damaged, the buyer is discharged from his obligation to pay the price to the extent that the loss or damage was due to an act or omission of the seller.

6. The loss or damage to the goods may be caused by an act or omission of the seller which does not amount to a breach of the seller's obligations under the contract. For example, if the contract was on FOB terms, the risk would normally pass when the goods passed the ship's

---

[1] E.g., Incoterms, FOB, A.4 and B.2; CIF, A.6 and B.3; C & F, A.5 and B.3 provide that the seller bears the risk until the goods pass the ship's rail from which time the risk is borne by the buyer.

The use of such terms in a contract without specific reference to Incoterms or to some other similar definition and without a specific provision in the contract as to the moment when risk passes may nevertheless be sufficient to indicate that moment if the court or arbitral tribunal finds the existence of a usage. See para. 6 of the commentary to article 8.

[2] Article 5.

rail.[3] If the seller damaged the goods at the port of discharge when he was recovering his containers, the damage to the goods may be considered not to be a breach of the contract but, instead, to constitute a tort. If the loss or damage to the goods constitutes a tort rather than a breach of the contract, none of the buyer's remedies under articles 41 to 47 would apply.[4] Nevertheless, article 78 provides that the buyer would not be obligated to pay the price as stated in the contract but would have the right to deduct the damages as they would be calculated under the applicable law of tort.

[3] See footnote 1 above.

[4] Article 41 (1) makes these remedies applicable only if the seller "fails to perfom any of his obligations under the contract and this Convention".