

TO WHAT EXTENT DO INCOTERMS 2000 VARY
ARTICLES 67(2), 68 AND 69?

*Jan Ramberg**

I. INTRODUCTION

Contracting parties cannot rely solely on the stipulations of the Convention on Contracts for the International Sale of Goods (CISG) to determine the modalities of delivery. They have to agree on where, when and how the goods should be delivered. For such purposes, they have, since time past, used standardized trade terms, which, in contemporary world trade, are reflected by INCOTERMS 2000.¹ In the United States, the American Foreign Trade Definitions of 1941 have been used and incorporated in the Uniform Commercial Code (UCC), however, they have been removed from the updated version. This removal will undoubtedly contribute to an increased worldwide use of INCOTERMS 2000. Disputes relating to modalities of delivery and passing of risk normally will not concern the interpretation of the CISG but rather the interpretation of trade terms as related to the CISG.

The CISG, in Article 31, distinguishes between handing over the goods to the carrier and delivery at a particular place. If the contract of sale involves carriage of goods, they are, according to Article 31(a), to be handed over to the first carrier for transmission to the buyer. This corresponds to the principle of CPT and CIP INCOTERMS 2000. Articles 31(b) and (c) deal with cases unrelated to carriage where the goods have to be made available directly to the buyer at “a particular place”² or the seller’s “place of business.”³ These cases correspond to EXW INCOTERMS 2000.

INCOTERMS 2000 adds specificity in a number of carrier-related trade terms. Traditionally, these concerned cases where the goods were to be handed over for carriage of goods by sea (FAS, FOB, CFR (or C&F) and CIF). In the revisions of the original INCOTERMS 1936, trade terms relating to carriage by rail (FOR, FOT) and air (FOB Airport) were added, but these

* Professor Emeritus.

1. INCOTERMS2000: ICC OFFICIAL RULES FOR THE INTERPRETATION OF TRADE TERMS (1999).

2. CISG art. 31(b).

3. CISG art. 31(c).

terms have now been replaced by the general FCA-term (“Free Carrier”), which could be used for all modes of transport.

While, traditionally, maritime transport required the seller (shipper) to deliver the goods *to the ship*, the use of so-called cellular vessels receiving goods stowed in containers implies delivery of the goods *to the carrier* rather than to the ship. In practice, the goods are either received at so-called container freight stations (CFS) or container yards (CY) for subsequent loading of the containers onboard the ship. Hence, the traditional terms FOB, CFR and CIF, where the goods are to be placed onboard and the risk passes when the goods pass the ship’s rail, became inappropriate in such traffic. FCA is now available for use instead of FOB, while CPT and CIP could be used in place of CFR and CIF. As has been said, CPT and CIP conform with the principle of handing over the goods to the first carrier adopted in CISG Article 31(a).

INCOTERMS 2000 contain variations compared with Articles 67(2), 68 and 69, and it is the purpose of this paper to deal with these article-by-article.

II. ARTICLE 67(2)

Article 67(2) stipulates that “the risk does not pass to the buyer until the goods are clearly identified to the contract, whether by markings on the goods, by shipping documents, by notice given to the buyer or otherwise.”⁴ The language used in INCOTERMS 2000 is slightly different, as the proviso of B5 requires “that the goods have been duly appropriated to the contract, that is to say, clearly set aside or otherwise identified as the contract goods.”⁵ Both versions create difficulties of interpretation when the sale concerns goods to be shipped in bulk together with other goods of the same kind. In such cases, it may be difficult to hold that the goods have been *identified* as the contract goods before they have been separated from the bulk at the destination. However, the words “*appropriated* to the contract” might invite the conclusion that a pro rata part of the bulk might be appropriated to the contract by a bill of lading, as long as the *bulk* is identified. If so, the risk may pass to the buyer before breaking bulk at destination so that each buyer would have to bear the risk in proportion from the moment that the goods have been handed over to the carrier. Another solution would create strange results in the case of a sale of goods in transit, where breaking bulk as a requirement for

4. CISG art. 67(2).

5. INCOTERMS 2000, *supra* note 1, § B5.

the passing of the risk would keep the original seller at risk until the goods have arrived at the destination. There is, to my knowledge, no case providing guidance on the issue, but it follows from comments made on the article that the CISG should be interpreted as suggested here and there would not seem to be any difference between CISG Article 67(2) and INCOTERMS 2000 clause B5.

III. ARTICLE 68

With respect to sale in transit, Article 68 connects the passing of the risk to the time of the conclusion of the contract. However, owing to the use of CFR and CIF, this rule is superseded in practice so that, as expressly stipulated in INCOTERMS 2000, the risk passes when the goods pass the ship's rail at the port of shipment. In this respect, these trade terms reflect the exception to the main rule in Article 68, second sentence: "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 document embodying the contract of carriage."⁶ It may seem strange that the risk could pass retroactively before the conclusion of the contract, but this logical dilemma may be solved if the sale is regarded as a sale of documents, putting subsequent buyers of the goods in the same position as the first buyer receiving the document controlling the disposition of the goods.

IV. ARTICLE 69

The most obvious differences between the CISG and INCOTERMS 2000 relate to Article 69. INCOTERMS 2000, in EXW and the D-terms (DAF, DES, DEQ, DDU and DDP), expresses the principle that the risk passes as soon as the goods have been made available to the buyer at the respective delivery points, without any further requirements, such as the buyer "commits a breach of contract by failing to take delivery" as stipulated in the main rule of Article 69(1).⁷ Thus, under INCOTERMS 2000, the exception to the rule of Article 69(1) in Article 69(2) that, in case of taking over the goods at a place other than the place of business of the seller, the buyer's awareness of the fact that the goods are placed at his disposal is enough for the passing of

6. CISG art. 68.

7. CISG art. 69(1).

the risk becomes redundant.⁸ It may, perhaps, seem rough on the buyer that, under INCOTERMS 2000, the risk may pass to the buyer even before he has been aware of the fact that the goods are at his disposal. However, it should at least be clear to the buyer that the risk *may* pass to him at the agreed date or at the beginning of an agreed period for delivery, so that he could insure himself accordingly. According to INCOTERMS 2000, the seller has the duty to notify the buyer that the goods are available for him or that they have been duly delivered (clause A7).⁹ Thus, the seller's failure to notify the buyer would constitute a breach of contract, entitling the buyer to the remedies for breach under CISG.

8. CISG art. 69(2).

9. INCOTERMS 2000, *supra* note 1, § A7.