The timing of the passing of risk under the English Sale of Goods Act 1979, the interplay between the principle of party autonomy and the default rule

Should the risk linked to the passing of property or to the situation of the goods?

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Introduction

In a contract of sale, the exact time when the passing of risk takes place is very important to the parties under the contract, because, in most cases, it determines who bears the consequences should there be any loss or damage. Generally, risk can be understood to describe the position of the party who bears the risk when goods are lost or damaged. In other words, when one party within the contract is discharged from having to perform his obligations, the other bears the risk. However, determining which party is bearing the risk, depends on knowing the actual timing of the passing of risk. Apparently, the general principle in English law is that the risk of accidental loss or damage falls on the owner of the goods, in the sense that the risk passes at the same time as the property. However, in special circumstances the SGA provides that risk does not always follow ownership directly, so that some other person besides the owner may have to cover the cost of accidental loss or damage.

Nevertheless, this rule can be modified, and passing of property and passing of risk may be separated by agreement between the parties. That means that passing of risk is a matter of intention. Under s20 (1), the goods remain at the seller's risk until property is transferred to the buyer. This rule applies irrespective of which party has possession of the goods. However, the general rule will not apply where the parties have agreed when risk should pass.[1] Based on this, further complications may arise in circumstances where the parties intend, explicitly or implicitly, to pass the risk before the property,[2] even if the goods remain unascertained, based on s.17 and s 20 (1), as will be discussed later.

1.1 The basic rule- "unless otherwise agreed" or "risk being passed with the property"?

Section 20 (1) of the SGA 1979 states: *Unless otherwise agreed, the goods remain at the seller's risk until the property in them is transferred to the buyer, but when the property in them is transferred to the buyer the goods are at the buyer's risk whether the delivery has been made or not*. As a general rule, the *prima facie* risk of loss transfers with the property. Namely, if the goods are damaged or lost before the property has passed, the seller bears the risk. Following the same rule, the risk falls upon the buyer when the property passes, irrespective of whose actual possession the goods were in at the time.

[1] S. 20 (1) SGA, 1979

[2] S.17 SGA, 1979

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In principle, as explained above, English law links the passing of risk to the passing of property as provided in s20-1. However, the parties may, by agreement, separate the passing of risk from the passing of property and an argument departing from the general rule indicating that one party should bear the risk may be inferred from their transaction or by usage. Although risk can be transferred before or after the property changes hands, the goods must be specified or easily ascertained.[3] In other words, if there is an agreement between the parties which stipulates that one of them is to bear the loss or damage of risk - even if he or she has no possession of the property[4] (for example, in cases where the seller reserves the right of disposal) - the priority must be given to the terms of agreement.[5]

Thus, the questions arise as to whether "unless otherwise agreed" or "risk being passed with the property" is the basic rule; i.e. why English law links the passing of risk to the passing of property, and why English law does not leave the timing in relation to the passing of risk to the parties involved.

In terms of the first question, the wordings of the SGA appear to be sufficiently wide and detailed, in the sense that, where there is an express or implied agreement that means one party is to bear the risk according to the agreement made between the parties, even though he has no property. In other words, the priority undoubtedly must be given to the agreement. Nevertheless, in the absence of an agreed time in relation to the passing of risk, the general rule of s20-1 will be applied and the risk therefore passes with the property. Namely, the risk of accidental loss or damage falls on the owner of the goods. This means the English statutory law adopts the principle of *res perit domino*. The rule of *res perit domino* is, in fact, generally an unbending rule of law, arising from the very nature of property[6]. Thus, it could be understood that English law gives priority to the intention of the parties over any other rule. This makes it more flexible with respect to the passing of risk. In addition, the term "unless otherwise agreed'' is clearly expressed in s20.

Accordingly, the rule of *res perit domino* constitutes a general rule, but the intention of the parties remains the cornerstone regarding the timing in relation to the passing of risk. On the other hand, the lack of agreement between the parties on the timing of the passing of risk can be objectively interpreted as implying that the parties intend to follow s20-1 and to have the risk being passed at the same time as the passing of property- so their silence can be implicitly understood as an implied intention to pass the risk at the time as the passing of property.

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[3] *Benjamin's Sale of Goods*(8th Edition, Sweet & Maxwell, London ,2010),302

[4] *Stock v Inglis* (1884) 12 qbd 564

[5] Atiyah P S ,John N Adamss,Hector Macqueen, *Atiyah's Sale of goods*, (11th edition ,pearson education limited, 2005),324

[6] Ibid, 354.

The issue of the passing of risk, according to the provision of s20-1, appears to be linked to the rules of ss17 and 18 of the SGA.[7] Put simply, when such rules govern the passing of property, so long as the risk follows, the property will be passed intuitively, according to the rules underpinning the passing of property. In analysis, it seems that s20 does not provide any new rule; it apparently refers the issue of timing in relation to the passing of risk to the rules on the passing of property contained in s17 and s18 of the SGA. This interpretation is evident in *Pignataro v Gilroy*,[8] where the defendants sold 140 bags of rice to the plaintiff. The goods were unascertained by description, and the particular bags required to satisfy the contract were not then ascertained; the plaintiff was told that 125 bags would be delivered at Chambers' Wharf, and that the remaining 15 bags would be delivered to the defendants' place of business. The plaintiff sent a cheque to meet the price of the goods, and asked for a delivery order as arranged. On the following day, the defendants wrote to the plaintiff enclosing a delivery order for only 125 bags from Chambers' Wharf, and stating that the 15 bags were ready for delivery. However, the defendants failed to send the 15 bags, which had been stolen some time shortly before that agreed date of delivery. On the issue whether the property of 15 bags of rice became the property of the buyer, the court, relying on "risk being passed with the property", found for the plaintiff upon the grounds that the subject-matter of the sale had involved unascertained goods and there was no evidence of appropriation by either party with the assent of the other, and that, consequently, the property had not passed to the plaintiff at the time of the loss. Hence, the seller bore the risk.

However, Rowlatt J of the Divisional Court focused on the element of assent and stated that, under the above contract, it would be the duty of the sellers to appropriate the goods to the contract; and if such appropriation were assented to, expressly or impliedly by the buyer, the property would have passed. In the current case, the implied assent was considered by Rowlatt J. He pointed out that when the seller received the cheque for the goods and was asked for a delivery order it was right and proper for them to appropriate and place at the disposal of the buyer the goods for which he thus paid in order to effectuate a delivery or its equivalent concurrently with the receipt of the money. They did send a delivery order for the goods at Chambers' Wharf, and as to the 15 bags, told the plaintiff that they were ready, and asked that they should be taken away. It might well be contended that not only as regards the goods covered by the delivery order, but also as regards the goods at the defendants' own premises, which they told the plaintiff were ready to be taken away, there was an appropriation, to which, by asking for the delivery order, the plaintiff had assented in advance. Rowlatt J held that assent can be implied or expressed. The possibility of an implied

[7] Ibid.

[8] *Pignataro v Gilroy, [1919] 1 K.B.* 459

assent was overlooked by the county court. As the assent can be implied, the 15 bags of rice were appropriated and the property passed to the buyer, thus the risk passed to the buyer as well.

It is not clear whether the judge reached his judgment on the grounds that the subject matter involved the sale of unascertained goods, and that, consequently, as the property had not passed to the buyer, nor had the risk. In contrast, applying the same provision, Rowlatt J reached a completely different conclusion and stated that: '*Under the above contract it would be the duty of the sellers to appropriate the goods to the contract; and if such appropriation were assented to, expressly or impliedly, by the buyer, the property would have passed when they received the cheque for the goods and were asked for a delivery order*.' It is noticeable that the subject matter in this case is who will bear the risk of stolen goods. However, the discussion was focused upon the question of whether the property has been passed or not according to the rules of passing of property, without discussing the question of the risk. This explains, without any doubt, that the issue of the passing of risk in s20 is based on and linked to the rules pertaining to the passing of property – that is, the rules detailed in s16, s17 and 18. Thus, while s20 ostensibly governs the process of passing of risk, an in-depth analysis reveals that the rules governing the issue of the passing of risk are the same rules as that governing the issue of the passing of property, as *Pignataro* has demonstrated.

Therefore, when Rowlatt J decided that the goods must be appropriated and assented by the buyer in order to pass the property, the risk is interpreted as being passed consequently. Corresponding with s16 of the SGA which prevents the transfer of property until the goods are ascertained, the risk will be passed simultaneously with property, where the passing of property occurred according to s17 and s18 of the SGA.

Practically, it seems that s20 is no more than just an illustrative article and refers to the rules of passing of property. In other words, it is only a presumptive one, so any statutory reform that links the risk without the property would yield modest improvements in practice.[9] Critically, there is a distinction between the passing of property and the delivery of physical possession of goods. Therefore, the seller may be in possession of goods although the property and risk have passed to the buyer.[10]

It seems that the general rule of s20 is an unfair rule on the buyer because sometimes the buyer could bear the risk of goods and at the same time the seller is still at possession of them. However, one must understand that the general rule stated in s20-1 of the SGA 1979 should not be read alone and is subject to the qualifications contained in sub-s (2) and (3), meaning that sub-sections (2) and (3) are really specific examples of the general principle that the passing of risk is to do with the allocation of the risk of damage

[9] Michael Bridge, *The Sale of Goods* (Second ed Oxford University Press, Oxford UK 2009),157

[10] Paul Dobson & Rob Stokes. *Commercial Law*, (7th edt. Sweet & Maxwell Limited of Avenue Road, 2008)

which is not the fault of either party. It may modify subsection (1) and provide a balance between the parties. The most important example of this is where the risk is on one party, but the other party is in possession of the goods and fails to take good care of them. Accordingly, the party who is in possession of goods must take care of goods even when the property and risk have been passed to the other party. It is worth noting that the determination of risk can be different in the case of delayed delivery from what it would otherwise have been.[11]

Although the general rule *res perit domino* is a *prima facie* rule; there seem certain cases and possibilities where risk may pass at a different time from the property. In other words, where it is expressed by "unless otherwise agreed". It is therefore possible to make provisions in the contract of sale to determine that risk passes at a different time from the property. Undoubtedly, phrase "unless otherwise agreed" points to the party autonomy principle. Accordingly, it could be passed before or after the property has been passed, according to an agreement of the parties, as will be seen. Moreover, in some cases the risk may pass at a different time from the property, even in cases where there is no expressed or implied agreement.[12]

1.2 Exceptions to the Default Rule

In certain cases, exceptions from the general rule, where the risk may pass separately from the property, can be allowed to remain in the absence of any expressed or implied agreement between the parties. The risk however, may pass exceptionally to the general rule; this can be inferred by the authorities (court) from the circumstances of the case. Although English statutory law does not indicate that the risk may pass separately from the property in the absence of any expressed or implied agreement between the parties, it is clear that the principle has been adopted in the common law.

1.2.1 Buyer's immediate right and interest may overwrite the default rule and assent – risk may pass before the passing of property

In common law, the risk may pass before or after the property has passed, according to various cases involving the effects of immediate interest. In the case of *Sterns V. Vickers*,[13] the defendants sold the plaintiffs 120,000 gallons of white spirit, which was part of a larger quantity then lying in a certain tank belonging to a storage company. They and later handed the buyers a delivery warrant, in which the company undertook to deliver that quantity of the spirit according to the buyer's order. Subsequent to the buyer's acceptance of that warrant and before the quantity purchased had been separated from the bulk, the spirit

[11] Professor Michael Furmston, *Principles of Commercial Law* (Second edition edn Cavendish Publishing Limited, London UK 2001),70

[12] Ibid, 69.

[13] *Sterns V. Vickers [1923] 1 K.B.* 78

in the tank deteriorated in quality. It was determined that the property did not pass, on the grounds that the goods were still unascertained goods.

Shearman J decided that the goods were still unascertained goods and so long as the property did not pass to the buyer, then the risk supposed to be borne by the seller. Obviously, the grounds of this judgment in relation to the passing of property accords with the general rule relating to the passing of risk. In fact, according to the general rule in relation to the passing of risk, the questions to be discussed in the present case are whether the property in the undivided portion of the larger bulk had been passed to the buyer and whether there was any agreement between the parties regarding the passing of risk?

It is clear that there was no evidence of any such agreement in this case. The goods remained unascertained and the buyer did not wish to take delivery at that time, but made his own arrangements for further storage with the company, and paid them storage rent. Having left the spirit in storage for some months, he subsequently found that the spirit in the tank had deteriorated in quality. Based on s20 -2 in the SGA, no property had passed to the buyer, hence it could be assumed no risk had passed.

Nevertheless, the judgement of Shearman J. was reversed by the Court of Appeal, which found that the risk had passed to the buyers, and the loss must be borne by them. Such a view was subsequently upheld by the House of Lords. Lord Normand stated that the risk was actually passed to the buyer without the property, due to the fact that the buyers indirectly paid for the storage rent and this meant they had an immediate interest in it. The action of paying for the storage acted as the catalyst to allow the buyers rather than the seller a practical and immediate interest in the goods. Thus, the acceptance of the delivery warranty by the buyer in the present case was regarded as the crucial factor, since it was this that gave the buyer an immediate right and interest to the possession of the goods even though the property had not yet passed.[14] It is clear that the Court of Appeal relied on the acceptance of the delivery warranty by the buyer, stating that as the buyer had accepted the delivery warranty he was bound to take reasonable care of the goods or bear the risk.

However, acceptance of the delivery warrant and possession by the buyer cannot be considered as actual delivery in all circumstances, because it would mean that the property passed to the buyer on the grounds that the goods became ascertained goods by action of delivery; as we have seen, risk would pass as well. However, the court did not address this issue but relied upon acceptance of the delivery warranty as an exceptional circumstance in the passing of risk before the property.

[14] (n 4)

1.2.2 Seller's absolute warranty may overwrite the default rule and assent – risk may pass after the passing of property

From the foregoing analysis, it can be observed that the risk may pass before the property, regardless of whether the goods are specific or unascertained. Indeed, as it is difficult to see how the goods remain at the buyers' risk when he has neither the property nor possession,[15] similarly, it is not easy to imagine circumstances in which the risk remains with the seller after the property has passed to the buyer in the absence of an expressed agreement relating to the passing of risk.[16] S20 states that the risk *prima facie* passes at the same time as the property; consequently, according to the general rule, the buyer would bear the loss of risk which occurred before he disapproved them.[17]

Nevertheless, the common law provided a different opinion, where the risk could pass after the property, which can be seen in *Head v Tattersall.*[18] The contract of sale stated that the horse was warranted to have been hunted with the Bicester hounds, and that if it did not answer to its description the buyer should be at liberty to return it by the evening of a specified date. The horse did not answer to its description, as it had never hunted with the Bicester hounds. It was returned by the date named and the court found that the buyer was induced by the warranty to buy the horse, and that the injury sustained by the horse was not caused through any negligence or default of the buyer's servant. Obviously, the property of the horse has been passed to the buyer, without any express agreement related to the passing of risk. This means that the risk should be passed as well, according to the general rule; however, in this case, the court held that the risk must be borne by the seller.

According to the court, the seller warranted the goods, which gives the buyer the right to return the horse, according to the subsequent condition in the contract. In the contract, there was an express condition in the contract giving the buyer an absolute right, under certain circumstances, to return the horse. Therefore, the buyer was entitled to recover the costs, while the seller must therefore bear the loss.

In this case, the seller's warranty, in the form of an express condition in the contract, gave the buyer an absolute right to return the horse. Because of this absolute right, the court held that the risk did not pass to the buyer until he was satisfied with the fulfilment of the warranty. Accordingly, there is no doubt that the seller had accepted to bear liability for the horse if it did not answer to its description, and that could be understood as an implied agreement between the parties that the seller would be liable to bear all the

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[15] Comptoir d'Achat et de Vente du Boerenbond Belge S/A v. Luis de Ridder Limitada (The Julia), 1949 A.C. 293 (1949)

[16] (n 3)365

[17] Ibid, 307.

[18] *Head v Tattersall. (1871-72) L.R. 7 Ex.* 7

consequences of the contract of sale, including the risk. In other words, the warrant note serves as an implied agreement in risk passing.

The researcher agrees that it was logical for the court to hold that the risk did not pass to the buyer, according to the fact of existing agreement between the parties. In support of that, the Scottish Law Commission reported that the common law provides that such risk passes to the buyer at the date when there is a binding contract for sale (when the buyer is satisfied with the goods) and not when he acquires ownership of the property, which might take place at a future time.[19]

Although both *Vickers* and *Tatterall* reached the same conclusion, namely, that the risk passes at a different time from the property, *Vickers* adopted the principle that acceptance of the delivery warranty by the buyer was evidence of the passing of risk, while *Tattersall* adopted the circumstance of the risk of warranted goods to be revisited, and held that the risk remains with the seller even if the property has passed to the buyer. Indeed, *Vickers* concluded that the risk passed to the buyer before the property, when he accepted the delivery warranty. In other words, the buyer would assume the risk even when the property had not been passed due to the goods being unascertained.

Some problems which arose in this case are closely related to the difficulties arising with respect to the passing of property; namely, the assumption that the sale of goods in this case involved the sale of unidentified parts of an identified bulk. This issue was addressed in the Sale of Goods (Amendment) Act 1995, which allows the property in an unidentified part of an identified bulk to be passed to the buyer who has paid for some or all of goods forming part of an identified bulk. In fact, in the sale of an unidentified part of an identified bulk, it can never be held that the risk passes before the property in the sale of such unascertained goods, otherwise the passing of property and therefore, passing of risk, is still governed by s18 Rule 5 as discussed earlier.[20]

The timing in these cases may also shed light on the discrepancy between the common law rules and s20-1 of the SGA. In the case of *Vickers*, where it was held that the risk (without the property) had passed to the buyer, it was because the buyer rather than the seller was seen to have an immediate and practical interest in the goods; as, for example, when he had an immediate right under the storekeeper's delivery warrant to the delivery of a portion of an undivided bulk in the store, or an immediate right under several contracts with different persons to the whole of a bulk not yet appropriated to the several contracts. The

[19] Scottish Law Commission (Scot Law Corn No 127)

[20] (n 3)354

same conclusion must be drawn by English law, but on a different basis, which is the passing of risk with property, according to s20 and s20A, which may be referred to the fact that the case occurred before the promulgation of that act. However, in *Tattersall* the property passed while the risk remained with the seller, on the grounds that the warranty of goods by the seller was an express condition – thus the same conclusion was drawn in English law but on a different basis, which is that risk can pass according to the implied agreement between the parties, because they have an absolute right to agree and determine the time when the risk will pass.

1.3 Intention of the parties to pass the risk and the legal nature of the rule of *res perit domino* principle under the SGA

It is important to understand the basic rules which govern the process surrounding the passing of risk from the seller to the buyer in a transaction. It seems that the English statutory law adopts the principle of *res perit domino* with regards to the time in which transfer of risk takes place. Consequently, as general rule, the *prima facie* risk of loss transfers with the property. Namely, if the goods are damaged or lost before the property has passed, the seller bears the risk and *vice versa*.

However, the point which should be discussed is relevant to the term of '*unless otherwise agreed'* set out in s20 of the SGA. The concept of 'unless otherwise agreed' actually means that the parties within the contract have an absolute right to agree upon the time in which the passing of risk takes place.

Accordingly, it can be observed that the passing of risk may be governed by more than one rule: according to these criteria, English statutory law appears to be a mixed system, and one which does not strictly follow the *res perit domino* rule. As already pointed out, it appears that the risk could pass with the property at that point when the property passes to the buyer, or at a different time, according to the agreement existing between the parties. With an express or implied agreement otherwise than the basic rule, one party may bear the risk according to the agreement, even though the property is not in their possession. In the absence of such an agreement determining the time in relation to the passing of risk, the rule of s20-2 will be applied and the risk therefore passes with the property. However, the question which arises in this context is whether any of these rules represent the general and basic rule. Put another way, which of them is the principle and which the exception?

The difference is, in fact, clear regarding the basic rule surrounding the passing of risk. It has been noted that the basic rule is that the owner of the property bears the risk, according to s20-2 of the SGA, *res perit* *domino*; the presumption, therefore, is that the risk and property pass together.[21] However, others have relied on the same section but reached a different conclusion, when they said that the basic rule is that the risk passes at the time agreed upon by the parties, where the parties may agree to separate the passing of risk from the passing of property, s20-1 of the SGA 1979.[22]

In more detail, s20-2 of the SGA 1979 connects risk with passing of property.[23] If the sale does not involve carriage of goods, risk may be summarized according to the rules of passing of property, where property passes then the risk will pass at the same time.

Nevertheless, the situation will be different according to part one of s20-1, (*unless otherwise agreed*) where the parties agree to passes the risk at different time. In other words, in a shipment contracts such as in CIF contracts risk may pass on shipment or as from shipment and is commonly separated from property, as property may not pass before appropriation and in many cases appropriation takes place on dispatch of notice of appropriation or on arrival of the ship[24]or may passes on tender of the shipping documents.

Moreover, the rule that risk in transit loss in shipment sales passes on or as from shipment according to intention of the parties, appears to allow the seller to passes the risk in goods which have been lost or damaged before property passes[25]. Similarly, in FOB contracts property is separated from risk. Then the risk will be passed according to intention of the parties, separately from property.[26]

Although both opinions rely upon the same section, they differ with respect to determining the basic rule relating to the passing of risk. The first view relies on the second part of s20, which provides that *goods remain at the seller's risk until the property in them is transferred to the buyer, but when the property in them is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not*. Namely, this view adopts the rule of *res perit domino*, where the risk passes with the property. On the other

[21] Benjamin's *Sale of Goods* (8th Edition edn Sweet & Maxwell, London 2010). P302.See also, Fidelma White & Robert Bradgate, *Commercial Law* (Blackstone Legal Practice Course Guide) (Exford University Press, Exford UK OX2 6DP 2007)P180. Also see Andreas Alsterberg ' Transfer of risk In sale of goods on shipment terms' (2006/2007)(Maritime Law) 18

[22] Prof. Tetley, William, Q.C. Sale of Goods-The Passing of Title and Risk. Faculty of Law

McGill University. See also Dionysios Flambouras, 'Transfer of Risk in the Contract of Sale involving Carriage of Goods: A Comparative Study in English, Greek Law and the United Nations Convention on Contracts for the International Sale of Goods ' ((2001)) VI 87-149. Number 39

[23] *Martineau v Kitching(1872) LR 7 QB 436*, 456

[24] *Benjamin's Sale of Goods*, 5th Edn., Sweet and Maxwell, (1997), 19-082

[25] Debattista, Charles.*The Sale of Goods Carried by Sea*. (Second ed. London : Butterworths. 1998) ,74

[26] Dionysios Flambouras, 'Transfer of Risk in the Contract of Sale involving Carriage of Goods: A Comparative Study in English, Greek Law and the United Nations Convention on Contracts for the International Sale of Goods ' ((2001)) VI 87-149. http://www.law.pace.edu/cisg/biblio

hand, the first part of s20 also states *unless otherwise agreed*, which can then be interpreted as a principle and assumed as basic rule in which the parties can agree when the risk shall pass. They have the absolute right to select the time when the risk passes; and this could occur before or after the time at which the property passes.[27]

Atiyah maintains that, if there is an express agreement that one party is to bear the risk, even though he has no property, the effect must undoubtedly to be given to the agreement, but in the absence of such an express contract the rule res perit domino, generally speaking, is an unbending rule of law arising from the very nature of property. Thus, there is nothing peculiar about separating the transfer of risk from the transfer of property.[28] Actually, the intention of the parties appears clearly where the parties intend to pass the risk of goods at a particular time; thud, the parties can separate the passing of risk and property.

The link between risk and property under English statutory law applies unless the parties agree otherwise. Therefore, the second part of s20 of SGA cannot apply to the sales contracts on shipment terms, where the parties of the contract are contracting autonomously and make special provisions in their contract whereby a risk may pass separately from the property.[29] Certainly, where the parties agree that the risk passes to the buyer on shipment contracts, the priority will be given to the intention of the parties, and the risk will be supposed to have been passed according to their agreement, and then the buyer would bear the risk of any loss or damage which precedes the contract under which he bought the goods.

In other words, where the goods are sold on shipment terms and are lost or damaged after shipment but before property in identifiable goods passes to a particular buyer through ascertainment and appropriation, the rule in shipment sales would appear to put the risk of transit loss or damage onto the buyer, who would need to look elsewhere for his remedy, if any, for such loss or damage.[30]

In practice, this can be seen clearly in the case of *Inglis v. Stock*,[31] where the seller agreed to sell 200 tons of sugar of a certain description to the plaintiff, to be shipped from Hamburg to Bristol on a FOB basis, and also made a similar contract for the sale of sugar to another Bristol merchant. Forwarding agents at Hamburg shipped about 400 tons of sugar of the description contracted for in 3900 bags, and consigned the same to "order Bristol". The plaintiff did not appropriate specific bags of sugar to any particular contract

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[27] Paul Dobson, *Sale of Goods and Consumer Credit* (6th edn Sweet & Maxwell Limited, London UK 2000),45

[28] P.S. Atiyah, John N. Adams; with sections on Scots law by Hector MacQueen, *Atiyah's Sale of goods*, (Harlow: Longman, Twelfth edition 2010),343

[29] (n 26)

[30] Andreas Alsterberg, ' Transfer of risk In sale of goods on shipment terms' (2006/2007)(Maritime Law) ,20

[31] (n 4)

at the time of shipment. Later, the entire consignment was lost during the voyage, before the goods became appropriated, and the buyer shouldered the risk under the terms of FOB.

Reviewing this decision, it is worth noting that, had the contract been for specific goods, no issue would have arisen, because the property would be supposed to have passed, which would mean the risk had passed as well. However, as the goods were unascertained, the property could not have passed by the time the damage occurred. It is clear that the passing of property was postponed because the cargo was part of unascertained goods.

In analysis, the goods remain unascertained, which means that the property did not pass to the buyer. Consequently, according to the *res perit domino* rule of s20 of the SGA, it can be assumed that the risk did not pass to the buyer as either, on the basis that the property and risk should pass at the same time. However, in the present case the court ruled that the risk had been passed to the buyer before the property; it is clear, however, that such a judgment does not comply with the rule of *res perit domino,* where the risk passes with the property. Nevertheless, it does comply with the rule of part one of s20 of SGA which states *unless otherwise agreed*, with the intention of the parties to pass the risk from shipment even if the property has not passed.

In other words, the choice of employing an ordinary FOB contract can be seen as a case of "*unless otherwise agreed*", as the parties make special provisions in their contract whereby a risk may pass on shipment. Thus, regardless of whether the property has passed to the buyer or not, a seller would not be responsible for any damages or losses after delivering the goods over a ship's rail in such a type of shipping contract.

From the previous analysis, it would appear that the court gave effect to the parties' intention where they agreed to pass the risk on shipment according to the FOB terms. The parties' intention supersedes any other rules, such as *res perit domino,* since it could be viewed as the basic rule in relation to the passing of risk under FOB contract. Moreover, according to any agreement between the parties, risk can clearly pass before the property, where the goods are specific or ascertained. Therefore, in principle, goods should be ascertained before risk passes.

However, such a principle may not be necessarily the case. In certain situations, the risk for goods not yet separated from bulk may be passed notwithstanding that the property is still vested in the seller.[32] In this sense, despite an ordinary CIF contract, risk passes on shipment to the buyer when property in them passed,

[32] Benjamin's *Sale of Goods* (6th Edition edn Sweet & Maxwell, London 2002),272,273

or as from shipment. This rule indicates two different methods of passing of risk under the CIF contract. The first one is that, when the seller has completed his contractual duty on CIF terms and delivered the goods on board the vessel, and then risk passes to the buyer on shipment. The second one is that the seller bought the goods which are already afloat; on this ground, he can make the goods subject of the contract with the buyer, in which case the risk passed "as from shipment." In this sense, it can be said that risk passed before the shipment, because of the intention of the parties.[33]

The issue arising in this context is whether the parties agreed that the risk would be passed to the buyer before the property, presuming that the goods are specific goods, or sufficiently identifiable as those to which the risk relates, or, if they were for the sale of unascertained goods, that the goods should become ascertained before the risk passes. However, such a presumption is not necessarily the case, because the risk in goods not yet ascertained or separated from bulk may be passed to the buyer, despite the property in the goods still resting with the seller.[34]

This can be seen in *Sterns v. Vickers*[35]where the goods remained unascertained and the Court of Appeal held that whether the property in the undivided portion of the larger bulk had passed or not upon the acceptance of the delivery warrant, the risk had passed to the buyers, and thus the loss must be borne by them. According to this view, the buyer bears the risk for goods according to the implied agreement between the parties at the point when the buyer accepts the delivery note.[36]

It appears that the relationship between parts one and two of s20 with regard to determining the timing of the passing of risk, is one of the relationship between a basic rule and an exception. Put simply, where the parties agree to pass the risk at a particular time, the precedence of an enforcement will be given for the intention of the parties; the risk will then be passed at an agreed time, regardless of whether the property has been passed or not. In other words, where the parties agree to pass the risk at a particular time, the risk must pass in accordance with the agreement; otherwise the risk will pass with the property, according to part two of s20 of the SGA (*res perit domino)*.This means the intention of the parties with regard to the passing of risk plays a significant role in terms of defining the moment when the passing of risk takes place.

In the application of the principle of "*unless otherwise agreed*", it is possible to say that the intention of the parties "to agree otherwise", where they agree to passes the risk in a different way from that stipulated in

[33] Zorlu Ramazan , The main dfferences between CIF and FOB contractes under English law,6, Available at http://www.akellawfirm.com/yayinlar/THE_MAIN_DIFFERENCES_BETWEEN_CIF_AND_FOB_CONTRACTS_UNDER_ENGLISH_LAW.pdf. See also, Wiebe v Dennis Bros [1913] 29 TLR. 250

[34] (n 3)303

[35] (13)

[36] (n26)

part two of s.20 -1, is the basic rule underpinning the passing of risk, so long as the parties agree to pass the risk separately from the property. On the other hand, in the absence of any expressed or implied agreement between the parties with respect to the passing of risk separately from property, *prima facie* the risk will be passed with the property under *res perit domino*, according to part two of s20-1.[37]

In cases where the parties intend to pass the risk with the property, whether by expressed or implied agreement, the risk is transferred with the property where the property passes according to s17 and s18 of the SGA. In this sense, the passing of risk is linked to the passing of property. Furthermore, the issue of the intention of the parties to pass the property according to s.17 and s.18 may play a multiple role, including issues relating to the passing of property and risk simultaneously.

In other words, where by an express or implied agreement the parties' intention is to pass the property at a particular time, this agreement will govern the issue relating to the passing of risk as well, and the risk will be passed at the agreed time. Thus, it can be seen that the actual time at which the risk passes may be based on the issue of determining whether the passing of property occurs according to s17 or s18. Thus the risk and the property will pass at the same time according to an agreement regarding the passing of property, where the rule of *res perit domino* will be implied, although the passing of risk is not made explicit in such an agreement.

It may be difficult to determine whether the intention of the parties is the basic rule or not. However, from the previous analysis, it seems that the English law offers a system which is governed by the rule that the risk passes when the contracting parties intend for it to pass. If, however, the intention of the parties is being overlooked by the parties, the court will resort to other criteria to supplement the parties' intention with a default rule, such as *res perit domino.*[38] Considering that the principle of precedence is a standard in determining the basic rule (namely, the basic rule is the applicable principle which must be taken into consideration over all other rules) *Stock* clearly demonstrates that the court gave priority in the application to the agreement between the parties over all other rules and placed the risk on the buyer as occurring from the shipment. In other words, the agreement between the parties was the basic principle; however, in the absence of such an agreement, other rules, such as *res perit domino* rule, will be applied.

Giving priority to an agreement between the parties may refer to the principle of the freedom of parties to contract and create the terms of their agreement as they desire (party autonomy principle), in which case the parties have an absolute right to create the terms of the contract according to their intention. Although

[37] Sale of Goods Act 1979

[38] (n 26)

English statutory law does not mention it expressly, it has been indicated that the intention of the parties with regard to the passing of risk takes precedence over the *res perit domino* rule, and might even be adopted within the English law rules.[39]

From the foregoing, it can be concluded that the priority in the performance is always given to the agreement of the parties. In other words, intention between the parties has the priority; which is the basic rule with regards to the passing of risk; and the *res perit domino* rule is the default rule in the absence of parties' intention.

1.4 Passing of risk in relation to specific and unascertained goods

In general, English statutory law distinguishes between specific and unascertained goods with regard to the issue of timing in relation to the passing of property, s16 of the SGA points out that, in a contract for the sale of specific goods, the property passes at the time the contract is made, or when the parties intend it to pass, according to s17 of the SGA. Furthermore, if no time is specified for the passing of the property, s18 provides rules for ascertaining when the goods becomes specific goods and the parties' intention has been ascertained. This means that where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained. From this we can conclude that there is distinction between specific and unascertained goods with regard to timing in the passing of property, and thus the timing in relation to the passing of property will differ depending on whether the goods are specific or unascertained goods.

However, in s 20-1 SGA, which states that *Unless otherwise agreed, the goods remain at the seller's risk until the property in them is transferred to the buyer, but when the property in them is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not,* there is no indication of an issue relating to the passing of risk with regard to whether the goods are specific or unascertained. It would appear that there is no problem regarding part two, where the risk passes at the same time as the property, because timing in relation to the passing of risk would be subject to the passing of property in the case of specific goods; consequently, no property would be transferred to the buyer unless and until the goods were ascertained. For example, in a FOB contract, where the property can be passed even though the goods are

[39] S 20 (1) SGA 1979

still in transit, this means if the goods already ascertained then the risk will be passed at the same time as the property, based on the terms of a FOB contract, where the property and risk are passes from shipment in the case where the goods are ascertained.

1.4.1 Unless otherwise agreed

As with other aspects of these laws, the difficulty lies in the phrase '*unless otherwise agreed'* set out in part one of s20 of SGA. It is clear that where there is an express or implied agreement one party will bear the risk according to the agreement, even though they have no property, and regardless of whether he/she is in possession of goods. Accordingly, when the parties intend to pass the risk at a specific time, the risk may pass separately, that is, before or after the property. Where the parties intend to pass the risk separately, i.e. before or after property, it is clear and logical that the goods must be sufficiently identifiable as those to which the risk relates. It might therefore be assumed that the contract must be one for the sale of specific goods, or if it was one for the sale of unascertained goods, the goods should have become ascertained before the risk could pass.[40]

Nevertheless, despite the existence of an English statutory law, there is no provision highlighting the passing of risk with regard to whether the goods are specific or unascertained; it appears that the goods must be sufficiently identifiable as those to which the risk relates. The identity of the goods to which the risk relates, seems to be an implied standard in the issue of determining the passing of risk, as will be seen. Therefore, in the contract of a sale of specific goods, the risk could be passed from the seller to the buyer separately, before or after property, especially in cases involving the passing of risk after property, as this indicates clearly that the goods are specific goods, because according to s16 of the SGA no property in the goods is transferred to the buyer unless and until the goods are ascertained. It appears that there is no difficulty with passing risk separately in accordance with the intention of the parties involved, whether before or after property, so long as the contract is for the sale of specific goods. The germane question relates to unascertained goods, where the parties intend to pass the risk before the property, by reason of whether the goods are still unascertained or where the seller reserves the right of disposal: do the same rules apply?

[40] Benjamin's *Sale of Goods* (8th Edition edn Sweet & Maxwell, London 2010),303. See also Aedit Abdullah "Issues in the Tranfer of Risk in CIF Contracts." Sing. L. Rev. 14 (1993),151

1.4.2 Passing of risk in unascertained goods

English statutory law adopts the principle of *res perit domino,* where the risk passes at the same time as the property, or when the parties intend and agree to pass the risk at the same time as the property. However, this can occur only in the circumstance of ascertained goods and not in the circumstance of unascertained goods.

In support of that, Benjamin states that the goods must be sufficiently identifiable as those to which the risk relates and points out that the contract must be one for the sale of specific goods[41]. Presumably, if the contract is for the sale of unascertained goods, that means goods should have been ascertained before the risk passes.

Accordingly, it seems to be difficult or even impossible according to part two of s20-1 of the SGA, to comprehend that, where the goods are unascertained, the risk could transfer at the same time in which the property passes. This is because s16 of the SGA prevents the transfer of property from the seller to the buyer unless and until the goods are ascertained; consequently, no risk passes so long as the risk is linked to the property. On the other hand, with regard to the passing of risk after the passing of property, clearly there is no problem, because it is logical that the risk passes after the property when the property has already passed, which means it is inevitably specific goods.

However a further question which is most likely to arise in such circumstances is whether the risk can pass before the property in relation to unascertained goods?

1.5 The possibility of the passing of risk before the passing of property

Without a clear provision, it seems to be the case that an argument may be restricted in relation to the passing of risk before the property, where the goods are unascertained goods. This may occur in circumstances where the parties intend, explicitly or implicitly, to pass the risk before the property, even if the goods remain unascertained, or alternatively, when the seller reserves the right of disposal. Furthermore, in CIF contracts, the position will be different, for it is "otherwise agreed". Property does not usually pass until tender of documents, which usually occurs after the goods have been shipped. The rule is that risk is

[41] Ibid.

to pass on shipment or as from shipment.[42] Accordingly, risk is thus separated from property and could be passed before property being passed regardless the goods are specific or unascertained goods.

In fact, as we have noted, there is no expressed provision in English statutory law which prevents the parties in the contract from agreeing to pass the risk before the property, even if the goods are unascertained. Accordingly, under party autonomy and English law risk may theoretically pass on shipment without identification being necessary.[43] However, we could assume that the *prima facie* and general standard of the English law is the sufficiently identifiable goods which the risk relates, and the contract must then be one for the sale of specific goods. As a result, it is illogical to rely upon such standards, due to the fact that they are impossible to apply, because the goods remain unascertained and are not sufficiently identifiable as those to which the risk relates (unknown goods). Accordingly, the risk could be said not be able to be passed before the property in relation to unascertained goods.

On the face of it, this conclusion appears to be in conflict with *Inglis v Stock*.[44] However, the situation was different in *Inglis v. Stock*, where the goods were unascertained; hence, the property could not have passed by the time the damage occurred; however, the court held that the buyer had responsibility for the risk of the goods from the moment of shipment, under the terms of FOB. It was noteworthy that the courts held that the buyer was at risk even though the goods were unascertained. Actually, if a contract had been for specific goods, no issue would have arisen, but the goods were unascertained and therefore the property could not have passed by the time the damage occurred, according to the standard of sufficiently identifiable goods of which the risk relates and *res perit domino*. Consequently, it would be assumed that the risk did not pass to the buyer as well. Nevertheless, in the current case, the risk passed to the buyer separately, before property, and before the goods became appropriated. The agreement of the parties is the basic rule in the passing of risk under an FOB contract, where they agree to pass the risk from shipment and furthermore, property supposed to be passed at such time, but the paradox in the current case is that the court held that property had not passed by the time the damage occurred. Similarly, this can be seen in the case of *Sterns v. Vickers*[45] where the goods remained unascertained and the Court of Appeal held that the risk had passed to the buyers upon the acceptance of the delivery warrant, even though no property had passed.

In both cases the risk was held to have passed before the property. However, the difficulty in relation to ascertaining which unproportioned goods are at the buyer's risk is highlighted by Dobson. Dobson is of

[42] (n 15) 309

[43] (n 26.)211

[44] (n 4)

[45] (n 13)

the view that, presumably, it would be decided by the proportionality standard (pro rata).[46] This can clearly be seen in the *Sterns* case, where the buyer should bear the risk of 120,000 from 200,000 gallons, which presumably would be on a pro rata basis, where the buyer would bear 120,000/200,000=3/5 of the loss.[47] Indeed, this is possible, as in current cases where the contracts are for the sale of unascertained goods out of a specified bulk. It is possible to identify the bulk, calculate the total loss and ensure the buyer bears a proportion according to his share of the bulk. However, the author is of the opinion that this could not occur where the contract of sale concerns the sale of purely generic goods, because it would be impossible to identify those goods which were at the buyer's risk. It follows that it would therefore be impossible to identify any goods which were pro rata at his risk. As a result, it is impossible for the risk to pass.[48]

This view is supported by the amendment introduced by s20A of Sale of Goods (Amendment) Act 1995 which points out that, property in an undivided share in the bulk is transferred to the buyer, and the buyer becomes an owner in common of the bulk and the goods at the buyer's risk on a pro rata basis.[49] Nevertheless, the pro rata solution has been criticised, especially in large bulk commodity shipments where part of the cargo had deteriorated, as it would be inefficient and result in time consuming litigation. It would work only if the seller has not clearly appropriated or the carrier had not delivered the goods to a particular buyer.[50]

Critical analysis shows that risk in a specified quantity of unascertained goods, according to the Sale of Goods (Amendment) Act 1995, will be passed simultaneously with the property, where the Act allows the property to pass in relation to such goods. However, it has been noted that the risk would pass when the property passes, namely, the act seems link the passing of risk to the passing of property. In fact, the Sale of Goods (Amendment) Act 1995 mentions property instead of risk. There is no indication of the passing of risk separate from property, whether the goods are unascertained or of an unspecified quantity. Nevertheless, the difficulty of passing risk in relation to a specified quantity of unascertained goods seems to be have been solved, in the sense that, where property can be passed, the risk could be passed as well. However, issues can still arise where the parties intend to pass the risk separately, before the property, if the goods are unascertained or relate to a specified quantity of unascertained goods, as will be seen.

[46] (n27)46

[47] Ibid.

[48] Ibid.

[49] *Martineau v. Kitching (1872) L.R. 7 Q.B* 436, 453-454.

[50] (n24)246

1.5.1 Should risk be linked to the passing of property or to the situation of the goods?

According to the discussion in the previous section, the issue of the passing of risk in unascertained goods remains debatable. In other words, although the statute does not mention unspecified goods, the negative interpretation of the provision can mean that the risk cannot pass until they are specified as, neither the SGA 1979, nor the Sale of Goods (Amendment) Act 1995 specifically deal with the passing of risk in relation to unascertained goods. Nevertheless, both are linked to the issue of the passing of risk to the passing of property, in that the property is never to pass until goods are specific goods, in SGA 1979, or a specified quantity of unascertained goods, in the Sale of Goods (Amendment) Act 1995.

Thus the question is whether English statutory law prevents the transfer of risk in relation to unascertained goods, or is restricted merely to the passing of property in cases where the goods are undivided shares in goods forming part of a bulk, according to the conditions set out in s20A. In particular, unlike property, risk can pass before the goods have been ascertained, at any rate, where the goods form part of a larger, but identified, bulk. In most FOB contracts, risk may pass on shipment, regardless of whether property passes at that stage; and this is so even where the goods have been shipped in unsegregated parcels,[51] as Stock clearly demonstrates the influence of parties' choice of FOB contract on the interpretation of the passing of risk.

In fact, this leads us back to the previous argument regarding intention of the parties to pass the risk and the legal nature of the rule of *res perit domino*. With an intertwined relationship between the parties' intention and the general rule on the passing of risk, a difficulty may arise whether the precedence should be given to the intention of the parties.[52] In other words, assuming the parties agree to transfer the risk regardless of the situation of the goods, whether they are ascertained or unascertained, and precedence is given to their intention, the risk will be passed in the case of unascertained goods separately, before the property, according to agreement of the parties as seen in *Inglis v. Stock*[53]. This is contrary to the principle of *res perit domino*, because the English statutory law linked issue of passing of risk to the passing of property, where no property passes in the case of unascertained goods, and not to the situation of the goods.

On the other hand, suppose that English statutory law linked the risk to the situation of the goods, where no risk passes to the buyer until the goods are clearly identified within the contract, then the risk could

[51] John Bassindale, 'The passing of ownership and risk in international commodity contracts' (1993)

[52] See above, Intention of the parties to pass the risk and the legal nature of the rule of *res perit domino*

[53] (n4)

never be passed until the goods are ascertained, nor could risk could be passed before property. This is because linking the risk to the situation of the goods extends to property as well. In other words, no property could be passed until the goods are ascertained, and then no risk could be passed until property is passed. Despite the different perspectives, the results were identical, as discussed in *Stock* and *Vickers*: the risk was deemed to have passed separately and before the property, where the goods remained unascertained or a specified quantity of unascertained goods.

By undertaking a comparative analysis, one may say that the Sale of Goods (Amendment) Act has establishes that the risk can be passed where the goods are a specified quantity and unascertained; however, the risk in such circumstances must be based on the transfer of property, where the Act allows the passing of property over an undivided share in the bulk of goods. According to the Sale of Goods (Amendment) Act, due to the link with property, the risk never passes separately without the property. However, in both of the cases cited the risk is deemed to have been passed to the buyer, without the property; where the property remains with the seller, irrespective of whether the goods are unascertained goods or a specified quantity of unascertained goods. Accordingly, it seems that the passing of property is the heart of the matter, while the transfer of risk is based on the transfer of property, according to English statutory law, in common law it is permitted for the risk to pass separately, before the property, without any condition.

Indeed, it seems that English statutory law implies that no risk is deemed to have passed until the property has passed, and no property passes until the goods are identified in the contract; however, it did not remedy an issue where the risk passed separately and before the property expressly. A difference between English statutory law and common law regarding this issue is noted. It would seem that the common law is broader than English statutory law; where the common law allows for the passing of risk, even if the goods are unascertained, and does not link risk to the passing of property; whereas English statutory law requires the passing of property in order to pass the risk, despite the space left for parties' intention. One may say that the current cases were previous to the promulgation of the law; nevertheless, English statutory law does not rule explicitly on this issue.

The applicable standard is that goods must be sufficiently identifiable as being those to which the risk relate, in the forms of a specified quantity of unascertained goods, and no property, and consequently risk, passes in relation to unascertained goods. It may be the subject of criticism that there is no explicit provision in English statutory law for this issue. It has been argued that, although the SGA has endeavoured to codify the common law on sale of goods, some areas were left out of the statutory framework and are governed by the common law; consequently, contracting parties choosing 'English statutory law' as the governing law of the contract are agreeing to the applicability of both the common law and the SGA.[54] This is reflected in s62-2 of the SGA.[55] On other hand, we cannot overlook the common law as the primary source of English statutory law, where the risk could be passed separately before the property.

In fact, with the absence of any such indication on this issue in English statutory law, the question that arises is whether the standard of common law can be considered as the applicable standard or not? In fact, the answer to this question lies in the provision of s.62 of the SGA, as mentioned, consequently and logically it can be said that the risk may passes separately before the property and it is immaterial whether the goods are ascertained or unascertained goods.

To conclude, it is arguably the case that there are three standards which could cover the issue of the passing of risk in relation to unascertained goods. The first is the sufficiently identifiable goods standard, where the goods must be specific or a specified quantity of unascertained goods. Critically, this view actually links the issue of passing of risk to the issue of the passing of property, so that no risk could be passed until the property passes, and, as result, no risk passes in relation to unascertained goods, even in such cases where the parties have agreed to pass the risk separately before the property.[56] Additionally, the buyer may bear the risk even if he/she is not in physical possession of the goods, where it is deemed that he/she is the owner of said goods.

This opinion seems to reflect approach of the English statutory law, although it does not state it expressly. The second instance is provided by the *Stock* case, which gave freedom for the risk to pass separately before the property and did not link the risk to the property. In fact, such a view relied on the intention of the parties and gives priority to the agreement between the parties over any other rule. Clearly, this view reflects the party autonomy principle. Accordingly, despite the criticism over the imposition of an unfair burden on the buyer when he/she is not the owner of the goods, the buyer may bear responsibility for the risk, even when he/she is not in physical possession of the goods nor holds the property, because according to this view appropriation is regarded as irrelevant, and it argues that risk passes as from shipment in any situation.[57] The third standard involves cases where the parties intend to pass the risk when the buyer accepts

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[54] Lachmi Singh. 'The United Nation Convention on Contracts for the International Sales of Goods 1980 (CISG) An examination of the buyers remedy of avoidance under the CISG: How is the remedy interpreted, exercised and what are the consequences of avoidance? '(PhD University of the West of England, Bristol 2015)

[55] SGA, s 62(2) states: 'The rules of the common law, including the law merchant, except in so far as they are inconsistent with the provisions of this Act, and in particular the rules relating to the law of principal and agent and the effect of fraud, misrepresentation, duress or coercion, mistake, or other invalidating cause, apply to contracts for the sale of goods'.

[56] Aedit Abdullah,. "Issues in the Tranfer of Risk in CIF Contracts." Sing. L. Rev. 14 (1993). 160 to 169

[57] *Margarine Union GmbH v. Cambay Prince Steamship Co. Ltd.*, 1969 Q.B.1 219 (1969)

the delivery note. This view, highlighted in the *Vickers* case, where the court held that the risk had passed to the buyer, relied on the implied agreement between the parties, and the delivery warrant, where the buyer accepted the delivery note although the property remained with the seller. Indeed, the researcher is of the view that this might be more logical than the others because the court relied on physical possession, which is supported by the buyer's acceptance of the delivery warrant of goods; thus the buyer becomes the possessor of those goods, and hence becomes responsible for the care of those goods.

1.6 Fault Basis - Exceptions in relation to passing of risk under English law

As we have seen, it is generally the case that the risk passes simultaneously with the property. However, it may also pass at a different time, according to the intention of the parties, whether before, after, or even at the same time as the property passes – in the case of the latter, the parties intend to apply the principle of *res perit domino*. In fact, as pointed out in the previous sections, risk may pass otherwise, whether according to the terms of the contract or the situation of the goods. Obviously, the risk will be passed regardless of the principle of *res perit domino*, according to the terms of the contract, including the expressed or implied intention of the parties. This includes the cases where there is delay in delivery, delivery to the carrier, or where the seller of goods agrees to deliver them at his own risk, or according to the situation of the goods, such as in the case of conformity of the goods to the contract. Under these circumstances, instead of following the principle of *res perit domino* or parties' intention, the passing of risk will be operated on a "fault basis" as examined below.

1.6.1 Delay in delivery:

The first of these particular rules is contained in s20-2, which reads: *where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party at fault as regards any loss which might not have occurred but for such fault.* The scope of application of this sub-section concerns delivery terms, including shipment terms, such as FOB and CIF contracts, where the seller is bound to deliver the goods whether at the port of shipment or at any place according to the terms of the contract.[58] Further, the provision of s20-2 is not restricted to shipment contracts, but is extended to conclude any contract of sale of goods regardless of the place of delivery, so long as

[58] However, s20-2 does not apply where the buyer deals as a consumer. See Benjamin's *Sale of Goods* (8th Edition edn Sweet & Maxwell, London 2010),316

the contract is a contract of sale. The interpretation of s20-2 should be read in conjunction with s102 of the SGA, which states, *whether any other stipulation as to time is or is not of the essence of the contract depends on the terms of the contract*. Namely, the determination of the time of delivery is subject to the parties' absolute right to agree on this matter. Accordingly, s20-2 applies only in the case of agreement between the parties on the timeline for the delivery of the goods.

However, an issue may arise in the cases where the parties fail to agree on the timing of the delivery. Delay of delivery at fixed time, in fact can be caused by faults attributed to either parties or the seller alone.[59] In the case of delay, the party with delay of delivery must bear the risk, even though the other party would be expected to assume the risk in the normal situation.[60] For instance, under a typical FOB sales contract, the buyer must procure space on board a vessel. If the buyer fails to do so within a reasonable or agreed time, the buyer must bear the risk of any deterioration of goods on the wharf.[61] Thus, a simple failure to perform by a specified date, although a breach of contract, does not entitle the other party to treat the contract as repudiated. However, a failure to perform an obligation within a reasonable or agreed time, depending on the interpretation of the contract, may amount to repudiation of the obligations for the other party.[62]

In the same context, s29-3 of the SGA states that '*Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time'*. Accordingly, if the contract is silent as to the time of delivery, the seller is bound to deliver the goods within a reasonable time.[63] A "reasonable time" is defined in s59 of the SGA as any time which is not manifestly unreasonable under the circumstances and this time may be affected by the usage of trade, consequently, a failure to perform within a reasonable time may, depending on the interpretation of the contract or the trade usage, amount to repudiation.[64]

They will not fulfill their contractual obligations

[59] Michael G. Bridge, *The Sale of Goods* (Oxford University Press, Oxford UK 1998) ,126

[60] Prof. Tetley, William, Q.C. Sale of Goods-The Passing of Title and Risk. Faculty of Law McGill University, 33,34

[61] *Lusograin v. Bunge, 1986 Lloyd's Rep*. 2 654 (1986)

[62] *Astra Trust Ltd v. Adams and Williams, 1969 Lloyd's Rep.* 17, 28. (1969)

[63] S.59 SGA 1979

[64] (n 62)

Delay and the breach of the contract

As discussed above, if the seller fails to deliver the goods within an agreed period or within a reasonable timeframe, the risk is placed on his part. However, it is noteworthy that the application of s20-2 may affect the nature of the contract where the risk passes on, or from shipment - such as in CIF and FOB contracts - where the parties intend to pass the risk before the goods are delivered. In this regard, Debattista maintains that the assumption that this sits ill with the nature of those contracts is unwarranted, as delay in discharge caused by the seller would very likely involve a breach of his obligation to procure a contract of carriage. Consequently, the risk of post-shipment loss caused by delay is attributable to and lies with the seller, because he is deemed to be in breach of his contractual obligations, rather than because of the application of s20-2.[65] In this regard, Debattista further argues that his view can be supported by s27 of the SGA, which states that it is the seller's duty to deliver the goods and the buyer's duty to accept and pay for them, in accordance with the terms of the contract of sale, in the sense that the delivery of goods by the seller and acceptance of them by the buyer within the agreed period time or reasonable time is an essential duty.

That can be seen in *Bowes & Co v Shand & Co*[66] where the seller was imposed with risk in his failure to deliver shipments according to the agreed time. In this case, the court held the view that contracts must be interpreted strictly, so as to render shipments made in in February, earlier than March, as agreed in the contract, a breach of the contract of sale, which entitled the plaintiffs to reject the rice. This gave the buyer the right to claim damages from the respondents in respect of any damage they had suffered.

In summary, when the seller or the buyer failed to ship the goods within the agreed period of time, he was in breach of contract, moreover, according to s20-2 he should assume the risk. Since a party is obliged to deliver the goods within a reasonable time, the party in breach bears the risk regardless, whether the breach lies in a delivery by shipment or by a separate route, an obligation to deliver the goods, to hand over any documents relating to them, and transfer the property or an obligation to take delivery within an agreed period of time, or within a reasonable time.[67] Such a view has attributed the legal nature of the delay to delivery of the goods. Nonetheless, the next question which needs to be addressed is the consequences of the lack of expressed wordings of the 'fault bases in s20-2 of the SGA.

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[65] Charles Debattista, *'Sale of goods carried by* sea' (1ST edition edn Butterworth & Co Ltd, London 1990),93. See also Andreas Alsterberg, ' Transfer of risk In sale of goods on shipment terms' (2006/2007)(Maritime Law) ,23

[66] *Bowes & Co v Shand & Co [1874-80] All ER Rep* 174

[67] S27 SGA1979

1.6.2 Fault of one of the parties

It has been argued that the risk of shipment loss or damage caused by delay is attributable to the fault of either the seller or the buyer, but only "as regards any loss which might not have occurred but for such fault".[68] For instance, under a classic FOB contract, the buyer must procure space on board a vessel, where the buyer fails to do so within a reasonable time, and the buyer at fault must bear the risk even though the seller would normally have had to bear the risk until the actual shipment. Although this risk is imposed on the buyer, the title remains with the seller.[69] The determination of fault leading to risk allocation can be seen clearly in the case of *Demby Hamilton & Co Ltd v Barden*,[70] where the buyer delayed in collecting the goods at the time agreed and when he did collect it, it was discovered that the juice had deteriorated. Although the juice was unappropriated and placed in casks waiting for collection, risk was transferred to the buyer despite the fact that no property had passed to the buyer.

In principle, no property passed to the buyer in the unappropriated goods, hence no risk should be passed to the buyer according to s20-1. However, in *Demby Hamilton* the situation was different, where the exception is supposed to be applied instead of the general rule in part one or part two of s20-1, in the sense that the risk of deterioration of juice occurred as result of delay of the buyer in collecting the goods within reasonable time. In other words, delivery has been delayed through the fault of the buyer. The court supported the view that where delivery has been delayed through the fault of the buyer, the goods are at the risk of the party in fault "as regards any loss which might not have occurred but for such fault." The court also pointed out that the goods referred to must be the contractual goods which have been assembled by the seller for the purpose of fulfilling his contract and making delivery. The 30 tons of juice were goods which the sellers rightly and reasonably kept for the fulfilment of their contract, and had awaiting the collection. Due to the breach on the buyer's part alone, it was held that the buyer must bear the risk of deterioration on the ground that delivery was delayed by his default and that delay had caused deterioration. Nevertheless, the fault of either of the parties cannot be considered a delay unless the other party has fulfilled his obligations.

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[68] Fidelma White & Robert Bradgate, *Commercial Law* (Blackstone Legal Practice Course Guide) (Exford University Press, Exford UK OX2 6DP 2007),181,182. Also See Prof. Tetley, William, Q.C. Sale of Goods-The Passing of Title and Risk. Faculty of Law McGill University

[69] *Lusograin v. Bunge*, [1986] 2 *Lloyd's Rep. 654; Bunge v. Tradax,* [1981] 2 Lloyd's Rep. 1 (H.L.)

[70] *Demby Hamilton & Co Ltd v Barden* [1949] 1 All ER 435

On the other hand, the option to return goods does not affect the passing of risk from the seller to the buyer in any case where the seller has fulfilled his obligations of delivery towards the buyer. [71] Consequently, if the contract relates to a sale of unascertained goods and the buyer delays, then the risk passes only when the seller has set aside goods manifestly appropriated to the contract and has notified the buyer that this has been done. It is an essential obligation on the part of the seller to undertake all acts necessary in order to enable the buyer to take delivery[72]. In other words, risk would pass when the seller has done everything necessary to enable the buyer to take delivery.[73] Thus, where the seller is ready and willing to deliver the goods to the buyer but the buyer does not take delivery of the goods within agreed or a reasonable time, he is liable to bear any risk caused by his omission or refusal (fault) to take delivery[74]. While this view has attributed the legal nature of the delay to deliver the goods, due to the fault of either buyer or seller, through breach of contract, the next question is which one is more compatible with English statutory law perspective.

1.6.3 Evaluation of fault basis in English law

Based on the discussion above, it can be said that the latter view which adopted the fault as basic delay seems more compatible with an English statutory law perspective theoretically, as the word fault appears in s20-2. In practice, we have seen that the *Bowes* case made the decision on the ground of breach of contract, whereas the *Demby's decision was* based on the fault of the party as the basic cause of delay. This leads the researcher to highlight the relationship between the fault of the party and the breach of the contract. In fact, according to contract law, the parties to a contract that is legally enforceable are obligated to perform the obligations arising from the contract terms, and failure to perform may constitute a breach of the contract, for which the other party may seek remedies due to such a breach.[75] A breach of contract can take various forms including the fault of the party.

From the forgoing analysis, we can see that the legal nature of s20-2 is based on the contractual relationship between the seller and the buyer, where the party breaches the terms of the contract through the delay to delivery of the goods, by any reason, including the fault, as the seller is obligated to deliver the goods at

[71] Heli Piksilä-Rantanen and Tommi Härmä, 'Obligations Of The Seller According To The Finnish Sale Of Goods Act – What One Should Know About Finnish Law When Conducting International Sale Of Goods' (18 January 2013) mondaq 22/11/2013 <http://www.mondaq.com/x/216608/Contract+Law/Accelerated+Reorganization

[72] *raineri v miles* [1981] AC 1050

[73] S.P. de Cruz, ' Risk of loss: A Need for Reform ' Anglo-American law review 12. (1982)

[74] Ibid.

[75] Moussa Sékou, ' A Comparative Study of Contract Formation and Breach of Contract and Liability in China and Ohada Space Contract Laws ' (2011) 4, No. 2; September 2011, 157

the place of business of the buyer, unless the parties agree upon a different arrangement such as in shipment contracts.[76]

One may argue that the basic principle of s.20-2 is the delivery of goods, wherein the risk passes according to the delivery. In other words, while the *prima facie* in s 20(1) is *res perit domino* unless otherwise agreed, the *prima facie* in s20-2 is the time of delivery. Namely, it is acknowledged that the risk passes simultaneously with the property or according to the intention of the parties, such as in a CIF or FOB contract, where the goods have been ascertained and shipped at the same time as delivery. If the fault acts as an intervening factor in the delivery, then the risk will pass automatically to the party whose action or inaction has caused the delay of delivery. Thus, it appears that the crucial factor with respect to the passing of risk in the application of s20-2 is the timing of the delivery of goods, not the time of passing of property. Therefore, it can be said that the delivery of goods plays an important role in the transmission of risk alongside the principle of *res perit domino* and the intention of the parties.

1.7 Passing of risk involving third party (delivery to the carrier)

Section 32-1 of the SGA deals with the sale of goods in transit, where the seller is authorised or required to send the goods to the buyer, and/or deliver the goods to a carrier and states that '*Where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier (whether named by the buyer or not) for the purpose of transmission to the buyer is prima facie deemed to be a delivery of the goods to the buyer.'*

In such a case, the risk is deemed to have passed simultaneously with the property. Namely, depending on the contractual terms, the *prima facie* rule is that risk passes with the property upon delivery to the carrier, where the property passes from the seller to the buyer, whether upon the conclusion of the contract, or at the moment of shipment (i.e. from the time at which the goods are handed over to the carrier). Due to the provision of s32-1, in the case of unappropriated goods, s18 must be read in conjunction with s16, as it is obvious that if the seller delivers goods which are mixed with other goods (such as unascertained goods) to a carrier, no property can be deemed to have passed.[77] What constitutes appropriation will vary according to the types of goods in question and the general circumstances of the case.

Unappropriated goods are goods that have not yet been specifically identified or set aside for a particular buyer under a contract of sale. They remain unascertained

[76] (n 27)194

[77] Atiyah, P.S. "*Sale of Goods*" 3th edition, .114

Generally, unlike property, the risk can pass before the goods have been ascertained, in circumstances where the goods form part of a larger but identified, bulk. In most FOB and CIF contracts, risk will pass on shipment, regardless of whether property passes at that stage; and this is even so where the goods have been shipped in unsegregated parcels.[78] In common law, there exists a dichotomy on the question of appropriation in relation to law and equity, where the risk in relation to unascertained goods has passed from the seller to the buyer on shipment before the passing of the property according to intention of the parties.[79]

At this juncture, it is necessary to distinguish the difference between the passing of risk under s32-1 and s20-2 respectively. While part two of s.20-1 links the issue of the passing of risk to the issue of the passing of property *res perit domino* and according to the parties' intention in part one of the same provision, s32-1 introduces an intervening factor when the involvement of the carrier of the shipments is concerned. In such cases, the property transfers as the risk passes on shipment,[80] even though the delivery of goods to the carrier could occur before the actual passing of property, where the goods form part of a larger but identified bulk or unascertained goods.

Indeed, on the basis of "in pursuance of a contract of sale", it seems that s32-1 makes the delivery of goods to the carrier a basic rule in relation to the passing property and then passing of risk; however, a close reading of the provision reveals its compatibility with s20-1, as in the case where the passing of risk occurs simultaneously with the passing of property in the sale of goods in transit contracts, then *prima facie* risk could be passed on the principle of *res perit domino*.

Nevertheless, according to common law, in the case where a carrier is involved in the transport of property, the risk passes to the buyer regardless of whether the property has passed or not. Thus, the time of delivery could be a basic rule regarding the passing of risk, based on the intention of the parties, where they have agreed that the risk would pass on shipment.[81] Indeed, despite the difference between English statutory law and common law regarding this issue, the result is the same, which is that the risk passes to the buyer on delivery to the carrier. Namely, the general rule will be applied where the seller is required by the contract to send goods to the buyer, in cases where delivery to a carrier is presumed to constitute delivery to the

[78] (n51)

[79] (n 4)

[80] Sale of Goods Act 1979

[81] (n 4)

buyer. However, further issues may arise in s32 where the seller is liable to bear the risk retroactively in the case of loss or damage to goods due to an unreasonable carriage contract made by the seller.

1.8 The retrospective passing of risk in seller's failed duty involving third party

In fact, even if the risk lies with the buyer while the goods are in transit, the seller may still be liable if damage or losses are due to an unreasonable contract of carriage made by the seller with the carrier. Section 32-2: states that *Unless otherwise authorised by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable having regard to the nature of the goods and the other circumstances of the case; and if the seller omits to do so, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself or may hold the seller responsible in damages*.

According to s32-2, the buyer could alternatively take an action in damages against the seller for failing to make a reasonable contract of carriage, having regard to the nature of the goods and other circumstances. In other words, the risk passes to the seller retrospectively, subject only to the reasonable burden of the carrier. Therefore, according to s32-2, the seller should make a carriage contract with the carrier on behalf of the buyer, taking into consideration the nature and circumstances of the goods; subsequently, he will disclaim any responsibility for bearing the risk as long as he has made such a contract with the carrier. In such contracts, the seller will have regard to the nature of the goods and other circumstances, otherwise the goods remain at the seller's risk, in the sense that the seller is liable to the buyer for any loss or damage caused from the breach of his obligations under the contract of sale, and the carrier being liable for such loss or damage under the contract of carriage.[82] This is exemplified in the case of *B.G. Fruit Market Ltd v National Fruit Co.*, where the seller was obligated to send the goods in heated wagons but failed to stipulate that condition with the carrier. It was held that the seller was in breach of the contract of sale and therefore liable when the goods suffered frost damage after being left unheated.[83] It is clear that the seller made the carriage contract with the carrier on behalf of the buyer; at the same time he continued to bear the risk of goods retrospectively, because he failed to stipulate that the goods must be carried in heated accommodation/environment.

However, the question may arise as to whether liability in relation to an event such as the theft of goods is attributable to the party who carries the risk, or is the responsibility of the other party, whose fault has

[82] carles Debattista, *'Sale of goods carried by sea' in* (1ST edition edn Butterworth & Co Ltd, London. 1990),94,95. See Also Prof. Tetley, William, Q.C. Sale of Goods-The Passing of Title and Risk. Faculty of Law McGill University,35

[83] *B.G. Fruit Market Ltd v National Fruit* (1949) 59 DLR 87

caused or enabled the event? *Thomas Young & Sons v Hobson & Partner*,[84] highlights that such an issue should rest on the burden of proof. In this case, the plaintiffs sold seven electric engines to the defendants. It was a terms of the agreement that the engines should go by rail, that they should be put in box wagons with the sellers bearing the relevant costs. The sellers put the engines on rail in box wagons, but did not secure them by means of battens or in any other manner, with the result that they arrived in a damaged condition. The buyer's refusal to take the delivery was viewed as succeeding in proving that the seller had failed in their duty under s32-2 of the SGA to make such a reasonable contract with the third party. Considering the nature of the goods and the other circumstances of the case, the buyer was accordingly entitled to reject the goods. It will ordinarily be the obligation of the party alleging fault to prove it; if he or she fails to do so, the loss will fall within the risk. Consequently, the goods remain at seller's risk, in the sense that he is liable to the buyer for any loss or damage resulting from this breach of his obligations under the contract of sale.

However, the situation differs depending on the type of contract and the obligations of the parties under the contract of sale. For example, in some of types of contracts, the seller is responsible for making arrangements for shipping the goods, and as a result is obligated to conclude such a contract of carriage, such as in the case of CIF, C&F and FOB with additional services, whereas the buyer is responsible to do it in other types of contracts, as is the case in straight FOB.[85]

Moreover, s32-2 should apply regardless of whether the seller contracts with the carrier as principal or as agent for the buyer. However, the words "*make such contract with the carrier on behalf of the buyer"*, may present some difficulties if interpreted strictly as meaning "agent for the buyer". This would mean that this section would be excluded from application of the terms concluded in CIF, C&F and FOB with additional services, because in these types of contract the seller is obliged to conclude such a contract of carriage in his own name and then transfer it to the buyer as one of the seller's duties. However, under a straight FOB contract the situation is different, because in this type of contract of sale the seller concludes no contract of carriage at all, because the seller needs only to put the goods on board. Thus, he is not obligated to carry and transfer the goods - in none of these types of contract does the seller contract with the carrier as agent for the buyer. Accordingly, s32-2 would not be applicable for straight FOB contracts, as the seller is not

[84] *Thomas Young & Sons v Hobson & Partner* (1949) 65 T.L.R. 365

[85] Indira Carr, ' ' in *International Trade Law* (first edn Cavendish publishing limited, Great Britain 1996),26,31. See Also Be*njamin's Sale of Goods* (8th Edition edn Sweet & Maxwell, London 2010),313

obliged to send the goods to the buyer unless the FOB contract obliges the seller to conclude such a contract of carriage in his own name on behalf of the buyer, as in the case of CIF and C&F contracts.[86]

1.8.1 Notification of shipment

A C&F contract may not fit within an application with the straight FOB contract under s.32-2. Nevertheless it could meet the condition laid down in s32-3, which establishes the presumptive rule that, "*nless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit; and if the seller fails to do so, the goods are at his risk during such sea transit*." It is clear that an effect of this provision is to give such notice to the buyer as may enable him to insure the goods. It appears that the main issue addressed in this section is: whose duty is it to effect an insurance cover?

Thus, where the seller is under an obligation to effect insurance cover, the section is evidently inapplicable. Therefore, the provision is inapplicable to contracts concluded on CIF and FOB with additional services, because the contract does not require the buyer insure the goods, unless there are risks not covered by the seller.[87] It seems clear that in the case of *Law & Bonar, Limited v British American Tobacco Company, Limited*,[88] where defendants bought from the plaintiffs a quantity of Calcutta hessian at a price CIF Smyrna, to be shipped from Calcutta and to arrive at Smyrna by September, 1914. The defendants stipulated in the contract that the goods were to be at the plaintiffs' risk until actual delivery to the defendants. In fulfilment of the contract, the goods were shipped by the plaintiffs' correspondents in Calcutta on the British Steamship City of Winchester. It is noteworthy that on July 31, the seller wrote to the buyer pointing out that war risk was not covered by the insurance under the contract, but on August 4, 1914, war was declared between Great Britain and Germany and on August 13, 1914, the vessel was sunk by a German cruiser and the goods were lost.

To determine the issue of risk passing, the buyer was first of all required to bear the risk according to the terms and contract of the CIF, which stipulated insurance against marine risks, as required by the contract, and that the goods were at the seller's risk until the point of delivery. However, the buyer will bear the risk from shipment. In the current case, it was supposed that the seller is not obliged to give such notice to the

[86] See above NO 61 p117,118. Also see Carles Debattista, *'Sale of goods carried by sea' in* (1ST edition edn Butterworth & Co Ltd, London. 1990, 95

[87] Carles Debattista, *'Sale of goods carried by sea'* in (1ST edition edn Butterworth & Co Ltd, London. 1990),96

[88] *Law & Bonar, Limited v British American Tobacco Company, Limited* [1916] 2 KB 605

buyer on the basis that the CIF contract dictates the seller's duty to insure the goods. Nevertheless, the goods were lost by an act of war, which was not covered by the insurance under the contract.

Rowlatt J. reported the possibility that s32-3 may apply to a contract made at a time when insurance against war risk was usual, but in that case the seller would be under an obligation to provide war risk cover anyway. Generally, s32-3 does not apply to a CIF contract in times when no one contemplates war, and when war is not being insured against. On the other hand, when the war was becoming imminent, another form of insurance emerged and the contract ceased to be one which dealt exhaustively with the question of insurance. A new obligation therefore arose for the seller, in relation to whether there was an employment of the seller by the buyer to effect such an insurance against war risks. Rowlatt J. pointed out that:

> *This sub-section annexes a term to the contract, and whether it is applicable or not to be decided at the time when the contract is made. I say nothing as to whether the sub-section could apply to a CIF contract made at a time when insurance, other than those to be provided by the seller - e.g., against war risks - are usual. That point does not arise. In this case I do not think that there is any real evidence that it was usual to insure against war risks at any material time. Nor am I certain whether the buyers themselves had made up their minds whether they would insure against war risks or not.*

Accordingly, it was held that s32-3 is inapplicable to ordinary CIF contracts; there was no evidence of such employment, in the sense that the seller was irresponsible to effect such insurance, on the grounds that insurance does not cover war risks. Even if the contract is CIF, at the same time, he must give such notice to the buyer as may enable him to insure them during the transit. It is clear that s 32-3 could be applied to a CIF contract only in cases where risks are not covered by the seller. There is surely an obligation on the buyer to do so in respect of documentary credit purchases, and it is only in respect of these contracts that the s32-3 requirement comes into play and where the seller may remain at risk if there is insufficient information for the buyer to be able to insure the cargo.[89]

However, s32-3 can be applicable to contracts where insurance is not included in an agreement, such as in the case of C&F and ordinary FOB terms. Nevertheless, the situation may be different in the case of FOB or C&F contracts, with additional services, where such contracts are extended to include an insurance contract to be undertaken by the seller, unlike the classic FOB and C&F, where it is undertaken by the

[89] Nationwide Mediation Academy for NADR UK Ltd 'The passing of risk in cif and fob contracts' (2004) 34. Available at http://www.nadr.co.uk/articles/published/shipping/003CHAPTERTHREETRADE3.pdf

buyer, who still needs such notice as may enable him to insure the goods. Namely, s32-3 applies to classic contracts rather than contracts with additional duties.[90]

On the other hand, in a classic FOB contract, s32-3 may still not be applicable and the seller may remain at risk if there is not sufficient information for the buyer to be able to insure the cargo.[91] For example, in the case of *Wimble, Sons & Co. v. Rosenberg & Sons*[92], under an FOB sales contract the plaintiffs sold the defendants goods to be shipped by the buyer, who then sent instructions to the plaintiffs to ship the goods to Odessa and to pay freight on their account, leaving it to the plaintiffs to select the ship. The cargo was loaded on a Sunday. The seller did not notify the buyer of the loading and the name of the vessel because of a postal delay. The buyer had no open cover and was uninsured. He claimed that he did not know the name of the vessel or that the goods had been shipped.

A close examination of the facts reveals that although under FOB terms the seller must give notice to the buyer to enable him to insure the goods, the essential information possessed by the buyer for insurance purposes rendered s32-3 inapplicable. The buyer knew the port of discharge and did not need to know the name of the vessel, since he could have effected insurance on an Odessa voyage by a vessel or vessels to be declared. Buckley L.J. pointed out that the seller provided sufficient information on the freight and the ports of loading and discharge which should have enabled the buyer to take out open cover, thus fulfilling the requirements of s32-3. In fact, the buyer can always take out a general policy of insurance, without needing to know the name of the ship.

However, as Hamilton L.J. argued, if this view is correct, the section imposes no obligations on the seller, because the buyer already has sufficient information to take out a general insurance policy anyway, in the sense that the buyer knew the description of the goods from the contract he made, the port of discharge because it was selected by him and the port of loading from the contract. Actually, the buyer will always know the freight and ports of loading and discharge. In the FOB contract it is often the buyer who nominates the vessel, so he should not be able to claim ignorance of its name. Even though s32-3 applies, the duties are not onerous and therefore the section is not useful at all.[93] Alternatively, following Hamilton J., it may be that s32-3 only applies to contracts which specify destination; thus since delivery is at the place of destination and involves sea transit, warehouse to warehouse. etc.s32-3 could apply to any type of FOB contract where the seller undertakes to arrange the vessel and has a choice of ports of loading.

[90] (n 87) 97

[91] (n 59)119

[92] *Wimble, Sons & Co. v. Rosenberg & Sons* [1913] 3 K.B. 743. C.A

[93] (n 87)

1.9 Goods delivered at seller's risk

On this issue, s.33 provides an illustration of overlapping, when it states that *Where the seller of goods agrees to deliver them at his own risk at a place other than that where they are when sold, the buyer must nevertheless (unless otherwise agreed) take any risk of deterioration in the goods necessarily incident to the course of transit.*

Occasionally the seller agrees to bear the risk throughout the transfer; regardless of the *res perit domino* rule. This rule is subject to the seller's agreement. In any event, s.33 has a restricted scope in international sales. For instance, the parties may incorporate into their own agreement trade terms such as the Incoterms.[94]

Obviously, this provision comes from the principle of party autonomy, where the parties have the freedom to agree when the risk passes. Therefore, it can be said that the application of s.33 may be consistent with the presumptive rule in s.20-1, where the risk remains with the seller even if the property has passed.[95] In general, under the rules of s.20-1 of the SGA, the parties of the contract may agree expressly or implicitly that the risk is separate from the property.[96]

However, the question arising is: Does s.33 change the nature of the contract in cases of contract for sales involving the carriage of goods, such as FOB or CIF, where the risk passes to the buyer, whether on shipment or from shipment, at which point the seller will not be responsible for any damage or losses after that? In other words, in the first the parties are agreed on the CIF or FOB terms to pass the risk on (or from) shipment, while the second is where the seller agrees to bear the risk through the transfer, according to s.33 SGA.

However, the scope of this rule is unclear with respect to the words *the goods necessarily incident*. It seems that s33 effectively limits the scope of such an agreement by splitting the risk during transit so that the seller bears the risk of what may be called "extraordinary" loss or damage; that is, due to an accident or casualty. In other words, s33 gives an illustration of overlapping the risks, the seller having the general risk and the buyer that of deterioration that is necessarily incident to the course of transit. It must follow from s33 that if deterioration is due to a combination of a "transit" risk and some other cause, the loss is to be shared.

[94] Benjamin's *Sale of Goods* ,(A.G. Guest ed., 3d ed. 1987),1522. 1523

[95] (n 59)120

[96] Clive M. Schmitthoff, *The Sale of Goods* (2d ed Kluwer Law International 1966), 94

Perhaps the circumstances and ordinary principles of causation are adequate to ensure that one party does not bear more than is his due, as well as in cases of overlapping "risks".[97]

An FOB contract (Free on Board) is another type of international sales agreement where the seller fulfills their obligation to deliver once the goods are loaded onto the ship designated by the buyer.

This can be understood by looking at a Canadian case, *Winnipeg Fish Co. v. Whitman Fish Co*[98] where cured fish were sold by sample under FOB terms, namely, to be shipped during the winter from the seller's warehouse at Canso to Winnipeg. The sample was sound and satisfactory. The fish arrived in Winnipeg in a frozen state and were received by the buyer and kept by them in an outhouse for several weeks before being placed in the freezer, the atmospheric conditions being such that the fish could not, in the meantime, have deteriorated by thawing. Some of the fish when sold proved unfit, and were subsequently returned, while the whole shipment was found unfit for human consumption and not up to standard. On inspection the health inspector condemned the whole carload and it was destroyed. Approximately six weeks after the fish had been received, the buyer notified the seller of the rejection of the carload. In an action for the price at which the fish had been sold, the buyer counterclaimed for damages due to breach of warranty and consequent loss to their business.

It was held that the seller could not recover, and that the buyer was entitled to receive damages on their counterclaim, and that the risk must be borne by the seller. In fact, the sale had been made subject to delivery by the seller at Winnipeg. Accordingly, under s.33 any loss occasioned by deterioration in transit not necessarily incident to the course of transit should be borne by the sellers. The loss in this case was not so incident, and furthermore, under the circumstances, the buyer had notified the sellers of the rejection within a reasonable time. The judge further highlighted that, assuming the goods to have been delivered to the carrier at Canso in suitable and good condition, as found by the Court of Appeal, any damage causing deterioration to the fish arising from their having been frozen and thawed during transit, not being necessarily incident to such transit, must under the circumstances of this case be held to have been accidental and exceptional and so must fall on the seller.

From the foregoing, it appears that s33, with its limited allocation of necessary risk to the seller, should not be understood to detract from the broader allocation of risk according to *prima facie* rule in s20 or special rules in s32-2 and (3). In other words, it should not be allowed to undermine the normal rule that, where the risk is on the buyer, the seller must still ship goods that will not in a normal transit deteriorate to the point of unsuitability. On the other hand, an unsuitability may entitle the buyer to reject goods that are not in conformity with the contract.

[97] L. S. Sealy, ' risk in the law of sale' (April 1972,) Cambridge Law Journal, , 247

[98] *Winnipeg Fish Co. v. Whitman Fish Co* [1909] S.C.R. 453

1.10 The lack of conformity of the goods with the contract

In terms of conformity of the goods, whether it relates to discrepancies in the quantity or quality of the goods at issue, it makes no difference whether the quantity of the goods delivered is more or less than agreed upon. Similarly, non-conformity of the quality of goods means delivery of goods whose quality is worse or better than agreed upon. Moreover, goods must be of satisfactory quality according to s14 of SGA, namely they would meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods.[99] Thus, it has been stated that a contract of sale is not only a contract that goods will arrive, but a contract to ship and deliver goods conforming to the contract of sale.[100] Generally, conformity can be discussed from several perspectives. In other words, one of the most important obligations of the seller is to deliver goods in conformity with the contract, and the right of the buyer is to examine the goods to ascertain whether they are in conformity with the contract or not, and reject the goods when they do not conform to the contract, according to s.14 SGA.

Hence, when the seller fails to deliver such conforming goods, by any reasons, whether by intention, such as counterfeit goods and fraud, or by accidental causes, for instance loss or damage of the goods during transfer, he is deemed to have breached a contractual obligation. A breach of contract by the seller which is sufficient to allow the buyer to reject the documents or reject the goods on arrival, if he has already accepted the shipping documents, results in situations where the buyer does reject the goods, in placing the risk on the seller whilst the buyer exculpates himself.[101] Accordingly, under English law, in such a situation, if the buyer properly rejects the non-conforming goods, the risk and the property will revert back to the seller.[102]

However, when goods arrive that are not fit for the intended purpose and not in conformity with the contract, it may be difficult to determine whether this is due to the seller's breach in delivering goods of unsatisfactory quality, or due to an event that occurred in transit, while the goods were at the buyer's risk. The risk allocation will depend on the evidence regarding the state of the goods upon shipment and subject to the burden of proof theory. Namely, where the buyer claims the goods to be in non-conformity with the contract, the burden is on the buyer to show that they were not capable of withstanding the voyage. On the

[99] *Jewson Ltd. v. Kelly, 2003 E.W.C.A. Civ* 1030 (2003)

[100] *Groom v Barber [1915] 1 K.B.* 316

[101] (n 89)35

[102] *Kwei Tek Chao v. British Traders and Shippers Ltd,* 1954 Q.B.2 459 (1954)

other hand, the seller has to identify the cause or causes of damage or loss and prove that they were out of the seller's sphere of responsibility.[103]

In essence, according to the SGA, risk passes with the property, while property passes at the moment of making the contract or when intended in the contract of sale. Therefore, regardless of whether risk and property pass at the moment the contract is made, or at an intended time, according to s17 of the SGA, it is assumed that the property becomes the risk of the buyer who will bear any risk of loss or damage to the goods. However, if the buyer rejects goods whose non-conformity was caused by the seller the risk and the property will revert to the seller retrospectively; accordingly, the time of passing of risk occurs at the same time as rejection of non-conforming goods. However, the carrier being liable for such loss or damage under the contract of carriage according to s32-2 of the SGA.[104]

Some difficulty may arise in this context, in the case of CIF contracts, in which documents are transferred and payment made, in the case where a buyer accepted the documents and later rejected the goods. He might obtain a conditional property on tender of documents, which then leads to losing his right to reject the goods, by having dealt with the documents. In the case of *Kwei Tek Chao v. British Traders and Shippers Ltd*[105], London exporters, under a CIF contract made in August 1951, for the sale of 20 tons of Rongalite to Hong Kong merchants, at a price of £590 a ton, for shipment to Hong Kong by October 31 1951, at latest, the sellers presented to the buyers' bank bills of lading on December 10 1951, purporting to show that the goods had been shipped. They received payment of the price agreed under the contract. In fact, the bills of lading had, without the knowledge of the sellers, been forged by the third party, the sellers' shipping agents being privy to the forgery, and the goods had not been shipped until November 3, 1951. The buyers knew before the ship arrived on December 10 that the date of shipment, as indicated by the bills of lading, was false but, nevertheless, they took delivery of the goods, retaining them in a godown in Hong Kong. Owing to the late shipment of the goods the buyers lost a contract for resale. An embargo placed by the Chinese authorities on the importation of Rongalite from Hong Kong resulted in such a serious fall in the market price that Rongalite became virtually unsaleable in Hong Kong. In February, 1952, the buyers discovered that the bills of lading had been forged and sued the sellers for the return of the price, or alternatively for damages for breach of contract. Devlin, J held that what the buyer obtains when the title under the documents is given to him is the property in the goods, subject to the condition that they revert to the seller, if, upon examination, he finds them in non-conformity with the contract.

[103] Michael Bridge, *The Sale of Goods* (second Edn Oxford University Press, Oxford UK 2009) ,162

[104] (n 87)95

[105] (n 102)

In analysis, a CIF contract puts a number of obligations upon the seller, some of which are related to the documents and some of which are related to the goods. These are separate obligations; the right to reject the documents arises when the documents are tendered, and the right to reject the goods due to unconformity arises when they are delivered. Accordingly, the right to reject the goods, thus passing of the risk to the seller retrospectively, would be at the moment when the goods are loaded and after an examination, and not at the moment of obtaining documents.

Arguably, even though property and risk will be passed, it seems to be that the position under English law is that handing the documents over, and mere acceptance of the documents, does not preclude subsequent rejection of the goods for breach of condition related to non-conformity of the goods. Thus, the fact that risk will have been passed to the buyer is not absolute. It can be understood that the risk will not have passed on mere delivery of documents in any case, and so the result as between buyer and seller will be the same.[106] Accordingly, a CIF buyer does not lose his right to reject the goods by dealing with the documents.[107]

[106] Atiyah, P.S. "*Sale of Goods*" 5th edition, 246

[107] (n 102)

1.11 Conclusion

To understand the legal nature of these rules, it is essential to examine the rules and the exceptions to the risk doctrine in the SGA, in the sense of the nature and basis of these rules.[108] However, as mentioned above, the passing of risk according to s20-1 may be governed by more than one rule; according to these criteria, English statutory law appears to have a mixed approach.[109] Namely the risk could be passed with the property *res perit domino* rule, at the point when the property passes to the buyer, or at a different time separate from the property, according to the agreement of the parties. It has been noted that the general rule is that the risk passes with the property, according to *res perit domino under* s20 of the SGA.[110] Others have relied on the same section but reached a different conclusion, arguing that the basic rule is that the risk passes at the time agreed upon by the parties, according to the intention of the parties.[111] The rule of s20 may be prevailed by expressed or implied agreements; furthermore, it is subject to exceptions or modifications which would determine the timing when the passing of risk takes place.[112] Therefore, in order to ascertain the legal nature of these rules and the relevant exceptions, a comparison between the first and second part of s20-1 of the SGA is required.

In fact, it is clear that the risk may pass at a different time from the property, where the buyer has the right to examine the goods in order to ascertain whether they are in conformity with the contract or not. In other words, under English law, in a situation where the buyer rejects the non-conforming goods, the risk and the property will be revested in the seller. Similarly, with respect to s33, the seller may choose to ignore the rule of *res perit domino* and agree to bear the risk through the transfer. That means also the risk passes at different time from property, where the property passes on (or from) shipment and the risk passes at the place of destination. Therefore, it can be said that application of these two rules may be contrary to the presumptive rule in s20-1, in that the risk remains with the seller even if the property has passed. At the same time their application complies with part one of s20-1 and the words *unless otherwise agreed*, in the sense, the parties of the contract may agree expressly or impliedly that the risk is separate from the property. Accordingly, these rules could be included under the category of the first part of s20-1, where the parties agree impliedly or expressly that the goods must be of satisfactory quality with the contract, according to

108 Paul Todd, 'Risk the General Rule' (26 Dec 1997.) Paul Todd's home page 06/02/2014 <http://pntodd.users.netlink.co.uk/intr/risk/risk.htm#toc

109 (n 26)

110 Benjamin's *Sale of Goods* (8th Edition edn Sweet & Maxwell, London 2010). P.302.See also, Fidelma White & Robert Bradgate, Commercial Law (Blackstone Legal Practice Course Guide) (Exford University Press, Exford UK OX2 6DP 2007),180

111 Prof. Tetley, William, Q.C. Sale of Goods-The Passing of Title and Risk. Faculty of Law McGill University. Also (n 89)

112 Robert Bradgate, Fidelma White, '*Commercial Law*' (OUP Oxford, UK 2007) .181

s14-2, which states that '*Where the seller sells goods in the course of a business, there is an implied condition that the goods supplied under the contract are of merchantable quality*.'

From the foregoing, it can be concluded that the legal nature of the passing of risk, under rules of conformity with the contract and the rule of s33, is the intention of the parties, where the parties have absolute right to agree upon the time of passing of risk according to part one of s20-1, unless otherwise agreed. Consequently, it can be said that the time at which risk passes under both rules relies on the intention of the parties, which can be considered under the category of part one of s20-1, where parties' intention is the primary rule with regards to the passing of risk.[113]

Furthermore, as the research has suggested, the situations under s20-2 and s32 may be different, as the delayed delivery of the goods through the fault of either the buyer or seller will have impacts on how the risk is passed. This depends on whether the goods are at the risk of the party at fault, under s20-2, or whether the seller breaches his obligations according to s32 of the SGA. Accordingly, the passing of risk under the rules of s20-2 and s32 occurs separately from the property. Consequently, despite the primary rule under s20-1 of the SGA, it can be said that the risk rules under both s20-2 and s32 will be viewed as exceptions.

Knowledge

A CIF contract, or cost, insurance, and freight contract, is an agreement between a buyer and seller for the international shipment of goods.

—> The seller is responsible for the cost of transporting and insuring the goods to the destination port, while the buyer is responsible for paying the agreed-upon price and any import fees and taxes.

However, the seller is not obligated to cover such as war risks, unless explicitly stated in the contract. (Law & Bonar, Limited v British American Tobacco Company, Limited)

FOB

1. FOB Shipping Point: As soon as the goods arrive at the transportation site, and are placed on a delivery vehicle, or at the shipping dock, the buyer is liable for any losses or damage that occur after.

Seller's Obligation: The seller is responsible for getting the goods to the port and loading them onto the ship.

Buyer's Obligation: The buyer assumes risk and responsibility once the goods are loaded onto the ship, including arranging insurance for the goods during transit and covering any costs or risks after loading.

2. FOB Destination:

Contract Term: The contract specifies that the seller retains risk and responsibility upon successful delivery of goods to buyer's destination.

Seller's Obligation: The seller is responsible for shipping the goods and delivering them to the specified destination port. The seller must also arrange insurance during transit.

Buyer's Obligation: The buyer assumes risk only when the goods arrive at the destination port. The buyer does not need to arrange insurance for the transit period unless the seller fails to insure the goods properly.

[113] See above, Intention of the parties to pass the risk and the legal nature of the rule of res perit domino.

Section 16 (SGA 1979): Unascertained Goods
Rule: Property in unascertained goods does not pass to the buyer unless and until the goods are ascertained.
Example: A bulk shipment not allocated to a specific buyer retains property (and risk) with the seller.

Section 18: Rules Governing the Passing of Property
Rule 1: For specific goods in a deliverable state, property passes when the contract is made unless otherwise agreed.
Rule 5: For unascertained goods, property passes when goods are ascertained or appropriated.

Section 20A: Bulk Goods
Rule: Risk may pass proportionally if goods are part of an identified bulk and conditions for ascertainment are met.

Section 20(1): Default Rule on Risk
Rule: Risk passes with property unless otherwise agreed (res perit domino).
Example: If a fire destroys goods before property passes, the seller bears the risk.

Section 20(2): Delays Due to Fault
Rule: If delay in delivery is due to the fault of either party, the party at fault bears the risk.
Example: Demby Hamilton & Co Ltd v Barden (1949) – Risk passed to the buyer due to their delay in collecting perishable goods.

Section 32: Delivery to a Carrier
Subsection 1: Risk passes to the buyer upon delivery to the carrier unless agreed otherwise.

Subsection 2: Seller must ensure a reasonable contract with the carrier.
Consequence: Seller is liable for damages if negligence in contracting with the carrier leads to loss.

Subsection 3: Seller must notify the buyer of dispatch. Failure to do so can retain risk with the seller.

Case Law
Risk Passing on Delivery
1. Demby Hamilton & Co Ltd v Barden (1949):
Facts: Buyer delayed collecting apple juice; it deteriorated.
Outcome: Risk passed to the buyer due to the delay, even though goods were unascertained.

2. Pyrene Co Ltd v Scindia Navigation Co Ltd (1954):
Facts: Damage occurred during loading under FOB terms.
Outcome: Risk passed when the goods were handed to the carrier.

Fault-Based Risk Allocation
1. Bowes v Shand (1877):
Facts: Early shipment of rice violated contract terms.
Outcome: Risk remained with the seller due to the breach.

2. Head v Tattersall (1871):
Facts: A warranty allowed the buyer to return goods within a specific time.
Outcome: Risk remained with the seller until the warranty period expired.

Special Circumstances
1. Sterns v Vickers (1923):
Facts: Delivery warrant issued for unascertained goods.
Outcome: Risk passed to the buyer with the warrant despite property remaining unascertained.

2. Law & Bonar v British American Tobacco (1916):
Facts: War risks insurance issue in a CIF contract.
Outcome: Seller's Obligations: Under a CIF contract, the seller is required to arrange insurance covering marine risks, but not war risks. The seller was not required to provide war risk coverage, as it was not customary at the time. The buyer assumed the risk once the goods were shipped.
S32-3 of the Sale of Goods Act: This section requires the seller to provide notice to the buyer to enable them to insure the goods during transit. However, in this case, s32-3 did not apply because the seller had fulfilled the duty of insuring marine risks.

3. Re Goldcorp Exchange Ltd (1994):
Facts: Buyers purchased gold bullion stored in bulk.
Outcome: Risk did not pass as goods remained unascertained.

Delivery and Notification
1. Margarine Union GmbH v Cambay Prince Steamship Co Ltd (1969):
Facts: Seller failed to notify the buyer about shipment.
Outcome: Risk remained with the seller due to lack of communication.

Exceptions and Notes
Exceptions to Default Rule (s20):
1. Intentions of Parties: Agreements between parties can override statutory provisions.
2. Unascertained Goods: Risk generally cannot pass until goods are ascertained unless agreed otherwise (e.g., Sterns v Vickers).

Scenarios Where Risk Does Not Follow Property:
In CIF or FOB contracts, risk can pass on shipment regardless of the transfer of property.