

### Article 79

#### [Passage of risk when sale involves carriage]

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

(2) Nevertheless, if the goods are not clearly marked with an address or otherwise identified to the contract, the risk does not pass to the buyer until the seller sends the buyer a notice of the consignment which specifies the goods.

#### PRIOR UNIFORM LAW

ULIS, articles 19 (2), 19 (3) and 97 (1).

#### Commentary

1. Article 79 governs the passage of the risk of loss where the contract involves the carriage of the goods and the parties have not, by the use of trade terms or otherwise, provided for a different rule in respect of the risk of loss.<sup>1</sup>

2. The contract of sale involves carriage of the goods if the seller is required to ship the goods or is authorized to ship the goods and in fact does so. It does not involve carriage of the goods if the buyer takes delivery of the goods at the seller's place of business, even though they may need to be shipped by public carrier from that place, or if the buyer makes the arrangements for the goods to be shipped.

3. Contracts of sale which involve the carriage of goods fall into three categories for the purpose of determining the point of time at which the risk passes from the seller to the buyer.

#### First category

4. If the contract of sale provides for carriage of the goods from the seller's place of business, or such other place at which the goods may be located at the time of shipment, but does not require the seller to hand them over to the buyer or to the carrier at any place other than the place at which the carriage begins, "the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer".

5. In many, perhaps in most, of the cases of the first category there will only be one carrier involved. For example, the contract provides

that the seller is to arrange for carriage of the goods by truck from his place of business to that of the buyer. In some cases there will be two or more carriers. For example, the contract provides that the seller is to arrange for carriage by rail to a port at which point the goods are to go by ship. In still other cases the contract may provide that the seller is to arrange for the carriage but it is up to his judgement as to the modes of transport to be used.

#### Second category

6. In many contracts of sale which involve carriage of the goods, the seller is required to hand the goods over to a carrier at a place other than the seller's place of business. For example, an inland seller who contracts to sell on CIF terms is required to hand over the goods to an ocean carrier at a port. By necessity the seller will have to arrange for the goods to be carried to the port. The seller may be able to accomplish this by his own personnel and vehicles, but normally he will use an independent carrier.

7. In cases of the second category where the contract requires the seller to hand the goods over to a carrier at a place other than either the point of original shipment or the final destination of the goods, the risk passes when the goods are handed over to the carrier at that place. Therefore, where the goods are to be handed over to an ocean carrier at a port, risk passes when the goods are handed over to the ocean carrier and not when they are handed over to "the first carrier", i. e. the road or rail carrier, for carriage to the port.

#### Third category

8. Where the contract provides that the seller is to hand the goods over to the buyer at a particular destination, e.g. by use of an Ex Ship terms, a term which calls for delivery at the port of destination named in the contract, the risk of loss does not pass under article 79 but passes under article 81 (1) after the goods have arrived at the named port of destination. The exact time at which risk passes depends upon factors discussed in the commentary to article 81.

#### Retention of documents by the seller

9. It is a normal practice for an unpaid seller to retain the shipping documents as a form of security until such time as payment is made. In some legal systems "title" or "property" in the goods does not pass to the buyer until the documents are handed over to him. This can raise the question as to whether the risk of loss has passed.

10. The third sentence of article 79 (1) makes it clear that the fact that the seller is authorized to retain documents controlling the disposition of the goods, or the fact that he acts in accordance with that authority, does not affect the passage of the risk, even though under the applicable national law it may affect the passage of "title" or "property".<sup>2</sup>

#### Identification of the goods, paragraph (2)

11. It is not infrequent that goods are shipped for the purpose of fulfilling a sales contract but the shipment is such that it would not be possible to tell from the markings on the packages, if any, or from the documents accompanying the shipment or in any other manner that the goods are intended to fill that particular contract. This situation can arise if the seller ships the goods to a party other than the buyer, such as an agent of the seller, who is to arrange for delivery to the buyer. Similarly, goods to fulfil more than one contract may be shipped in bulk. For example, a seller might ship 10,000 tons of wheat to fulfil his obligations to deliver 5,000 tons to each of two separate buyers.

12. In any of these cases in which the goods are not identified to the contract, article 79 (2) provides that the risk does not pass as provided in article 79 (1). Instead, it passes at the moment the seller sends the buyer a notice of the consignment which specifies the goods.

<sup>1</sup> Article 82 affects the application of article 79 if there has been a fundamental breach of contract.

<sup>2</sup> Article 4 (b) provides that this Convention is not concerned with "the effect which the contract may have on the property in the goods sold".