

Article 66

Loss of 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.

INTRODUCTION

1. Article 66 provides that the buyer is not discharged from the obligation to pay the price if the goods are lost or damaged after the risk has passed to the buyer unless the loss or damage was caused by the seller. Article 66 does not create the obligation to pay the purchase price; that obligation is set out in article 53. Article 66 is also silent as to when the risk of loss or damage passes. The parties' contract and articles 67-70 set out rules for determining when the risk passes. Many cases also apply article 66 to contracts in which parties agree on the use of trade terms such as "CIF", "CFR", "FOB", and "FCA" that provide for when the risk passes.¹

CONSEQUENCE OF PASSING OF RISK TO BUYER

2. Once it has been established that the risk passed before loss or damage to the goods occurred, decisions routinely require the buyer to pay the price unless it is established that the seller was responsible for the loss or damage.² Most, but not all, of these decisions cite both article 53 and article 66.³

3. If the goods are lost or damaged before the risk has passed, non-delivery or delivery of the damaged goods is a breach of the seller's obligation to deliver conforming goods (articles 30, 35, and 36). In that case, the buyer's obligation to pay the price may be discharged if the buyer avoids the contract (articles 49 and 81), or the price may be reduced (article 50). On the other hand, several decisions cite article 66 for the proposition that a buyer is not obligated to pay the price for lost or damaged goods it did not receive.⁴

4. In a case where the goods were taken over by the buyer at the seller's warehouse, but where the contract included a "Delivered at Frontier" clause according to which the risk passes at the border, an arbitral tribunal held that the time for examining the goods under article 38 is the moment of

the passing of the risk because the seller is only liable for non-conformities that existed at the time of the passing of the risk.⁵

EXCEPTION WHEN LOSS OR DAMAGE DUE TO SELLER'S ACTS OR OMISSIONS

5. Although the buyer normally is not discharged from its obligation to pay the price if the goods are lost or damaged after the risk has passed to the buyer, the "unless" clause of article 66 provides an exception to this rule. If it is established that the loss or damage was due to an act or omission of the seller, the buyer's obligation to pay may be discharged. Some arbitral tribunals, addressing CIF sales of a chemical substance, found that the seller's failure to give the carrier agreed instructions on the temperature at which the goods were to be stored during carriage caused the goods to be damaged through melting and leakage, and the seller was held liable for the loss or damage.⁶ Another decision found that the seller was liable for damage to the goods that occurred due to improper packaging prior to the passing of the risk to the buyer or carrier.⁷ Another decision suggested, without citing article 66, that the seller would be liable for deterioration of the goods (live sheep) during shipment if the seller's instruction to the carrier caused the overloading of the truck, and thus caused the bad physical condition of the sheep.⁸ According to several cases, the buyer bears the burden of proving that a loss or damage was due to the act or omission of the seller; in none of these cases has the buyer carried this burden.⁹

6. This exception to the buyer's obligation to pay is distinct from the seller's continuing liability under article 36 (1) for non-conformities that exist at the time the risk of loss passes even if they do not become apparent until a later time; the exception in the "unless" clause of article 66 is also distinct from the seller's liability under article 36 (2) for non-conformities that arise subsequent to passage of risk if the seller has guaranteed the goods against these non-conformities.

Notes

¹ Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 17 May 1999, (Arbitral award No. 342/1998), English translation available on the Internet at www.cisg.law.pace.edu ("FCA"); CLOUT case No. 683 [China International Economic and Trade Arbitration Commission, People's Republic of China, 1999] ("CIF"), English translation available on the Internet at www.cisg.law.pace.edu; China International Economic and Trade Arbitration Commission, People's Republic of China, 23 February 1995, English translation available on the Internet at www.cisg.law.pace.edu ("CIF").

²District Court in Komarno, Slovakia, 12 March 2009 (Frozen peas case), English translation available on the Internet at www.cisg.law.pace.edu (citing article 66 without explicit mention of its consequences); Hof van Beroep Ghent, Belgium, 16 June 2004 (Mermark Fleischhandelsgesellschaft mbH v. Cvba Lokerse Vleesveiling), English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 552 [Audiencia Provincial de Valencia, Sección 6, Spain, 15 February 2003 (Cerámicas S.L. v. Hanjin Shipping Co. Ltd)]; CLOUT case No. 360 [Amtsgericht Duisburg, Germany, 13 April 2000] (obligation to pay not discharged where goods suffered damage after risk passed to buyer); CLOUT case No. 340 [Oberlandesgericht Oldenburg, Germany, 22 September 1998] (risk had passed to the buyer upon delivery of raw salmon to processing plant, and buyer's obligation to pay therefore was not discharged even though the plant sent the processed salmon to other customers) (see full text of the decision); CLOUT case No. 338 [Oberlandesgericht Hamm, Germany, 23 June 1998] (buyer not obliged to pay for goods that had disappeared from warehouse because risk had not shifted to buyer under article 69 (2)); CLOUT case No. 864 [China International Economic and Trade Arbitration Commission, People's Republic of China, 25 June 1997, English translation available on the Internet at www.cisg.law.pace.edu] (in a contract on "CNF" ("Cost and Freight") basis, buyer not obliged to pay for good that sank with the ship); CLOUT case No. 163 [Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 10 December 1996] (risk having passed to buyer under FOB term, buyer's obligation to pay was not discharged even if buyer was unable to make proper use of goods because of subsequent UN embargo); CLOUT case No. 191 [Cámara Nacional de Apelaciones en lo Comercial, Argentina, 31 October 1995] (obligation to pay was not discharged despite deterioration of goods during transit because risk had passed on shipment and buyer was unable to establish that seller was responsible for the deterioration), upholding Juzgado Nacional de Primera Instancia en lo Comercial No. 11 (Buenos Aires), Argentina, 18 March 1994.

³The following cases cite both article 53 and article 66: CLOUT case No. 377 [Landgericht Flensburg, Germany, 24 March 1999]; CLOUT case No. 340 [Oberlandesgericht Oldenburg, Germany, 22 September 1998] (see full text of the decision); CLOUT case No. 338 [Oberlandesgericht Hamm, Germany, 23 June 1998]; CLOUT case No. 163 [Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 10 December 1996] (see full text of the decision).

⁴CLOUT case No. 283 [Oberlandesgericht Köln, Germany, 9 July 1997] (under articles 66 and 67 (1) buyer had no obligation to pay the price for goods buyer did not receive where seller did not establish delivery to first carrier); CLOUT case No. 317 [Oberlandesgericht Karlsruhe, Germany, 20 November 1992] (under articles 66 and 67 (1) buyer had no obligation to pay the price for goods it did not receive because risk of loss had not passed under "*Frei Haus*" trade term).

⁵Foreign Trade Court of Arbitration attached to the Yugoslav Chamber of Commerce, Serbia, 12 July 1994, English translation available on the Internet at www.cisg.law.pace.edu.

⁶CLOUT case No. 683 [China International Economic and Trade Arbitration Commission, People's Republic of China, 1999 (Piperonal aldehyde)] English translation available on the Internet at www.cisg.law.pace.edu; China International Economic and Trade Arbitration Commission, People's Republic of China, 23 February 1995, English translation available on the Internet at www.cisg.law.pace.edu (Jasmine aldehyde).

⁷CLOUT case No. 724 [Oberlandesgericht Koblenz, Germany, 14 December 2006].

⁸Oberlandesgericht Schleswig, Germany, 22 August 2002 (Live sheep case), English translation available on the Internet at www.cisg.law.pace.edu (denying seller's liability).

⁹Federal Arbitration Court for the Western Siberia Circuit, Russian Federation, 6 August 2002, English translation available on the Internet at www.cisg.law.pace.edu; Tribunal cantonal de Vaud, Switzerland, 26 May 2000, available on the Internet at www.cisg-online.ch; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 17 May 1999 (Arbitral award No. 342/1998), English translation available on the Internet at www.cisg.law.pace.edu; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 30 December 1998 (Arbitral award No. 62/1998), English translation available on the Internet at www.cisg.law.pace.edu; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 11 March 1998 (Arbitral award No. 487/1996), English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 163 [Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 10 December 1996] (see full text of the decision); CLOUT case No. 191 [Cámara Nacional de Apelaciones en lo Comercial, Argentina, 31 October 1995].