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Master Thesis

Passing of Risk under The United Nations Convention on Contracts for the International Sale of Goods and INCOTERMS 2020

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ABSTRACT

International sale of goods is an area which is inherently drawn to risk. The seller and the buyer, both are in a grey area where there are lots of uncertainties. To deliver the goods from one place to another contains a lot of risks in between, that isn't in control of both sides of the parties: The delivery of the goods in conformity as agreed in their contract, without any loss or damage, and to receive the payment from the seller in return of the delivery, carriage complications, protection over the goods being carried, custom problems, etc. All these instances are delicate situations that can cause obstacles for the performance of the contract and that someone must bear the risk for. Thus, passing of risk regulations are crucial to determine the rights and obligations of the seller and the buyer.

Like all areas of international trade, the area of passing of risk also needs legal certainty and predictability, hence calls for harmonization. The aim of this thesis is to examine passing of risk regulations in two instruments that harmonize international sale of goods: The United Nations Convention on Contracts for the International Sale of Goods (CISG) and recently revised ICC INCOTERMS 2020, and to draw a conclusion on which of these instruments is better at adapting to modern commercial practices and answering the needs of merchants, specifically in the area of passing of risk. By comparing these legal instruments, the reason behind the success of INCOTERMS in regulating passing of risk will be revealed. INCOTERMS standardizes trade terms and gives them a uniform meaning to prevent divergent interpretation. This thesis will show the emerging theories on the legal nature of INCOTERMS. It'll be demonstrated that there are some theories on the autonomous application of INCOTERMS due to prevailing principle of party autonomy in international trade. This will showcase the importance INCOTERMS holds in sale of goods contracts. Subsequently, by applying all the points mentioned above, the question of why merchants are susceptible to choose INCOTERMS rather than CISG to allocate risk will be answered. Finally, considering this success of INCOTERMS, it'll be concluded that specialized harmonization such as INCOTERMS works better than generalized harmonization as in CISG. Because INCOTERMS is fact-based, practice-oriented, and better at adapting to recent trade practices, reducing the risk of doing business in a globalized world.

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ABBREVIATON LIST

CFR	: Cost and Freight
CIF	: Cost, Insurance and Freight
CIP	: Carriage & Insurance Paid
CISG	: The United Nations Conventions on Contracts for the International Sale of Goods
CPT	: Carriage Paid To
DAP	: Delivered at Place
DDP	: Delivered Duty Paid
DPU	: Delivered at Place Unloaded
EXW	: Ex-Works
FAS	: Free Alongside Ship
FCA	: Free Carrier
FOB	: Free on Board
ICC	: International Chamber of Commerce
INCOTERMS	: International Commercial Terms

INTRODUCTION

Sales that are limited to domestic transactions are a thing of the past now. Globalization has caused the erosion of the national borders and encouraged us to make sale contracts that exceeds our national borders. Along with great advantages of globalization, this generated a new need of legal harmonization, since doing business around the world requires a level of legal certainty and predictability. The actors of international trade, merchants, don't wish to be limited by the territorial nature of law, considering its potential to increase transaction costs, and hindering international trade. United Nations Convention on Contracts for the International Sale of Goods and ICC INCOTERMS 2020 are an inherent consequence of this need of uniformity in international trade. While CISG regulates general rules of international sale of goods, INCOTERMS is more practice oriented, as it standardizes trade terms and reflects mercantile custom. This explains the success of INCOTERMS, being incorporated in nearly every international sale of goods contracts[1].

Amidst globalization, a unique problem arises: Who bears the risk if something happens to goods in the process of transportation? With the start of international sales that crosses domestic boarders, the diversity in types of goods that can be transported has changed[2]. From automobiles to foods to bulk shipment of minerals, oil and other natural recourse, various goods can be subjected to international sales[3]. This diversity in goods transported amplified types of damages that can happen[4]. Moreover, mode of transportation has changed. Goods started to be carried in containers for protection during the carriage. Since goods cannot be observed through the containers, it created a legal problem of determining when the damage occurred and a need to have legal rules on passing of risk[5]. The notion of risk itself means loss or damage on goods that is not caused by the parties of the contract[6]. It has this inherent unfairness, due to one party bearing the risk of a lost or damaged good, that was not caused by their actions. This calls for

[1] Juana Coetzee, 'The Interplay Between Incoterms® And The CISG' (2013) 32 Journal of Law and Commerce, 2
[2] Douglas E. Goodfriend, 'After the Damage Is Done: Risk of Loss Under the United Nations Convention on Contracts for the International Sale of Goods' (1984) 22 Colum J Transnat'l L 575, 578
[3] Ibid
[4] ibid
[5] İbid, 579
[6] Juana Coetzee, 'INCOTERMS As a Form of Standardisation in International Sales Law: An Analysis of The Interplay Between Mercantile Custom and Substantive Sales Law with Specific Reference to The Passing of Risk' (University of Stellenbosch 2010), 29

a compromise. This can either be made with an agreement by the parties or by the provisions of international conventions. Parties can agree on who bears the risk in their contracts. The common way of doing this between merchants is incorporating INCOTERMS 2020 that was created by International Chamber of Commerce, a private non-governmental organization. If it's not the case, assuming this falls under the scope of the United Nations Convention on Contracts for the International Sale of Goods, its default rules regulated under Chapter 4 on the passing of risk will be applied.

This thesis will examine the differences between CISG and INCOTERMS 2020 on their legal nature and passing of risk provisions. The main aim behind this comparison is to convey the way the two instruments regulate passing of risk and to show which one is better at adapting to the modern commercial practices and needs of merchants, in the area of passing of risk. Hence, the method implemented on the comparison between the two instruments will be functional, problem-solving method. It'll be argued that INCOTERMS is much adaptable to the needs of international trade, and that there are emerging trends on the legal nature of INCOTERMS to support the autonomous application of it. This outcome will be connected to the party autonomy principle and merchants feeling more bound by the rules they have participated in creating, as INCOTERMS reflects mercantile custom. Consequently, this thesis will defend that specialized harmonization works better than general uniform rules in passing of risk, and that this should be followed by other areas of international trade. Because it'll be concluded that merchants prefer INCOTERMS over CISG. To summarize, because party autonomy prevails in international trade, merchants feel more bound with INCOTERMS, which explains the autonomous application of it, and in the end that's why merchants prefer it over CISG, with other reasons that'll explained below, as they want to shape their contracts according to modern commercial practices and their needs, which consequently shows the success of specialized harmonization, and that this kind of harmonization must be the future of international trade.

Firstly, in Chapter 1, two instruments of harmonization in the field of international sale of goods will be discussed. The success of INCOTERMS will be explained by them addressing the special needs of international trade. Subsequently, the legal nature, and the field of application of these instruments, and their relationship between each other will be studied. With that it’ll be shown that there are new theories around the legal nature of INCOTERMS which foresees autonomous application of INCOTERMS and realizes the importance of it as a legal instrument in international trade. In Chapter 2 the meaning of risk under CISG and INCOTERMS will be discussed, at the same time the theory that is adopted on passing of risk in these instruments will be clarified. Furthermore, Chapter 3 will focus on the provisions on passing of risk under CISG and INCOTERMS 2020, while conveying the differences and similarities between these regulations, simultaneously. After, the consequence of the applicability of INCOTERMS will be explored, and it’ll be studied if the inclusion of it dismisses the application of CISG overall, or if there is a special relationship between the two. Lastly, in Chapter 4, it’ll be declared which one of the two instruments is more favored by merchants in allocating passing of risk. It’ll be concluded from the comparison, that specialized harmonization works better for the needs of merchants in international trade rather than general rules, and that this characteristic of INCOTERMS can be guiding on other areas of harmonization in international trade.

I. The United Nations Convention on Contracts for the International Sale of Goods and INCOTERMS as the Backbones of International Sale of Goods

Before moving on defining the risk and comparing the passing of risk provisions, the instruments that are subject to this discussion must be elaborated. As they are both international instruments that were created to harmonize the international sale of goods[7], and both regulate passing of risk, the relationship between the two must be established.

Legal certainty and predictability are two characteristics that is needed when it comes to international trade. These can be achieved by harmonizing international sale of goods contracts. The works on harmonization can abolish the differences between national laws, and help merchants foresee the applicable rules on their contracts[8]. CISG was established to uniform international sale of goods contracts so that the parties don't have to trouble themselves with the highly costly process of applicable law. This establishes efficiency, reduces transaction costs and facilitates international trade[9]. CISG has uniform rules on formation of the contract, obligations of the parties, remedies for the breach of these obligations and passing of risk.

Trade terms are three letter abbreviations that reflect mercantile custom and convey parties' obligations in sale of goods contracts[10]. They govern subjects as, passing of risk, allocation of costs and delivery of goods[11]. They have been used by merchants to establish efficiency and to accommodate themselves to the rapid needs of trade and commerce[12]. However, the fact that the interpretation of these trade terms varied between different national legislations, lacked this need of legal certainty, speed and efficiency[13]. It caused conflicts and problems in the performance of the contract and eventually in time and money consuming

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[7] Zoi Valioti, 'Passing of Risk in International Sale Contracts: A Comparative Examination of The Rules on Risk Under the United Nations Convention on Contracts for the International Sale of Goods (Vienna 1980) And INCOTERMS 2000' (2004) 2004 Nordic Journal of Commercial Law, 26
[8] H. Ercüment Erdem, *Milletlerarası Ticaret Hukuku Ile Ilgili Makaleler (2007-2016)* (onikilevha 2017), 245
[9] **Coetzee**, **2013,** 1-2
[10] ibid, 3
[11] **Coetzee, 2010,** 174
[12] ibid
[13] Aslıhan Sevinç Kuyucu, 'Uluslarası Ticari Terimler (INCOTERMS)' (İstanbul Üniversitesi 2009), 11-12

litigation[14]. Harmonization on these trade terms was necessary to reduce the risk of doing business internationally. INCOTERMS was the by-product of this legal need and it standardized trade terms. It was established by the International Chamber of Commerce, a private non-governmental organization, to hinder the divergence in interpretation and harmonize the trade terms that was common between the actors of commerce in 1936, with the name of ''INCOTERMS 1936''[15].

There is no denying when it comes to success of CISG, it has been a considerable influence in sales law across the globe[16]. But I'll argue that INCOTERMS has showed specialized harmonization, in the case of international trade, works better than uniform general rules on international sales as in CISG. Harmonization isn't limited to having uniform set of rules to inhibit the divergences in different national laws, it's also needed to reduce legal risks of doing business globally by improving national laws[17]. Some rules that are needed in international law is either non-existent in national law or it's undeveloped, unsuited for international transactions, since international law has certain characteristics that national law doesn't need to govern[18]. Thus, international law has specific needs that can't be met by just unifying national laws. CISG, while a great success, lacks in this area. It handles international sales law in a national perspective. Thus, CISG doesn't meet the needs of merchants, due to its remoteness to commercial practice. ULIS, also criticized CISG on this matter, stating it paid little attention to commercial practices while unifying the national laws[19].

This explains the enormous success of INCOTERMS. It tries to eliminate the risks of doing business internationally by improving on national law and addressing the special needs of modern commercial activity[20]. INCOTERMS governs passing of risk, allocation of costs, issues such as freight, loading charges, export and import duty and taxes, areas that share a

[14] **Valioti**, 6
[15] Jan Ramberg, ''INCOTERMS 1980'', in Horn N & Schmitthoff CM (eds) *The Transnational Law of International Commercial Transactions II* (1982) Kluwer Deventer, 138
[16] Roy Goode, *Transnational Commercial Law (2nd Edition)* (Oxford University Press 2015), 216
[17] Roy Goode, 'Rule, Practice, And Pragmatism In Transnational Commercial Law' (2005) 54 International and Comparative Law Quarterly, 555-556
[18] **Goode, 2005,** 556
[19] **Coetzee, 2010,** 269
[20] Juana Coetzee, CISG and Incoterms: Reviving the traditions of the lex mercatoria, In *Research Handbook on International Commercial Contracts* (2020), Edward Elgar Publishing, 159

complexity that is unique to modern cross-border business[21]. Hence, can't be resolved adequately by uniformed sale rules in CISG. It's more fact-specific and practice-oriented[22]. Unlike CISG, it covers international sales law with a point of view that is unique to international transactions. INCOTERMS originates from mercantile custom, and it was created by experts and practitioners brought together by the ICC[23]. Consequently, it's the by-product of practice, and is up to date.

The international commerce and its needs are ever-changing. Hence, it isn't sufficient to have general rules on international sales. As Goldstaijn states ''*general provisions on the law of contract will no longer be able to meet the needs of individual branches.*''[24]. The harmonization itself also needs to adapt to these changes. So rather than having general rules, problem-specific harmonization is the ideal scenario in international sales, as in INCOTERMS. CISG fails to capture the international trade practice, while INCOTERMS has been revised eight times depending on the needs of merchants and developments in international sales[25].

This advantage of INCOTERMS manifests itself in passing of risk regulations as well. As trade terms are part of mercantile custom, INCOTERMS' passing of risks regulations are also reflected by practice. It addresses the allocation of risk problem in the perspective of merchants[26]. As CISG only uniforms national laws, it misses the commonly used trade terms in international sales and fails to accommodate itself with well-established terms such as CIF, FOB[27]. Hence, CISG isolates itself from the developments in international sales with its national law-based perspective. It doesn't improve the deficiencies in other legal systems but eliminates differences between national laws[28]. An area, passing of risk, that is so essential to the international trade and has a complexity that is inherent to international transactions can't

[21]**Ramberg, INCOTERMS 1980,** 138
[22] **Goode, 2005,** 541
[23] https://iccwbo.org/resources-for-business/incoterms-rules/, (online) accessed at 15.06.2022
[24]Aleksandar Goldstaijn, The New Law Merchant Reconsidered, in: Festschrift Schmitthoff, Frankfurt a.M. 1973, 178
[25] **Coetzee, 2010,** 325
[26] John Honnold, "Uniform Law and Uniform Trade Terms – Two Approaches to a Common Goal" in Horn N & Schmitthoff CM (eds) *The Transnational Law of International Commercial Transactions II* (1982) Kluwer Deventer, 171
[27] Ingeborg Schwenzer and Pascal Hachem, 'The CISG—Successes And Pitfalls' (2009) 57 American Journal of Comparative Law, 476
[28] **Coetzee, 2010,** 281

be regulated with an instrument that merely focuses on uniforming the differences in national laws. The fact that parties select trade terms frequently in commercial practice to determine passing of risk, despite the existence of unified default rules of CISG, is a living proof of this fact[29].

It was suggested by scholars that the efforts towards the harmonization of international commercial law through the adoption of common terminology and rules could prove more fruitful than the adoption of international conventions[30]. The success of INCOTERMS in harmonization conveys the accuracy of this statement. The harmonization must be on a specific problem of international sales that is influenced by the recent developments in that area, drawn up by people who are specialized in that field and answering to the needs of merchants and modern commercial activity.

A. The United Nations Convention on Contracts for the International Sale of Goods

The UN Convention on the International Sales of Goods (CISG) was signed in Vienna with the participation of 62 states and 8 international organizations[31]. It entered into force on 1 January 1988 and was ratified by 63 states, which includes all countries of the European Union, with the mere exception of the United Kingdom[32], Ireland, Malta, and Portugal[33].

i. Legal Nature:

CISG is a uniform substantive law governing international sale of goods contracts[34]. It consists of four parts: Part 1, deals with the sphere of the application, Part 2 regulates general rules and the requirements for formation of the contract, Part 3 contains rules on the obligations

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[29] ibid**,** 27
[30]Alejandro M Garro, ''Rule-Setting By Private Organisations, Standardisation of Contracts and the Harmonisation of International Sales Law'', in Fletcher, Ian F. (eds) *Foundations and Perspective of International Trade Law* (2001), Sweet& Maxwell, 319, n.27
[31] **Valioti**, 4
[32] At that time the United Kingdom was part of the EU
[33] Michael Bridge, *The International Sale of Goods* (4th edn, Oxford University Press 2017), 555
[34] **Bridge**, 555

of the seller and buyer, the remedies the respective parties can recourse to, the subject of our thesis: passing of risk and Part 4 has final provisions. As a uniform substantive law, when the contract is under the scope of CISG, it supersedes both the state's domestic laws and conflict of law rules concerning the sale of goods contracts[35]. It's a convention, thus binding on the contracting states.

ii. Field of Application

For a contract to fall under the scope of CISG, it must comply with its formal scope, material scope and temporal scope. Article 1 of CISG defines the formal scope. First, parties of the contract must have their places of businesses in different contracting states. This is how the internationality of contracts is achieved according to CISG. After conforming with this requirement there is two ways CISG can be applied. The first one is regulated under Article 1(1)(a). It states that, the parties' places of business must be in different contracting states. If this is not met, Article 1(1)(b) gives another option. At the situation in which one of the party's places of business is in the contracting state and the other one's isn't, CISG can only be applicable if the private international law rules lead to the application of a contracting state. To exemplify, if party A's place of business is in the Netherlands and the counterparty B's place of business is in Ireland, and the private international law leads to the application of German law, CISG will be applicable. According to Article 95 of CISG contracting parties can make a reservation to this provision, which means in the so-called scenario, CISG will not be applied[36]. For example, the United States of America is one the contracting states that made a reservation to that provision.

CISG's material scope is international sale of goods. What signifies as a 'good'' under CISG is movable, tangible objects[37]. Furthermore, CISG excludes consumer sales, sales by auction, forced sales, sales of negotiable instruments, ships, aircraft, and electricity in Article 2.

[35] ibid, 556
[36] **Goode, 2015,** 223
[37] Michiel Buyduaert, 'The Passing of Risk in The International Sale of Goods, A Comparison Between the CISG And the Incoterms' (Faculteit Rechtsgeleerdheid Universiteit Gent 2013), p. 5

Article 100 of CISG regulates temporal scope. According to this Article, CISG is applicable ‘‘*only to contracts concluded on or after the date when the Convention enters into force in respect of the Contracting States referred to in subparagraph (1)(a) or the Contracting State referred to in subparagraph (1)(b) of article 1.*’’

Article 6 states that it’s possible to exclude the application of CISG or derogate from its provisions, which conveys that party autonomy is one of the underlying principles of CISG[38]. Its provisions were drafted as default rules, and it gives precedence to party autonomy[39].

B. The ICC INCOTERMS 2020

INCOTERMS is an abbreviation for ‘‘international commercial terms’’ created by International Chamber of Commerce[40]. Since 1936, it has been revised eight times; in 1958, 1967, 1976, 1980, 1990, 2000, 2010, and finally in 2020[41]. The 2020 rules entered into force on January 1, 2020[42].

INCOTERMS regulates the mutual obligations of sellers and buyers regarding costs, risks, documents, and responsibilities arising from the carriage and delivery of goods[43]. For example, the term CIF, obliges the seller to arrange transportation, pay the freight for the carriage contract, arrange, and pay for the insurance[44]. Parties can define these aspects, by only incorporating trade terms to their contracts, which correlates with freedom of contract principle.

ICC is a private non-governmental organization and has no legislative status[45]. Hence, INCOTERMS doesn’t enjoy the status of a statutory instrument. Their application depends on the voluntary acceptance by the parties. But can INCOTERMS, be also autonomously applied

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[38] **Erdem**, 250-251
[39] **Coetzee, 2013,** 5
[40] **Coetzee, 2010**, 180
[41] Yusuf Çalışkan, 'Uluslararası Satımda 2020 INCOTERMS® Kuralları ve Hasarın Geçişi' (2021) 41 Public and Private International Law Bulletin, 234
[42] İbid
[43] Gülçin POLAT, 'Uluslararası Ticarette Risk Yönetimi: Incoterms® 2020 Kuralları Üzerine Bir Değerlendirme' [2021] İktisadi ve İdari Bilimler Fakültesi Dergisi, 210
[44] **Çalışkan,** 233
[45] **Coetzee**, **2010,** 284

to the contract without express or implied reference? To answer this question, the legal nature and field of application of INCOTERMS will be examined.

i. Legal Nature

INCOTERMS' legal nature is highly debated. There are several theories on the legal nature of INCOTERMS. Some accept it as a contractual term, some define it as a privately made law that shares the same authority as CISG, others think it as a custom and lastly, the remaining see it as legal usage.

Legal centralism supports the idea that a rule can only be considered as ''law'' if it's backed up by state power and coerce[46]. This theory doesn't accept privately made laws or non-state legislation as a concept[47]. Only if the state confers the legal authority to make law, the private parties can enact binding rules[48]. The reluctance on accepting privately made rules as law is that it lacks legitimacy, reasoning that the affected actors of these rules are excluded from the lawmaking process[49], that private law making is a closed, club-like lawmaking[50] and that they aren't a product of public democratic process[51]. Regarding this view, INCOTERMS which was established by ICC, a non-governmental organization, can only be qualified as a contractual term.

Contrary to legal centralism some scholars advocate that there are different types of law that can simultaneously exist, that law isn't strictly limited to state backed up law and rules that were formulated by private parties can have the same effect as law[52]. According to this theory, in commercial law, parliaments are not the only ones having the power to create laws, on the

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[46] Gralf-Peter Calliess and Insa Jarass, 'Private Uniform Law &Amp; Global Legal Pluralism: The Case Of ICC's Incoterms And UCP' [2018] SSRN Electronic Journal, 3
[47] ibid, 18
[48] Juana Coetzee, 'Private Regulation, in The Context of International Sales Contracts' (2020) 24 Law, Democracy and Development, 35
[49] Levit, 'Bottom-Up Lawmaking: The Private Origins Of Transnational Law' (2008) 15 Indiana Journal of Global Legal Studies, 60
[50] ibid, 57
[51] David V. Synder, Private Lawmaking, 64 Ohio St. L.J (2003), 415
[52] Andreas Maurer, 'The Creation Of Transnational Law – Participatory Legitimacy Of Privately Created Norms' [2012] SSRN Electronic Journal, 8, Horacio A. Grigera Naon, ''The UN Convention on Contracts for the International Sale of Goods'', in Horn N & Schmitthoff CM (eds) *The Transnational Law of International Commercial Transactions II* (1982) Kluwer Deventer, 90, n.6, **Calliess, Jarass**, 4, **Goldstaijn**, 177

contrary, its actors, merchants, also enjoy this authority[53]. Going even further, they state that, *it is more favorable to leave the legislative activity to the creative and spontaneous impulses of the actors of international trade rather than to coordinated state action introducing homogeneous legal regulation in this field*[54].

The reluctance on privately-made-law because of the lack of democratic process is rebutted, since there is a participative discourse in the creation of INCOTERMS[55]. Privately-made-law can have a procedure similarly to State-law which legitimizes its binding effect. Legitimacy in State-law is due to the democratic decision making, where people are represented in the law formation process[56]. A similar participation element is also available in INCOTERMS. INCOTERMS was formulated by the drafting committee following a consultation process which involves the national committees of the ICC[57]. These committees represent various interest groups and stakeholders connected to international business[58]. So, the affected stakeholders have an opportunity to participate in the process of INCOTERMS' formation. Another reason for reluctance to accept privately-made-rules as law is the view that these rules are voluntary and can't be enforced[59]. Although INCOTERMS is voluntary in the formal legal sense, meaning there isn't a legal sanction in the case non-compliance, there is a practical enforcement which is explained by the game model[60]. According to this, individuals are inclined to coordinate with each other, rather than breaking their promises, because of the long-term relationship they have[61]. Breaking the promise has a severe consequence of losing future economic gains[62]. Considering international trade where merchants constantly do business together reinforces this theory. If merchants don't comply with the rules, then they bear a significant risk of market ostracism[63]. Hence, INCOTERMS can be accepted as a privately-made-law that is binding on the parties.

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[53] **Goldstaijn,** 177
[54] **Naon,** 91
[55] **Maurer,** 9
[56] ibid**,** 10
[57] **Coetzee,** ***Research Handbook on International Commercial Contracts***, 175-176
[58] ibid*,* 176, **Maurer,** 9
[59] **Levit,** 54
[60] İbid, n.17, Bo Yuan, 'A Law And Economics Approach To Norms In Transnational Commercial Transactions: Incorporation And Internalisation' (2016) 9 Erasmus Law Review., 7
[61]**Yuan,** 7
[62] ibid
[63] **Levit,** 54, n.17

Some scholars consider INCOTERMS as customary law[64]. But to define something as custom two elements are essential: First, a legal practice must be observed and second, the relevant actors must consider that practice as a law[65]. Although, INCOTERMS' source was trade terms that reflect the mercantile custom, as they got codified by the ICC, to harmonize these trade terms and unify different meanings that was given by different jurisdictions, they lost their custom qualification[66]. Custom means unwritten rules, but INCOTERMS is codified, positive rules.

Lastly, the others accept INCOTERMS as trade usage under Article 9 of CISG[67]. For this theory, the fact that INCOTERMS is a codification of the trade terms that have been used for years between merchants conveys that the instrument itself can be accepted as a trade usage[68]. Article 9 of CISG covers trade usages. Article 9/1 states that parties of the contract will be bound by usages, that either they expressly or impliedly agreed on. Article 9/1 and Article 8/3 is two different sides of the same coin. According to Article 8/3, the parties' will be interpreted by taking due consideration of *relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages, and any subsequent conduct of the parties.* Hence, reading Articles 8/3 and 9/1 together, if the parties have incorporated INCOTERMS to their previous contracts, this can mean they impliedly agreed on that trade term in light with INCOTERMS even they haven't mentioned it in the current contract. Unlike 9/2, here, a widely acceptance of the practice is not necessary, as long as it's understood from the interpretation of the wills of the parties that they intended to be bound by the practice[69]. Thus, the individual practice is decisive here to determine if the practice is considered as usage, rather than the general practice[70]. But there must be a well-established practice of contractual dealings that involves more than one contract[71].

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[64] **Calliess, Jarass,** 17
[65] ibid
[66] ibid, 18
[67] **Ramberg**, **INCOTERMS 1980,** 151, Michael C. Rowe, ''The Contribution of the ICC to the Development of International Trade Law'', in Horn N & Schmitthoff CM (eds) *The Transnational Law of International Commercial Transactions II* (1982) Kluwer Deventer, 53
[68] **Coetzee**, **2010,** 300
[69] Ferrari Franco, 'Trade Usage and Practices Established Between the Parties Under The CISG' [2003] International Business Law Journal, 572
[70] ibid, 573
[71] ibid

The key part of the Article 9 is its second paragraph. Article 9/2 states that practices *that parties knew or ought to have known and is widely known in international trade, and regularly observed by the parties to contracts of the type involved*, are considered as usages, *unless they agreed otherwise*. Thus, to determine if a practice falls under the Article 9/2 three conditions need to be met: the usage in question must be known or ought to have known by each party, the usage must be widely known to parties to like contracts in international trade and the usage must be regularly observed by such parties to like contracts in international trade[72]. If one of these conditions is not met than it can't be considered as usage under 9/2. Some scholars in Germany also accepted INCOTERMS as trade usage by the means of Article 9/2[73].

The difference between this paragraph and prior one is that here, there is no intention of the parties that can be interpreted as regarding this practice as usage. The fact that this practice is so widely known that it must be assumed that parties know or ought to have known in that particular trade concerned, is what gives legitimacy to accept that practice as usage. On the other hand, a usage doesn't need to be internationally known and observed in full spectrum of international trade for it to find automatic application via Article 9/2[74]. Considering trade terms have been used in the commerce for a long time it's not exorbitant to suggest that INCOTERMS is widely known, and parties know or ought to know it. Although, it must be noted that trade terms such as CIF, FOB are more likely to be accepted as usage under Article 9/2 as their recognition is more ubiquitous and have better chance of meeting the conditions of 9/2[75].

ii. Field of Application

If INCOTERMS accepted as contractual terms; it can only be applied if it's incorporated into the contract[76]. Referring to INCOTERMS 2020 means to specifically include the three-

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[72] William P. Johnson, 'Analysis of Incoterms as Usage Under Article 9 Of The CISG' (2013) 35 University of Pennsylvania Journal of International Law, 405
[73] **Sevinç Kuyucu,** 19, n.50
[74] **Coetzee**, **2010,** 302
[75] ibid, 303
[76] Ingeborg Schwenzer (ed), Schlechtriem & Schwenzer Commentary on the UN Convention on the International Sale of Coods (4th edn, Oxford UP 2016), p. 956, Johan Erauw, 'CISG Articles 66-70: The Risk of Loss And Passing It' (2005) 25 The Journal of Law and Commerce, p. 212, these scholars don't consider INCOTERMS as trade usage.

letter term with INCOTERMS and the version the parties want to apply[77]. For example, if the parties want to apply CIF under INCOTERMS 2020, just writing CIF to the contract isn't sufficient. They must specifically state ‘‘CIF INCOTERMS 2020’’. According to the legal centralism, as the International Chamber of Commerce is a non-governmental private body and has no statutory power that is given to public bodies, the instruments created by International Chamber of Commerce are regular private rules that can only be applied in the case of adoption to contracts. If not, it can only be used as a tool to interpret the parties' will.

Courts and tribunals apply INCOTERMS even when there are trade terms in the contract without any reference to INCOTERMS, with different reasonings. In Germany, courts have interpreted trade terms according to INCOTERMS, even when it wasn't mentioned in the contract, without justifying this by referring to trade usage or custom[78]. The German Federal Court of Justice stated that even when a trade term is used without a reference to INCOTERMS, it'll still be read according to INCOTERMS[79]. Although courts didn't state the fact that INCOTERMS can be considered as a privately-made-law, applying it without giving any other reason leads to the conclusion that courts acknowledge this classification for INCOTERMS. Because they apply INCOTERMS in a manner similar to the application of a statutory law, without vocalizing it in their judgements[80].

The consequence of INCOTERMS considered as trade usage is that it prevails over CISG according to Article 6, even when there is no reference to INCOTERMS in the contract[81]. It's seen in the case law that courts apply INCOTERMS even it isn't incorporated, because they classify it as trade usage. In BP Oil case the parties have incorporated CIF into their contract, without mentioning INCOTERMS. The American Court ruled that *‘‘Even if the usage of Incoterms is not global, the fact that they are well-known in international trade means that they are incorporated through Article 9/2.’’.*[82] Moreover, in China North Chemical Industries v. Beston Chemical case, when China declared that they aren't bound by CISG, the court decided

[77] **Johnson,** 422
[78] **Calliess, Jarass**, 19
[79] İbid, n.80, German Federal Court of Justice, judgement of 07.11.2012-mVIII ZR/12
[80] **ibid**, 21
[81] **Ferrari,** 572, **Ramberg, INCOTERMS 1980,** 151, **Rowe,** 53
[82] *BP Oil International v Empresa Estatal Petroleos de Ecuador* 332 F 3d 333 (5th Cir 2003)

that by merely referencing to CIF, the parties have made INCOTERMS impliedly applicable[83]. They interpreted trade terms according to INCOTERMS. French and German courts also applied INCOTERMS as trade usages[84].

In my view, the autonomous application of INCOTERMS realizes the characteristics of international trade. As INCOTERMS is the standardization of trade terms that have been used for a long time, it draws from the practices and behaviors of merchants, uniforms them to avoid divergent interpretation and in turn governs such practices and behaviors[85]. In other words, the actors of the international trade already feel bound by these trade terms that is regulated under INCOTERMS. Because, in a way, the parties themselves created the legal regime that they'll be bound with in their transactions[86], since INCOTERMS reflects mercantile custom. Thus, the autonomous application is parallel with the practice. Some scholars suggest that autonomous application of INCOTERMS isn't possible since its scope is limited with allocation of costs, passing of risk and seller's delivery obligation[87]. But as it'll be discussed below INCOTERMS doesn't replace CISG in total, so when it's automatically applied the areas that aren't governed by INCOTERMS will be decided according to CISG. This theory acknowledges INCOTERMS' practical importance in international trade.

C. The Interplay Between the CISG and INCOTERMS 2020

When INCOTERMS is incorporated into contracts, it's inherent that it'll take precedence over CISG, considering Article 6 and its adoption of party autonomy principle. But what draws attention is, INCOTERMS' applicability when it's not expressly referred in the contract. As the German courts apply INCOTERMS without its incorporation while leaving trade usage and custom law out of their reasoning, it reinforces the idea of INCOTERMS as a privately-made-law. The application of INCOTERMS as a statutory law by courts convey privately created

83 China N. Chem. Indus. Corp. v. Beston Chem. Corp., No. Civ.A. H-04-0912, 2006 WL 295395 (S.D. Tex. Feb. 7, 2006)
84 **Johnson,** 302
85 **Levit,** 56
86 Norbert Horn, ''Uniformity and Diversity in the Law of International Commercial Contracts'' in Horn N & Schmitthoff CM (eds) *The Transnational Law of International Commercial Transactions II* (1982) Kluwer Deventer, 16
87 **Honnold**, 171, **Coetzee, 2010,** 319, n.170

norms have the same effects of law and therefore are ‘‘functional equivalents’’ of law[88]. Hence, a privately made instrument enjoys the same authority as a Convention that had been ratified by the states. Furthermore, in commerce, merchants widely recognize and apply the commonly used INCOTERMS. Hence, INCOTERMS conforms with the requirements of Article 9/2 of CISG that mentioned above. Especially trade terms such as CIF and FOB, which are older and more established, will qualify as trade usages, as they've been an inseparable part of commerce for so long[89]. Consequently, INCOTERMS is applied without an explicit reference.

Treating INCOTERMS, harmonized rules by a private body, same as a convention, CISG, shows that to define something as law, and give a binding effect, it isn't mandatory for it to be supported by the state power. Moreover, INCOTERMS prevailing over a public source of law, CISG, even without expressed mention in the contract, shows that the typical divergence between soft law and hard law is slowly diminished.

According to some scholars, this reversed hierarchy between soft law and hard law is due to importance given to party autonomy in international trade[90]. Merchants are free from domestic laws and can choose the law that will be applicable to their contract. When there is a dispute, the parties don't even have to recourse to court that has state authority but agree to go to arbitration where they assign their own arbitrators/tribunals and have a control on the whole procedure[91]. Thus, the intention of the parties supersedes in international trade. Merchants must be able shape their transactions according to their needs. This is also shown by the CISG having default rules that can be deviated by the parties of the contract according to Article 6. This conveys that CISG itself prioritizes principles like party autonomy and freedom of contract. The result of party autonomy principle, thus, is dominance of private law making in international trade.

As a conclusion, an instrument, INCOTERMS, created by a non-governmental organization, ICC, supersedes CISG, that is regulated by a public body. This conveys that the

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88 **Calliess, Jarass,** 4
89 **Coetzee, 2010,** 303
90 **Goldstaijn,** 171, **Naon**, 90
91 **Yuan,** 5-6

traditional gap between state law and non-state law is weakening, as well as the divide between private and public law[92]. The legal centralism theory is slowly decaying.

II. The Notion of Risk

In this Chapter, the meaning of risk in sale of goods contracts will be elaborated. There is no definition of risk in neither of the instruments. Hence, the meaning will be induced out of these instruments. After having a sense of what risk is, what it includes and its consequences, the theories on passing of risk that is adopted by the instruments will be clarified.

A. The Meaning of Risk under CISG and INCOTERMS 2020

There are two types of risks: One is non-performance risk, and the other is price risk. Non-performance defines the risk of the seller's obligation to deliver goods in accordance with the contract and the Convention, even after goods were lost or damaged which wasn't caused by his actions[93]. If this risk passes to the buyer, it means that the seller has recovered from his obligation to redeliver the goods and the buyer will bear the risk of lost or damaged goods from that point. This subsequently establishes the second type of risk: Price risk. It means that even though the loss or damage on the goods didn't occur due to actions of the buyer, he will bear the risk of paying the price of them[94]. These two types of risks are a result of the synallagmatic contracts, where the buyer has the obligation to deliver goods accordingly to the contract and seller paying the price in return[95]. Hence, non-performance risk and price risk are like two sides of the same coin. If the non-performance risk passes to the buyer, consequently the buyer will bear the price risk[96]. Article 66 of CISG conveys that the understanding of risk under CISG is indeed ''price risk''. According to this Article, the loss or damage in goods don't discharge the

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[92]**Coetzee, 2020**, 48
[93]Adem Yelmen, 'MİLLETLERARASI MAL SATIMINA İLİŞKİN SÖZLEŞMELER HAKKINDA BİRLEŞMİŞ MİLLETLER ANTLAŞMASINA GÖRE HASARIN İNTİKALİ' (2016) 22 Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi, 2952
[94] İbid, **Erauw**, 208
[95] Mustafa Doğan, 'Milletlerarası Mal Satımına İlişkin Sözleşmeler Hakkında Birleşmiş Milletler Anlaşması Uyarınca Hasarın İntikali' (Ankara Üniversitesi 2016), 19
[96] **Yelmen,** 2952

buyer from the obligation to pay the price after the risk has passed to him, while he cannot ask the performance of the contract from the seller.

There is no definition of risk under CISG but according to the reading of Article 66, risk can be defined as *‘‘The loss or damage in the good that is subject to contract, that was caused neither by the seller nor the buyer*.’’[97]. Thus, there is an accidental characteristic in the notion of risk. Goods must be lost or damaged by the 3rd parties or by the acts of God[98]. This is highlighted by this provision, stating if the loss or damage occurred because of the act or omission of the seller, the risk will revert back to the seller and the buyer will no longer be obliged to pay the price of lost or damaged goods. For example, in the *Jasmine Aldehyde* case, the buyer warned the seller on the sensitivity of goods and instructed him to store the relevant goods in a cool place[99]. But when the delivery was made, it was understood that a large portion of goods had melted and leaked due to heat. Hence, the tribunal found that because the seller had infringed his contractual obligation about the temperature, the risk reverted to the seller, according to Article 66, and buyer had been discharged from the obligation to pay the price. The notion of risk is same in INCOTERMS. In both instruments risk has an accidental characteristic, loss or damage occurred by neither of an act nor the omission of the parties of the contract[100]. Moreover, both view risk as ‘‘price risk’’ rather than ‘‘non-performance risk’’[101].

This leads to a question of, what type of risks fall within the scope of CISG and INCOTERMS. One of them is the physical loss and deterioration. This includes disappearance of goods by means of theft, misplacing goods, their transfer to a wrong address or a person, and mixing up goods with other goods included[102]. Furthermore, the damage associates with deterioration of goods without the entire destruction of them. These might be the cause of an occurrence happened during the carriage of goods, like carrier not being vigilant towards goods, or can be the result of natural processes leading to decline in quality[103]. Moreover, late

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[97] **Yelmen**, 2951, **Valioti**, 8
[98] **Bridge**, 402
[99] China International Economic and Trade Arbitration Commission (CIETAC)-Jasmine aldehyde Case, China 1995
[100] **Coetzee**, **2010**, 188
[101] **ibid**
[102] **Erauw**, 204
[103] ibid

deliveries are also accepted as a risk under CISG and INCOTERMS. There is no consensus on whether the legal risks count as a risk[104]. Legal risks can be defined as State having a control on goods that deprives the ability of the buyer to use goods[105]. The prevailing view is that legal risks are left outside from the notion of risk which is reasoned with the fact that these acts of States are more about punishing the people who possesses them rather than acts against goods themselves[106]. On the other hand, it's up to no discussion that economical risks are not covered by CISG and INCOTERMS[107]. The fluctuation of the value of goods on the market is also not subject to the notion of risk in these instruments.

Article 70 states that if the seller commits a fundamental breach of the contract, Articles 67, 68, and 69 don't deprive the buyer from using its legal remedies given by CISG. Which means although the risk passes to the buyer according to the articles of 67, 68, and 69, the seller's contractual liability stays within himself. If the buyer prefers to use his avoidance of contract and demand delivery of the substitute goods remedies- which can only be used in the case of fundamental breach- the price risk will revert to the seller[108]. Because the buyer then will have to deliver goods back to the seller and as the passing of risk is dependent on delivery of the goods, which will be discussed below, the risk will revert to the seller. This Article doesn't address the situation where the fundamental breach of the seller has caused the loss or damage to goods[109]. In this case, the passing of risk would be irrelevant, and governed by the rules on conformity of goods. Rather, the provision is directed to the situation where there is no causal link between the fundamental breach of contract and the loss or damage to the goods[110]. Loss and damage to goods is still accidental, but there is a separate fundamental breach of the contract. For example, let's assume a contract concluded on the sale of 1.000 phones, without batteries. During the carriage, 600 phones were destroyed by sea water. Here, for the 600 phones the risk passes to buyer, because the damage is accidental. But there is also a fundamental breach of the seller who sent non-conformity goods to the buyer. Subsequently the buyer can use his legal remedies under CISG. If he chooses to demand substitute goods or avoidance of

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[104] **Schlechtriem, Schwenzer**, 950, in view of that counts as a risk
[105] **Erauw,** 205
[106] **Valioti**, 8
[107] **Erauw,** 206, **Schlechtriem, Schwenzer**, 951
[108] **Schlechtriem, Schwenzer,** 999
[109] Ibid, 996
[110] ibid, 996-997

the contract, the risk will revert to the seller. For the other 400 goods, this is not under the scope of risk but governed by the rules on conformity of the goods.

B. Theories on Passing of Risk under CISG and INCOTERMS

There are different stages when a risk can pass to the buyer. To determine this time of passing of the risk is crucial. Because it changes the obligations of the parties of the contract accordingly. If the accidental loss or damage occurs at the time of conclusion of the contract but the risk passes at the time of the delivery of goods, the buyer can ask the performance that is in conformity with the contract and won't have to pay the price of the damaged good. Seller will have to perform the contract again, but this time in conformity with contract. Thus, depending on the time of passing of risk, the obligations of the parties will also differ.

CISG and INCOTERMS have adopted delivery of the goods theory, meaning the risk will pass according to delivery of the goods[111]. In CISG, this is visible through the parallel regulations between the delivery obligation of the seller under Article 31 and passing of risk provisions under Article 67, 68, and 69[112]. CISG differentiates its passing of risk regulations depending on the delivery methods. Articles 67 and 68 regulates deliveries that involves carriage of the goods, while 69 establishes delivery of the goods without carriage. According to Article 31/1(a), if the contract of sale involves carriage of goods, the seller will be freed from his obligation to deliver at the moment of handing over the goods to the first carrier. Mirroring this provision, pursuant to Article 67 of CISG, if the contract of sale involves carriage of the goods, the risk passes to the buyer when the goods are handed over to the first carrier. Moreover, Article 31/1(b) states that if the contract doesn't involve carriage of the goods and the contract relates to goods to be delivered at a particular place, the delivery will be done when goods are ready for the disposal of the buyer. This corresponds to Article 69/2, in which, the risk passes to the buyer when the delivery is due, and the buyer is aware that goods are in his disposal. Lastly, according to Article 31/1(c), if the delivery must be done in seller's premises, then the seller will be dispatched from his delivery obligation by placing goods at his place of business for the disposal of the buyer. This is a parallel regulation with Article 69/1. But they don't

[111] Article 68 of CISG is the only exception as the risk passes once the contract is concluded.
[112] **Doğan**, 144

completely mirror each other. As Article 69/1 determines moment of passing of risk by taking over the goods, while Article 31(c) regulates delivery obligation with disposal of goods.

INCOTERMS also adopts the delivery theory. In INCOTERMS 2020, every term has an A column and B column. The seller's obligations are enumerated under A column, while buyer's obligation is regulated under B column. A2 suggests the obligation of the seller to deliver goods[113]. If the seller delivers goods accordingly to A2, then the risk will pass to buyer[114]. The moment that the seller bears the risk is regulated under A3, while the moment the risk passes to the buyer is stated in B3[115]. Hence, the risk transfers at the moment seller delivers goods in conformity with A2.

This theory is favorable in passing of risk, since the buyer will bear the risk for the goods that he has physical control over[116]. According to my view, it's an optimal moment for passing of risk compared to conclusion of the contract or transfer of ownership. Because in both scenarios, most of the time, seller is the one who has physical control over goods[117]. Hence, buyer would bear the risk for goods that he doesn't have a control over, which will lead to an unfair result[118].

On the other hand, when the contract involves carriage, the risk passes as the seller delivers goods to the first carrier rather than the buyer (CISG, Article 67). Thus, the buyer doesn't have control over the goods once the risk passes to him as they're delivered to the first carrier. This might seem contradictory to the aim of the delivery system. But a compromise must be made when the possession of the good that is neither in the hands of the seller and the buyer. It's stated that this compromise was made at the detriment of the buyer because most of the time goods that are subject to international sale of goods are delivered by a sea carrier, and the carrier then issues a bill of lading which is equivalent to the possession of goods[119]. Although the buyer doesn't have physical control over the goods, he has the bill of lading as his safety net which

[113] Ibid, 247
[114] ibid
[115] ibid, 245
[116] **Valioti**, 9
[117] **Schlechtriem, Schwenzer**, 951-952, **Valioti**, 8-9
[118] **Valioti,** 9
[119] ibid

has the same function of having goods at his disposal[120]. Hence, it justifies the passing of risk when he doesn't enjoy physical control over the goods. Furthermore, the delivery system doesn't coincide with physical control all the time. In 31/1(b) and (c), delivery is achieved once goods were placed at the buyer's disposal. For the term ''handing over the good'', it isn't enough for the seller to place goods at the disposal of the carrier[121]. The carrier must take the custody[122]. In other words, the carrier must have physical control over them. So, terms ''delivery'' and the ''physical control'' don't always correspond to each other.

As a conclusion, although the delivery theory has some insufficiency within itself, it's the most optimal determining point to determine allocation of risk compared to conclusion of contract or transfer of ownership theories.

III. Passing of Risk Regulations under CISG and INCOTERMS 2020

Under this Chapter, the regulations on the moment of passing of risk will be discussed. For this, there'll be a comparison between the related articles in CISG and the corresponding terms under INCOTERMS 2020. Firstly, the articles will be examined, and subsequently the terms that has similarities with that article will be discussed. After that, a comparison between the corresponding terms and the article will be done.

A. Article 67 and F-terms

Article 67 of CISG establishes the time of passing of risk where the sales contract involves the carriage of the goods. According to this Article, when there is a carriage of goods involved, the risk passes to the buyer at the time the seller hands over the goods to the first carrier. This means the physical transfer of possession of the goods to the carrier[123]. After that point, the buyer bears the risk. It's essential at this point to define the ''first carrier''. It's accepted that the ''first carrier'' must be understood as an independent carrier, who isn't taking directions

[120] ibid
[121] **Schlechtriem, Schwenzer**, 973
[122] ibid
[123] **Honnold,** 167

from the seller and not personnel of the seller[124]. But when the parties have agreed on a particular place for handing over the goods, the risk will pass the buyer when the seller transfers the possession of the goods to the carrier at the agreed place. Moreover, as it mentioned above, CISG has adopted the delivery system, this is also apparent from the third sentence of the Article, which states that documents controlling the disposition of goods has no impact on the passing of risk. It conveys that the transfer of risk is different from the transfer of ownership[125]. Finally, the Article mentions in its second paragraph that for passing of risk, goods must be clearly identified to the contract. Even though, this is mentioned only in this Article and Article 67/3, this is a general requirement in CISG[126]. Likewise, this requirement is also vital in INCOTERMS, for passing of risk[127].

The INCOTERMS 2020, is more explicit on the moment the risk transfer to the buyer. Under this heading, FCA, FAS and FOB will be discussed. In all F-terms the seller is obliged to deliver goods to the carrier appointed and paid by the buyer[128].

Firstly, FCA can be used in any mode of transport in multimode transport. According to this term, seller must deliver goods to the carrier either at his premises or another named place. As it was mentioned above, under INCOTERMS, the transfer of risk is dependent on the delivery of the good. According to FCA, if the seller must deliver goods at his premises, the delivery will be completed when goods are loaded on the means of transport[129]. Consequently, the risk will pass when loading is completed[130]. This corresponds the condition in Article 67/1, sentence 1, passing of risk at the moment of handing goods to the first carrier. Whereas if there is an agreed place, according to FCA the seller must place goods to the disposal of the carrier in that place[131]. Thus, the risk passes after that point. This conveys the difference between FCA and Article 67, second sentence. In Article 67, second sentence, when there is an agreed place, CISG requires handing over the goods to the carrier, thus the carrier must have a physical

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[124] ibid, 166, **Schlechtriem, Schwenzer**, 972,
[125] **Schlechtriem, Schwenzer**, 973
[126] İbid, 955
[127] **Buyduert**, 80
[128] Ibid, 78
[129]ibid, 82
[130] ibid
[131] ibid, 79

control over the goods[132]. Hence, it isn't sufficient for the seller to merely place the goods at the disposal of the carrier[133].

Secondly, FAS can only be used in sea and inland waterway transport. The delivery will be accomplished when the seller places goods at the ship's side. Therefore, risk will pass to buyer when the seller places goods alongside the ship. This term is equivalent to Article 67/1, second sentence of CISG. For CISG, the carrier's physical control over goods is necessary. While in FAS, it's enough for the seller to place goods alongside the ship for passing of risk[134].

Lastly, FOB, can only be used in sea and inland waterway transport. Pursuant to this term the seller will deliver goods by placing them on the board of the vessel. Thus, the risk passes to the buyer when the seller places goods on the board of the vessel. This term corresponds to Article 67, second sentence because the delivery is done in the vessel. ‘‘Placing goods on board of the vessel’’, is different from the 67/1, second sentence's wording of ‘‘handing over goods’’. The latter's scope is broader than the formers[135]. For ‘‘handing over’’ it's sufficient to deliver goods to a container yard, and no need to place goods to the vessel[136]. Before INCOTERMS 2010, the term used the ship's rail as a decisive point for passing of risk[137]. The risk had passed to the buyer when goods passed the ship's rail. But goods passing the ship's rail was seen as imprecise criterion, as it was insufficient and impractical, since it's hard to determine that hypothetical point[138].

B. Article 67 and C-terms

In contradiction to F-terms, the seller will conclude and pay for the carriage contract. Under INCOTERMS 2020, there are CFR, CIF, CPT, and CIP. CFR and CIF can only be used in sea and inland waterway transport, while CPT and CIP can be used any mode of transport or multimode of transport.

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132 ibid, 83
133 **Schlechtriem, Schwenzer**, 973
134 **Coetzee, 2013,** 12-13
135 Ibid, 12
136 ibid
137 **Erdem**, 203
138 **Sevinç Kuyucu**, 98, **Erdem**, 203, **Honnold**, 165

Firstly, CPT and CIP cover the same obligations and rights for seller and the buyer. Only difference is that in CIP, the seller has an obligation to pay for the insurance. According to these terms the risk will be passed once the seller hands over the goods to the carrier[139]. Thus, these terms are corresponding to the first sentence of Article 67.

Secondly, CFR and CIF are governing same rules in CPT and CIP, but here the seller concludes its obligation to deliver once he places goods on board of the vessel, similar to FOB[140]. But in FOB, the buyer must pay for carriage charges while in CFR and CIF, paying freight is seller's obligation. CFR and CIF govern the same obligations and rights of the parties, while under CIF the seller also has the obligation to pay for the insurance. The risk passes once goods are placed to the board of the vessel. As in FOB, CFR and CIF also is reciprocal of the second sentence of the Article 67 and has the same issues as FOB relation to CISG.

C. Article 68 and CIF, CFR, FOB

Article 68 regulates goods that sold in transit, meaning goods sold through their carriage. For this, CISG deviated from delivery system and adopts the contractual system. Pursuant to this Article, risk passes upon the conclusion of the contract. The second sentence of the Article states the exception to this general rule: If the circumstances so indicate the risk will pass to the buyer, retroactively, from the moment of the seller handing over goods to the carrier who issued the documents embodying the contract of the carriage. The wording of this exception has been heavily criticized as it's very vague[141]. It's accepted that an insurance coverage between the time period of handing over goods to the carrier and the conclusion of the contract can be counted as the circumstance that Article 68 mentions[142]. Moreover, the documents embodying the contract of carriage, is not the same thing as the documents control the disposition of goods that mentioned in Article 67/1[143]. The purpose of this requirement is to prove the existence of the carriage contract[144]. If more than one carrier issues such documents, the first among them

[139] **Buyduaert**, 84
[140] ibid, 85
[141] **Schlechtriem, Schwenzer**, 981
[142] ibid, 981-982
[143] **Yelmen**, 2959
[144] **Schlechtriem, Schwenzer**, 983

is the relevant carrier[145]. Subsequently the third sentence of the Article suggests that if the seller knew or ought to have known that goods had been lost or damaged at the time of the conclusion of the contract and did not disclose this to buyer, the loss or damage on goods is at the risk of the seller. The main discussion on this part is whether this sentence only applies to the exception stated in the second sentence, or also to the main rule in the first sentence. It's mostly accepted that sentence 3's scope is limited with the second sentence[146]. This means that if the seller is acting in bad faith, the risk will not retroactively pass to the buyer upon handing over goods to the carrier[147].

The FOB, CIF and CFR are mostly associated with the sales in transit[148]. With INCOTERMS 2010, the string sales had been accepted. It means goods being sold multiple times within a transit. This way a seller along the way of the string is not the one who delivers goods, because the parties have agreed on the first seller to deliver goods, but the one who procures goods[149]. Thus, seller undertakes to procure goods, delivered for the destination agreed in the contract of sale[150]. This is the same situation in Article 68. Conversely, the risk passes upon the seller placing goods on the board of the vessel, rather than the conclusion of the contract[151]. So, the risk retroactively passes to the moment of placement of the good to the board of the vessel. Thus, the buyer has to bear the risk even before the contract is concluded[152], which is a more unfair result.

D. Article 69 and EXW

From the literal interpretation of the Article 69, it covers the sale of goods contracts that don't involve carriage. Because it states that Article 69 is only applicable in the cases that Articles 67 and 68 don't cover. It regulates two different scenarios and outcomes. Paragraph 1 regulates the case where the buyer takes over goods at the seller's place. Pursuant to the first

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[145] ibid, 983
[146] Ibid, 984, **Coetzee, 2010**, 255-256
[147] **Doğan**, 196
[148] **Coetzee, 2010,** 256
[149] **Erdem**, 206
[150] **Buyduaert**, 87
[151]ibid, 87
[152] **Valioti,** 28

scenario risk passes to buyer as he takes over goods or, if he fails to do so, when goods are placed at his disposal, and he commits a breach of contract by failing to take delivery. Subsequently, paragraph 2 regulates the case where the seller must deliver goods other than his premises. According to this scenario, the risk passes upon seller placing goods at the disposal of the buyer and when the buyer is aware of this fact. The general understanding of the phrase ‘‘aware’’ is the actual knowledge of the buyer that goods have been placed at his disposal[153]. Furthermore, paragraph 3 suggests that in order to risk passing to the buyer, goods must be identified. As mentioned above, this is a general principle in Convention, even though it's only mentioned in Article 67 and 69.

A similar INCOTERM, that governs the same situation is EXW. It can be used in any mode or multimode transport. EXW also deals with cases that don't involve carriage of goods as in Article 69[154]. The delivery obligation of the seller under this term, consists of placing goods at the disposal of the buyer, either in his premises or to another agreed place[155]. Thus, independent from the place of the delivery, the risk will pass to the buyer upon the seller placing goods at the disposal of the buyer. As in CISG, goods must be identified for the passing of risk[156]. There are several points where EXW differs from CISG. Firstly, according to CISG, if the place of the delivery is seller's place of business, the risk will only pass to the buyer at the moment buyer taking over goods and if not, at the moment when goods were at his disposal, and he commits a breach of contract by failing to take delivery (Article 69/1). Contrarily, in EXW, even in the scenario where the place of delivery is the seller's premises, the risk will pass as soon as the seller places goods at buyer's disposal[157]. Let's assume a case that the seller needs to deliver coffee beans to his buyer. It's stated in the contract that the time of delivery is 17th March in seller's place of business. On 5th of March seller informs the buyer that goods are ready for him to take over. According to EXW, the risk will pass at this moment, on the 5th of March, as it's the time goods are at buyer's disposal. On the other hand, pursuant to Article 69/1 risk will pass to the buyer on 17th March, as the buyer breaches his obligation to take over goods.

153 **Schlechtriem, Schwenzer**, 994
154 **Valioti**, 29
155 **Buyduaert**, 76
156 İbid
157 **Coetzee, 2013,** 13

Furthermore, the other difference is caused by Article 69/2. Even though, the criterion on the passing of risk is the same, seller placing goods to the buyer's disposal, there is a further requirement in CISG, which is ''buyer's knowledge'' on the fact that goods are in his disposal[158]. However, in EXW, even though the seller has the obligation to notify the buyer that goods are placed at his disposal, the risk may pass to the buyer before he has been aware of the fact that goods are in his disposal[159]. Thus, buyer's unawareness on this fact doesn't affect the passing of risk to him in EXW[160].

E. Article 69 and D-terms

There are three types of D-terms: DAP, DPU and DDP. All these terms can be used in any mode or multimode of transport. According to these terms, the seller is required to deliver goods at the point of destination, as in Article 69/2. In DPU, the risk will pass when the seller unloads goods from arriving means of transport. In DAP and DDP, the risk will pass earlier, when goods are placed at the disposal of the at the place of destination[161]. Because, in DPU the seller is discharged from his obligation to deliver goods when he unloads goods from arriving means of transport[162]. However, in DAP and DDP, the seller doesn't have the obligation to unload goods, the delivery is done once the seller places goods at buyer's disposal without unloading goods[163]. The only difference between DAP and DDP is that in DDP, seller is the one who's obliged to clear goods for import and to pay taxes levied on the import of goods.

Thus, similar to Article 69/2, in DAP, DPU, DDP risk passes upon seller placing goods at the disposal of the buyer, either ready to be unloaded (DAP, DDP) or already unloaded (DPU)[164]. But as in EXW, the requirement of buyer being aware that goods are in his disposal regulated in Article 69/2, is not necessary in D-terms[165]. Hence, the risk passes when goods are in his disposal of the buyer, regardless of buyer's awareness on this fact.

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[158] Jan Ramberg, 'TO WHAT EXTENT DO INCOTERMS 2000 VARY ARTICLES 67(2), 68 AND 69?' (2005) 25 The Journal of Law and Commerce, 221-222
[159] **Ramberg,** 222, **Buyduaert**, 78
[160] **Buyduaert**, 78
[161] ibid, 89, **Çalışkan**, 240
[162] **Buyduaert**, 89
[163] **Çalışkan**, 240
[164]**Buyduaert,** 89
[165] **Ramberg,** 221

F. Relationship Between Risk Regulations under CISG and INCOTERMS 2020

According to Article 6 of CISG, the parties may derogate from its provisions or going further can exclude the application of it all together. Thus, CISG's rules function as default rules, and opts for party autonomy. Here, whether the incorporation of a trade term under INCOTERMS excludes the whole applicability of CISG or just constitutes a mere deviation/modification from its provisions on delivery and passing of risk will be discussed.

Although there are some scholars who defend that incorporating INCOTERMS into a contract displaces CISG in total, the prevailing view is that the incorporation of INCOTERMS doesn't cause entire derogation from CISG[166]. In regard with this latter view, the incorporation of INCOTERMS is just a modification or supplementation of the delivery and passing of risk provisions of CISG. Thus, INCOTERMS and CISG works in sync and complements each other[167]. Because INCOTERMS has a limited scope of application. Even though, it regulates obligations of the parties regarding, costs, delivery of goods and passing of risk, it doesn't govern the formation of the contract, legal remedies the parties have, which are under the scope of CISG. Assuming, the inclusion of INCOTERMS excludes the applicability of CISG, it'd be necessary to recourse to domestic law or conflict-of-law-rules, when there is a gap in INCOTERMS[168]. This would cause inefficiency and fail the needs of commerce. Hence, the incorporation of INCOTERMS doesn't exclude the application of CISG altogether, but merely derogates its passing of risk, delivery provisions and supplement it when necessary[169].

The best example to this is the *Jasmine Aldehyde* case, mentioned above[170]. In the case, parties incorporated INCOTERMS, in particular CIF, into their contract. Thus, the problem of passing of risk was a matter of INCOTERMS, rather than CISG, as it excluded the provisions of CISG. Although, in the case the damage occurred to goods, due to act of the seller. INCOTERMS doesn't regulate the consequence of the damage occurred because of the actions

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166 **Coetzee, 2013,** 7
167 İbid, 8
168 ibid, 10
169 ibid, 17
170 *supra*, 99

of the seller. If the incorporation of INCOTERMS excluded the application of CISG all together, the risk would have passed to the buyer. Because, goods were placed on board of the vessel, which is the determining moment of passing of risk under CIF and there is no sanction of damaged caused by the actions of the seller in INCOTERMS. But the tribunal decided that the seller will bear the risk of the damaged goods under Article 66 of CISG, since the damage was caused because of the seller's actions. Hence, the tribunal implemented CISG to supplement the rules of INCOTERMS. As a conclusion, if there is an incorporation of INCOTERMS, the two instruments will co-exist and supplement each other, rather than INCOTERMS excluding the applicability of CISG in total.

IV. The Dilemma for Merchants: Which one to Choose?

Considering both instruments regulate passing of risk, the inevitable question is: Which one merchants prefer in commerce? The comparison above on these instruments as two ways of harmonizing sale of goods, their legal nature and lastly their regulations on allocation of risk are guiding to answer this question.

The comparison between trade terms and articles of CISG shows that INCOTERMS governs different varieties of trade terms for every possible scenario that might happen in international trade. It gives a template to parties, with 11 options to choose from. By merely incorporating a three-letter trade term the parties can agree on the point of passing of risk. This cuts negotiation costs, and it has better time and economic efficiency. Moreover, in a substantive level, the terminology used in trade terms, like delivery in alongside ship in FSA, is more compatible with commercial practice than CISG. Also, CISG's risk rules aren't completely clear due to its vague and ambiguous language[171], such as the sentence in Article 68 ''*If the circumstances do indicate…*''. It's not clear what is meant by *''circumstances''* and its meaning is essential considering the consequence of it, the retroactive passing of risk, before the conclusion of the contract, to the detriment of the buyer. Also, in the same Article, as discussed above, it's not clear if the third sentence of the Article only applies to the exception in the second sentence or if includes the first sentence as well. This confusion is left to scholars

[171] **Coetzee, 2010,** 264

to solve. Additionally, the CISG fails to define some essential notions like ‘‘handing over the good’’ or ‘‘first carrier’’[172]. All these notions were defined by the works of scholars. Article 70 is another vague provision that doesn’t display the intention of the Article, which is risk reverting to seller in the case of avoidance of contract and substitution of goods[173]. Consequently, this can create different interpretation and hamper the efficiency of CISG[174], considering its ambition to harmonize international sales. These kinds of uncertainties aren’t present in INCOTERMS, it defines delivery places clearly as alongside the ship or board of the vessel, etc. leaving no room for confusion. It doesn’t do the confusing differentiation in CISG of seller’s premise or another place as in Article 69[175]. It specifically states the delivery place and subsequently allocates risk. This makes INCOTERMS more appealing. This is also shown in the commercial reality as trade terms still being dominant in the legal position to allocate passing of risk regardless of unified risk rules of CISG[176].

As it was discussed under the legal nature and field of application of INCOTERMS, the case law suggests the autonomous application of INCOTERMS. I argued that this is a result of the importance given to parties’ intentions in international trade. Thus, it was rationalized in this thesis that diminishing difference between soft law and hard law in international trade is due to party autonomy principle. Because merchants feel more bound by the rules of INCOTERMS, as it reflects their own mercantile custom and, in a way, they participated in the creation of these rules. Since INCOTERMS is in line with commercial facts, developed by practitioners who are in practice, it’s more compatible with the uniqueness of passing of risk in international trade. It’s essentially generated by transnational merchants themselves based on their own mercantile practice and can answer to the specific needs of transnational merchants in international trade[177]. It regulates allocation of risk in accordance with the needs of international commerce[178]. Consequently, in passing of risk merchants would be more drawn to choose the determining point of passing of risk according to INCOTERMS.

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[172] İbid, 261
[173] İbid, 264
[174] İbid
[175] İbid, 262
[176]ibid, 269
[177] **Yuan,** 16
[178] **Coetzee, 2010,** 281

As a conclusion, the success of INCOTERMS shows that specialized harmonization works better when it comes to international trade and can be guiding to future attempts of harmonization. Generalized harmonization, isn't sufficient for the dynamic nature of international sales. Although, this doesn't eliminate the importance of CISG. As it was suggested above supplementary nature of CISG is needed, considering specialized harmonization only focuses on one portion of international trade. The general rules of CISG can supplement where specialized harmonization has shortcomings. INCOTERMS and CISG co-exists in harmony. Co-operation between these two instruments strengthens the law regulating international sales, which leads to the benefit of international trade[179].

[179] **Coetzee, 2013,** 21

CONCLUSION

Risk is an indispensable part of international sale of goods, where goods must be delivered from one place to another. The parties are exposed to different kinds of risks in this period, in which they have no control over. Hence, a compromise must be made to determine which party will bear the risk of a damaged or lost good. Does the seller have to make a second delivery, this time in conformity with the contract, or does the buyer have to pay the price even though he must endure to the fact he can't ask for the performance of the contract?

To determine which party must bear the risk, the moment of passing of risk must be assessed. Under this thesis, the assessment was made between The United Nations Convention on Contracts for the International Sale of Goods and recently revised ICC INCOTERMS 2020. Both instruments have harmonized international sale of goods. CISG is a uniform substantive law governing international sale of goods, while INCOTERMS is the standardization of three letter trade terms that have been used by merchants in international trade. The undeniable success of INCOTERMS conveys the efficacy of specialized harmonization in international sale of goods. The area of passing of risk has a complexity that is particular to international transactions. Thus, the harmonization must be done considering the intricate needs of merchants and practice. Although, the success of CISG cannot be argued, general rules on sale of goods that was done by unifying national laws, lacks this uniqueness that the field, passing of risk needs.

The legal nature and field of application of CISG is relatively evident compared to INCOTERMS. According to Article 1 of CISG, it'll be applied either when the parties of the contract have their place of businesses in different states and when the states are contracting states or when the rules of private international law lead to application of a contracting state. Its characteristic as convention shows its binding nature. On the other hand, the same determination is complicated when it comes to INCOTERMS. There are several theories on the legal nature of INCOTERMS that also determines its field of application. Some scholars state that INCOTERMS is a contractual term that can only be applied when they are incorporated to the contracts. The others say that it constitutes custom, trade usage, or a new kind of law, privately made law, where INCOTERMS can be applied autonomously. By this discussion it had been concluded that in international sales law, there is a new view on privately-made-law, the law established by a non-governmental organization that has the same effect as state-enforced law. This affects the long-standing understanding of the hierarchy between soft law and hard law. The party autonomy principle in international trade makes this idea plausible. The case law constitutes evidence for this. The tribunals and courts apply INCOTERMS without it being incorporated into the contract, which shows its characteristic can't be narrowed down to just a contractual term and acknowledges the importance of INCOTERMS in international trade as a phenomenon.

The notion of risk is similar between the two instruments. The risk is understood as an accidental loss or damage happened to goods. Both regulate price risk, meaning buyer's obligation to pay the price although goods were not delivered according to the contract. Furthermore, in both the delivery theory is adopted to determine the moment of passing of risk. CISG's passing of risk provisions in Articles 67, 68 and 69 are in conformity with the delivery obligation of the seller that regulated in Article 31, with minor differences that was discussed above. Similarly, in INCOTERMS, the passing of risk is determined by the delivery obligation of the seller. The seller's obligation to deliver is regulated under A2 column while the time of passing of risk to buyer is shown under column B3. As long as the delivery is performed accordingly to A2, the risk passes to buyer.

The correlation can be made between the two instruments on their passing of risk regulations. Article 67 has similarities with F-terms and C-terms, while Article 68 corresponds to CIF, CFR, and FOB, lastly Article 69 resembles Ex-Works and D-terms. Although these regulations have similarities, they have points where they differentiate from each other.

This brings the question of which one supersedes the other in the moment of contradiction. Evidently, the passing of risk moment will be determined by INCOTERMS. Although this doesn't exclude the applicability of CISG altogether, as the *Jasmine Aldehyde* case has demonstrated. CISG has supplementary characteristic, which fills the gaps that INCOTERMS doesn't regulate. The co-existence of these instruments enhances the international trade.

It's concluded in this thesis that INCOTERMS is preferable by merchants compared to CISG in the area of passing of risk. This is proved by the commercial reality, in which merchants frequently select to regulate the aspect of risk by means of trade terms, despite the existence of unified default rules in CISG[180]. INCOTERMS consists of three letter abbreviations that define the crucial obligations of the parties in international sales. By merely incorporating one of the trade terms, parties allocate the risk. This gives them option and cuts negotiation costs. Also, in substantive level the terminology in INCOTERMS is more compatible with the commercial practice, while CISG's vague wording causes divergence in interpretation, contrary to the aim of harmonization. Moreover, international sales is a field where party autonomy prevails. Even CISG itself highlights this in Article 6. Merchants feel more bound by INCOTERMS rather than CISG, as it's a reflection of mercantile custom and created by their own commercial practice. This also supports the autonomous application of INCOTERMS. Therefore, merchants would prefer choosing the determining point of passing of risk according to INCOTERMS rather than default rules of CISG.

The fact that merchants choose INCOTERMS over CISG shows that in the field of international sales the specialized harmonization works evidently better than general rules and that this must be the future of harmonization. As it's established by the people specialized in that area, and answers the specific demands of that specific field, it's more fact-specific and more practice oriented. CISG, on the other hand fails to adapt to the ever-changing dynamics of international trade. Hence, INCOTERMS is more compatible to adapt the modern commercial practices and answering the needs of merchants. Although this doesn't eliminate the importance of CISG in allocating risk. Its supplementary nature helps fill the gaps of INCOTERMS, rather than recoursing to national laws or conflict-of-law rules, which is more efficient.

[180] **Coetzee, 2010,** 27

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