NEAR EAST UNIVERSITY

GRADUATE SCHOOL OF SOCIAL SCIENCES

MASTER OF LAW IN INTERNATIONAL LAW PROGRAMME

(LL.M)

MASTER'S THESIS

THE PASSING OF RISK IN THE INTERNATIONAL SALE OF GOODS: ACOMPARISON BETWEEN CISG AND INCOTERMS

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NICOSIA

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IN ACCORDANCE WITH THE REGULATIONS OF THE GRADUATE SCHOOL OF SOCIAL SCIENCES

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ABSTRACT

The study is an explorative study that examines various ways the CISG and ICONTERMS can be deployed to address the transfer of risk in sale of goods between Iraq and other economies so as to promote sustainable international trade. The study also draws its focus on the use of the CISG and ICONTERMS in international trade and how it influences trade between Iraq and other merchants. The study established that both the CISG and ICONTERMS are international trade guidelines that are meant to promote the smooth flow of international trade. It was also noted that the major significant difference between the CISG and INCONTERMS is that the CISG seeks to harmonise and unify international trade rules and regulations while INCONTERMS is aimed at addressing challenges caused by huge differences rules and regulations that govern the obligations and rights of parties to an international sale of goods. Observations were made that risk transfer is considered to have been effected when the goods have been made available to the disposal of the buyer. Further observations were made that risk transfer between Iraq and other merchants is strongly influenced by the type of terms which have been used in the agreements and such pertain to C-terms, F-terms, E-terms, and D-terms. Conclusions were thus made that both the INCONTERMS and CISG are important aspects of international trade and have managed to unify and harmonise international trade rules and regulations. This has positively led to the growth and smooth flow of international trade.

Key terms: Convention on Contracts for the International Sale of Goods, International Chamber of Commerce, International Commercial Terms, International sale of goods.

ÖZ

Bu araştırma,Viyana Satım Antlaşması (CISG) ve Uluslararası Ticaret'teteslimat şekillerini organize eden Incoterms'i uygulayarak, Irak ile diğer ekonomiler arasındaki ticarette rik devrinin nasıl gerçekleşeceği ve bu vesileyle sürdürülebilir bir uluslararası ticaretin nasıl geliştirilebileceğinin farklı yol ve yöntemleri sınanmaktadır. Araştırma aynı zamanda CISG ve Incoterms'den yararlanma konusu ve Irak ile diğer satıcıların arasındaki ticarete etkileri üzerinde durur. Araştırma CISG ve Incoterms'in uluslararası ticaretin akşını sağlayan ve geliştiren iki uluslararası ticaret rehberi olduğunu saplamıştır. Aynı zamanda, CISG ve Incoterms arasındaki en belirgin farkın, CISG'nin uluslararası ticaret ile ilgili yasa ve mevuatları birleştirme ve harmonize etmeyi amaçlarken, Incoterms'in uluslararası ticarette tarafların hak ve sorumluklarını organize eden kanun ve kuralların farklılıklarından dolayı oluşan zorluklara karşı çözümler üretmek olduğunu not etmiştir.Araştırmanın sonucunda, ürünlerin pazara sürülmesi alıcın insiyatifine bırakıldığı zaman, risk devrinin etkilendiği gözlemlenmiştir. Ayrıca Irak ve diğer satıcılar arasındaki risk devrinin, C-terms, F-terms, E-terms ve D-terms gibi teslimat şartlarından şiddetli bir şekilde etkilendiği gözlemlenmiştir. Sonuç olarak, CISG ve Incoterms'in uluslararası ticaret kanun ve mevzuatlarının birleştirilmesi ve harmonize edilmesi konusunda önem arzettikleri ve uluslararası ticaretin önemli bir unsuru oldukları anlaşılmıştır. Bu uluslararası ticaretin gelişmesi ve akışının kolaylaşması için olumlu bir rol oynamıştır.

Anahtar Kelimeler: Milletlerarası Mal Satımına İlişkin Sözleşmeler Antlaşması, Uluslararası Ticaret Odası, Uluslararası Ticaret Şartları, Milletlerarası Mal Satımı.

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DEDICATION

This study is dedicated to my parents father and mother whose love, support, and their prayers of day and night made me able to get such an honor and a success. Also, I dedicate this study to my brothers, love, and friends.

TABLE OF CONTENTS

ABSTRACT.....i

ÖZ.....ii

ACKNOWLEDGEMENTS iii

DEDICATION.....iv

TABLE OF CONTENTS v

ABBREVIATIONS..... viii

CHAPTER ONE 1

INTRODUCTION.....1

1.1 Background to the study 1

1.2 Research objectives.....3

1.3Scope of the study.....3

1.4Structure of the study.....3

CHAPTER TWO 5

CONTEXTUAL BACKGROUND AND APPLICATION OF INCONTERMS ANDTHE UN CONVENTION ON CISG. 5

2.1 History of the INCONTERMS 5

2.2 Field of application of INCONTERMS.....8

2.3 Evolution of convention on CISG.....9

2.4 Field of application of CISG.....10

CHAPTER THREE 12

PASSING OF RISK IN ACCORDANCE TO INCONTERMS AND HOW IT AFFECTS IRAQ.....12

3.1 Overview.....12

3.2 Division under INCONTERMS 2010.....13

3.3 Relationship between INCONTERMS and CISG 14

3.4 E-Term: EXW and INCONTERMS 16
3.4.1 EXW 16
3.5 F-terms and the CISG 18
3.6 C-terms and the CISG 19
3.7 D-terms and the CISG 20
CHAPTER FOUR 22
RISK AND THE PASSING OF RISKS UNDER CISG 22
4.1 Introduction 22
4.2 Risk under ISoG 23
4.3 Methods of passing risk 24
4.4 Burden of proof 25
4.5 Article 66 CISG the basic obligations of the buyer 26
4.6 Article 66 CISG: risk when the contract involves carriage 27
4.7Damage or loss of the goods due to seller's act or omission 27
4.8Risk and the action for the price 28
4.9 Article 70 - Risk and remedies 29
4.9.1 Fundamental breach 31
4.9.2 Remedies to the buyer in the event of a breach 33
4.9.2.1 Restitution 33
4.9.2.2 Right to substituted goods 34
4.9.2.3 Right to claim damages 34
4.9.2.4 Right of avoidance 35
4.9.2.5 Right to a price reduction 37
4.10 Conclusion 38
CHAPTER FIVE 41
CONCLUSIONS, RECOMMENDATIONS AND SUGGESTIONS 41
5.1 Conclusions 41

5.2 Recommendations....43
BIBLIOGRAPHY....45
ARTICLES....45
BOOKS....48
CASE LAW....51
PRIMARY SOURCES....53

ABBREVIATIONS

CFR - Cost and Freight

CIF - Cost Insurance Freight

CIP - Carriage and Insurance Paid To

CISG: Convention on Contracts for the International Sale of Goods.

CPT - Carriage Paid To

DAP – Delivered at Place

DAT - Delivered at Terminal

DDP- Delivered Duty Paid

EXW - Ex Works

FAS - Free Alongside Ship

FCA - Free Carrier

FOB - Free on Board

ICC: International Chamber of Commerce

INCONTERMS: International Commercial Terms

ISoG: International sale of goods.

RAFTD - Revised American Foreign Trade Definitions

UNCITRAL - United Nations Commission on International Trade Law.

UNIDROIT - International Institute for the Unification of Private Law

CHAPTER ONE

INTRODUCTION

1.1 Background to the study

It is apparent that the global economy has gone through a series of a wide number of economic, social, religious and political changes and such changes have resulted in increase in global interaction and trade between States[1]. This can also extend to include the increase in liberation and globalisation which are presumed to have necessitated an increase in demand for global harmonisation of commercial law. As a result, many scholars outlined that statutory instruments such as the CISG and INCOTERMS are as a result of efforts to harmonise commercial law beyond boarders and deal with much broader trade issues between States.

Meanwhile, States around the world are increasingly engaging in international trade and such trading activities are characterised by risks which can either befall the supplier or buyer. Sellers and buyers have a tendency to cut back their international trading activities whenever they foresee high trading risks[2]. An extremely high risky international trading environment tends to negatively affect the growth and sustainability of international trade[3]. Thus, the need to promote the growth and sustainability of international trade resulted in the establishment of the Convention on Contracts for the International Sale of Goods (CISG).

The need for the CISG can be said to have been caused by lack of international information about the rights of the buyer and seller and this has resulted in the loss of either goods or money as either buyers or seller were taking advantage of the lack of one's understanding[4]. It has also been established that there are a lot of risks that are involved in international trade and successful, effective and sustainable international trade lies in the ability to distinguish between the types of risks that are involved in international, who bears such risks and under

[1]Convention Des Nations Unies Sur Les Contrats De Vente Internationale De Marchandises - 1980/1980 - United Nations Convention On Contracts For The International Sale Of Goods' (1989) os-17 Uniform Law Review.
[2] Ibid.
[3] Emily Nordin, 'The Possible Success of Soft Law: Incoterms 2010, Maastricht Journal of European and Comparative Law (2010) 508.
[4] Ibid.

what circumstance is the risk transferred between the buyer and the seller[5]. The CISG also contended to have been brought about by efforts to clearly highlight and formalise legal formalities that are involved in the international trading process[6].

Meanwhile, the established of CISG came into effect in 1988 in United States of America soon after the formulation and adoption of the INCONTERMS in 1936 in Paris by the International Chamber of Commerce (ICC). The sole aim was to regulate the buyer's and seller responsibilities[7]. This follows ideas that there have been legal disputes and uncertainties that between international buyers and seller[8]. Such had an effect of hampering international trade and hence there was a need to establish an international standard interpretation of the buyer's and seller's duties.

Iraq on the other hand, has vast amount of natural resources which are dominated by the production of natural gas and crude oil and it is estimated that Iraq possesses about 153 billion barrels of crude oil and is capable of producing 4 647.8 barrels of oil a day[9]. Such resources have a huge capacity to transfer Iraq's economy and the lives of its people and boosting economic activities of those nations that will import these natural resources from Iraq. However, incidences of civil unrests have threatened international trade between Iraq and other States and most buyers are now reluctant to import from Iraq due to high trading risks involved[10].Risk in this case is relatively believed to fall on the buyer but circumstances are also available where the seller can bear the risk as well and this can observed in relation to F-terms such as free on board (FIB), C-Terms such as cost insurance freight (CIF) and D-terms such as Delivered at terminal (DAT). This therefore shows that possibilities are high that international trade can be promoted, boosted and sustained when a clear reference is made concerning the transfer of risk. Questions can be placed on how the CISG and INCONTERMS can be used to promote the growth and sustainability of international trade between Iraq and other States by addressing transfer of risk concerns.

[5] Bainbridge, Stephen. "Trade Usages in International Sales of Goods: An Analysis of the 1964 and 1980 Sales Conventions." Va. J. Int'l l. 24 (1984): 619.
[6] Ibid, 4.
[7] P. M. Roth, 'The Passing of Risk', (1979), the American Journal of Comparative Law, Vol. 27, No. 2/3, Unification of International Trade Law: UNCITRAL's First Decade p. 291-310
[8] Ibid, 5.
[9] Based on facts and figures on Iraq published by OPEC Annual Statistical Bulletin 2017.
[10] Benjamin's Sale of Goods, 5th Edn., Sweet and Maxwell, (1997) 1133.

1.2 Research objectives

The main aim of the study is explore various ways the CISG and ICONTERMS can be deployed to address the transfer of risk in sale of goods between Iraq and other economies so as to promote sustainable international trade. The study also seeks to attain the following aims;

- To identify similarities and differences that exist between the CISG and INCONTERMS in dealing the transfer of risk in international sale of goods.
- To examine the extent to which the CISG and INCONTERMS are effective in minimising international risks involved in international sale of goods.
- To identify possible solutions and or amendments that can be made to deal with the operational ineffectiveness of the CISG and INCONTERMS in minimising international risks involved in international sale of goods.

1.3Scope of the study

The study is based on the comparison of the CISG with the INCNTERMS on how they treat and address the transfer of risk between buyers and sellers in ISoG and reference is made to Iraq. The study uses previous studies, cases, books, websites, publications and other academic materials to deduce arguments and insights about the interaction of CISG and INCNTERMS in the passing or risk in ISoG and recommendations that can be made to enhance the growth and sustainability of international trade.

1.4Structure of the study

The study will be structured as follows;

- **Chapter One:** Proffers introductory remarks concerning the CISG and INCONTERMS and the transfer of risk in ISoG.
- **Chapter Two:** Gives a contextual background and application of INCONTERMS and the UN Convention on Contracts for the International Sale of Goods.
- **Chapter Three:** Covers a detailed insight of risk, conditions and the various channels through which it can be passed from the buyer to the seller and vice versa with regards to INCONTERMS based on the international perspective of Iraq.

- **Chapter Four:** Covers a detailed insight of risk, conditions and the various channels through which it can be passed from the buyer to the seller and vice versa with regards to the CISG based on the international perspective of Iraq.
- **Chapter Five:** Concludes the study by looking at limitations, similarities and differences between CISG and INCONTERMS and a discussion of possible measures that can be adopted to enhance the effectiveness of the two statutory apparatuses.

CHAPTER TWO

CONTEXTUAL BACKGROUND AND APPLICATION OF INCONTERMS ANDTHE UN CONVENTION ON CISG.

2.1 History of the INCONTERMS

Ever since the emergence of international trade, merchants have been encountering problems concerning the c[11]. As a result, there were uncertainties concerning questions like;

- Who is responsible for bearing risk in cases were the carriage of goods is delayed?
- Who bears the risk bearer in the event that goods have been damaged or lost in transit?
- Under which terms should the contract of carriage be concluded on?
- Who pays for the insurance of goods?
- Who is responsible for meeting carriage and other related costs?

Answers to the above questions were established to be provided through the use of Cost Insurance Freight (CIF) and Free on Board (FOB)[12]. However, the use of these terms was considered to be limited in terms of offering explanations about what they mean and how they can be interpreted[13]. The other problem that was surrounded by the use of these terms is that they lacked a common meaning in the sense that they meaning would change at different ports of entry[14]. This created problems in international trade and a significant challenge is that their use created conflicts and conflicts. As a result, the International Chamber of Commerce (ICC) conducted a survey on how different legal systems influenced the meaning of internal trade terms. The established findings showed strong proof that the interpretation of international trade terms was associated with a lot of different perceptions and opinions[15]. This further heightened uncertainty problems in international trade and efforts by the ICC were therefore to deal with such uncertainties and hence the first outline of the INCONTERMS was established in 1936. The use of the INCONTERMS in international trade was followed with numerous revisions which were aimed at improving its use and

[11]Bradford Stone, 'Contracts for the International Sale of Goods' (2014) 10.
[12] Ewan McKendrick, Contract Law: Text, Cases, and Materials (4th edn, Oxford University Press 2010) 932.
[13]Eastern Europe and United States, 'The Uniform Law on International Sale of Goods : A Constructive Critique'.
[14] Ibid, 11.
[15]Legal Guidance and FOR Doing, 'Model Contracts for Small Firms Legal Guidance for Doing'.

effectiveness and a total of seven amendments were made between the periods 1953 to 2010[16]. Arguments can thus be placed on the effectiveness of the INCONTERMS in fulfilling its mandates as arguments can be placed that such amendments were able to incorporate changes and improvements in the mode of transportation in international trade[17]. This first version of the INCONTERMS was much restricted to the exchange of commodities mainly goods. This first version of the INCONTERMS managed to bring a lot of achievements in international trade and such improvements include its ability to demarcate delivery points once the load has been loaded on board a shipping vessel. This also led to the introduction of the Ex-works which established the seller's obligations.[18]

Observations were made that the World War II resulted in an increase in the movement of goods between States and this was greatly enhanced by the introduction of rail transport systems[19]. Such had negative implications which placed a huge demand on the need to review the first version of the INCONTERMS. This is because the new mode of transport (rail) imposed effects on existing international trade rules on how goods were to be carried, considerations concerning the required time the goods should be delivered, individuals who were to bear carriage costs and risk of concerning the loss and damage of goods during transit. This was also followed by the introduction of two additional terms Free on Truck (FOT) and Fee on Rail (FOR) in 1957 as part of efforts to further revise INCONTERMS with changing patterns in international trade while FOB Airport was included in the revision of 1976[20].

Much of the revisions that took place were as a result in changes in modes of transport. For instance, the further proliferation of shipping containers shifted focus from having goods transported over the ship to having the delivered goods stored in containers[21]. However, revisions made in 1990 were mainly caused by efforts to address technological changes that were being observed not only in international trade but in the entire economic and business spheres. The major influence of technology in international trade was through electronic communication and this saw an increase in consensus among trading parties to engage in Electronic Data Interchange. The introduction of different terms such as FOB Airport, FOT and FOR further resulted in different interpretations and opinions among traders and this had

[16]*X*, UNCITRAL Yearbook VIII, New York, United Nations(1977) 63, no 531.
[17] Ibid.
[18] Ibid
[19] Ibid, 4.
[20]Commencement Information, 'Sale and Supply of Goods Act 1994' [1995] Changes 1.
[21] Ibid, 6.

a strong effect of creating uncertainty and hence there was need for another revision that could address such concerns. The 1990 revision was therefore part of efforts to cater for such concerns and it removed all trade terms that related to how goods were to be transported and emphasised on the importance of the use of the Free Carrier named point.

The FCA incoterms grew in importance as a result of increased usage of containers and arguments were given that the use of FOB instead of FCA was not realising the desired results[22] this is because goods were being distributed to container freight stations instead of being given to the carrier on board the ship.

Major limitations that were observed with the 2000 INCOTERMS are the ones that necessitated the 2010 revisions and the main reasons was that it remained unclarified about which statutory enforcements should be applied to in a given situation[23].Thus, another factor that factor contributed on the need to revise the rules was the fact that the Uniform Commercial Code had just being removed and economies such as the United States were calling for efforts to broaden INCOTERMS rules. This can be as a result of the fact that in the USA, FOB was mainly restricted to the use of vessels for the shipment of goods and this was accompanied by the introduction of Delivered at Place (DAP) as another trading term which gave traders free options to choose a port of delivery[24]. However, the DAP was limited in use in the sense that it did not apply once the goods had commenced the offloading process from the designated transport mode[25]. This also resulted in the introduction of DAT which means Delivered at Terminal whose focus was to deal with the unloading of goods and it highlighted that the unloading process would be undertaken when during the event that seller bears the risk and costs of delivery. The introduction of DAT and DAP facilitated trade through the transportation of goods through the sea as their concepts broadened to cover more maritime and non-maritime transport concerns[26].

In overall, it can be said that the introduction of INCOTERMS facilitated trade but problems were still encountered in international trade and this was attributed to observations that were made which highlighted that traders were still opting to use their old and traditional trading procedures and processes[27]. Thus the 2010 INCONTERMS guidelines were not only

[22]Laurence Kaffman and Elizabeth Macdonald, The Law of Contract (7th edn, Oxford University Press 2010), 21-110.
[23]Table of Provisions, 'Sale of Goods (Vienna Convention) Act 1987'.
[24]Jafarzadeh (n 13) section 2.1.3; Treitel (n 29), 1024.
[25] Indira Carr and Peter Stone, International trade law (4th ed, Routledge-Cavendish 2010). 81.
[26] Ibid
[27]Rudolf Schlesinger Formation of contracts: a study of the common core of legal systems Vol 2, 1584.

restricted to maritime transport but extended to include inland waterway transport and other non-maritime modes of transport and also sought to encourage traders to use the developed and revised modern laws.

2.2 Field of application of INCONTERMS

The basic principle that underlies the use of INCONTERMS lies in its ability to give freedom to parties to a contractual agreement[28]. Meaning that they can agree to any trade agreement as they wish. Such an idea and principle implies that may detract from applying provisions of the conventions and even that of the CISG so as to influence the passing of risk and is even supported by Article 6 of the Vienna Convention which asserts that parties change the effects of any provision. Thus parties have to opt to include INCONTERMS rules in their contract relating to specific trade terms and arbitral awards and court decisions are liable to accept INCONTERMS rules written in the contractual agreement and consider them to be a binding force. This can be supported by the BP oil case in which the CFR term was explicitly mentioned and judgement was passed that it formed and served as a binding force though it was not recognised globally but because it had been concluded in the contractual agreement[29]. The other concern was that such terms were also widely known terms in international trade and this meant that they were also included in the CISG under Article 9(2).

Irrespective of such an observation, care must be placed to note that INCONTERMS do not constitute part of customary law and hence traders do not always depend on them for use in international trade agreements.

In the event that traders desire to implement them, then it implies that clear references must be made to INCONTERMS guidelines unless otherwise a practice has been established by both parties[30]. Thus, Article 9 recognises such contractual agreements as binding and this can be supported by ideas established which posits that INCONTERMS thrives to create a common statutory exercise that matches that of various States[31]. The major challenges is that different States have different approaches towards trade terms and this makes it difficult to have a common ground on which international trade can be practised. Difficulties and

[28] Ibid.
[29]US Court Appeals (5th Circuit, USA). 11 June 2003, BP Oil International/EmpresaEstatalPetroleos de Ecuador, Clout Case No. 575.
[30]Law Commission, Sale of Goods Forming Part of a Bulk (Law Com No 215, 1993).
[31] Ibid.

problems that can occur in the interpretation and use of INCONTERMS requires that Parties use the prevailing INCONTERMS guidelines in concluding sakes agreements[32]. This is done to ensure that examinations can be made to see if such contractual agreements contain references to the INCONTERMS and if so, then to make sure that they are currently up to date to include current INCONTERMS rules. Problems have however been encountered when Parties to an international trade agreement have been using references to an older INCONTERMS guidelines such as DEQ, DDU, DES and DAF. INCONTERMS can thus be considered to be flexible statutory guidelines which only apply when trade partners have implicitly and explicitly agreed to include them as part of the contractual agreement. Such decision is also surrounded with the need to choose which version of INCONTERMS parties will use as part of their contractual agreement.

2.3 Evolution of convention on CISG

The CISG can into effect following efforts to establish common laws that would govern international sale of goods in April 1980. The follows observations which were made which showed that international trade was now being characterised by a lot challenges caused by huge differences rules and regulations that govern the obligations and rights of parties to an international sale of goods[33].The basic idea was that different rules that govern trade within States were characterised by numerous problems when applied on an international scale that involves international movement of goods. This implies that local regulations governing the movement of goods within a State like Iraq were mostly incompatible with rules governing other States and this created uncertainties which compromised trade. Thus, there was a need to establish a platform upon which uniform guidelines could be established to promote a smooth flow of goods between States. Since its inception in 2009, the CISG had a total of 70 member States who trading activities accounted for more than two thirds of international trade of goods[34]. This shows how successful the CISG has been able to harmonise cultural, geographic and economic diversity and this is because of combined efforts by the UNCITRAL (United Nations Commission on International Trade Law) and UNIDROIT (International Institute for the Unification of Private Law). The use of the CISG was however restricted in terms of participation and this required that other statutory guidelines such as the

[32] Ibid, 22.
[33]Nygh, Peter. Autonomy In International Contracts. Oxford University Press. 1999,29.
[34]Paul Dobson & Rob Stokes. Commercial Law, (7th edt. Sweet & Maxwell Limited of Avenue Road, 2008).

UNCITRAL be established to increase member States' participation. As it stands the CISG now comprises of a total of 89 member States and these constitute major international players in international trade[35]. The success of the of the CISG can be compared to previous conventions which were made to harmonise international trade and such include the ULFC (Uniform Law in the Formation of Contracts for the International Sale of Goods) and ULIS (Uniform Law of the International Sales) which had a low member participation in terms of ratification. Insights drawn from previous studies also showed that the effectiveness of the CISG was based on the work of Ernest Rabel who encouraged efforts to harmonise of international trade laws through the use of the UNIDROIT[36].

On the other hand, it can be noted that international sale of goods conventions were not important but also brought value in international trade through their innovativeness ability but they evaluated impact on international trade is considered to be minimal because of low ratification[37]. This therefore led to conclusions being made that the success of This therefore led to conclusions being made that the success of the CISG relies significantly on the participation of the international community[38]. Thus unification and harmonisation of international trade regulations remained a big challenge in international which led to the establishment of UNITRAL in 1968.

2.4 Field of application of CISG

The basic criteria on determining whether a contract can be considered to be governed by the CISG is determined on the basis that the established contact is part of the ISoG[39]. Other decision criteria are based on the consideration that the concerned goods involved in the trading process are surrounded by international movements from one State to the other[40]. However, Article 6 of the Convention grants parties to an international trade agreement with the choice to engage in contractual agreements outside the CISG[41]. This means that they can choose to engage in contractual agreements without considering or including CISG elements. Parties can also opt to engage in the application of the CISG in their trading agreements.

[35]Guenter H Treitel, The Law of Contract (11th edn, Sweet & Maxwell 2003), 1024.
[36]An Australian scholar who initiated efforts to harmonise international trade laws and the development of other trade guidelines to reinforce international trade.
[37] Ibid, 26.
[38] Ibid, 27.
[39] Ibid
[40] The Sale of Goods (Amendment) Act 1995 section 2(d).
[41] Ibid.

Whether parties opt to use the CISG or not, it is totally acceptable and this is based on the concept of freedom[42].

There is also an element of internationality which can be used to determine the applicability of the CISG. Internationality in this case implies that business transactions in ISoG is done between contracting States[43]. Exception can be made that using the Vienna Convention rule of Article 1(1)(b) allows national transaction of goods to be considered to be subject to the application of the CISG when the delivery of goods is to be made to another State[44]. Furthermore, the application of the CISG is made on the account that the States involved in ISoG are contracting States otherwise if not then the CISG is not applicable as mentioned by Article 95[45]. On the other hand, not all goods are subject to the application of the CISG and only tangible and movable goods are subject to the application of the CISG and hence does not include sales of negotiable electricity, aircraft, ships, instruments, forced sales, sales by auction and consumer sales[46]. The decision to opt of a CISG agreement can be done using the INCONTERM.

[42] Michael Bridge, The Sale of Goods (1st edn, Oxford University Press 1998) 532. Alternatively, it is possible that ascertainment occurs as the same time as unconditional appropriation for the purpose of passing of property.
[43] Ibid, 37.
[44] Peter A Piliounis, 'The Remedies of Specific Performance, Price Reduction and Additional Time (Nachfrist) Under the CISG: Are These Worthwhile Changes or Additions to English Sales Law?' (2000) 12(1) Pace International Law Review, 36
[45] Ibid
[46] Ibid, 44.

CHAPTER THREE

PASSING OF RISK IN ACCORDANCE TO INCONTERMS AND HOW IT AFFECTS IRAQ.

3.1 Overview

The movement of goods between nations is surrounded by a lot of risks which include transaction risks, loss and damage of goods during transit such as a ship capsizing or goods deteriorating in condition whilst being transported. Though such risks are insurable, there is a lot of concern about the party which should bear such risks, liable for insuring them, press claims or salvage the goods. The major challenge is how to treat and pass certain kinds of risks which are not insurable as noted in many cases in which goods are being shipped through a route which is characterised by armed conflicts such as the Strait of Hurmuz or through non-maritime transportation systems like in Iraq which is facing series of armed disputes against armed militia groups. Though the CISG does acknowledge the existence of risk in international trade under Articles 66-70, it does not give an exact definition of risk[47]. This chapter therefore provides a detailed explanation of risk in relation to the CISG and how it can be passed between parties to a contractual international trade agreement.

As noted in the earlier discussion that Parties to an ISoG can opt from contractual provisions by formulating their own contractual rules. One of the notable ways of achieving that has been established to be through the use of Article 6 of the Vienna Convention which recommends the use of INCONTERMS.

The idea of passing risk is also determined by the modes of transportation that are used to transport the goods. The INCONTERMS is structured into two broad categories that offer a description of the modes of transportation that can be used in transporting goods in ISoG. The first category deals with the transportation of goods under ISoG using all modes of transportation while the second category deals with lists terms that are used to address goods that are transported by sea[48]. Such category of terms apply to Iraq in which goods are transported by either pipeline, road and shipped to neighbouring States such as Turkey where they are transported by sea. INCONTERMS can thus be said to be a reflection of commercial

[47] Muna Nduo, 'The Vienna Sales Convention 1980 And The Hague Uniform Laws On International Sale Of Goods 1964: A Comparative Analysis' (1989) 38 International and Comparative Law Quarterly 5.
[48] Ibid.

practices used in ISoG and yet still remain free to choose whether they like to include them in their contractual agreements. Furthermore, it contractual agreements between Iraq nationals and other States' traders can allow adjustments to be made to INCONTERMS in a manner that suits the contractual Parties. However, it provides a list of obligations that both the buyer and the seller are obligated to perform and this is stipulated by the b-side and a-side rules of the INCONTERMS rules[49]. The rules offer guidelines concerning;

- Packaging and inspection of goods,
- Supply of information,
- Proof of delivery.
- Issuing of notices to the buyer and seller,
- Cost allocation,
- Transfer of risks,
- Delivery,
- Contracts of insurance and carriage;
- Obligations of the buyer and seller,

Due to the idea that this study seeks to address the passing of risk, this chapter will thus place emphasis on cross examination of b-side and a-side of the INCONTERMS. It can be noted that the risk of risk is related to the seller's obligation to deliver the goods and this implies that Iraq nationals have a tendency to influence risk transfer in the event that they are selling goods to other States. This can be reinforced by the idea that the INCONTERM rules stipulates that risk of either damage or loss of goods is borne by the seller until such goods are delivered to the buyer[50]. On the other hand, risks will befall the buyer when goods have been dispatched to him as stipulated by the INCONTERMS stipulations. This chapter thus examines the ICC's INCONTERMS stipulations, how they address the transfer of risk in ISoG and how they can be used to enhance international trade between Iraq and other States.

3.2 Division under INCONTERMS 2010

Foremost, the INCONTERMS rules of the ICC are decomposed into two categories that relate to the mode of transportation in which the first category covers all the modes of

[49] Ibid.
[50]The Sale of Goods Act 1979 c 54 as amended by the Sale of Goods Act (Amendment) Act 1995 (hereinafter referred to as the Act).

transportation. The first category covers DDP (Delivered Duty Paid), DAP, DAT, CIP (Carriage AND Insurance Paid To), CPT (Carriage Paid To), FCA (Free Carrier) and EXW (Ex Works)[51].

The second category of INCONTERMS deal with inland waterway and sea transport modes of transportation and these include CIF, CFR (Cost And Freight), FOB, and FAS (Free Alongside Ship)[52]. These categories therefore allow traders with the ease to promote trade as they are internationally recognised and are easy to use.

3.3 Relationship between INCONTERMS and CISG

The importance of trade terms is based on their ability to clearly demarcate the responsibilities of the parties to an ISoG. This implies that trade terms are there to clarify obligations that are to be performed by both Iraq nationals and its trading partners either as buyers or sellers. It is important to note that there is a relationship that exist between INCONTERMS and CISG[53]. This is because in the event that traders have decided to deviate from passing risk as stipulated by the CISG by devising their own regulations using the INCONTERMS as described by Article 6 of the Vienna Convention. Article 6 of the Vienna Convention thus says that;

> *…Parties may exclude the application of this convention or subject to article 12 derogate from or vary the effect of any of its provisions*[54].

This therefore shows that any new agreement agreed and entered into by Iraq traders with other traders is therefore considered to be binding and each Party is also mandated to abide by the practices mentioned and fulfil the said obligations. This Article thus gives ways to addressing practices that bind Parties to a contractual agreement of an ISoG and these are[55];

1. Parties are bound by practices that are implied by their contractual agreement or what they could have known or knew about international trade and significantly known and normally perceived to be familiar to Contractual Parties to an international trade agreement.

[51]Edward Fry, A Treatise on the Specific Performance of Contracts (William Donaldson Rawlins ed, 5th edn, Stevens and Sons 1911).
[52] Ibid.
[53] Ibid (n, 47).
[54]X, Incoterms 2010, Berlin, ICC Publication no. 715 ED, 86-87.
[55] Ibid.

2. Any practice which has been established and agreed on by Parties to a contract becomes legally binding and obligates Parties to conform to its given practices.

The above provisions therefore show that international trade partners and Iraq traders can apply them implicitly by agreement and establishment of a practice or explicitly by including INCONTERMS. It is important to note that decisions to make reference to the INCONTERMS does not render the application of the CISG ineffective. It can thus be said that INCONTERMS are there to further reinforce the use and effectiveness of the CISG. The use of INCONTERMS is also meant to alter the CISG on matters concerning risk of loss, loading and transportation of goods and other related matters[56]. Furthermore, it can be said that INCONTERMS are kind of superior to the CISG in the sense that it overrides the CISG in any matters that pertain to its use[57]. This can be supported by a case whereby French seller will use a carrier to transport the sold goods to the German buyer based on *untaxed, duty paid and free delivery* conditions. The buyer strongly refused of having received the goods while the seller was not capable of providing the required evidenced of the goods being handled over to the buyer. The court thus ruled in favour of the buyer citing that the buyer had no obligation to pay for the goods since the seller was incapable of providing proof of the goods being handled over to the buyer. The major reason was that there was not risk transfer that took place even though the goods were dispatched to the carrier. This can also be supported by Article 6 and 31 of the CISG in which the Parties had explicitly agreed to use the term free on delivery and hence the seller was obligated to have the goods delivered to the buyer. In addition, interpretation of the term was done based on *freihaus* (the German Law) and this is because the agreement was entered into with a German buyer using a German drafted agreement in which the Parties had agreed on the use of a German term[58].

The INCONTERMS is however limited is use and does not extend to cover matters such as consequences of breach, transfer of property and formation of the contract[59]. This entails that if a contract only discloses certain aspects of the INCONTERMS then a Party will have to refer to another international law if this extends to cover the Vienna Convention as applicable

[56] John O. Honnold, Uniform Law for International Sales under the 1980 United Nations Convention (3rd edition edn Kluwer Law International, 1999)..369-1, n.369-2. discussion infra Ch.II, Part I.A.1, A.2.
[57] X, Incoterms 2010, Berlin, ICC Publication no. 715 ED, 29.
[58] Ibid.
[59]The Incoterms Rules and others, 'Obligation as to Insurance , Transfer of Risk and Costs as per Incoterms 2010 Obligation as to Insurance , Transfer of Risk and Costs as per Incoterms 2010'.

then the CISG will be used as reinforcing legal statutory instrument to deal with uncertainties and problems that may arise[60].

Irrespective of the natural differences, both the INCONTERMS and the CISG have played an important role in international trade and the adoption has to a relatively large extent has managed to harmonise legal laws of different States into a common agreeable law which international sellers and buyers can agree on and form a foundation upon which they can base their contractual agreements. Thus, it can be stated that the INCONTERMS and the CISG have led to improvements and growth in international trade and future amendments must be made to ensure that their use continues to address issues that impair international trade.

3.4 E-Term: EXW and INCONTERMS

This term allows the seller to make to decide on whether goods should be made available at any other place (warehouse, factory, works etc.) or at his place of business[61]. This EXW therefore highlights the seller's required obligation which states that the seller has to allow access of the goods to a place that is disposal to the buyer. This term also stipulates that the delivery of goods has to be done within the designated time period as agreed by the Parties[62]. This requires that the seller informs the buyer that the goods are now available for disposal. Thus risk transfer in INCONTERMS is tied to the idea of having the goods available for disposal to the buyer and this entails that risk is considered to have been transferred when the seller has made available the goods for to the buyer. This applies on the condition that the goods are clearly highlighted in the contract.

3.4.1 EXW

Article 31 of the Convention stipulates that the obligation of the seller is considered fulfilled under the following circumstances[63];

- Article 31(a) considers that goods have been dispatched in the hands of the carrier assuming that a carriage is to be used to transport the goods.

[60]Ewan McKendrick, Force majeure and frustration of contract (Lloyds of London Press, 1991).
[61] Ibid.
[62]'INCOTERMS 2010 Passing of Risks and Costs' 2010.
[63] Ibid.

- Article 31(b) considers the obligation fulfilled when the seller makes the goods available at his place of business. Under this circumstance, Supra 4 of the Convention under Article 6 can thus be used to determine how risk will be passed.
- Article 31(c) considers the obligation fulfilled when the seller makes the goods available at a given place.

Risk transfer does not always occur at the same stage as stipulated with the EXW rules under Article 69 but will be transferred at different stages and this is because of clauses A5 and B5[64]. This can be supported by the idea that the Vienna Convention consider risk to have been transferred when the buyer is fully aware that goods are no available for his disposal and have been placed at premises other than those of the seller, fails to take delivery and hence breaches the contract or when he collects the goods from the seller's premises[65]. On the other hand, INCONTERMS EXW, considers that risk has been transferred when goods have been placed at a warehouse, factory or works or a seller's premises[66]. For example, with the use of INCONTERMS 2010 rule EXW, an agreement has been entered by an Iraq seller and American buyer for the sale of 100 000 barrels of oil and that the oil will be made available for collection to the buyer on the 20th of March (date at which they are placed at the seller's premises) to the 27th of March. Information is usually passed to the American buyer on the same day that the oil is now available for collection but if the oil gets contaminated as a result of rain (*an act of God*) spilling into the storage tanks. The EXW thus consider the American buyer to bear the risk since the risk had already been passed the time the oil was made available for his collection. The Convention considers that risk will be transferred to the buyer on the 20th when he fails to collect the goods from the premises causing the seller to bear the risk of loss.

The other differences is that under EXW, the seller is obligated to inform the buyer that goods are now available for his disposal but the Vienna Convention under Article 69 disregards this idea and considers that the passing of risk is still unaffected by the idea that the buyer is not aware that the goods are now available for collection[67]. though the seller might be responsible for bearing the damages as stipulated by the CISG, risk is still have been passed and the inability of the seller to inform the buyer is not considered to be a

[64]Louise Merrett. Commercial Law Lectures 2011-2012 Sale of Goods, Trinity College.
[65] Philip Head Son Ltd V Showfronts Ltd [1970] 1 Lloyd's Rep. 140.
[66] Ibid, 62.
[67]Re Anchor Line (Henderson Bros) Ltd [1936] Ch. 211.

significant breach[68]. Supra 4.7.2 of the CISG as noted by Article 70 gives provision for risk to be transferred back to the seller when fundamental breaches have been committed by the seller[69].

The buyer on the other hand is required to provide notice to the seller about collection of the goods on the condition that has been offered an opportunity to determine the time but this is made within a specified time frame. In this case, the inability of the buyer to furnish the seller with information results in an early risk transfer. The transfer of risk occurs after the designated period of collection has expired[70]. Thus the basic principle of all established ICC INCONTERMS is that risk passes when the goods are explicitly and implicitly.

3.5 F-terms and the CISG

F-terms consist of FOB, FAS and FCA (Free Carrier) and such terms enforce the seller to handle over the goods to a carrier which has been chosen by the buyer[71]. Article 67(1) of the CISG outlines that the obligation is that the goods have to be handled over to the will transfer to internal buyers on the condition that Iraq seller have loaded the goods on the transporting mode and the transfer of risk takes effect when such loading has been made. This is similar to expressions which states that considerations that risk transfer has been made are put into effect once the carrier has received the goods by the CISG's Article 67(1)[72]. Reference can be made to by Courts to the CISG when such terms are in conformity with Article 67.

Thus, risk transfer between Iraq and other merchants takes effect when the carrier has received the goods and this also implies that the when Iraq sellers are still in possession of the goods then they are still be liable to bear the risk. INCONTERM FAS and FOB relate to circumstances when delivery of goods has been made alongside and on board a ship while FCA applies to matters that involve the delivery of goods to places than are not considered to be not of the seller[73].

[68]BadischeAnilin und Soda Fabrik v Hickson [1906] A.C. 419.
[69] Ibid.
[70] Ibid
[71] Ibid, 67.
[72] Ibid, 68.
[73]X, Incoterms 2010, Berlin, ICC Publication no. 715 ED, 68-69.

3.6 C-terms and the CISG

These terms are made up of CIF, CIP and CPT and they are based on stipulations that the seller is responsible for making carriage arrangements and bearing the associated costs[74]. This entails that the risk of damage and loss will still be in the hands of the seller until they have been loaded to carriage. It also preeminent to note that letters that precede the C will also help in determining how transportation costs will be determined. Distinction is also placed between a *place of delivery* and a *place of destination* and FCA terms of the INCONTERMS are usually making reference to a *place of delivery*[75].

When it comes to the risk transfer, it can be noted that F-terms and C-terms is similar and this is because risk is considered to have been transferred when goods have been placed on a vessel as expressed by CIF and CFR or have been given to the carrier[76]. Thus both F-terms and C-terms will be made reference to by Courts when they have been made in conformity with Article 67. Considerations can be made that F-terms apply to any mode of transport and when goods have been loaded into a mode of transport prescribed by the buyer, risk is presumed to have been transferred to the buyer. C-terms on the other hand, regard risk transfer to take effect when the carrier is now in possession of the goods. The problem with the use of C-terms (CIP and CPT) is that they do not cater for the time the goods are being loaded into a container and this therefore requires that Parties to a contractual determine the moment risk is to be transferred. This also requires that the place at which risk will be transferred be clearly mentioned. Such can be evidenced by a case between a US buyer and a Chinese seller in which the Chinese arbitral court ruled in favour of the buyer after goods were destroyed after being delivered at the designated place[77]. The decisions was that the damage that occurred to the goods was as a result of a chemical substance which was in the possession of a seller and hence this placed the seller on a liability of having to pay for the risk of loss.

However, when the goods are sold afloat then Article 68 will be applicable which posits that risk transfer takes effect the moment the contracts have been concluded[78]. There are however conditions which exceptions can be made to the passing of risk and this normally occurs

[74] Ibid
[75]Raymond in S. Kröll, L. Mistelis and M. Del Pilar Perales Viscacillas, Commentary, 903.
[76] Ibid, 73.
[77]Simmons v Swift (1826) 5 B. & C.862.
[78]Taylor v Combined Buyers Ltd [1924] N.Z.L.R.627.

when insurance cover is either made available[79]. Insurance cover thus causes the buyer to bear the risks when contract of carriage documents have been given to the buyer. Thus when goods have been sold afloat, CFR, CIF and FOB will consider risk to have been transferred when the goods are placed on a shipping vessel.

3.7 D-terms and the CISG

These are known as arrival contracts or destination trade terms which require that the seller delivers the goods to a specified destination as part of his obligation[80]. D-terms are based on stipulations made Article 69(2) which asserts that risk has been passed when delivery is ready and the buyer is fully informed are now at his disposal. This can be supported by the Bulgarian buyer and Australian seller whereby current DAP terms of INCONTERM and INCONTERM DAF stipulated that the goods be delivered to the Australian-Hungary border[81]. Ruling was based on Article 69 and conclusions were made that the seller did not make the goods available for collection to the buyer and hence the argument of risk transfer was totally ruled out. Thus the decision was ruled in favour of the buyer and that no damages were liable to the buyer even though the goods had stayed long in the warehouse.

In addition, DDP, DAP and DAT place an obligation to the seller to transport the goods to a predetermined destination and considers that the seller remains liable for any risk even such goods are in transit. Thus, INCONTERMS D-terms highlight that the fact the seller has made goods available to the disposal of the buyer is itself sufficient to consider risk to be transferred to the buyer from the seller[82]. However, this still requires the buyer to remain vigilant of delivery and to be aware when goods are now ready for collection and this is important because it made it possible to determine risk transfer in cases where goods have been delivered to a place other than that of the seller. On the other hand, if the goods remain with the seller before disposal of the goods to the buyer is made, risk transfer is considered to be null and the seller remained liable. This is based on the argument that the seller was preserving then goods from damages or events that may causes losses. But cases where the goods have placed at a warehouse or are with another third Party then the buyer is considered to be in a swift position to access them and that the seller has limited power to have the goods

[79] P.S. Atiyah, John N. Adams; with sections on Scots law by Hector MacQueen, Atiyah's Sale of goods, (Harlow: Longman, Twelfth edition 2010) 7, 9.
[80] Ibid.
[81] Pyrene v. Scindia Navigation co. 1954, 2 QB 402, 419.
[82] Ibid, 79.

protected against loss or deterioration[83]. Risk transfer in this case is deemed to have taken effect when international buyers are fully aware of disposal concerns and are in a strong position to assume total control of the goods. The major element to reckon with is that D-terms is that they do not necessarily need the buyer to be fully informed but risk transfer comes into effected when goods have been delivered to a designated place or at his disposal. This can be evidenced by a case between a Hungarian buyer and Yugoslavian seller in which the *FOB Kladovo* was used as a delivery term and this was considered to be void because the used term was irrelevant since no sea transport was used[84]. This therefore implied that the Hungraian buyer was liable for risks caused by UN embargoes and hence the buyer could not pay and thus became in effect when the goods were dispatched to Kladovo while the seller[85]. The Court decision was thus made on the considerations of Article 67 in favour of the seller and asked the buyer to bear the risk.

Differences can be noted between INCONTERMS and CISG, FCA and FAS as a result of the stipulations made by the INCONTERMS which states that the goods be made available to the availability of the carrier (FCA) and alongside ship (FAS) while CISG contends that goods have to be surrendered to the carriers' place[86].

Article 67 asserts that giving the carrier charge of the goods constitute handing over and cases are there which require that the goods be loaded to a carriage by the seller[87]. The problem is that they do not clearly mentioned the exact time when goods have been given to the carrier. As a result, such complications need to be addressed by making reference to INCONTERMS.

[83] Joseph Reid Pty Ltd v Schultz 338 JQAT (1949).
[84] Clout Case No. 163 of the Hungarian Chamber of Commerce and Industry accessed from http://cisg3.law.pace.edu/cases/961210h1.html.
[85] Ibid
[86]Hof van Beroep Ghent (Belgium) 16 June 2004, MermarkFleischhandelsgesellschaftmbh/CvbaLokerseVleesveiling, http://cisgw3.law.pace.edu/cases/040616b1.html
[87] Ibid.

CHAPTER FOUR

RISK AND THE PASSING OF RISKS UNDER CISG

4.1 Introduction

Methods and criteria that can be used to determine how risk should be passed, circumstances that surround the passing of risk ate highlighted in Article 66 to 70 of the CISG. As noted, Article 66 of the CISG asserts that is liable to pay for the goods at their stipulated price and of course with other costs that may occur in the event that he has breached his obligatory requirements as evidenced in the contractual agreement he has entered into with the seller[88]. The relevant Articles and how they relate with the passing of risk under ISoG can be listed as follows;

- Article 66 enforces the need to pay the price.
- Article 53 defines the obligation to pay the price.
- Article 67-69 highlight possible repercussions that will occur when risk has been passed.
- Article 67 also deals with carriage of goods that involve international contracts.
- Article 70 highlights the association between how risk is passed and what constitute a breach.

When a seller has met his responsibility to transfer documents or goods will stop to shoulder the risk of damage or loss[89]. It has also been highlighted that there has been greater need to determine how risk should be transferred among different transportation modes. This chapter seeks to discuss how risk should be transferred, circumstances under which it should be transferred, and how transportation modes influence the passing of risk and consequences of breaches.

[88] Jacob S. Ziegel, Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods (July 1981) Pace Law School Institute of International Commercial Law .4.
[89] René R David 'The Methods of Unification' (1968) 16 American Journal of Comparative Law 13, 14.

4.2 Risk under ISoG

Understanding of the idea or passing risk in ISoG is best made when a clear definition of risk can be made. Roth defined risk as unexpected destruction of goods caused by undesired circumstances[90]. This definition therefore implies that unforeseeable circumstances such as deterioration, damage, destruction, seizure and theft constitute risk[91].

The CISG does address the challenge of risk and its application and its application commences soon after risk has been passed[92]. It states,

"Loss or damage to the goods after the risk has been passed to the buyer does not discharge him from this obligation to pay the price, unless the loss or damage is due to an act or omission of the seller"[93].

The above clause therefore implies that international buyers buying goods from nations such as Iraq will be liable to pay for the goods in the event that they get lost or destroyed. However, Article 36 contradicts with this idea and contends that the seller is the one liable for any adverse outcomes that occur as a result of lack of conformity as risk shifts from the seller to the buyer but Article 66 asserts that there is a transfer of risk from the seller to the buyer that occurs in the event of damage or loss of the goods[94]. This means that if the goods bought from Iraq disappear as a result of misplacement or have been shipped to the wrong destination. This can be supported by a case which has been settled between a Swiss buyer and a French seller in which goods had been transported to a carrier for delivery and this implied that the risk had already shifted and that the seller was liable for any charges and risks that will take place in the event that the goods have been delayed by the carriage firm[95].

Care must be taken to note that the transportation of goods from Iraq can be associated with damage or deterioration when being stored or being handled and such can be as a result of natural causes such as temperature changes. Both buyers and sellers must be well positioned to identify possible factors that can compromise the quality of goods so as to avoid potential losses. But the most significant effect occurs when risk has been transferred between the seller and the buyer in which the burden to bear costs will be unavoidable. If so, then the

[90]Ibid
[91]Charles Debatitista, 'Transferring Property in International Sales: Conflicts and Substantive Rules Under English Law' (1995) 26 Journal of Maritime Law and Commerce.
[92] Ibid
[93] Ibid, 88.
[94]United Nations Convention and Others, 'Whither the CISG ? Case for Its Acceptance In Nigeria'.
[95] Ibid, 89.

buyer is forced to pay for damages or losses that occur in the event that the buyer is now bearing the risk[96]. Observations have also been made that the buyer is also liable for costs when he fails to accept deliverance of the goods including storage costs[97]. However, if goods get damaged or destroyed whilst there are still in possession of the seller, then the seller is liable to pay the buyer or refund him. In addition, any inconveniences such as damages that occur as a result of non-delivery of the goods will also be met by the seller[98]. This therefore places a huge need to clearly place a distinction of the party which bears the risk in ISOG and the time at which the transfer has been made. This requires that the goods be insured so as to reduce the effects and in the case that the goods are not insured or the insurance cover is not adequate enough, the risk effects will be high.

4.3 Methods of passing risk

There are basically three different methods that can be used to determine how risk should be passed in sales transactions and these can be listed as follows;

- **Conclusion of a contract:** This is based on the *Periculumestemptoris* which highlights that risk is transferred to the buyer from the seller once the contractual agreement has been made[99]. Any breach of the contractual agreement will still render any party to fulfil its obligations as stipulated by the contractual agreement and this implies that any once contractual agreements have been made between international buyers and sellers in Iraq, the agreement becomes binding and each party is required to fulfil its obligations.
- **Change of ownership to the buyer from the seller:** This is alternatively known as the *Res perit domino* which contends that the seller will still liable to bear the risk even if goods have been delivered to the buyer and this has been in application in States such as England, Italy and France[100]. The major limitation with this statutory apparatus is that it does not conform with modern international trade practices
- Physical transfer of goods to the buyer from the seller

[96] Taylor v Combined Buyers Ltd [1924] N.Z.L.R.627.
[97] Ibid, 93.
[98] Ricard Stone, Contract Law (6th Ed Gavendish Publishing Limited, 2006-2007) 227
[99]Sanhoori, Abdel Razek, The mediator in explaining the Civil Law, (4nd edn, Encyclopedia of law, Cairo 1970) 349
[100] Ibid

4.4 Burden of proof

The notable observation that can be made concerning who bears the risk has not been explicitly mentioned in Chapter IV of the convention. There are also circumstances under which the risk of loss that of documents is treated the same as the risk of loss of goods[101]. As result, the same convention of rules that apply to loss of goods also apply to loss of documents. Such documents include documents that enhances control of the goods such as certificates of origin, consular or commercial invoices, and certificates of insurance. Under such conditions, the risk of loss to documents can be regarded to apply to documents. The seller is obligated to give all the necessary documents to the buyer as required by the contractual agreement and this is enforced by Article 34[102]. For instance, given a situation whereby a buyer buys a painting from a seller and a seller has to issue a certificate of authenticity to the buyer, the risk of burden will when goods have been shipped. In the case, that goods are still with the seller, the risk of loss of the certificate will still be with the seller. Article 34 thus relates together the handling of documents and the delivery of goods but this not always imply that both goods and documents have to be handed and delivered at the same time.

Article 67 also stipulates that in the event that the buyer presses for efforts to recover what has been paid then the burden of onus lies with the seller to provide proof this can be supported by a ruling made between a court ruling made by a German court which ruled in favour of the buyer and consider the buyer not liable for any costs and this because the seller had failed to issue proof that showed that the risk had already been transferred to the buyer at time the goods got lost[103]. Other conditions which are sufficient for risks to be transferred (both awareness and availability of delivery) were not fulfilled and hence such was considered to be void[104].

Cases were disputes may ensue between the buyer and the seller with the buyer refusing to pay for the goods, the burden of proof lies with the buyer to provide evidence that damage occurred before risk had been transferred[105]. Such takes an example of a French buyer who bought meat from a German seller who was claiming compensation for meat which had

[101] Louise Merrett. Commercial Law Lectures 2011-2012 Sale of Goods, Trinity College.
[102]Ibid.
[103]Amtsgericht Duisburg (Germany) 13 April 2000, Pizza Carton case, Clout case no. 360,
[104]G. Hager and M. Schmidt-Kessel In P. Schlechtriem and I. Schwenzer, Commentary, 925.
[105]Ibid.

deteriorated citing that his customers were returning it because it had gone stale[106]. The argument was that the meat had gone bad before risk was transferred to the buyer and the court required proof to be made by the buyer. Decision was however passed in favour of the seller due to the fact that the buyer could not provide evidence that the meat had gone bad before he assumed risk of the meat and was supposed to notify the seller of such condition at the time delivery was made[107].

This can also be supported by a case where goods had to be transported to Belgium, Antwerp from Finland, Kotka were confirmation was required to be made that the mode of delivery had defects. The seller could not provide evidence that the pipeline used to ship the phenol did not have defects at the time of the loading. On the othetr hand, the buyer managed to furnish the court with sufficient evidence that the phenol was not up to standards prescribed by the buyer and did not get spoiled because of the conditions of the ship. As a result, the seller was held liable for damage charges and the buyer was not liable for charges.

4.5 Article 66 CISG the basic obligations of the buyer

Major aspects of that address the passing of risk to the buyer are covered under Article 66 and under this Article, international buyers are required to pay for the goods in the case that the goods have been lost or damaged[108]. This imposes limitation on the buyer on his ability to invoke Article 58(1) with an intention to refuse to pay for the goods even if he cites that the goods have not been delivered to him[109]. Furthermore, Article 25 of CISG also states that even if the goods have been damaged or lost, the contractual agreement therefore limits the buyer's ability to make claims[110]. Articles 80 and 84 of the CISG clearly states the conditions under which the buyer can request compensation for consequences of avoidance and this also includes the ability of the buyer to request for a reduction in the price using the CISG's Article 51[111].

[106]Oberlandesgericht Hamm (Germany) 23 June 1998, Clout case no. 338.
[107]Joseph Lookofsky (ed), Understanding the CISG (3rd n edition edn Kluwer Law International, Netherlands 2008) 22.
[108] Ibid.
[109] L Collins and others (eds) Dicey and Morris on the Conflict of Laws (13th edn Sweet & Maxwell London, 2000) 965.
[110]Lisa Lundgren, 'The United Nation ' S Convention on Contracts for the International Sale of Goods'.
[111] Ibid

4.6 Article 66 CISG: risk when the contract involves carriage

Article 66 asserts that once risk has been transferred then the buyer is obligated to pay and this implies that goods sold to merchants in other States will cause risk to transfer to merchant buyers once they receive the goods. This also extends to the condition of the goods and if such goods have been damaged or got lost after risk has been transferred to international merchants then the merchants will have to bear the costs even when the goods did not get to their intended destination[112]. Acts of non-performance against the seller in this case cannot be raised by the buyer and the buyer is still obligated to perform his obligations as stipulated by Article 45[113]. So the basic decision is that in the event that risk had been passed before the goods got lost or damaged, then the buyer has an obligation to pay for the goods.

4.7Damage or loss of the goods due to seller's act or omission

Under the CISG, it can be noted that the Iraq sellers will be liable for risks in the event that 'act *or omission'* has resulted in damages or loss of the goods as described by Article 66 of the Convention regardless of the fact that risk had been transferred to the buyer. On the other hand, in the event that the international buyer has suffered losses or damages to the goods then will be entitled to remedies from the Iraq seller[114]. Such a demarcation is made under Article 36 which contends that the is subject to assume responsibility for any breaches or absence of conformity that ensue irrespective of the fact that risk has already been passed to the buyer [115].

Such entails that Iraq sellers are compelled to offer remedies to the international buyer irrespective of considerations of risk transfer and such is highlighted and supported by Article 70. Such also follows stipulations made by Article 66 which contends that omissions or an act of breach will render risk transfer as ineffective and out of context. Hence, the '*the*

[112]B. Nicholas in C. M. Bianca and M. J. Bonell, Commentary, 496; B. Von Hoffmann, Dubrovnik Lectures,293.

[113] G. Hager and M. Schmidt-Kessel in P. Schlechtriem and I. Schwenzer, Commentary, 932.

[114] Ibid.

[115]Dr. Ahmet CemilYildirim. Lack of uniform application regarding transfer of property in internationalsales contracts with particular regard to retention of title clauses. Pace Law School Institute of InternationalCommercial Law,2012.

loss or damage will have to be borne by the seller[116]*.'* Such incidences therefore discharge the duties of the international buyer to pay for the damages or loss.

Such can be evidenced by a ruling made in which damaged suffered as reflected by deterioration of the goods were as a result of chemical substances which caused the goods to melt[117]. Also a ruling made between a US buyer and a Chinese seller was based on the observation that the contractual agreement had explicitly mentioned the moment and or place risk transfer was going to take effect (CIF) at the Chinese port[118]. Hence, the decision was the damages to the goods that took place was as a result of the inability of the seller to furnish the buyer with complete storage details hence the buyer was entitled to remedies from the seller[119]. It is therefore obligated that Iraq sellers provide international buyers with the necessary information concerning the storage of goods whilst being transported to the buyer. Under the CISG's Article 66 and 36(2), the passage of risk will not hinder Iraq sellers from offering remedies to the buyer in the event of an omission[120]. Sellers are thus also required to ensure that goods are properly packaged as this can be considered to be merely a contractual breach.[121]In order for this clause to be applicable, the events or incidences must be those that are prescribed by Article 36(2) as to be contractual or omissions[122].

4.8Risk and the action for the price

The transfer or risk puts an obligation on the party which has assumed the goods and hence by implication, the risk as well[123]. Such implications also demand that a price be paid by the buyer and such a matter is enforceable in the courts or law and assuming that the goods have been damaged or got lost, then the buyer is liable to compensate the seller[124]. Article 62 thus stipulates that the buyer;

- Takes delivery,
- Perform his other obligations

[116]Ibid.
[117]The Republic of the Philippines Vs The People's Republic of China, PCA Case Nº 2013-19.
[118] China International Economic & Trade Arbitration Commission CIETAC (PRC) Arbitration Award, Freezing facilities case [2 September 2005]. http://www.unilex.info/case.cfm?id=1355.
[119]Ibid.
[120] Ibid, 113.
[121] Ibid, 117.
[122]Draft which correspond to articles 45 till 51 of the 1980 Vienna Convention.
[123] Ibid.
[124]K_ Llewellyn, Through Title to Contract and a Bit Beyond,15 N.Y. U. L. Rev., 159.

- Pay the price,

Obligations imposed on the buyer does not render the seller incapable of fulfilling his obligations and the buyer will still enforce the seller to abide on fulfilling his mandated obligations[125]. However, once the buyer has accepted the goods, the seller has numerous ways he can use to get payment from the buyer and this can either be in the form of a debt and a right to recovery[126].The seller's remedy disclosed under Article 62 and the buyer's remedy under Article 28 require performance on either Party but state that courts would get involved in the need to pass judgement on their own accord. This means that courts are not mandated to enforce the buyer to pay for the goods under the law of the forum when such goods have been damaged or destroyed[127]. Thus performance can only be ordered by State courts when similar experiences have been done in accordance to domestic law.[128]Thus Article 28, is said to be in contrary to the principle of harmonisation of laws. In a similar case were payment was required from the buyer by a Swiss seller, the court ruled that efforts to enforce performance from the buyer by the seller were restricted by article 28 of CISG hence claims from the seller were not to be made on damages suffered[129].This problem can be said to be one of the problems associated with the use of conventions such as the CISG as arguments can be made that the need to solve problems by using legal laws often results in the creation of more problems. Such problems often increase when failure by legal instruments to justify and clarify certain aspects or behaviour by Parties involved in a contractual agreement. This can often form a base upon the effectiveness of both the INCONTERMS and the CISG can be judged. In addition, recommendations can also be made based on the need to improve and strengthen their effectiveness and as a result help to increase their adoption worldwide.

4.9 Article 70 - Risk and remedies

When contracts are entered into, the general perception is that all parties to the contract will owner their parts and that it is legally binding once concluded. This implies that any breach

[125]Michael G .Bridge, 'Uniformity and Diversity in the Law of International Sale' (2003) 15(1) Pace International Law Review 57.
[126] Ibid.
[127]Article 35 of the Convention relating to a Uniform Law on the International Sale of Goods (The Hague 1964).
[128] Ibid, 125.
[129] Ibid.

to the contract will pose problems about how risk is to be transferred to the buyer from the seller. As a result, Article 67, 68 and 69 do not stop the buyer from getting remedies and it therefore applies that Article 70 be used in this case[130]. Thus a fundamental breach situation is governed by the application of Article 70.

The need to apply Article 70 is control and establish a balance between how risk should be transferred and potential remedial actions and benefits that are entitled to the buyer in the event that the seller has fundamentally breached the contract, before the goods got damaged [131]. The application of Article 70 also extends to include when goods have been accidentally damaged or lost, and the seller has independently breached the contract[132]. Article 70 can thus be said to be a statutory foundation that seeks to handle potential breach problems by the seller caused by the seller's omissions or independent actions. It however does not focus on the passing of risk but if the seller has fundamentally breached the contract, then recommendations are that the risk be passed back to the seller and that the buyer be entitled to the right of avoidance[133]. However, this does not mean that the buyer will not be paying the price and this is because the seller will have performed his obligations.

Ground rules of the convention thus allow the buyer to be exempted irrespective of the fact that the goods have been accidentally lost or damaged after the risk transfer has taken place. Two separations must be made and these are[134];

- Article 70 does not focus on risk transfer but rather places focus on the damaged goods.
- The fundamental breach of the contract warrants remedies to the buyer even though risk had already been transferred to the buyer.

With respect to the second distinction, the risk will be in a position to be transferred back to the seller. This leads to the conclusion that Article 70 is mainly targeted at dealing with issues of contractual breach by the seller implying that any damages or loss of the goods suffered must not be as a result of the seller's actions. The problem is that this can be

[130] Emily Nordin, 'The Possible Success of Soft Law: Incoterms 2010, Maastricht Journal of European and Comparative Law (2010) 508.
[131] J. O. Honnold and H. M. Flechtner, Uniform Law for International Sales, 524.
[132] Ibid.
[133] Franco Ferrari, Harry M. Flechtner, Ronald A. Brand, The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the U.N. Sales Convention (Sellier European Law Publishers, 2003),97.
[134] Ibid.

difficult to determine exactly if the accidental damage of the goods was as a result of the seller's actions.

4.9.1 Fundamental breach

Based on the established ideas, it can be noted that the idea of fundamental breaches is an important part of the CISG, and plays an important role in determining if a buyer should avoid the contract or should be entitled to remedies. Arguments were however given about the idea of 'fundamental breaches' and such ideas point to the fact that some breaches are not fundamental[135]. With this in mind, it leaves a gap and considerations can be made that non-fundamental breaches are not considered in this case to be factors that determine if the buyer should avoid the contract or should be entitled to remedies. But final amendments of the Convention later concluded that non-fundamental breaches are not significant enough to consider a contract void or to help determine if the buyer should avoid the contract or should be entitled to remedies[136]. For example, when the traded goods are considered to lack conformity, this is regarded as a fundamental breach[137]. In addition, when goods deteriorate as a result of delays, this also constitute a breach of contract. When a delay has been encountered, this act is regarded as an act of 'non-performance' and the seller would have failed to fulfil his contractual obligations[138]. This is because the goods are supposed to be delivered to the buyer during or before the stipulated period of time and if not then this is will amount to a fundamental breach.

It is however important to note that the terms fundamental breach entails that the contractual has already being breached or the seller has already committed an act of default. This therefore requires that Article 25 of the CISG be used together in connection with Article 70[139]. Article 25 therefore stipulates that;

"An injured Party to a contract is considered to be fundamentally breached when he has been deprived of his rightful expectations stipulated by the contractual agreement which he has entered with the other Party considering the fact that the breaching Party should have foreseen the circumstance leading to the breach which any other Party can easily foresee"

[135] Ibid, 130.
[136]Franco Ferrari, Harry M. Flechtner, Ronald A. Brand, The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the U.N. Sales Convention (Sellier European Law Publishers, 2003),97.
[137]Ibid.
[138] Ibid, 131.
[139] Ibid, 133.

Ideas established by Article 25 therefore imply that any obligation mentioned in the contractual agreement that has not been performed will amount to a breach. For example, a fundamental breach can in some cases be as a result of a collateral breach. This can be supported by a judgement made in the case between *Delchi Carrier v.Rotorex Corp*[140]. In which an agreement was made that the seller is to transport the goods to New York, during which they are to be kept refrigerated. The goods later deteriorated and it was discovered that the seller failed to ensure that the goods are directly transport the goods to the buyer as excessive temperatures were observed during the transportation period which affected the condition of the goods[141]. Such an act can be considered to be an act of negligence by the seller and this amounted to a contractual breach. Moreover, the other contractual expressly stipulated the methods and conditions of carriage the seller was supposed to follow, hence the fact that risk had already been transferred to the buyer was over ruled[142]. This decision was made in line with Article 66 and recommendations were made that the buyer be entitled to remedies to cover for the damages made[143]. This notable example provides strong evidence that the concept of fundamental breach is not a simple and narrow issue but a major thing to reckon with. But the failure to deliver goods on time does not necessarily imply that the seller has committed a fundamental breach offense especially when Parties to a contractual agreement have not made an agreement about the data of delivery. But if the delivery date is of special concern to the buyer then such delays are considered to be a breach. This highlights that the idea of a fundamental breach is surrounded by different circumstances and not every situation can be considered to be a breach.

The problem with Article 70 is that it does not stipulate the criteria on how damages or losses caused by breaches are to be determined. This therefore lies in the hands of tribunal Court to determine such actions and the decision is often based on what is considered to be just and fair to both parties[144]. The idea is often to indemnify the injured back to the position he was before the breach took place. Such includes compensating the injured Party for any losses suffered as a result of the breach. This principles is important and when used in conjunction with Article 25, it helps to promote a sense of fairness which allows compatibility of several

[140] Delchi Carrier Spa v. Rotorex Corp, 71 F. 3d 1024 – Court of Appeals, 2nd Circuit 1995.
[141] Ibid.
[142] Ibid, 88.
[143] Ibid, 89.
[144] Eg S Gopalan 'Transnational Commercial Law: The Way Forward' [2003] <access via WestLaw website> (20 Jun. 2004). American University International Law Review 803, 803-4.

statutory instruments. Hence, there are no legal instruments that can stop the seller from compensating or offering remedies to the buyer and this includes Article 67, 68 and 69[145].

4.9.2 Remedies to the buyer in the event of a breach

Under normal circumstances, any losses or damages suffered by the buyer after he has received the goods are not borne by the seller but rather by the buyer. Legal guidelines always require that the buyer inspects the goods so a

4.9.2.1 Restitution

Though a buyer has the right to claim restitution after the seller has breached the contract, the seller can also substitute the damaged goods with other goods and this occurs when the seller is not capable of offering restitution to the buyer[146]. This however requires that the goods be in a different condition other than what they seller cannot afford to recompense. In such case, it provides strong evidence that the buyer does not always have the right of avoidance. This highlights the problem that is associated with Article 70 is that it is sometimes difficult to have restitution of the goods in the exact former state they were received. This therefore imposes a limit on the buyer's ability to avoid the contractual agreement.

Article 46 and 49 offer a suggestions of possible remedies that can be made in the event that the buyer has failed to return the goods in the former state he received them[147]. These suggestions do not apply when it has been deemed that the buyer is not capable of returning the goods in their previous good state. Moreover, these strategies are limited in application on the condition that the buyer has been found liable for acts of omission. Conditions under which the buyer has the right of avoidance are outlined in Article 82(2) and this posits that substitution of the goods and contract avoidance can be made by the buyer due in acts of omission by the seller[148]. It therefore implies that the buyer can have the right to substitute the received goods and obtain the right of avoidance whilst at the same time seller is considered liable for the risk. Only in the case when it has been established that the buyer has been found to have committed acts of omissions that is when both substitution and avoidance cannot be made.

[145]Ibid, 136.
[146] J. O. Honnold and H. M. Flechtner, Uniform Law for International Sales, 524.
[147] Ibid.
[148] Ibid.

4.9.2.2 Right to substituted goods

Cases where it has been discovered that the seller has to offer remedies to the buyer can be addressed by substituting the goods given to the buyer. The decision by the Court to enforce performance is avoided when domestic law fails to grant a remedy order and such is supported by Article 28 which imposes limits of remedies that can be made to the buyer[149]. Under such circumstances, the risk is still considered to be borne by the seller or it transfers from the buyer to the seller. Article 39 requires that notice be given to the seller by the buyer within a reasonable time frame. The requirements also require that all the legal formalities be followed and decision to enforce substitution of goods is based on the satisfaction of these conditions[150]. But the goods must fail to conform to what is being disclosed in the contractual agreement. Article 46(3) also contends that the damaged goods be repaired by the seller on the condition that incidences of omission have been observed against the seller[151]. However, the applicability of the statutory element lies on the conditional that the goods are not irretrievable and lost but rather got damaged. This implies that in the event that Iraq traders have sold goods to other international traders such as German oil buyers, remedies in the form of substitution can only be made by the Iraq sellers on the conditional that the goods are not lost but are damaged. International buyers on the other hand, have the responsibility to determine the time period over which the seller can offer remedies to the buyer either in the form of repairing and substituting the damaged goods[152]. The extent to which damaged goods can be repaired is also limited. This normally occurs when goods have been damaged beyond a point where they can be repaired. The decision to repair the damaged goods therefore requite that the damaged goods remain in a damaged condition that is feasible to make repairs. This therefore shows that there are two important factors that determine if the buyer is subject to have the bought goods repaired or substituted and these two factors require that the goods not be lost beyond a point irretrievability and repair.

4.9.2.3 Right to claim damages

The need to determine whether international buyers should not be worried about engaging in trading activities with Iraq for the fear of risk is of losing goods or them getting damages is minimum. This is because the CISG has a lot of statutory elements that protect buyers from damages and losses. The notable element of the CISG is Article 74 and this even covers

[149] X, Incoterms 2010, Berlin, ICC Publication no. 715 ED, 17-23.
[150]Ibid.
[151] Ibid.
[152] Ibid, 107.

other Articles including 75 to 77[153]. It must however be noted that the extent to which international buyers are protected in international trade is limited. This is because statutory elements of the CISG such as Article 74 only apply and are restricted to losses and damages made to the goods[154]. Other than that, then the buyer will have to bear all the losses but this has to be fundamentally proven that the seller has breached the contract through acts of omission. However, Article 74 has been discovered to be having shortfalls of being restricted losses and damages and this does not give the buyer huge advantages over the seller in the event that losses and damages have been incurred[155]. Thus, the buyer is forced to seek other statutory elements of the Convention that can safeguard his interests and position in international trade agreements. Such interests and positions are those that will either reduce the risk or will have the entire risk shifted to the seller in the event of incurring losses and damages. But, it is important to note that the buyer has the right to claim damages from an international agreement that has been breached and surrounded with acts of omissions when goods have been lost or damaged. Though this is totally possible, this does not always mean that every right always leads to a successful claim for damages, it has to be proved first that acts of omission have led to the losses or damages incurred by the buyer. The buyer is also required to file for a request for damages from the seller[156].

4.9.2.4 Right of avoidance

In the event of a breach, Article 49 requires the buyer to file for avoidance of the contract[157]. The notable feature with avoidance of contract frees the buyer from paying the price and the buyer can obtain whatever he had paid the seller[158]. This is however conditional, and other provision in the conventions can impose limitations on the ability of the buyer to get full remedies. For instance, if the seller had delivered a certain amount of the goods, then Article 51.1 applies in conformation to the contract. Article 46, 47, 48, 49 and 50 therefore apply to deal with those aspects which do not conform to the contract[159]. But a total avoidance is totally possible when a fundamental breach has been proved to have taken place and this stipulation is made under Article 51. Article 51(2)also contends that the remedies entitled to

[153] Ibid, 109.
[154] Ibid, 144.
[155]William Tetley, Q. C., 'Sale of Goods the passing of title and risk: a resumé Faculty of Law McGill University Montreal, Quebec, Canada 19.
[156] Ibid.
[157] Ibid, 146.
[158] Aashish Kaul, Passing of Property in International Sale Contracts: A Conceptual Analysis, (2003) http://www.ebc-india.com/lawyer/articles/671.htm.
[159]

the buyer can be limited but arguments are placed on the level to which such limitations can be made. The main thing to note is that by allowing the buyer to avoid the contract, chances are very high that the entire risk is now being passed back to the seller. This means that any risk of damage or loss that has been suffered by the buyer after receiving the goods will be borne by the seller. The seller can only be spared from assuming the total risk on the condition that the buyer has conducted an act of omission. In the event that the contract has been terminated, it implies that all the obligations are also terminated. Alternatively, either the buyer or seller is no longer in any obligation. Hence, deductions can be made concerning Article 70 that it is not only concerned with remedial actions but also about who bears the risk. Moreover, the decision on the idea of the party which is supposed to bear the risk must be made based on what is reasonable. This decision must not put the offending party at a disadvantage. The problem with the remedial actions to the buyer has limitations when looking at what may be considered to be reasonable time. It can also be noted that the essence to complete transactions is determined by the need to control international sales costs[160].

Meanwhile, the buyer is also required to offer notice of avoidance on time and this must be done in the form of a declaration. Failure by the buyer to declare avoidance must render the remedial exercise invalid and the seller in this case will not be compelled to indemnify the buyer.The buyer is also required to provide proof to that he has issued a notice of avoidance and once it has been sent the decision to effect avoidance can be made irrespective of whether the declaration was received or not. This can be supported on rulings made from the Germany case which considered that the buyer had fulfilled his obligation after a notice of avoidance was sent to the seller[161]. Furthermore, conclusions were made from this case that the declaration must clearly state the intentions of the buyer to avoid contractual obligations[162]. This therefore shows that there are circumstances which can also affect the buyer's entitlement to avoidance. For instance, if the declaration is not realizable to the seller then the buyer will not be in a position to avoid the contractual obligations. Also, the declared avoidance must also be totally recognizable to the seller otherwise the declaration of avoidance will be considered to be void. The challenge from this case that the Court did not put into consideration the importance of having a formally submitted declaration and it could

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[161] OLG Naumberg (9U 146/98), 27 April, Germany available at http://cisgw3.law.pace.edu/cases/990427g1.html.

[162] Ibid.

not even specify the kind of actions that were available to the buyer's disposal[163]. Another problem was with clarity about the exact circumstances under which the buyer can file for avoidance and such circumstances were not clearly mentioned. Furthermore, the decision made could not specify the exact method the buyer could use to declare his intention to avoid the contractual obligations. Such was considered to be either implicitly by conduct or expressly[164].

In the event that a declaration has been in over a period of time that is not reasonable, the avoidance is not considered to be effective. The Court is in most cases required to determine what may be considered to be the reasonable time over which a notice of avoidance can be issued. The circumstance under which a fundamental breach and the nature of goods involved in ISoG also plays an important role in determining the reasonable time upon which a buyer can declare avoidance[165]. The question is therefore what is a reasonable time and decisions made from a Spanish court outlined that two days is appropriate though the buyer was not awarded the right to avoidance because the notice of avoidance was made five months later time to file for avoidance[166]. As a result, the risk could not be transferred to the seller and the buyer remained liable for the risk. Both Article 29 and 49 do not offer a clear description of a satisfactory period of time and formality of filing for avoidance. Hence, conclusions can be made that circumstances are the ones which determine in most cases what is considered to be a reasonable time for filing for avoidance. Article 82 is applied when an avoidance has been successfully filed for and goods have been dispatched back to the seller.

4.9.2.5 Right to a price reduction

Suppliers of goods in international trade are always tasked with a responsibility of ensuring that the goods that have been received by the buyer conform to what they have agreed on[167]. Thus, any discrepancies will result in the contract being considered to be void or to have been breached by the seller. More so, the transfer of risk to the buyer does not stop him from seeking remedies from the seller when discoveries have been made that the goods are not actually in conformity to what was agreed on[168]. As a result, the buyer can advocate for a

[163] Ibid.
[164]Ibid.
[165]Evelien Visser, 'FavorEmptoris: Does the CISG Favor the Buyer?' (1998) Pace Law School Institute of International Commercial Law. 77-92
[166] Ibid.
[167]X, Incoterms 2010, Berlin, ICC Publication no. 715 ED, 17-23.
[168] Ibid.

reduction in price and this does not matter whether the buyer has fully paid for the goods[169]. The extent to which price reductions can be made is however limited by the idea that the goods have to be different from what was agreed on or must be damaged due to incidences of omission.

When considering a price reduction, there are considerations that are taken into account and one of the considerations is ensuring that the required price reduction is within reasonable limits. Examinations must also be made and value determined of the goods that do not conform to the agreement. This implies that price reductions are restricted to the value of the goods that are not in conformity to the trade agreement. Courts are in most circumstances tasked with such a mandate and are in a strong position to determine this[170]. The other thing to reckon with is the place which the value of the goods will be determined. Propositions to determine the value of the goods which have been received by the buyer after discoveries of non-conformity have been made suggests that the buyer's place of delivery is the best place to do so[171]. A Court decision was made over a Hungarian case over a situation in which goods were damaged and most of them were not in conformity to the trade agreement and a decision had to be made on where to determine the value of the goods[172]. This is because the goods had already being dispatched to the buyer and the buyer had also been notified of the delivery[173]. This therefore implied that the risk had shifted to the buyer and a decision had to be made that the buyer's place of delivery is the right place to determine the value of the goods.

4.10 Conclusion

Conclusions can thus be made that the CISG under Article 66 asserts that the buyer has an obligation to pay for the goods in the event that they get damaged or lost after risk has been passed. However, there exist some exceptions to which the buyer might not be liable and this includes cases whereby acts of omission by the seller. When a contractual breach by the seller has been noticed, Article 36(2) therefore renders the seller as responsible for the loss or damage and protects the buyer against such loss or damage. The use of Article 28 can cause

[169]Ibid, 84.
[170] Ibid, 167.
[171] VB?94131, Arbitration Court of the Chamber of Commerce and Industry of Budapest, December 5, 1995.
[172] Ibid.
[173] Ibid.

the buyer to avert paying for the goods as the law does not compel him to pay. The problem with this law is that it impairs the principle of harmonisation of laws. The use of the CISG is therefore to harmonise laws and help determine the risk bearer, conditions or risk bearing, effects of breaches and proposed acts and procedures that can be followed in the event of risk or loss and damage.

Conclusions can also be made from this chapter that buyers in international trade have statutory elements of the Convention that can offer them protection of their interests and position against risks. Such protection lies in the idea that buyers have the right to claim remedies in the event that the seller has breached the contract and acts of omission. Buyers in international trade are therefore given the rights to restitution, substitute the damaged goods, claim for damages, avoid the contract and ask for a price reduction in the event of a fundamental breach or act of omission. It can also be concluded that statutory instruments of the CISG do offer clarification on the type of remedies that should be awarded to the buyer when goods have been lost or damaged under stipulated conditions.

Conclusions can also be made that the extent to which the buyer can claim for remedies is limited to the degree of damages or losses incurred. In addition, it can also be concluded that in the event that risk had already shifted to the buyer and goods have been discovered to be different from what was agreed on, then the buyer can ask for a price reduction but only to the value of the goods that do not conform to the agreement and such has to be made at the buyer's place of delivery.

Conclusions can be made in reference to the effectiveness of the CISG based on its ability to address risk, damages and losses that occur in international trade. Though the CISG can be considered to have managed to deal with a notable number of problems affecting international trade, its effectiveness is being affected by a wide number of its inherent legal problems. This can be evidenced by its inabilities to state what should be considered to be a reasonable time within which a buyer can file for avoidance and it considers both explicit and implicit actions as part of the declaration process. Little emphasis is paid to the need to have formal declarations as the notable form of declaration. This problem is made worse by the fact that it considers that once the buyer has issued a notice of declaration of avoidance, then the seller will be obligated to meet the remedial action and assume the equivalent amount of risk that is being asked to compensated for without looking at whether such declaration was received or not.

Meanwhile, conclusions can be made that it has in most cases now possible to easily identify who should bear the risk in the event of losses or damages in international trade through the use of the CISG and hence its adoption is highly recommended as favourable and conducive to international trade. Not only does it helps to clarify who bears the risk, but also it instils confidence in both parties that are involved in international trade as assurance can be given that their interests and positions are protected in the event of losses or damages. The CISG also deters future and possible breaches that may take place as actions by Courts to compel offending Parties to meet the consequences and obligations of breaching a contract through remedial actions, shows probable consequences other parties may face in the future if they breach a contractual agreement.

Lessons can however be drawn that contractual agreements are an important element of international trade which must be honoured in order to avoid problems. Hence, by having contractual agreements and Conventions such as the CISG, the extent to which problems will hinder international trade will thus be limited. It is therefore imperatively that the interest of both the buyer and the seller be protected to ensure a smooth flow and growth of international trade. Lessons can also be drawn from this chapter that the CISG seeks to combat international trade problems but this intention also creates its own problems. Such occurs when lack of clarity and misspecifications problems are observed with the Convention. It however remains important to note through this chapter that the CISG thrives to promote just and fairness between sellers and buyers thus creating a sense of harmony between them. The aspect of harmony in international trade also extends to include harmonisation of legal elements (different States' rules and laws)

Lastly, it can therefore be concluded that the CISG does offer a lot of remedies towards protecting international buyers from ill-practices by international sellers. Such is therefore important for the growth and development of international trade. The effectiveness of the CISG is handling risk transfer issues is also determined by the role that is played by Arbitral Courts who are in most cases tasked with responsibilities of determined what is just, fair or reasonable when it comes to restitution, remedies, compensation and time

CHAPTER FIVE

CONCLUSIONS, RECOMMENDATIONS AND SUGGESTIONS

5.1 Conclusions

Based on the discussions made, it can be noted that there are limited definitions on dealing with risks and this limits the effectiveness of both the INCONTERMS and CISG in matters concerning the ISoG. In most cases, Parties to an international agreement are free to include a trade term as part of their agreement and such causes further complexities and uncertainties which can compromise efforts to ensure the prevalence uniform trade laws. Such can be noted to be also based on ideas that have shown that most laws are specifically designed for application in developed economies and hence their application to developing nations might be limited as surrounded with challenges as noted all specialists and lawyers will be fully informed of such developments. Another issue to reckon with surrounding the INCONTERMS and CISG is that the meaning of trade terms is in most cases subject to change since they may lack and ICC is not always readily to keep abreast with changes in commercial customs as have been evidenced that RAFTD (1941) and INCONTERMS (1953)which have different aspects. Such therefore leads to the conclusions that there is no general acceptable meanings surrounding the use of INCONTERMS and the CISG. In addition, the use of trade terms by lawyers is in most cases different from the way they are used by merchants and this also compromises the effectiveness of INCONTERMS and the CISG in handling international trade matters.

Conclusions can however be made that both INCONTERMS and CISG are important statutory guidelines in international trade whose establishment has brought so much improvements in international trade. Conclusions can also be made that both guidelines were formulated in the midst of challenges that were being encountered in addressing international trade problems. The INCONTERMS guidelines can thus be said to have been tailored towards addressing issues relating to the bearing risk in cases were the carriage of goods is delayed, in the event that goods have been damaged or lost in transit, determining which terms should the contract of carriage be concluded on, who pays for the insurance of goods and who is responsible for meeting carriage and other related costs. Conclusions can also be made that the CISG is mainly restricted to addressing issues concerning the interpretation of

international trade terms which was established as being associated with a lot of different perceptions and opinions which created conflicts. The use of various international trade terms lacked a common meaning as their meaning would change at different ports of entry.

The major significant difference between the CISG and INCONTERMS is that the CISG seeks to harmonise and unify international trade rules and regulations while INCONTERMS is aimed at addressing a lot challenges caused by huge differences rules and regulations that govern the obligations and rights of parties to an international sale of goods.

Differences are however in both their historical backgrounds and fields of application. Where parties opt not to use the CISG, they can apply the INCONTERMS as part of their contractual agreement.

When it comes to the idea of risk transfer, it can thus be concluded that risk is considered to have been transferred to the buyer. However, such is influenced by conditions such as places where such goods are to be made available for the buyer's disposal. Hence, risk transfer is assumed to be in effect assuming that goings have been made available at the seller's premises, other places stipulated by the seller or to a carrier and that the buyer has been notified of the availability of the goods.

Article 66 thus will obligate Iraq merchants and other involved traders to perform their contractual obligations. In the event that goods have been damaged or lost after risk has been transferred to the buyer, then Iraq merchants in this case are not obligated to pay the buyer. In addition, if such a case occurs that international buyers are claiming compensation from losses or damages made to the goods, then they must proof to the courts that the Iraq sellers had delivered the goods in a bad state. Moreover, this would also require that the buyers notified the Iraq seller of the existence of defects of the goods. Similar considerations can be made that in the event that Iraq sellers are claiming payment for damages or losses from international buyers, they must provide support to show that the goods were damaged after risk had been transferred and that no defects were caused during transit or by the mode of transport be it linkages in pipelines which can cause for instance oil contamination.

It also important to note that risk transfer between Iraq and other merchants is strongly influenced by the type of terms which have been used in the agreements and such pertain to C-terms, F-terms, E-terms, and D-terms.

The major element which can compromise the principle of harmonisation of laws in the principle of freedom which is disclosed by Article 28 which gives the buyer a freedom not to pay and in such cases courts are not compel to enforce performance from the buyer and if they are to do so then they must do it at their own accord assuming that similar experiences have been made in the past. The other challenges which can affect the passing or risk between Iraq and its merchants is the use of INCONTERMS which do not specify the moment at which risk transfer has been made and such is evident with C-terms.

Despite the existence of such challenges, conclusions can still be made that both the INCONTERMS and CISG are important aspects of international trade and have managed to unify and harmonise international trade rules and regulations. This has positively led to the growth and smooth flow of international trade.

5.2 Recommendations

Recommendations can thus be made that there is need for Parties involved in ISoG to clearly indicate and make reference to either CISG and INCONTERMS terms in their contractual agreement with full disclosure and when some ideas need that implicit or explicit disclosure then such disclosure must be made so as to deal with uncertainties that may occur in the foreseeable future.

Conclusions can also be made that if international trade challenges, conflicts and disputes are to be reduced between Iraq and its merchants, then there is need to identify and account of potential restrictions made by other International Organisations such as the UN which can impose embargoes on trade with certain States. This can cause either a buyer or seller to suffer losses or damages in the event discoveries have been made that trade embargoes had been placed on one of the States.

Based on the problem of lack of clarity about what should be a reasonable time upon which a buyer can file for declaration of avoidance, recommendations can therefore be made that future traders (buyers and sellers) must explicitly state in their agreements as provision about possible time the buyer is required to notify the seller about the need to avoid the contractual obligations in the event that losses and damages have been suffered following acts of omissions by the seller. This must also include the method of notification the buyer should use to notify the seller about intended action of avoidance. This recommendations can be

made as suggestions for improvements and amendments to the CISG that it implicitly state the reasonable time international trade players are required to file for avoidance. Clarity and proper specification of key issues remains an important element that must be improved by both the CISG and INCONTERMS.

There is need to promote a global flow information about changes and developments in CISG and INCONTERMS across the world so as to promote a wide familiarity and applicability in developing economies as well.

Possible measures must be put to ensure and promote standard interpretability of the CISG and INCONTERMS and put guidelines for merchants who may be willing to include another terms in the agreement so as to reduce further complexities and uncertainties.

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