

Article 69

(1) In cases not within articles 67 and 68, the risk passes to the buyer when he takes over the goods or, if he does not do so in due time, from the time when the goods are placed at his disposal and he commits a breach of contract by failing to take delivery.

(2) However, if the buyer is bound to take over the goods at a place other than a place of business of the seller, the 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.

(3) If the contract relates to goods not then identified, the goods are considered not to be placed at the disposal of the buyer until they are clearly identified to the contract.

OVERVIEW

1. Article 69 provides residual rules on the time of passing of risk in cases not covered by the preceding two articles of the Convention. The consequence of the passing of the risk on the buyer's obligation to pay is dealt with in article 66. The effect of seller's fundamental breach on the passing of risk is addressed in article 70.

2. Article 69 applies only if the preceding two articles of the Convention do not apply.¹ Article 67 governs cases where the contract of sale involves carriage of goods, and cases falling within that provision are thus beyond the scope of article 69. If the contract of sale is silent as to the carriage of goods, however, article 69 rather than article 67 will govern the passing of risk. This is the case even if the buyer arranges for subsequent transportation of the goods by a third-party carrier. Which article applies in a particular case often turns on the interpretation of the parties' agreement. A court concluded that a contract term "list price ex works" was not inconsistent with article 67 (1) where the goods were to be taken by a third-party carrier from Japan.² An arbitral tribunal also applied article 67 (1) to a contract providing that "the buyer has to pick up the fish eggs at the seller's address and take the goods to his facilities in Hungary" and that the price was "FOB Kladovo" (Kladovo being the seller's address).³ On the other hand, with respect to a contract where the seller agreed to deliver the goods under the "DAF" ("Delivered at Frontier") term in accordance with Incoterms 1990 (under Incoterms 2010, "DAF" is subsumed under "DAP" ("Delivered at Place")), an arbitral tribunal found that article 69 rather than article 67 (or the DAF term itself) governed the issue of when the risk passes.⁴ For more cases, see the digest to article 67.

3. Article 69 (1) covers cases where delivery is to take place at the seller's place of business, while article 69 (2) addresses all other cases.⁵ If the loss or damage occurred after the buyer took over the goods, some decisions apply Article 69 without specifying whether they are applying paragraph (1) or (2).⁶

TAKING OVER GOODS AT SELLER'S PLACE OF BUSINESS

4. When goods are to be delivered at the seller's place of business, article 69 (1) provides that the risk passes to the buyer when it takes over the goods. The buyer's use of a carrier to take over the goods does not prevent the passing of risk even when it was agreed that the goods were to be taken over by the buyer.⁷ A court has applied article 69 (1) to a contract between an individual and an auctioneer where the individual ordered the auctioneer to sell by auction a painting.⁸

5. If the buyer fails to take over the goods, paragraph (1) provides that the risk passes at the point when two requirements have been satisfied: 1) the goods have been placed at the buyer's disposal, and 2) the buyer's failure to take them over constitutes a breach of contract. One court found that the goods had not been placed at the buyer's disposal when they were stored in the manufacturer's warehouse, rather than in the seller's warehouse where the delivery to the buyer was to be made.⁹

TAKING OVER GOODS AT OTHER LOCATIONS

6. Paragraph (2) of article 69 addresses the passing of risk in cases where the buyer is bound to take over the goods at a place other than the seller's place of business. In these cases, the risk passes when the buyer is aware that the goods are placed at its disposition and delivery is due.

7. Paragraph (2) covers a variety of cases, including cases involving delivery of goods stored in a third party's warehouse, delivery at some place other than the seller's or buyer's place of business, and delivery at the buyer's place of business.¹⁰ In one case, a court found that the risk that furniture stored in a warehouse would be lost had not passed to the buyer; the buyer had been issued storage

invoices but delivery was not yet due because, by the parties' agreement, delivery was due only on the buyer's demand and it had not yet made a demand.¹¹ Another case found, however, that risk of loss had passed when the seller delivered raw salmon to a third party processor because the buyer acquiesced in the delivery and delivery was due.¹² In another case, an arbitral tribunal found that the seller, who had stored the goods following the buyer's failure to open an agreed letter of credit, bore the risk of loss because the seller had not delivered the goods "DAF" ("Delivered at Frontier") as agreed, nor had the seller placed the goods at the buyer's disposal.¹³

IDENTIFICATION OF THE GOODS

8. For the same reasons that justify paragraph (2) of article 67, paragraph (3) of article 69 provides that, in case of a sale of goods not identified when the contract is concluded, the goods are considered not to have been placed at the disposal of the buyer until they are clearly identified to the contract. Consequently, the risk of loss does not pass under either paragraphs (1) or (2) of article 69 until that time. One court applying article 69 (2) held that the requirement that the goods be clearly identified was satisfied by storing the goods in a warehouse separately from other goods.¹⁴

Notes

¹ CLOUT case No. 360 [Amtsgericht Duisburg, Germany, 13 April 2000] (article 69 (1) applies only if preceding two articles do not apply) (see full text of the decision).

² CLOUT case No. 283 [Oberlandesgericht Köln, Germany, 9 July 1997].

³ CLOUT case No. 163 [Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 10 December 1996].

⁴ CLOUT case No. 104 [Arbitration Court of the International Chamber of Commerce, 1992 (Arbitral award No. 7197)].

⁵ See U.S. District Court, District of Colorado, 6 July 2010 (Alpha Prime Development Corporation, Plaintiff, v. Holland Loader), available on the Internet at www.cisg.law.pace.edu.

⁶ Oberlandesgericht Linz, Austria, 23 January 2006, English translation available on the Internet at www.cisg.law.pace.edu (article 69 referred to during application of article 36; however, applicability of CISG denied upon appeal in Oberster Gerichtshof, Austria, 4 July 2007, English translation available on the Internet at www.cisg.law.pace.edu); CLOUT case No. 995 [Randers Byret, Denmark 8, July 2004] (agricultural machine to be delivered in Buyer's country, a few kilometers from the field where it was intended to be used).

⁷ Oberlandesgericht Schleswig-Holstein, Germany, 29 October 2002 (Stallion case), English translation available on the Internet at www.cisg.law.pace.edu.

⁸ Arrondissementsrechtbank Arnhem, the Netherlands, 17 July 1997 (Kunsthaus Math. Lempertz OHG v. Wilhelmina van der Geld), Unilex, affirmed on other grounds, Hof Arnhem, the Netherlands, 9 February 1999, Unilex (Convention not applicable).

⁹ Landgericht Paderborn, Germany, 10 June 1997 (Furniture case), available on the Internet at www.cisg-online.ch (although the upper court in CLOUT case No. 338 [Oberlandesgericht Hamm, Germany, 23 June 1998], applied paragraph (2) of Article 69).

¹⁰ Cour de Justice de Geneve, Switzerland, 20 January 2006 (Paper products case), English translation available on the Internet at www.cisg.law.pace.edu (delivery at buyer's President's private residence—obiter dictum); Appellationshof Bern, Switzerland, 11 February 2004 (Wire and cable case), English translation available on the Internet at www.cisg.law.pace.edu (delivery at buyer's address although there is no explicit citation of article 69 (2)); Rechtbank van Koophandel Ieper, Belgium, 18 February 2002 (L. v. SA C.), Unilex, full text available on the Internet at www.law.kuleuven.be (delivery at buyer's place); CLOUT case No. 360 [Amtsgericht Duisburg, Germany, 13 April 2000] (paragraph (2) covers cases where buyer takes over goods at a place other than seller's place of business; in this particular case, the place of delivery was buyer's place of business).

¹¹ CLOUT case No. 338 [Oberlandesgericht Hamm, Germany, 23 June 1998].

¹² CLOUT case No. 340 [Oberlandesgericht Oldenburg, Germany, 22 September 1998].

¹³ CLOUT case No. 104 [Arbitration Court of the International Chamber of Commerce, 1993 (Arbitral award No. 7197)] (see full text of the decision).

¹⁴ Oberlandesgericht Hamburg, Germany, 14 December 1994 (Cobalt sulphate case), available on the Internet at www.cisg-online.ch (affirmed in CLOUT case No. 171 [Bundesgerichtshof, Germany, 3 April 1996] without explicit mention of this issue).