

### Article 67

(1) If the contract of sale involves carriage of the goods and the seller is not bound to hand them over at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract of sale. If the seller is bound to hand the goods over to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place. The fact that the seller is authorized to retain documents controlling the disposition of the goods does not affect the passage of the risk.

(2) Nevertheless, 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.

### OVERVIEW

1. Article 67 provides rules governing the time at which the risk of loss or damage passes to the buyer if the contract of sale involves carriage of the goods.<sup>1</sup> In general, the risk passes to the buyer when the seller hands over the goods to the first carrier. The risk passes without regard to whether the seller or the buyer has title to the goods,<sup>2</sup> and without regard to who is responsible for arranging transport and insurance.<sup>3</sup> 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 67 states a generally-accepted international rule. A constitutional court, hearing a challenge to a similar domestic rule on the ground that it was inconsistent with the constitutional principle of equality, cited articles 31 and 67 of the Convention as evidence of general acceptance.<sup>4</sup>

3. Under article 6, the parties may agree to derogate from the provisions of article 67. Under article 9, they may also be bound by usages of trade or a course of dealing that derogate from article 67. If the parties' agreement is consistent with article 67, courts frequently cite the article. This is also true when the parties agree on trade terms that address the passage of risk. Decisions have found the terms "CIF",<sup>5</sup> "C & F"<sup>6</sup> (which was replaced by "CFR" in Incoterms 1990), "FOB",<sup>7</sup> "FOT"<sup>8</sup> (which was replaced by "FCA" in Incoterms 1990), and "list price ex works"<sup>9</sup> to be consistent with article 67 (1). If the trade term is inconsistent with article 67 (1), the parties' agreement prevails in accordance with article 6. Thus, although the goods in the particular case were handed over to a third-party carrier, a court did not apply article 67 in a case where the parties agreed that the goods would be delivered "*frei Haus*" ("free delivery"), which the court construed to mean that the seller undertook to deliver the goods to the buyer's place of business.<sup>10</sup>

### CONTRACTS OF SALE INVOLVING CARRIAGE OF GOODS

4. Article 67 does not define when a contract of sale involves carriage of goods. A similar formula is used in article 31 (a), which provides that if the contract of sale involves carriage of goods the seller satisfies its obligation to deliver the goods when it hands them over to the first carrier. Given the identical language in the two provisions, they should be read to cover the same transactions.<sup>11</sup>

5. Article 68 sets out special rules for passage of risk when goods are sold in transit. Therefore, article 67 does not apply when goods are sold in transit.

6. A contract of sale involves the carriage of goods when it expressly or implicitly provides for subsequent carriage. The contract may expressly provide that the goods are to be transported via carrier by, e.g., including details with respect to the manner of carriage. This is often done most efficiently by incorporating trade terms, such as the International Chamber of Commerce's Incoterms (e.g. "CIF", "FOB"), which spell out which party's obligation it is to arrange for a contract of carriage. Other terms of the contract may also imply that the goods are to be carried. An arbitral tribunal found that the contract involved carriage when it provided that "the buyer shall pick up the fish eggs at the seller's address and bring the goods to his facilities in Hungary" and the price was stated to be "FOB Kladovo" (Kladovo being the seller's address).<sup>12</sup> Some cases apply article 67 without reciting facts which show that carriage was involved.<sup>13</sup> A decision held that a contract which provided for delivery "free of charge" was still a contract involving carriage where the buyer engaged the carrier and the seller was charged for the transport.<sup>14</sup> However, where the seller was to deliver the goods free at the buyer's address, customs duties unpaid, the court held that the risk passed at the time of unloading at the place of performance.<sup>15</sup>

7. For the purpose of deciding whether a contract of sale involves carriage or not, it is irrelevant whether the contract of carriage is to be arranged by the seller or the buyer.<sup>16</sup> There is no question that the sale involves carriage if it is the obligation of the seller to arrange the carriage. Cases in which the buyer arranged the carriage also apply article 67.<sup>17</sup> Some cases apply article 67 without specifying which party was to arrange the carriage.<sup>18</sup>

8. Carriers for the purpose of article 67 may be a courier service<sup>19</sup> or postal service.<sup>20</sup> Article 67 refers to “carriage of the goods” and does not expressly require that the goods be carried by a third-party carrier. Some decisions treat delivery to a freight forwarder as the equivalent of delivery to the “first carrier”.<sup>21</sup>

#### ALLOCATION OF RISK

9. Paragraph (1) of article 67 sets out separate rules for two different situations: first, if the seller is not bound to hand the goods over to the carrier at a particular place (first sentence of article 67 (1)), and second, if the seller is so bound (second sentence). In both cases, the risk passes to the buyer when the seller hands over the goods to the specified carrier.

##### **If the seller is not bound to hand over the goods to the carrier at a particular place**

10. If the seller is not bound to hand over the goods to a carrier at a particular place, the risk of loss or damage passes when the goods are handed over to the first carrier. This rule is consistent with the seller’s obligation to deliver the goods as set out in article 31 (a). In the absence of proof that the parties agreed on delivery at another location, one court found that the seller delivered and the risk passed when the seller handed over the goods to the first carrier.<sup>22</sup>

##### **If the seller is bound to hand over goods to the carrier at a particular place**

11. The second sentence of paragraph (1) provides that if the seller is bound to hand over goods to a carrier at a particular place, the risk passes when the goods are handed over to the carrier at that place. An agreement by a seller whose place of business is inland to send the goods from a port falls within paragraph (1). There are no reported decisions interpreting this part of the provision.

#### **The meaning of “hand over” to a carrier**

12. The handing over of the goods is complete when the goods are in the physical custody of the carrier. One court held that “handing over” requires that the carrier take custody of the goods, which implies an actual surrender of the goods to the carrier; and that it is necessary for the seller to load the goods onto or into the respective means of transport; and that the risk only passes when loading is completed.<sup>23</sup> In that case, the damage was caused by improper loading by the seller onto a truck arranged by the buyer. Another court found that the risk had not passed when the goods (a machine) fell on the ground from a fork lift and became unsalable before the machine was loaded on a truck that arrived to pick up the goods.<sup>24</sup>

13. However, one court held that the risk does not pass even when the goods are handed over to the carrier, if the seller fails to present a bill of lading to the issuing bank of the letter of credit for payment within the time limit stipulated in the sales contract (with the consequence that the bill of lading did not reach the buyer); without referring to article 67, the court held that the seller still bore the risk because of its breach of contract.<sup>25</sup> The seller bears the burden of proof for handing over the goods.<sup>26</sup> A copy of a seller’s own document that the seller handed over the goods to unnamed persons cannot serve as proof.<sup>27</sup>

#### RETENTION OF DOCUMENTS BY SELLER

14. The third sentence of paragraph (1) provides that the passage of risk under article 67 is not affected by the seller’s retention of documents controlling the disposition of the goods. There are no reported decisions interpreting this part of the provision.

#### IDENTIFICATION OF GOODS

15. Paragraph (2) of article 67 conditions the passage of risk on clear identification of the goods to the contract of sale.<sup>28</sup> This rule is designed to protect against the possibility that a seller will identify to the contract goods that have already suffered casualty. Some decisions have found that the requirement that the goods be clearly identified is satisfied by the description of the goods in the shipping documents.<sup>29</sup> Another court noted that the parties to a CIF contract agreed that the risk of loss would pass when cocoa beans clearly identified to the contract of sale were handed over to the carrier at the port of shipment.<sup>30</sup>

#### Notes

<sup>1</sup> See CLOUT case No. 447 [U.S. District Court, Southern District Court of New York, United States, 26 March 2002] (plaintiffs’ experts wrongly asserted that Convention did not include rules on passage of risk).

<sup>2</sup> Oberlandesgericht Schleswig-Holstein, Germany, 29 October 2002 (the Stallion case), English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu) (the passing of risk at the time of handing over is independent of the passing of ownership); Wuhan Maritime Court, Hubei, People’s Republic of China, 10 September 2002 (Nanjing Resources Group v. Tian An Insurance Co. Ltd, Nanjing Branch), English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu) (the principle of separation of ownership and risk is adopted under the Incoterms and CISG); CLOUT case No. 447 [U.S. District Court, Southern District Court of New York, United States, 26 March 2002] (passage of risk and transfer of title need not occur at the same time).

<sup>3</sup> CLOUT case No. 247 [Audiencia Provincial de Córdoba, Spain, 31 October 1997] (risk passes without regard to who must arrange for transport or insurance).

<sup>4</sup> CLOUT case No. 91 [Corte Costituzionale, Italy, 19 November 1992].

<sup>5</sup> CLOUT case No. 253 [Cantone del Ticino Tribunale d'appello, Switzerland, 15 January 1998] (see full text of the decision).

<sup>6</sup> 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](http://www.cisg.law.pace.edu); CLOUT case No. 191 [Cámara Nacional de Apelaciones en lo Comercial, Argentina, 31 October 1995], upholding Juzgado Nacional de Primera Instancia en lo Comercial No. 11 (Buenos Aires), Argentina, 18 March 1994.

<sup>7</sup> Shanghai No. 2 Intermediate People's Court, People's Republic of China, 25 December 2006 (Cabinets and accessories case), English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu); High People's Court, Ningxia Hui Autonomous Region, People's Republic of China, 27 November 2002, (Xinsheng Trade Company v. Shougang Nihong Metallurgic Products), English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu) (explicit cumulative application of article 67 (1) CISG and Incoterms 2000); China International Economic and Trade Arbitration Commission, People's Republic of China, 6 September 1996 (Engines case), English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu).

<sup>8</sup> Arbitration Court of the International Chamber of Commerce, 2000 (Arbitral award No. 8790) (Processed food product case), available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu).

<sup>9</sup> CLOUT case No. 283 [Oberlandesgericht Köln, Germany, 9 July 1997].

<sup>10</sup> CLOUT case No. 317 [Oberlandesgericht Karlsruhe, Germany, 20 November 1992], overturning Landgericht Baden-Baden, Germany, 13 January 1992, available on the Internet at [www.cisg-online.ch](http://www.cisg-online.ch).

<sup>11</sup> See, for example, CLOUT case No. 360 [Amtsgericht Duisburg, Germany, 13 April 2000] (the word "carrier" means the same in both articles 31 and 67).

<sup>12</sup> CLOUT case No. 163 [Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 10 December 1996].

<sup>13</sup> Landgericht Köln, Germany, 25 March 2003 (Racing carts case), English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu).

<sup>14</sup> Landgericht Bamberg, Germany, 23 October 2006 (Plants case), English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu).

<sup>15</sup> Appellationshof Bern, Switzerland, 11 February 2004 (Wire and cable case), English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu) (perhaps applying article 69 (2) though without explicit citation).

<sup>16</sup> CLOUT case No. 247 [Audiencia Provincial de Córdoba, Spain, 31 October 1997] (risk passes without regard to who must arrange for transport or insurance).

<sup>17</sup> U.S. Court of Appeals (7th Circuit), United States, 23 May 2005, (Chicago Prime Packers, Inc. v. Northam Food Trading Co.), available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu); CLOUT case No. 774 [Bundesgerichtshof, Germany, 2 March 2005] (contaminated pork), English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu) reversing on different grounds CLOUT case No. 820 [Oberlandesgericht Frankfurt, Germany, 29 January 2004] (contaminated frozen pork), English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu), and amending Landgericht Giessen, Germany, 18 March 2003, original text available on the Internet at [www.cisg-online.ch](http://www.cisg-online.ch).

<sup>18</sup> Oberlandesgericht Schleswig, Germany, 22 August 2002 (Live sheep case), English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu).

<sup>19</sup> Landgericht Saarbrücken, Germany, 26 October 2004 (Fuses and fuse brackets case), English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu).

<sup>20</sup> Tribunal cantonal du Valais, Switzerland, 19 August 2003 (Clothing, household linen case), English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu).

<sup>21</sup> Landgericht Saarbrücken, Germany, 26 October 2004 (Fuses and fuse brackets case), English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu); CLOUT case No. 283 [Oberlandesgericht Köln, Germany, 9 July 1997].

<sup>22</sup> CLOUT case No. 360 [Amtsgericht Duisburg, Germany, 13 April 2000].

<sup>23</sup> Landgericht Bamberg, Germany, 23 October 2006 (Plants case), English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu).

<sup>24</sup> Bundesgericht, Switzerland, 16 December 2008, English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu) (the disputing parties are the seller and the employer of the operator of the fork lift).

<sup>25</sup> Wuhan Maritime Court, Hubei, People's Republic of China, 10 September 2002 (Nanjing Resources Group v. Tian An Insurance Co. Ltd, Nanjing Branch), English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu).

<sup>26</sup> Landgericht Darmstadt, Germany, 21 March 2013, Internationales Handelsrecht 2014, 69 = CISG-online No. 2446.

<sup>27</sup> Ibid.

<sup>28</sup> Article 32 (1) requires the seller to notify the buyer of the consignment of the goods if they are not otherwise clearly identified.

<sup>29</sup> CLOUT case No. 360 [Amtsgericht Duisburg, Germany, 13 April 2000]; 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](http://www.cisg.law.pace.edu).

<sup>30</sup> CLOUT case No. 253 [Cantone del Ticino Tribunale d'appello, Switzerland, 15 January 1998].