

# Risk of Loss in Goods Sold During Transit: A Comparative Study of the U.N. Convention on Contracts for the International Sale of Goods, the U.C.C., and the British Sale of Goods Act

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## I. INTRODUCTION

In 1980, a diplomatic conference of the United Nations General Assembly approved the final text of the Convention on Contracts for the International Sale of Goods ("Convention").<sup>1</sup> The purpose of the diplomatic conference, held in Vienna, was to revise and adopt the draft convention prepared by the United Nations Commission on International Trade Law ("UNCITRAL").<sup>2</sup> The Convention, which has been in force since 1988,<sup>3</sup> is the culmination of more than fifty

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1. The text of the United Nations Convention on Contracts for the International Sale of Goods is found in the United Nations Conference for the International Sale of Goods, Official Records, U.N. Doc. A/Conf. 97/18, Annex I, at 178-90 (1981) [hereinafter Convention]. The text of the Official Records is reprinted in JOHN HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES (1989).

2. See Douglas E. Goodfriend, Comment, *After the Damage is Done: Risk of Loss Under the United Nations Convention on Contracts for the International Sale of Goods*, 22 COLUM. J. TRANSNAT'L L. 575, 575 n.2 (1984). UNCITRAL assumed the task of unifying the law of international sales in 1968. JOHN HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION § 5 (2d ed. 1989).

3. The Convention went into force in Argentina, Egypt, France, Hungary, Italy, Lesotho, China, Syria, the United States, Yugoslavia, and Zambia on January 1, 1988. HONNOLD, *supra* note 2, app. F at 693-94. As of October 1, 1991, the Convention is also in force in Australia, Austria, Bulgaria, Byelorussian S.S.R., Chile, Czechoslovakia, Denmark, Finland, Germany, Iraq, Mexico, Norway, Spain, Sweden, Switzerland, Ukrainian S.S.R., and the U.S.S.R. *Id.* Current information about countries that have ratified the Convention can be obtained through the United Nations Treaty Section, Office of Legal Affairs, New York, N.Y. 10017, (212) 963-7958.

years of study.<sup>4</sup>

The aim of the Convention is to provide a uniform law for the international sale of goods.<sup>5</sup> It focuses on the function of the contract between parties.<sup>6</sup> In analyzing the Convention, one must bear in mind that its provisions play a supporting role, supplying only those terms to a contract that the parties have failed to include.<sup>7</sup> Thus, if the terms of a contract conflict with the Convention's provisions, the terms of the contract will prevail.<sup>8</sup> Alternatively, parties may choose to disregard the Convention's provisions entirely.<sup>9</sup>

The Convention effectively addresses the issue of who bears the risk of loss on a simple point-to-point sale.<sup>10</sup> The introduction of containers, however, has led to more complicated forms of transportation.<sup>11</sup> Indeed, a container that holds the goods may not reach a buyer until it has experienced several different modes of transportation, such as trucks, rail, and ships.<sup>12</sup> Although a solution is needed for the problem of multiple sales while goods are in transit, including daisy chain sales,<sup>13</sup> the Convention fails to offer any guidance. This absence of direction in the area of multiple sales during transit is the achilles heel of chapter IV of the Convention.

This Article examines the grey area of multiple sales during transit, placing special emphasis on the allocation of risk in an undivided bulk owned by two or more persons. It also explores a solution to this problem under the provisions of the Uniform Commercial Code ("U.C.C.")<sup>14</sup> and the British Sale of Goods Act.<sup>15</sup> This Article compares the Convention, the U.C.C., and the Sale of Goods Act, and analyzes the issue of allocation of risk under each body of law.

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4. *American Bar Association Report to the House of Delegates*, 18 INT'L LAW. 39, 40 (1984).

5. HONNOLD, *supra* note 2, § 1.

6. *Id.* § 2.

7. *Id.*

8. *See* Convention, *supra* note 1, art. 6 ("The parties may exclude the application of this convention or . . . vary the effect of any of its provisions.").

9. *Id.*

10. Chapter IV of the Convention deals with the passing of risk. *See id.* ch. IV.

11. HONNOLD, *supra* note 2, § 363.

12. *Id.*

13. A "daisy chain sale" has been defined as "a line of sellers and buyers of a single cargo of oil, traded on a forward basis on the expectation of making a profit on short-term price movements." Terry Povey, *The North Sea Market "Undermining" OPEC*, FIN. TIMES, Nov. 26, 1984, § I, at 15, col. 3.

14. The U.C.C. contains two basic risk of loss provisions. *See* U.C.C. §§ 2-509, 2-510 (1989).

15. Sale of Goods Act, 1979.

## II. THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

### A. Risk of Loss in Goods Sold During Transit

#### 1. Generally

Most commodity trading in international commerce involves contracts for future delivery.<sup>16</sup> A future contract is an agreement to deliver or receive a certain quantity of a commodity at an agreed price at some stated time in the future.<sup>17</sup> The parties to such a contract need not be present in order to deliver or pay for the goods.<sup>18</sup> Indeed, the buyers under a future contract neither inspect the commodities themselves,<sup>19</sup> nor take physical delivery of the goods.<sup>20</sup> This can be contrasted with the spot market, where goods are exchanged for immediate payment.<sup>21</sup>

Consequently, bulk commodities have achieved the status of speculative securities, comparable to corporate stock. Indeed, a shipment of such a commodity can be bought and sold a number of times before arriving at its final destination. Additionally, forward or future trading subjects a contract of sale to a myriad of problems among several companies of differing nationalities and varied legal systems.<sup>22</sup> As a result of these problems, article 68 of the Convention, which governs the risk of loss of goods sold while in transit, has become quite significant.<sup>23</sup>

Most contracts for the international sale of goods specify the time and place at which risk passes, either explicitly or through standard trade terms.<sup>24</sup> In disputes, unambiguous terms generally govern.<sup>25</sup> Additionally, standard trade terms are treated as trade usage and the Convention is not used to interpret their meaning.<sup>26</sup> Thus, the Convention's provisions on risk of loss should only be utilized

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16. 21 THE NEW ENCYCLOPEDIA BRITANNICA 840 (15th ed. 1989).

17. *Id.*

18. 3 *Id.* at 491.

19. 21 *Id.* at 840.

20. 23 *Id.* at 555.

21. 3 *Id.* at 491.

22. James W. Skelton, Jr., *Potential Effects of the International Sales Convention on U.S. Oil Traders*, 9 HOUS. J. INT'L L. 95, 97 (1986).

23. See Convention, *supra* note 1, art. 68. For the text of article 68, see *infra* note 28.

24. The International Chamber of Commerce has developed standard trade terms, commonly known as "Incoterms." See I.C.C. GUIDE TO INCOTERMS (1980) [hereinafter INCOTERMS].

25. See Goodfriend, *supra* note 2, at 578.

26. *Id.* at 578 n.14.

where the contract terms are inadequate.<sup>27</sup>

## 2. Article 68

Article 68 of the Convention applies to situations in which goods are sold while they are in transit.<sup>28</sup> Its language is inherently confusing. In fact, article 68 was the provision that caused the most difficulty at the diplomatic conference.<sup>29</sup> It is possible, however, to amend article 68 to make it more comprehensible, and thus more effective.

The drafters of the Convention decided at the outset that the risk of loss rules would not be controlled by the concept of delivery.<sup>30</sup> They believed that if parties entered into a contract while the goods were in transit and the goods suffered damage while in transit, a provision based on delivery would make it necessary to determine the exact points where the various types of damage occurred.<sup>31</sup> This requirement would result in several practical difficulties.<sup>32</sup>

The original draft provision, article 97(3), dealt with the passing of risk when goods were sold during transit, and was modeled on article 99 of the 1964 Hague Sales Convention ("U.L.I.S.").<sup>33</sup> Article 97(3) stated:

Where the contract relates to goods then in transit the risk shall be borne by the buyer as from the time of the handing over of the goods to the carrier. However, where the seller knew or ought to have known, at the time of the conclusion of the contract, that the goods had been lost or had deteriorated, the risk shall remain with him [until the time of the conclusion of the contract] unless he disclosed such fact to the buyer [and the buyer agreed to assume

27. *Id.* at 578.

28. Article 68 states:

The risk in respect of goods sold in transit passes to the buyer from the time of the conclusion of the contract. However, if the circumstances so indicate, the risk is assumed by the buyer from the time the goods were handed over to the carrier who issued the documents embodying the contract of carriage. Nevertheless, if at the time at the conclusion of the contract of sale the seller knew or ought to have known that the goods had been lost or damaged and did not disclose this to the buyer, the loss or damage is at the risk of the seller.

Convention, *supra* note 1, art. 68.

29. United Nations Conference for the International Sale of Goods, Official Records, U.N. Doc. A/Conf. 97/18, Annex I, at 215 (1981) [hereinafter O.R.], *reprinted in* HONNOLD, *supra* note 1, at 750.

30. 5 UNCITRAL Y.B. 92, U.N. Doc. A/CN.9/SER.A/1974, *reprinted in* HONNOLD, *supra* note 1, at 170.

31. *Id.* at 90, *reprinted in* HONNOLD, *supra* note 1, at 169.

32. *See id.*

33. *Id.* at 91, *reprinted in* HONNOLD, *supra* note 1, at 170.

such risk].<sup>34</sup>

The drafters recognized that article 97(3) favored sellers.<sup>35</sup> In the discussions leading to the final draft, the drafters made few references to the passage of risk in a fraction of a larger bulk, and did not incorporate a specific provision on the subject in the final draft.<sup>36</sup> The United Nations Secretary-General suggested that such transactions would be subject to the basic principle that the risk cannot pass until the goods in question are identified.<sup>37</sup> It was argued that once the bulk was identified, the risk would pass with respect to a share in the bulk.<sup>38</sup>

In a sale occurring when the goods are in transit, the buyer does not see the purchased goods until they are unloaded at the port of destination. Generally, any loss or damage to the goods will be apparent only at the time of unloading, except in the case of external events, such as storms or collisions. Additionally, it is commercially reasonable to assume that a buyer of goods afloat is aware that the seller's knowledge of their condition cannot possibly extend beyond the time of shipment.<sup>39</sup>

### 3. Who Bears the Risk of Loss?

The question then arises as to who should bear the risk of loss—the buyer or the seller? The general rule is that the buyer bears the transit risk.<sup>40</sup> This approach has been reinforced by its application to international sales.<sup>41</sup> A practical consideration underlying this rule is that the seller is likely to be distanced from the damaged goods. The buyer, therefore, is in a better position to assess the damage and to make a claim against the carrier or insurer.<sup>42</sup> Article 99 of the U.L.I.S. recognized international trade usage, which requires that the risk in a sale of goods pass to the buyer retroactively, to include the

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34. *Id.*

35. *Id.* at 92, reprinted in HONNOLD, *supra* note 1, at 171.

36. *See id.*

37. *Id.*

38. *Id.* at 92 n.53, reprinted in HONNOLD, *supra* note 1, at 171. This hypothesis will be explored further in the Article.

39. Henry P. de Vries, *The Passing of Risk in International Sales Under the Vienna Sales Convention 1980 as Compared with Traditional Trade Terms*, 17 EUR. TRANSP. L. 495, 508 (1982).

40. HONNOLD, *supra* note 2, § 366.

41. *See id.*

42. P.M. Roth, *The Passing of Risk*, 27 AM. J. COMP. L. 291, 296 (1979).

entire period of sea transport.<sup>43</sup>

The draft that UNCITRAL submitted to the Vienna Conference embodied the principle that the buyer bears the transit risk.<sup>44</sup> Article 80 of the draft stated:

The risk in respect of goods sold in transit is assumed by the buyer from the time the goods were handed over to the carrier who issued the documents controlling their disposition. However, if at the time of the conclusion of the contract the seller knew or ought to have known that the goods had been lost or damaged and he has not disclosed such fact to the buyer, such loss or damage is at the risk of the seller.<sup>45</sup>

A number of developing countries objected strenuously to the retroactive passing of risk provision, and proposed that the risk pass at the conclusion of the contract.<sup>46</sup> These countries believed that it was unacceptable for the buyer to assume the risk for the period before the contract if the goods had not been insured before that date.<sup>47</sup> For example, the Swedish representative believed that it would be difficult to determine the exact moment when damage occurred.<sup>48</sup> In contrast, it would be easier to note if the goods were damaged when they were handed over to the carrier.<sup>49</sup> Despite these concerns, the final draft of article 80 was adopted without being put to a vote.<sup>50</sup>

The first sentence of article 68 is clear and unambiguous.<sup>51</sup> The risk with respect to goods sold in transit passes to the buyer only at the conclusion of the sales contract.<sup>52</sup> Damage to the goods occurring before that time raises a question of non-conformity.<sup>53</sup> Damage after

43. Bernd von Hoffman, *Passing of Risk in International Sale of Goods*, in INTERNATIONAL SALE OF GOODS: DUBROVNIK LECTURES 265, 293 (Petar Sarcevic & Paul Volken eds., 1986).

44. O.R., *supra* note 29, at 127, *reprinted in* HONNOLD, *supra* note 1, at 699.

45. *Id.*

46. These developing countries included Argentina, Egypt, Pakistan, Korea, and Turkey. *Id.* at 213, *reprinted in* HONNOLD, *supra* note 1, at 748.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 221, *reprinted in* HONNOLD, *supra* note 1, at 756.

51. For the text of article 68, see *supra* note 28.

52. See Convention, *supra* note 1, art. 68. For the text of article 68, see *supra* note 28.

53. See Convention, *supra* note 1, art. 36(2). Article 36(2) states:

The seller is also liable for any lack of conformity which occurs after the time indicated in [article 36(1)] and which is due to a breach of any of his obligations, including a breach of any guarantee that for a period of time the goods will remain fit for

the conclusion of the contract raises a question of risk.<sup>54</sup>

The second sentence of article 68 provides an exception to the general rule.<sup>55</sup> Under this exception, the risk passes to the buyer retroactively from the time the goods are handed over to the carrier "if the circumstances so indicate."<sup>56</sup> This exception may have many differing interpretations throughout the world, and, as a result, litigation may increase.<sup>57</sup>

A question arises over which "circumstances" allow a retroactive passing of risk. The second sentence of article 68 does not require the parties to expressly agree on retroactivity in their contract.<sup>58</sup> Rather, an agreement can be presumed from the "circumstances" of the sales transaction.<sup>59</sup> This results in a legal presumption that does not require an explicit understanding on the buyer's part.<sup>60</sup> One example of a "circumstance" in which the exception would apply is when the seller consummates a sale by transferring to the buyer the standard package of documents covering the shipment, including a policy of insurance endorsed to the buyer. The endorsement makes the buyer the one person who can assert a claim under the policy, and clearly evidences an intent to transfer to the buyer the total risk of the voyage.<sup>61</sup> However, the fact that the insurance coverage has been transferred to the buyer might, in some cases, be held inconclusive if the extent of coverage was not satisfactory from the outset.<sup>62</sup> Yet, a court might determine whether the coverage was effective, thereby alleviating the potential inconclusiveness associated with a transfer of insurance coverage. If deficient, the court may conclude that the buyer did not assume the particular risk that materialized.<sup>63</sup>

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their ordinary purpose[,] for some particular purpose[,] or will retain specified qualities or characteristics.

*Id.*

54. Barry Nicholas, *Goods Sold in Transit*, in COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION 500 (C.M. Bianca & M.J. Bonell eds., 1987).

55. See Convention, *supra* note 1, art. 68. For the text of article 68, see *supra* note 28.

56. See Convention, *supra* note 1, art. 68. For the text of article 68, see *supra* note 28.

57. M.L. Sevon, *Risk*, in THE 1980 VIENNA CONVENTION ON THE INTERNATIONAL SALE OF GOODS: LAUSANNE COLLOQUIUM 191, 203.

58. See Convention, *supra* note 1, art. 68.

59. von Hoffman, *supra* note 43, at 294.

60. de Vries, *supra* note 39, at 508.

61. HONNOLD, *supra* note 2, § 372.

62. de Vries, *supra* note 39, at 509.

63. *Id.* In addition, if the contract required the seller to insure, failure to do so properly might be a serious breach justifying avoidance of the contract, thereby imposing the risk on the seller.

The third sentence of article 68 introduces a proviso which puts the risk on the seller if, "at the time of conclusion of the contract[,] the seller knew or ought to have known that the goods had been lost or damaged and did not disclose this fact to the buyer."<sup>64</sup> The seller would also be liable for all subsequent damage that is causally connected to the original damage.<sup>65</sup> The third sentence applies only to the exception stated in the second sentence.<sup>66</sup> In fact, it is because the second sentence allows the risk to pass before the contract is made that the third sentence is necessary.<sup>67</sup>

Article 68 of the Convention applies only when the parties are, at the conclusion of the contract, aware that the goods are in transit.<sup>68</sup> However, article 68 does not require that the documents referred to in the second sentence be negotiable. Rather, the article also applies to carriage under an international consignment note.<sup>69</sup> Under such a note, the carrier is obligated to deliver the goods to the consignee named therein. However, on presentment of that copy, the holder may then instruct the carrier to deliver the goods to another person.<sup>70</sup>

Article 68 creates a number of logistical problems. Under the first sentence, the risk passes to the buyer at the conclusion of the contract. One would therefore have to establish the condition of the goods at that stage. If the goods are found to be damaged upon their arrival at the port of discharge, the question arises whether the damage was caused before or after the conclusion of the contract. As the goods were aboard the ship at that stage of transit, this would be difficult to establish.<sup>71</sup>

Article 36(1) of the Convention makes the seller liable "for any lack of conformity which exists at the time when the risk passes to the buyer."<sup>72</sup> In the case of hidden damage, it would be impossible to pinpoint at what stage the damage occurred. Therefore, the party responsible for proving when the damage occurred would be faced with an almost insurmountable burden.

The first sentence of article 68 may help a dishonest seller in a

64. Convention, *supra* note 1, art. 68.

65. Nicholas, *supra* note 54, at 500.

66. O.R., *supra* note 29, at 220, reprinted in HONNOLD, *supra* note 1, at 755.

67. *Id.*

68. Sevon, *supra* note 57, at 202.

69. *Id.* International consignment notes are used in carriage by rail or road in Europe. *Id.*

70. *Id.*

71. *Id.* at 203.

72. See Convention, *supra* note 1, art. 36(1).

multiple sale situation escape liability. Because the risk passes to the buyer at the conclusion of the contract, the seller presumably would not be responsible for hidden defects. It could be argued, however, that each buyer's claim is assigned to the subsequent buyer. In any event, this situation should rarely occur because it is customary to have a surveyor check the goods prior to loading.<sup>73</sup> In the case of oil tankers, surveyors ensure that the ship's holds are free of all gas residue before new cargo is loaded.<sup>74</sup> Moreover, it is in a carrier's interest to note any damage to the goods on the bill of lading to avoid claims of damage that did not occur in transit.<sup>75</sup> Despite these precautions, it is still possible that damaged or deteriorated goods that form a part of a fungible bulk will escape detection.

#### 4. Risk of Loss Hypotheticals

##### *a. Hypothetical I*

*Seller A sells bulk goods to Buyer B. B, a foreign buyer, has not had an opportunity to inspect the goods. B further sells to C and D while the goods are in transit. The goods are part of an undivided bulk. There is no negotiable policy of insurance.*

Article 36 of the Convention makes the seller liable "for any lack of conformity that exists at the time risk passes to the buyer, even though lack of conformity becomes apparent only after that time."<sup>76</sup> Under article 36(2), the seller is liable for any lack of conformity resulting from a breach of the seller's guarantee that the goods will "retain specified qualities or characteristics."<sup>77</sup> A broad reading of this phrase would include most transactions. Indeed, it would be difficult to find an international transaction that is not based upon a specific quality or a descriptive characteristic of the goods in question. Such contracts generally guarantee that the goods conform to the specifications. Furthermore, this guarantee implies that the goods will retain these qualities or specifications until they are delivered to the buyer.

According to the first sentence of article 68, C and D should be responsible for damage to the goods. However, C and D could make a plea of non-conformity under article 36(2), without having to prove

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73. Telephone Interview with Captain P. Singh, Surveyor with National Cargo Bureau, Inc., in Portland, Or. (Oct. 7, 1991) [hereinafter Telephone Interview].

74. *Id.*

75. *Id.*

76. See Convention, *supra* note 1, art. 36.

77. *Id.* art. 36(2).

when and at what stage of the transaction the non-conformity occurred. Using this loophole, they could shift the risk of loss to B. Thus, although the goods were not shipped by B, B could bear the risk of the entire voyage. The Convention does not offer a solution to this problem.

It may not be possible to pinpoint at what stage damage occurs, particularly in a sale taking place while the goods are in transit. Multiple sales while in transit exacerbate the problem. If the damage is due to an identifiable cause, its date of occurrence can be pinpointed. If, however, the damage is due to water seepage, overheating, variations of temperature, pilferage, or unreported in-shipment accidents, the general rule that splits the transit risk may work to the detriment of the buyer.<sup>78</sup> This would depend on whether the burden of proof rests on the buyer or the seller. If the buyer must prove that the damage occurred before the buyer was liable for the risk of loss, he or she will lose. On the other hand, the seller will lose if the seller has the burden of proof. This question will be determined by the choice of law rules of the forum, not the Convention, except where article 1 governs.<sup>79</sup>

There is an additional problem for which article 68 offers no solution. In Hypothetical I, there are two buyers of a bulk shipment sold in transit. No problem exists if the goods are sold on an individual hold or container basis, because the goods are clearly identifiable. However, in the case of an undivided bulk, where only part of the shipment is damaged, the Convention offers no guidance on apportioning the loss between buyers. A pro rata division of loss liability seems to be the most equitable solution because there is no other way to determine each party's share of the loss.<sup>80</sup>

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78. Goodfriend, *supra* note 2, at 588.

79. *Id.* Article 1 provides:

- (1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:
  - (a) when the States are Contracting States; or
  - (b) when the rules of private international law lead to the application of the law of a Contracting State.
- (2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.
- (3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention.

Convention, *supra* note 1, art. 1.

80. Goodfriend, *supra* note 2, at 589.

If the carrier has already delivered the undamaged portion to one buyer, the carrier will not be liable to another buyer who fails to obtain delivery unless the loss or deterioration were due to the carrier's breach of contract of carriage.<sup>81</sup> It would be unreasonable to impose a duty of apportionment on the carrier if the shortage or damage does not become apparent until the last delivery is made. The disappointed buyer's remedy should be against the one who obtained delivery of more than his or her rateable share, or against the seller who sold the buyer the goods.

A possible solution for buyers is to use out-turn clauses in their contracts, similar to those used in the oil trade. An out-turn, or landed weight, clause makes the buyer liable only for the goods actually received. The insertion of an out-turn clause would change the time at which risk of loss passes from the seller to the buyer, or from the port of shipment to the point of destination.<sup>82</sup> To avoid potential conflict while using an out-turn clause, any reference to C.I.F.<sup>83</sup> in the contract should be removed because it would put the risk of loss on the buyer.<sup>84</sup> In the case of a non-liquid bulk, the weight of the damaged portion could be excluded, and payment could be made only for the undamaged portion. This provision would work against an innocent seller, especially in a multiple sales transaction. The seller would be unaware of the actual undamaged quantity purchased, because the goods were in transit at the point of purchase. The seller could never prove the quality of the goods sold to him or her. However, a provision placing the transit risk on the seller may be an anomaly because, in most cases, the transit risk is placed on the buyer.<sup>85</sup>

### *b. Hypothetical II*

*A ship carrying iron ore has docked at Paris, its final destination. B, the owner of the shipment, sells the contents of one hold to X, Y, and Z, on an "as is" basis, while the ore is still aboard the ship. A part of*

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81. BENJAMIN'S SALE OF GOODS § 1557 (A.G. Guest ed., 3d ed. 1987) [hereinafter BENJAMIN].

82. James J. Lightburn & Gawie M. Nienaber, *Out-turn Clauses in C.I.F. Contracts in the Oil Trade*, LLOYD'S MAR. & COM. L.Q. 177, 178 (May 1987).

83. In a sales contract, "C.I.F." means that the insurance and freight charges, as well as the cost of the goods, are included in the price. BLACK'S LAW DICTIONARY 242 (6th ed. 1990).

84. Lightburn & Nienaber, *supra* note 82, at 179.

85. See John Honnold, *Risk of Loss, in INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS* § 8.02[1][a] (Nina M. Galston & Hans Smit eds., 1984).

*the ore turns out to be damaged. B's place of business is New York. There is no agreement identifying each buyer's share.*

Assuming B was the penultimate buyer in a chain of buyers, who would bear the risk of loss? The ship has berthed and the goods are not in transit. Article 68 does not apply because it only covers goods sold while in transit.<sup>86</sup> Further, the contract of sale does not involve carriage, which takes it out of the purview of article 67.<sup>87</sup> Thus, article 69 applies, as it governs "cases not within Articles 67 and 68."<sup>88</sup> Section 1 of article 69 applies only when the buyer is bound to take over the goods at the seller's place of business.<sup>89</sup> Thus, section 1 of article 69 is inapplicable here. Section 2 of article 69 provides that, "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."<sup>90</sup> The policy considerations behind section 2 assume that the seller is not in a better position than the buyer to protect and insure the goods or to pursue any claims.<sup>91</sup> Therefore, as the buyer is in a position to collect the goods, the buyer should bear the risk.<sup>92</sup>

In Hypothetical II, however, the goods are not identified. Section 3 of article 69 states that "the goods are considered not to be placed at the disposal of the buyer until they are clearly identified to the contract."<sup>93</sup> The goods owned by X, Y, and Z have clearly not been identified to the contract. According to article 69(2), the goods

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86. See Convention, *supra* note 1, art. 68. For the text of article 68, see *supra* note 28.

87. See Convention, *supra* note 1, art. 67. Article 67 deals with the passing of risk only when the contract involves carriage. See *id.*

88. *Id.* art. 69. Article 69 states:

- (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.

*Id.*

89. See *id.*; HONNOLD, *supra* note 2, § 374.

90. Convention, *supra* note 1, art. 69(2).

91. Nicholas, *supra* note 54, at 503.

92. Barry Nicholas, *The Vienna Convention on International Sales Law*, 105 L.Q. REV. 201, 240 (1989).

93. Convention, *supra* note 1, art. 69(3).

are still part of a common bulk, and each buyer's share has to be identified before the risk passes.

It has been argued that, in a sale "ex ship,"<sup>94</sup> risk passes to the buyer when the goods are effectively placed at his or her disposal.<sup>95</sup> However, in a situation such as Hypothetical II, this contention can be disputed by the clear wording of section 3. It has also been suggested that where identification is, for practical purposes, inseparable from the taking of delivery, the goods have been sufficiently identified when the seller enables the buyer to take delivery.<sup>96</sup> However, section 3 does not suggest these interpretations. It is a fundamental canon of legal construction that the clear unambiguous words of a provision must be given their full meaning.<sup>97</sup> Thus, the risk of loss would remain on B in accordance with the provisions of article 69(3).<sup>98</sup> Accordingly, there is no difference between X, Y, and Z and buyers C and D of Hypothetical I. Legal fiction and the berthing of a ship have put the risk of loss in X, Y, and Z's case onto the seller.

In addition to the problem of the passage of risk in a part of an undivided bulk with multiple ownership, article 68 creates a problem by assuming that the contract is silent as to trade terms.<sup>99</sup> The Convention's rules on passage of risk, which are limited to sales contracts where the parties have not used a trade term, vary greatly from the universal understanding of the rules applicable to trade terms.<sup>100</sup> Mere use of a trade term may be construed as implying an intent to exclude articles 66 through 70 of the Convention.<sup>101</sup> Nevertheless, the standard trade terms developed by the International Chamber of Commerce do not constitute a code of law and do not state the principles underlying the rules.<sup>102</sup> The function of the Convention, there-

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94. INCOTERMS, *supra* note 24. *Incoterms* describes the term "ex ship" to mean that the seller must make the goods available to the buyer on board the ship at the destination named in the sales contract. *See id.*

95. HONNOLD, *supra* note 2, § 377.

96. Nicholas, *supra* note 54, at 505.

97. 2 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS 270 n.6 (1990).

98. This problem is similar to the one created by section 16 of the Sale of Goods Act, which requires ascertainment of goods before property in them can pass. *See* Sale of Goods Act § 16.

99. *See* Harold J. Berman & Monica Ladd, *Risk of Loss or Damage in Documentary Transactions Under the Convention on the International Sale of Goods*, 21 CORNELL INT'L L.J. 423, 430 (1988).

100. *Id.*

101. *Id.* at 437.

102. *Id.* at 434.

fore, is to provide a body of law within the framework of which trade terms can apply.

### III. THE UNIFORM COMMERCIAL CODE

#### A. *Risk of Loss in Goods Sold During Transit*

##### 1. Generally

The Convention entered into force in the United States on January 1, 1988.<sup>103</sup> It received the requisite two-thirds advice and consent from the Senate and was ratified by the President.<sup>104</sup> Under the Supremacy Clause of the United States Constitution, the Convention prevails over the U.C.C. in international transactions to which the Convention applies.<sup>105</sup>

Article 1(1)(b) of the Convention makes the Convention applicable to contracts between parties whose places of business are in different member States and "when the rules of private international law lead to the application of the law of a Contracting State."<sup>106</sup> However, the United States has excluded the application of this rule through a declaration under article 95 of the Convention.<sup>107</sup> The Convention, therefore, only applies to a contracting party in the United States if the other party to the contract has its place of business in a country where the Convention is in effect.<sup>108</sup> This considerably narrows the application of the Convention in the United States, at least until the Convention is adopted by a majority of nations, since the U.C.C. will govern a contract of sale where the rules of international law lead to the application of United States domestic law.

##### 2. U.C.C. Section 2-509

The Convention's rules on risk of loss are closely patterned after

103. U.S. DEP'T OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 1988, at 365 (1988).

104. Jeffery S. Sutton, Comment, *Measuring Damages Under the United Nations Convention on the International Sale of Goods*, 50 OHIO ST. L.J. 737, 737 (1989).

105. *Id.*; see U.S. CONST. art. VI, cl. 2.

106. Convention, *supra* note 1, art. 1(1)(b).

107. Arthur G. Murphey, Jr., *Consequential Damages in Contracts for the International Sale of Goods and the Legacy of Hadley*, 23 GEO. WASH. J. INT'L L. & ECON. 415, 419 n.14 (1989). Article 95 provides: "Any State may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph (1)(b) of article 1 of this Convention." Convention, *supra* note 1, art. 95.

108. Convention, *supra* note 1, art. 1(1)(a).

the U.C.C.<sup>109</sup> Neither body of law employs the elusive concept of property.<sup>110</sup> Instead, the Convention's rules are drafted in terms of concrete commercial events, such as the handing over of goods to a carrier and the buyer taking physical possession from the seller.<sup>111</sup> The risk of loss provisions of the U.C.C., which are promulgated in sections 2-509 and 2-510, similarly reject notions of property.<sup>112</sup> Comment 1 to section 2-509 states that "[t]he underlying theory of these sections on risk of loss is the adoption of the contractual approach rather than an arbitrary shifting of the risk with the 'property' in the goods."<sup>113</sup> The question of "property" or "title" is of no importance in determining whether a buyer or seller bears the risk of loss.<sup>114</sup> The U.C.C. and the Convention, therefore, share a similar approach to risk of loss. Both support the premise that the risk of casualty should be allocated to the party who is in the better position to care for the goods and to cover the risk of insurance.<sup>115</sup>

Section 2-509 allocates risk of loss in the absence of a breach by the seller.<sup>116</sup> Similar to article 6 of the Convention,<sup>117</sup> the U.C.C.'s risk of loss provisions under section 2-509 are "subject to contrary agreement of the parties."<sup>118</sup> However, all variations should be

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109. John Honnold, *The New Uniform Law for International Sales and the UCC: A Comparison*, 18 INT'L LAW. 21, 27 (1984).

110. *Id.*

111. *Id.*

112. See U.C.C. §§ 2-509, 2-510.

113. *Id.* § 2-509 cmt. 1.

114. ROBERT J. NORDSTROM, *HANDBOOK OF THE LAW OF SALES* § 130 (1970).

115. Honnold, *supra* note 85, § 8.03.

116. U.C.C. § 2-509 cmt. 1.

117. Convention, *supra* note 1, art. 6.

118. U.C.C. § 2-509(4). U.C.C. section 2-509 provides:

(1) Where the contract requires or authorizes the seller to ship the goods by carrier (a) if it does not require him to deliver them at a particular destination, the risk of loss passes to the buyer when the goods are duly delivered to the carrier even though the shipment is under reservation (Section 2-505); but (b) if it does require him to deliver them at a particular destination and the goods are there duly tendered while in the possession of the carrier, the risk of loss passes to the buyer when the goods are there duly so tendered as to enable the buyer to take delivery.

(2) Where the goods are held by a bailee to be delivered without being moved, the risk of loss passes to the buyer

(a) on his receipt of a negotiable document of title covering the goods; or (b) on acknowledgement by the bailee of a buyer's right to possession of the goods; or

(c) after his receipt of a non-negotiable document of title or other written direction to deliver . . . .

(3) In any case not within subsection (1) or (2), the risk of loss passes to the buyer on his receipt of the goods if the seller is a merchant; otherwise the risk passes to the buyer on tender of delivery.

clearly stated in the contract.<sup>119</sup> Parties may specifically allocate risk through a clause specifying the allocation, or by selecting symbols, such as C.I.F. and F.O.B., that have special risk of loss meaning under the U.C.C.<sup>120</sup> The risk provisions of the U.C.C. do not cover goods already in transit.<sup>121</sup> Comment 2 to section 2-509 states:

The underlying reason of this subsection [2-509(1)] does not require that the shipment be made after contracting, but where, for example, the seller buys the goods afloat and later diverts the shipment to the buyer, he must *identify* the goods to the contract before the risk of loss can pass, [but] aside from special agreement, the risk will not pass retroactively to the time of shipment in such a case.<sup>122</sup>

Thus, comment 2 to section 2-509 provides the only possible resolution to a risk of loss problem of goods sold while in transit.<sup>123</sup>

### 3. U.C.C. Section 2-501

One major difference in handling this problem under the U.C.C., as opposed to under article 68 of the Convention, is that the U.C.C. requires the goods to be identified before the risk of loss can pass.<sup>124</sup> Section 2-501 deals with the identification of goods.<sup>125</sup> This section recognizes the supremacy of the contract between the parties, and states that "identification can be made at any time and in any manner explicitly agreed to by the parties."<sup>126</sup> However, in the absence of an explicit agreement between the parties, identification occurs "when the contract is made if it is for the sale of goods already existing and identified."<sup>127</sup>

If the sale involves goods in transit and the goods are already in existence, the risk of loss will pass, absent agreement to the contrary,

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(4) The provisions of this section are subject to contrary agreement of the parties and to the provisions of this Article on sale on approval (Section 2-327) and on effect of breach on risk of loss (Section 2-510).

*Id.* § 2-509.

119. JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 5-1, at 212 (3d ed. 1988).

120. *Id.*

121. *See* U.C.C. §§ 2-509, 2-510.

122. U.C.C. § 2-509 cmt. 2 (emphasis added).

123. *See id.*

124. *See id.*

125. *See id.* § 2-501 (1989).

126. *Id.*

127. *Id.* § 2-501(1)(a).

when the contract is made and the goods are identified.<sup>128</sup> Again, there is marked similarity to article 68 of the Convention, which passes risk with respect to goods sold in transit to the buyer at the time of conclusion of the contract.<sup>129</sup> However, under U.C.C. section 2-501(1)(a), there is an additional problem of identifying the goods.<sup>130</sup> Normally, the identification requires some overt act by at least one of the parties.<sup>131</sup> Under section 2-501(1), the buyer obtains an insurable interest in goods by identifying the existing goods to which the contract refers even though the goods are non-conforming and the buyer has an option to return or reject them.<sup>132</sup>

How important is identification of the goods for the passing of risk? Comment 2 to U.C.C. section 2-501 states that “[i]t is possible, however, for the identification to be tentative or contingent. In view of the limited effect given to identification by this Article, the general policy is to resolve all doubts in favor of identification.”<sup>133</sup> Although no specific statutory language can be found to support this conclusion, the comment should be given judicial approval in the construction of section 2-501.<sup>134</sup>

The general rule for the risk of loss in goods sold in transit, where no breach has occurred, is that risk will pass from seller to buyer when the goods are identified to their contract.<sup>135</sup> Absent specific agreement, identification occurs when the contract is made for goods which can be clearly identified.<sup>136</sup> When identification is uncertain or inconclusive, the general policy is to resolve all doubts in favor of identification.<sup>137</sup>

#### 4. Undivided Shares of a Fungible Bulk

The next problem is identifying the risk of loss in an undivided share of a larger bulk. Comment 5 to U.C.C. section 2-501 addresses this problem. The relevant portion reads:

Undivided shares in an identified fungible bulk, such as grain in an elevator or oil in a storage tank, can be sold. The mere making of

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128. *Id.* § 2-509 cmt. 2.

129. *See* Convention, *supra* note 1, art. 68.

130. *See* U.C.C. § 2-501(1)(a).

131. NORDSTROM, *supra* note 114, § 128.

132. *Id.*

133. U.C.C. § 2-501 cmt. 2.

134. NORDSTROM, *supra* note 114, § 128.

135. U.C.C. § 2-509 cmt. 2.

136. *Id.* § 2-501.

137. *Id.* § 2-501 cmt. 2.

the contract with reference to an undivided share in an identified fungible bulk is enough under subsection (a) to effect an identification if there is no explicit agreement otherwise. The seller's duty, however, to segregate and deliver according to the contract is not affected by such an identification but is controlled by other provisions of this Article.<sup>138</sup>

This comment must be read with section 2-105(3), which states that "there may be a sale of a part interest in existing identified goods."<sup>139</sup> U.C.C. section 2-105(3) also provides the premise for the special situation addressed in section 2-105(4), which reads:

An undivided share in an identified bulk of fungible goods is sufficiently identified to be sold although the quantity of the bulk is not determined. Any agreed proportion of such a bulk or any quantity thereof agreed upon by number, weight or other measure may to the extent of the seller's interest in the bulk be sold to the buyer who then becomes an owner in common.<sup>140</sup>

The key to interpreting these provisions is the definition of "fungible goods." Fungible goods are "goods of which each particle is identical with every other particle such as grain and oil."<sup>141</sup> This right of the several owners to separate ownerships of fungible goods is the subject of sale. Ownership by several persons may exist in property of an undetermined amount contained in one mass, even though the share of each owner can be determined only by measuring the whole mass.<sup>142</sup>

This definition encompasses nearly all shipments of bulk goods. Goods which are not fungible but are of the same genus are generally shipped in different holds, with each hold containing the species that is fungible.<sup>143</sup> If one reads section 2-105(4) together with section 2-501, it appears that the risk in a portion of an undivided mass of fungible goods is shared equally, as the buyers are owners in common.

In some trades, especially where fungible goods are sold while in transit, shippers retain the bill of lading.<sup>144</sup> Shippers then sell portions of the goods covered by the bill of lading to various buyers, by

138. *Id.* § 2-501 cmt. 5.

139. *Id.* § 2-105(3) (1989).

140. *Id.* § 2-105(4).

141. *Mississippi State Tax Comm'n v. Columbia Gulf Transmission Co.*, 161 So. 2d 173, 178 (Miss. 1964).

142. *Id.*

143. Telephone Interview, *supra* note 73.

144. Harold J. Berman & Colin Kaufman, *The Law of International Commercial Transactions* (Lex Mercatoria), 19 HARV. INT'L L.J. 221, 257 (1978).

transferring separate delivery orders.<sup>145</sup> Such delivery orders commonly are issued at the buyer's request and instruct the carrier to deliver the specified goods upon presentation of the documents.<sup>146</sup> If these delivery orders are signed by the carrier, they should have the same effect as a bill of lading. However, when the holder of the delivery order presents it to the carrier, there is still an outstanding bill of lading covering the same goods. This difficulty is easily overcome by making the bill of lading subject to any subsequently issued delivery orders.<sup>147</sup> Both the U.C.C. and United States courts generally recognize the delivery order as a document of title.<sup>148</sup>

The U.C.C. provisions are more comprehensive than those of the Convention with respect to the risk of loss in goods sold in transit. While the body of the U.C.C. does not deal with the risk of loss in this special type of situation, the comments to the various sections comprehensively address such risk.<sup>149</sup> Although these provisions appear legally sound, practical difficulties may arise. For example, comment 2 to section 2-509 states that where the seller "buys the goods afloat" and then resells them, "the risk will not pass retroactively to the time of shipment."<sup>150</sup> Thus, the risk passes when the goods are identified to the contract. As in cases involving fungible goods, this occurs with the mere reference in the contract to the undivided bulk. In a multiple sale situation, the buyer assumes the risk in goods without knowledge of their condition. This is identical to the scenario created by the first sentence of article 68 of the Convention.<sup>151</sup> In the case of hidden damage, the ultimate buyer will have to suffer the consequences of such damage. However, U.C.C. section 2-510(1) assists the buyer as follows: "Where a tender or delivery of goods so fails to conform to the contract as to give a right of rejection the risk of their loss remains on the seller until cure or acceptance."<sup>152</sup>

If the goods fail to conform to the contract in any respect, the buyer may reject the whole, accept the whole, or accept any commercial unit or units, and reject the rest.<sup>153</sup> In such a situation, the buyer has the option of deducting all or part of the damages resulting from

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145. *Id.*

146. *Id.* at 257-58.

147. *Id.* at 258.

148. *Id.*

149. *See, e.g.*, U.C.C. § 2-509 cmt. 2.

150. *Id.*

151. *See* Convention, *supra* note 1, art. 68. For the text of article 68, see *supra* note 28.

152. U.C.C. § 2-510(1).

153. *Id.* § 2-601 (1989).

the breach from the price due to the seller under the contract.<sup>154</sup> Additionally, section 2-613, which deals with casualty to identified goods, states:

Where the contract requires for its performance goods identified when the contract is made, and the goods suffer casualty without fault of either party before the risk of loss passes to the buyer . . . then . . .

(b) if the loss is partial or the goods have so deteriorated as no longer to conform to the contract the buyer may nevertheless demand inspection and at his option either treat the contract as avoided or accept the goods with due allowance from the contract price for the deterioration or the deficiency in quantity but without further right against the seller.<sup>155</sup>

Section 2-613 applies whether the goods are already destroyed at the time of contracting without the knowledge of either party or if the goods are destroyed subsequently but before the risk of loss passes to the buyer.<sup>156</sup> This section does not apply when damage to the goods occurs after the passage of risk of loss. Furthermore, it does not apply if, under an agreement, the risk has passed to the buyer before the casualty.<sup>157</sup> This provision creates the problem of finding out whether the damage occurred before or after the risk of loss passed. In the case of hidden damage, this is an impossible task.

#### IV. THE BRITISH SALE OF GOODS ACT

##### A. *Risk of Loss and Property*

The British Sale of Goods Act ("Act") is the fountainhead of many similar statutes in commonwealth nations sharing common law traditions, including Australia, India, and New Zealand. Except for Australia, which recently ratified and adopted the Convention,<sup>158</sup> the nations are still outside the Act's authority. This reluctance to ratify the Convention may stem from the fact that an essential feature of a sale under the Act is the passing of "property" in the goods.

English law does not have a specific definition for what constitutes "property."<sup>159</sup> The law regarding what the seller is obliged to transfer to the buyer, and what is transferred to the buyer when the

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154. *Id.* § 2-717 (1989).

155. *Id.* § 2-613 (1989).

156. *Id.* § 2-613 cmt. 2.

157. *Id.*

158. *See supra* note 3.

159. G.H.L. FRIDMAN, *SALE OF GOODS* 53 (1966).

terms of the contract or the provisions of the Act are fulfilled, is not necessarily absolute ownership or dominion of the goods, but the totality of the rights of the seller over the goods.<sup>160</sup> As a corollary to this rule, the risk of loss or damage to the goods also transfers, provided there is no contrary contractual term.<sup>161</sup> The approach of the modern commercial codes, including the U.C.C., has been to divorce questions of risk from the passing of property.<sup>162</sup> The passing of property is of considerable importance in English law, although some of its effects are negated when there has been no delivery of possession.<sup>163</sup>

As a general rule, the *prima facie* risk of loss transfers with the property.<sup>164</sup> Section 20(1) of the Act sets forth the basic rule that *prima facie* risk passes with property: "Unless otherwise agreed, the goods remain at the seller's risk until the property in them is transferred to the buyer, but when the property in them is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not."<sup>165</sup>

The parties may, by agreement, separate the passing of risk from the passing of property. An argument that one party should bear the risk may be inferred from their course of dealing or by usage.<sup>166</sup> Though risk can transfer before property changes hands, the goods must be specified or easily ascertained.<sup>167</sup> Further, the buyer's intention to assume the risk before the property has vested must either be express or clearly inferred from the circumstances.<sup>168</sup> Apart from these limited circumstances, risk generally only passes along with the "property" in the goods.<sup>169</sup>

Physical events, like possession and time of delivery, have no bearing on the passage of risk. It follows that if property has passed to the buyer, the buyer must pay the price if the goods are damaged or destroyed without fault on the part of the seller, even though the buyer neither took possession nor was entitled to it.<sup>170</sup> This is an ex-

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160. *Id.*

161. *Id.*

162. BENJAMIN, *supra* note 81, § 266.

163. *Id.*

164. *Id.* § 395.

165. Sale of Goods Act § 20(1).

166. BENJAMIN, *supra* note 81, § 396.

167. *Id.*

168. *Id.*

169. *See* Sale of Goods Act § 20(1).

170. JOHN ADAMS, *CASES AND MATERIALS ON SALE OF GOODS* 32 (1982).

ceedingly unsatisfactory rule, because in many cases it is difficult to state with precision when property has passed. The rule suffers from two serious defects: (1) it creates a high degree of uncertainty where certainty is crucially important; and (2) it quite likely places the loss on the party least likely to insure against it.<sup>171</sup> By contrast, a transfer of risk with delivery rule is both clear and calculated to place the loss where insurance lies.<sup>172</sup>

The rules under section 20 of the Act are merely *prima facie*, and the parties may agree expressly or impliedly that the risk is separate from the property.<sup>173</sup> Furthermore, many mercantile contracts utilize code terms that serve as international standards and imply clear rules for the passing of risk.<sup>174</sup>

Section 16 of the Act contains a specific rule for unascertained goods.<sup>175</sup> It states that in "a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained."<sup>176</sup> As a general rule, the sale of an unascertained portion of goods passes no property to the buyer until that portion is identified and appropriated to the contract.<sup>177</sup> Therefore, a contract for the sale of unascertained goods is not a sale but an agreement to sell.<sup>178</sup>

## B. Risk of Loss in Goods Sold During Transit

### 1. Generally

For a sale of goods in transit, section 16 of the Act must be read with rule 5 of section 18, which states that, subject to a contrary intention,

where there is a contract for the sale of unascertained or future goods by description, and goods of that description are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or the buyer with the assent of the seller, the property in the goods then passes to the buyer; and the assent may be express or implied, and may be given either before or after the

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171. *Id.*

172. *Id.*

173. CLIVE M. SCHMITTHOFF, *THE SALE OF GOODS* 94 (2d ed. 1966).

174. ADAMS, *supra* note 170, at 32.

175. *See* Sale of Goods Act § 16.

176. *Id.*

177. CHALMERS' SALE OF GOODS ACT 141 (Michael Mark ed., 18th ed. 1981).

178. BENJAMIN, *supra* note 81, § 322.

appropriation is made.<sup>179</sup>

Section 18 must be read in conjunction with section 16, as it is clear that if the seller delivers the goods, mixed with other goods, to a carrier no property can pass.<sup>180</sup> What constitutes appropriation will vary according to the types of goods in question and the general circumstances of the case.<sup>181</sup> Before the Act was passed, there was a dichotomy between the common law and equity on the question of appropriation.<sup>182</sup> While common law insisted on identification, equity did not.<sup>183</sup> In the post-Act era, the rules under the Act appear to be complete and exclusive statements of the legal relations both in law and equity.<sup>184</sup>

It follows that where the ascertainment of the goods depends upon their being severed, weighed, measured, or in some way separated by the seller from the bulk, no property can pass until the required task has been completed.<sup>185</sup> Nor will any property pass where the power of separation is in a third party or in the buyer, unless and until the power is exercised.<sup>186</sup>

Section 33 of the Act states that "where a seller of goods agrees to deliver them at his own risk at a place other than that where they were sold, the buyer must nevertheless, unless otherwise agreed, take any risk of deterioration in the goods necessarily incident in the course of transit."<sup>187</sup> The scope of this rule is unclear.<sup>188</sup> The rule applies to destination and shipment contracts, such as F.O.B. and C.I.F. contracts.<sup>189</sup> Section 33 effectively limits the scope of such an agreement by splitting the risk of deterioration during transit so that the seller bears the risk of what may be called "extraordinary" deterioration that is due to an accident or casualty.<sup>190</sup> The buyer bears the risk of what may be called "necessary" deterioration, which any goods of the contract description must necessarily suffer in the course

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179. Sale of Goods Act § 18.

180. P.S. ATIYAH, *THE SALE OF GOODS* 114 (3d ed. 1966).

181. *Id.* at 116.

182. *Id.*

183. *Id.*

184. *In re Wait*, [1927] 1 Ch. 606, 636 (Eng.).

185. BENJAMIN, *supra* note 81, § 323.

186. *Id.*

187. Sale of Goods Act § 33.

188. SCHMITTHOFF, *supra* note 173, at 141.

189. *Id.*

190. BENJAMIN, *supra* note 81, § 1522.

of transit.<sup>191</sup> This rule is subject to the seller's agreement.<sup>192</sup> In any event, section 33 has a restricted scope in overseas sales. Under C.I.F. and F.O.B. contracts, the goods are normally at the buyer's risk during transit because, in practice, the seller does not agree to deliver them at his own risk.<sup>193</sup>

## 2. Undivided Shares of a Fungible Bulk

A number of problems arise from the sale of an undifferentiated part of a larger bulk, or when a single consignment is split up for resale to several buyers. These problems stem largely from the rule that property in goods cannot pass until the goods are ascertained.<sup>194</sup> They are particularly acute in cases dealing with the delivery of parts of a bulk shipment, which is not physically split up until the arrival of the shipment a considerable time after the contract of sale,<sup>195</sup> and the goods have already perished or deteriorated in the interval.

Where the seller of an undifferentiated part of a bulk shipment tenders a delivery order rather than a bill of lading, no property in the goods sold passes because the goods remain unascertained.<sup>196</sup> English courts have refused to treat the delivery order as a document of title, as opposed to United States courts.<sup>197</sup> Because the transfer of the delivery order does not pass title in the goods, neither does the risk pass.<sup>198</sup> It has been suggested that property may pass by the transfer of a bill of lading covering an unascertained part of a bulk shipment.<sup>199</sup> However, as long as the goods remain unascertained, such a position is inconsistent with section 16.<sup>200</sup>

The general rule that property only passes when the goods are ascertained is based on two assumptions: the bulk cargo is to be carried to the same destination and the rights to receive different parts of the cargo remain vested in different consignees on arrival at that destination.<sup>201</sup> Where either of these assumptions fails, property may pass before appropriation at the port of destination, so that goods forming

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191. *Id.*

192. *Id.*

193. *Id.* § 1523.

194. *Id.* § 1546.

195. *Id.*

196. *Id.* § 1548.

197. Berman & Kaufman, *supra* note 144, at 258.

198. *Id.* at 259.

199. BENJAMIN, *supra* note 81, § 1548.

200. *Id.*

201. *Id.*

part of a bulk shipment can become ascertained by a process that has been described as "exhaustion" or "consolidation."<sup>202</sup> Ascertainment by "exhaustion" occurs if, before the ship reaches its final destination, the rest of the bulk has been discharged at other ports, leaving on board only the quantity sold to the buyer at the final destination.<sup>203</sup> If the buyer acquires the rest of the cargo before arrival from the person previously entitled to it, the goods can be said to have become ascertained by "consolidation."<sup>204</sup>

There is little authority on the problems that arise between several buyers of undifferentiated parts of a bulk shipment where part of the bulk has deteriorated or been destroyed. One possible solution is to look for some act of "appropriation" to allocate the deteriorated portion to a particular buyer.<sup>205</sup> Another possibility is to provide expressly in the contract for pro rata division among various buyers.<sup>206</sup> It is probable that a similar solution could be reached without such an express provision.<sup>207</sup>

The problem with the Act is section 16, which does not allow the transfer of unascertained goods.<sup>208</sup> Section 16 must be amended because most bulk commodities imported into Europe are governed by English law,<sup>209</sup> and certainty in this area is therefore crucial. Express contractual provisions on risk will be given full effect, thus avoiding the provisions of the Act.<sup>210</sup>

Interestingly, the English and Scottish Law Commissions have published papers detailing possible solutions to section 16 of the Act.<sup>211</sup> One suggestion was that repeal should be limited to sales of unidentified portions of a bulk.<sup>212</sup> Further, the English Commission stated that in the case of deficiency or damage to the goods, each recipient should get an indefeasible title to what is appropriated to him on a "first come, first served" basis.<sup>213</sup> Recipients to whom defi-

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202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.* § 1557.

206. *Id.*

207. *Id.*

208. *See* Sale of Goods Act § 16.

209. B.J. Davenport, Comment, *Problems in the Bill of Lading Act*, 105 L.Q. REV. 174, 174 (1989).

210. BENJAMIN, *supra* note 81, § 1556.

211. *See* A.H. Hudson, *Sales from Bulk*, LLOYD'S MAR. & COM. L.Q. 420, 420 (Nov. 1989).

212. *Id.* at 424.

213. *Id.* at 425.

cient appropriations were made would later be able to make a claim against the seller.<sup>214</sup> The Scottish Commission believed that where there is a problem of deterioration or damage to part of a bulk, buyers who receive conforming goods will not have a claim, while those who get imperfect goods will have a claim against the seller or a third party responsible for the harm.<sup>215</sup> If there is only partial damage, the salvaged goods are distributed on a rationed basis.<sup>216</sup> Thus, the possibility of the debtor dragging others down is reduced.<sup>217</sup> Pro-rating would also prevent undue concentration of loss on some buyers in sales from bulk.<sup>218</sup> Moreover, pro-rating appears in important standard form contracts and seems to address the expectations of at least some traders.<sup>219</sup>

## V. CONCLUSION

The Convention has the potential to be the world's first successful attempt at the unification of international trade law. As it progressively becomes a tested tool for traders and businessmen, its usage will become more widespread. Moreover, judicial scrutiny will in time iron out many of the Convention's problems.

Under the U.C.C., the ultimate buyer always has the option of rejecting non-conforming goods, even though the seller has no knowledge of the damage. Once the buyer has rejected the goods, the risk does not pass.<sup>220</sup> Thus, it is the buyer who will have the opportunity to inspect the goods at their final destination, and the ultimate seller who will bear the loss. In contrast, the Convention requires the ultimate buyer to prove at what stage the hidden damage occurred.<sup>221</sup> The buyer under the Convention is at the mercy of the jurisdiction where he is litigating because it determines which party has the burden of proof in such a situation.<sup>222</sup>

Despite the relative certainty of the U.C.C. provisions, the risk of loss provisions dealing with a share of an undivided bulk sold while in transit are ambiguous. Therefore, when drafting a contract for the

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214. *Id.*

215. *Id.* at 426.

216. *Id.* at 427.

217. *Id.*

218. *Id.*

219. *Id.*

220. WHITE & SUMMERS, *supra* note 119, § 5-5.

221. *See supra* notes 71-72 and accompanying text.

222. *See supra* notes 72, 78-79 and accompanying text.

purchase of goods already afloat, one should include a clear provision on whether the buyer bears the risk for damage that occurs throughout the voyage.<sup>223</sup>

The effectiveness of the Sale of Goods Act's risk of loss provisions is debatable. The Act in its present form is ineffective in allocating risk in a part of a larger bulk. In modern commerce, the party who should insure the goods, and who is in a better position to deal with a damage claim, should also bear the risk of accidental destruction. The present rule requires the party who has property in the goods to insure them. A better rule would require the person in physical possession of the goods to purchase insurance, although special provisions would be necessary to determine who is responsible for insurance while the goods are in the hands of a carrier.<sup>224</sup> Unless the Act is amended to resolve this fundamental problem, its effectiveness in providing a judicial solution remains questionable.

Of the three statutes discussed in this Article, the Convention, the U.C.C., and the Sale of Goods Act, only the U.C.C. offers a possible solution to the risk of loss in an undivided share of a fungible bulk sold while in transit. The U.C.C. addresses this issue by making the buyers of these goods owners in common.<sup>225</sup> This is a sensible and equitable approach to the problem. Moreover, in terms of identification, the U.C.C. has taken the only practical path by making the reference to an undivided fungible bulk in a contract sufficient to effect identification.<sup>226</sup> The U.C.C. provisions assist traders in determining their rights and liabilities in the case of any damage to their goods, which is an essential element for a law relating to contractual obligations and the sale of goods. The Convention should therefore implement the solutions offered by the U.C.C., thereby becoming a more effective tool for addressing problems of risk of loss in goods sold during transit.

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223. Honnold, *supra* note 109, at 27.

224. ATIYAH, *supra* note 180, at 124.

225. U.C.C. § 2-105(4).

226. U.C.C. § 2-501 cmt. 5.