To What Extent does the Marine Carrier Influence the Passing of Ownership and Risk in International Sales? A Critical Analysis of the International Instruments and Jordanian Law

A thesis submitted for the degree of Doctor of Philosophy

By

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Declaration of Authorship

I Derar Al-Daboubi, hereby declare that this thesis and the work presented in it is entirely my own. Where I have consulted the work of others, this is always clearly stated.

Signed:

Date:

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Abstract

This study examines the effect of the marine carrier on the operation of the transfer of risk and ownership between contracting parties to international contracts of sale and its consequences. However, this function cannot easily be clarified as it must be derived from the provisions of both the associated contract of sale and marine carriage contract. The discussion will initially focus on the relevant provisions of the CISG, Hamburg Rules 1978 and Incoterms 2010 Rules as international instruments. It will also cover the provisions of the Jordanian Civil Code 1976 (JCC), Jordanian Maritime Commercial Law 1972 (JMCL) and the Jordanian Commercial Law 1966 (JCL) as domestic statutes. The necessity to examine the influence of the marine carrier on transfer of risk and ownership lies in the impact of its performance on the right of the buyer of acquiring the ownership that may deprive him of selling the goods in transit and its influence on the transfer of risk on which procurement of the insurance cover is decided, either to cover the liability of the marine carrier or for the benefit of the goods' interests.

The study will point out the obstacles encountered when determining the time of transfer of risk and ownership. To overcome these obstacles which may arise from the application of the international instruments and Jordanian law, the study proposes some suggestions through which the role of the marine carrier in operating a transfer of risk and ownership and the liability borne in this regard, can all be recognised and hence, the time of the transfer of risk and ownership as well as the liability of the marine carrier can be easily determined.

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Chapter 1. Introduction

1.1 Background of the study

The international contract of sale is one of the most important international trade transactions, through which contracting parties can agree to incorporate other kinds of contract, such as insurance of goods or carriage of goods contract.[1] Its importance is one of the incentives that has motivated the international endeavours to adopt uniform rules aimed at governing such contracts and eliminate the legal obstacles encountered in such arrangements, particularly that contract involves parties from different backgrounds and jurisdictions.[2]

The unification of the rules of the international contract of sale has been broadly recognised through the rules of *lex mercatoria*, which were developed by merchants during the Middle Ages.[3] Not only has the unity of rules of the contract of sale been recognised in *lex mercatoria*, it has also been the focus of international endeavours in recent times, beginning in Rome in 1930 where the International Institute for the Unification of Private Law decided to draft a uniform law for contracts of sale, which was prepared in 1935 and submitted through a diplomatic conference held at the Hague in 1964.[4] The conference produced two conventions: the first dealt with the international sale of goods, while the second addressed the formation of the international contract of sale, but both have been met with criticism as they have not succeeded in achieving the worldwide unification of international sales rules.[5]

The United Nations Commission on International Trade Law examined both conventions and then held the United Nations Convention on Contracts for the International Sale of Goods in Vienna on 11 April 1980.[6] Similarly, the International

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[1] Abdulqader Al-Eteer, *Explanation of Maritime Commercial Law* (5th edn, Dar Althaqafa 2014) 271, 364. These contracts can take the form of CIF, DDP, DAT and DAP of the Incoterms 2010 Rules.
[2] Schlechtriem & Schwenzer: *Commentary on the UN Convention on the International Sale of Goods (CISG)* (Ingeborg Schwenzer (ed), 3rd edn, Oxford University Press 2010) 1, 3.
[3] Aneta Spaic, 'Interpreting Fundamental Breach' in Larry A. DiMatteo (ed), *International Sales Law/A Global Challenge* (Cambridge University Press 2014) 237.
[4] John O Honnold and Harry M Flechtner (eds), Uniform Law for International Sales under the 1980 United Nations Convention (4th edn, Wolter Kluwer 2009) 5; Henry Deeb Gabriel, Contracts for the Sale of Goods/A Comparison of U.S. and International Law (2nd edn, Oxford University Press 2009) 4, 6; Schlechtriem & Schwenzer (n 2) 1.
[5] See, Schlechtriem & Schwenzer (n 2) 1; Honnold and Flechtner (n 4) 6, 12; Vikki Rogers and Kaon Lai, 'History of the CISG and its Present Status' in DiMatteo (n 3) 8, 14.
[6] United Nations Convention on Contracts for the International Sale of Goods (11 April 1980).

Chamber of Commerce strove to create uniform rules that interpret the duties of contracting parties to the contract of sale, such as transfer of risk, goods delivery, costs, carriage, insurance, export obligations, import obligations, customs and marking or packing of goods.[7]

Transfer of risk is one of the implications of the contract of sale that is regulated in the CISG and Incoterms 2010 Rules. In each, transfer of risk in the context of the sale contract involving carriage is based on the act of handing or taking over the goods by the carrier.[8] However, unlike the transfer of risk, transfer of ownership has neither been addressed in the CISG nor under the provisions of the Incoterms 2010 Rules.[9] Therefore, it has been suggested that rules of conflict of laws should determine the domestic law that shall govern the matters relevant to a transfer of ownership.[10]

This study investigates the effect of the marine carrier on passing of risk and ownership in the contract of sale. The role of the marine carrier, as a third party, will not be identified on the transfer of risk and ownership, unless the transfer of risk and ownership has taken place in accordance with a contract of sale involving carriage of goods by sea, to which the marine carrier is party.

Like the contract of sale, international endeavours have been devoted to creating uniformity in the rules of the marine carriage contract, resulting in three conventions: the Brussels Convention 1924 and its Protocols 1968 and 1979 (Hague and Hague-Visby Rules) which have been widely criticised; the United Nations Convention on the Carriage of Goods by Sea (the Hamburg Rules 1978); and the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by

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[7] Charalambos Pamboukis, 'The Concept and Function of Usages in the United Nations Convention on the International Sale of Goods' (2005-2006) 25 JL & Com 126; Juana Coetzee, 'The Interplay between Incoterms and the CISG' (2013-2014) 32 JL & Com 4. The ICC is a private international organisation widely recognised in the area of international private business and trade. Patrick Ostendorf, *International Sales Terms* (2nd edn, Beck/Hart 2014) 68; Roberto Bergami, 'Managing Incoterms 2010 Risks: Tension with Trade and Banking Practices' (2013) 6(3) Int J. Economics and Business 326.

[8] Articles 67 and 69 of the CISG; Articles A5 and B5 of CIF, CFR, FOB, DPP, DAP, DAT of the Incoterms 2010 Rules.

[9] Ownership has been explicitly excluded from CISG by virtue of Article 4(b), while the Incoterm 2010 Rules have not regulated such a matter. See Article 4(b) of the CISG, a copy of which can be found in Appendix 1.

[10] See Schlechtriem & Schwenzer (n 2) 94; Honnold and Flechtner (n 4) 83, 84; Coetzee (n 7) 4.

Sea (Rotterdam Rules 2009), which has not yet come into force.[11] Criticisms of the Hague-Visby Rules had been levelled by developing countries which were not involved in drafting them, arguing that these rules provide shipowners from industrialised countries with unfair rights.[12]

Regrettably, in spite of the importance of the international contract of sale in the context of the international commercial domain, Jordan has neither ratified the CISG nor enacted a particular law regulating the international contract of sale, and this is deemed to be a gap in Jordanian law. Likewise, although Jordan has ratified the Hamburg Convention 1978, it has not enforced its provisions, which constitutes another deficiency in Jordanian law in the context of the marine carriage contract that might be incorporated into the contract of sale.[13]

The Jordanian position has given rise to several ambiguities as to the influence of the marine carrier on the transfer of risk and ownership in a contract of sale involving carriage of goods by sea, which has resulted in incompatibility between judgments of the Jordanian Cassation Court which has adopted contradictory rules in determining the time of the transfer of risk and ownership. This might be attributed to the vagueness of the role of the marine carrier in determining the time of such passage under the Jordanian Civil Code 1976 (JCC) and also, due to the inadequacy of the rules of the carriage contract under the provisions of the Jordanian Commercial Law 1966 (JCL), which provides few basic rules designated to regulate contract of carriage in general.[14]

This study examines the effect of the marine carrier on the transfer of risk and ownership in contracts of sale involving carriage of goods by sea and also, reviewing the rules of the contract of sale under international instruments and Jordanian law, in

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[11] Criticisms of the Hague-Visby rules lie in the areas of the scope of its application, excepted perils, package limitation, deck cargo, charterparties, transportation documents and multimodal carriage. Paul Todd, *Principles of the Carriage of Goods by Sea* (1st edn, Routledge 2016) 363, 365. Further clarification about the criticisms of The Hague-Visby can been seen in Marian Hoeks, *Multimodal Transport Law/The Law Applicable to the Multimodal Contract for the Carriage of Goods* (Kluwer Law International 2010) 327, 328; Paul M Bugden and Simone Lamont-Black, *Goods in Transit and Freight Forwarding* (3rd edn, Thomson Reuters 2013) 397, 399; Stephen Girvin, *Carriage of Goods by Sea* (2nd edn, Oxford University Press 2011) 219, 241.

[12] Hoeks (n 11) 328.

[13] The Hamburg Convention was ratified by Jordan on 16 April 2001 in Decision No 4484 of the Cabinet of Ministers; Mahmoud Mohammad Ababneh, *Principles of Carriage Contracts* (Dar Althaqafa 2015) 139.

[14] Articles 68 to 79 of the JCL.

particular that which are related to the transfer of risk and ownership. Since the marine carriage contract is the legal instrument through which the marine carrier can affect the transfer of risk and ownership in an international contract of sale, the study also analyses the relevant rules of the international instruments regulating marine carriage contract and the rules of both the Jordanian Maritime Commercial Law 1972 (JMCL) and Jordanian Commercial Law 1966 (JCL). The study will examine international trade law and the marine carrier as a point between the contract of sale and the marine carriage contract, examining the rules of each, both of which belong to the international trade domain.

1.2 Aims and objectives

The main purpose of this study is to investigate the effect that the marine carrier has on the transfer of risk and ownership between parties to a contract of sale. It considers this effect in relation to the relevant rules of the CISG, Hamburg Rules 1978, Incoterms 2010 Rules and the relevant acts of the Jordanian law. As application of the CISG and Incoterms 2010 Rules is hinged on the agreement of the parties to a contract of sale, the study will presume applicability of both sets to clarify the position of each, especially when the Jordanian law lacks clarity in resolving a dispute.

Jordan is the focus of this study for several reasons. One of these is the importance of its geographic position in the Middle East as it is a transit country to Africa and Europe through the only available water passage, the Aqaba Gulf, that leads to the Red Sea.[15] Since Jordan has neither ratified the CISG nor enacted a law regulating international contracts of sale involving carriage of goods by sea, the Jordanian Cassation Court has encountered difficulties in identifying the time at which the transfer of risk and ownership of the goods sold under these kind of sales takes place, as the position of the marine carrier cannot be recognised under the provisions of the JCC. This is the second reason for focusing on Jordanian law in this study.

The study will examine the impact of the marine carrier on transfer of risk and ownership under the provisions of the CISG, as it regulates the relevant matters of the international contract of sale involving carriage of goods. Through this, the study

[15] Maps of World, 'Facts about Jordan' (2016) <https://www.mapsofworld.com/jordan/facts.html> accessed 1 May 2018.

examines whether such effects could be identified if the relevant rules of the CISG were to be applied and the decisive moment of the transfer of risk or ownership ascertained.

However, application of the CISG may, in some cases, give rise to an uncertainty in terms of the effect of the marine carrier on the transfer of risk and ownership, particularly in the context of the destination sales and the sales concluded in transit, which may result in difficulty in determining the time at which such transfer should be considered.[16] As a result, the critical analysis embraces the relevant rules of the Incoterms 2010 Rules, which have designated particular terms to regulate the sales of goods involving carriage of goods by sea.

The marine carrier, while performing its role in operating a transfer of risk or ownership, might be liable for the failure in transferring risk and ownership between contracting parties to the sales contract. Therefore, the study analyses rules of liability of marine carriers under both the JMCL provisions and the general rules of the contract of carriage provided in the JCL. This is to assess if these rules can regulate the marine carrier's liability in the context of the transfer of risk and ownership. The study also scrutinises the relevant provisions of the Hamburg Rules 1978, which has been ratified by Jordan to point out the contradiction with the relevant rules of the JMCL that both have regulated the liability of the marine carrier.

Most of the previous studies have been dedicated simply to examining the legal relationship between the contract of sale and its parties in isolation from the contract of marine carriage. They have analysed the relevant rules of the international instruments and domestic laws in terms of transfer of risk and ownership, which have all been established on the performance of the contracting parties to contract of sale.[17]

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[16] Articles 68 and 69 of the CISG.

[17] Dionysios Flambouras, 'Transfer of Risk in the Contract of Sale Involving Carriage of Goods. A Comparative Study in English Law, Greek Law and the United Nations Convention on Contracts for the International Sale of Goods' (2001) 6 Int'l Trade & Bus L Ann 115; Johan Erauw, 'CISG Articles 66-70: The Risk of Loss and Passing It' (2005-2006) 25 JL & Com 211; Douglas E Goodfriend, 'After the Damage Is Done: Risk of Loss under the United Nations Convention on Contracts for the International Sale of Goods' (1983-1984) 22 Colum J Transnat'l L 577; Petra Joanna Pipkova, 'Risk of Loss and its Passing to the Buyer under the New Civil Code in Comparison with CISG' (2014) 25 ELTE LJ 131; Charles Debattista, 'Transferring Property in International Sales: Conflicts and Substantive Rules Under English Law' (1995) 26(2) J M L&C 273; Marielle Koppenol-Laforce, 'Property Law in Private International Law' in Marielle Koppenol-Laforce et al (eds), *International Contracts* (1st edn, Sweet & Maxwell 1996)174; Haxhi Gashi, 'Acquisition and Loss of Ownership

The novelty of this study lies in the fact of establishing a transfer of risk and ownership on the performance of the marine carrier rather than the performance of the contracting parties to contract of sale. Thus, its analysis is based on the relevant provisions of both of the contract of sale, provided in the CISG, Incoterms 2010 Rules and JCC, and the related rules of the marine carriage contract in the Hamburg Rules 1978, JMCL and JCL.

The next aspect of contribution to knowledge by this study lies in the liability of the marine carrier that could be incurred in the context of the transfer of risk and ownership. Earlier studies have addressed rights and obligations of marine carrier in addition to liability for damage to and loss of goods and delay in delivery, which have been discussed under the provisions of the relevant international conventions.[18] However, to draw the legal framework for the liability of the marine carrier for non-transfer of risk and ownership, the study undertakes an analysis of the general rules of civil liability under the JCC, as the liability of the marine carrier has been regulated neither under the related provisions of the international legal instruments nor under those set out in the JMCL and JCL.

At the conclusion of this discussion, the study puts forward some sound suggestions, recommendations and propositions through which the uncertainty of role of the marine carrier in operating a transfer of risk and ownership under Jordanian law and international instruments can be identified and eliminated, or at least mitigated. This will contribute to overcoming the obstacles of determining the exact time at which a transfer of risk and ownership will take place.

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under the Law on Property and Other Real Rights (LPORR): The Influence of the BGB in Kosovo Law' (2013) 9 Hanse L Rev 43; HL Ho, 'Some Reflections on Property and Title in the Sale of Goods Act' (1997) 56 Cambridge LJ 597; Georgios I Zekos, 'The Bill of Lading Contract and the Transfer of Property Under Greek, English and United States Law' (1998) 40 Managerial Law 5.

[18] Latif Jaber Koumani, *Maritime Law* (2nd edn, Dar Althaqafa & Al-Dar Al-Elmeyyah Al-Dawleyyah 2003) 108, 161; Al-Eteer (n 1) 271, 363; Adel Ali Al-Miqdadi, *Marine Law* (5th edn, Dar Althaqafa 2011) 116, 157; Ababneh (n 13) 86, 183; John F Wilson, *Carriage of Goods by Sea* (7th edn, Pearson Education 2010) 115, 173; Baha'a Baheej Shukri, *Researches in Insurance* (1st edn, Dar Al-Thaqafa 2012) 623, 672; Todd, *Principles of the Carriage of Goods by Sea* 370; Marwan Badri Al-Ibrahim, 'Liability of the Maritime Carrier in the Jordanian Maritime Commercial Law' (2006) 21(2) M R & S 77, 102; Lixin Han, 'A Study on the Liability of the Carrier and the Actual Carrier for Delivery of Goods without a B/L in China' (2008) 39 J Mar L & Com 275, 287; Marel Katsivela, 'Overview of Ocean Carrier Liability Exceptions Under the Rotterdam Rules and the Hague-Hague/Visby Rules' (2010) 40 Rev Gen 413, 423, 425.

To the best of the researcher's knowledge, this study is the first to clarify the position of the international conventions and Jordanian law pertaining to the effect of the marine carrier on transfer of risk and ownership in the context of a contract of sale involving carriage of goods by sea, and the first to analyse the liability of the marine carrier that could be incurred in the context of the transfer of risk and ownership.

The objectives of this study can be summarised as follows:

- To clarify the role of the marine carrier in operating transfer of risk between contracting parties to an international contract of sale involving carriage of goods by sea.
- To illustrate the role of the marine carrier in affecting transfer of ownership between contracting parties to an international contract of sale involving carriage of goods by sea.
- To address the liability of the marine carrier that could be assumed as a consequence of hindering or not passing risk and ownership between contracting parties to an international contract of sale involving carriage of goods by sea.

Investigating these issues will contribute to solving important and difficult matters, such as those related to disputes arising in the insurance domain where a difficulty in ascertaining the time of transfer of risk could negatively affect the right to claim the insurance cover that the goods' interests may enjoy.

Likewise, a clarification of the marine carrier's liability in this regard will overcome obstacles to determining the insurance coverage for the liability of the marine carrier provided by Protection and Indemnity Clubs (P&I Clubs), as the uncertainty in the context of such liability may deprive a marine carrier of enjoying such protection.

Lastly, this study will clarify the rules used to determine the time of passage of ownership and so enhance the position of the buyer to receive the goods or to sell the goods in transit, as the time of the passage of ownership would have been previously and clearly ascertained.

1.3 Research question

The study will seek to provide a sound answer to the following question:

- To what extent is the transfer of risk and ownership between parties to a contract of sale affected by the performance of the marine carrier?

Answering this question involves clarifying the performance of the marine carrier on which a transfer of risk or ownership is hinged. Therefore, the study illuminates the

legal basis on which the marine carrier stands in operating the transfer of risk and ownership in the contract of sale, regardless of its position as a third party to the contract of sale. This is to identify the obligation imposed on the marine carrier, or the instruments through which the marine carrier may operate or obstruct a transfer of risk and ownership between contracting parties to contract of sale involving carriage of goods by sea.

This answer also requires identification of the essence of the liability of the marine carrier in the case of lack of performance, which shall operate a transfer of risk or ownership between contracting parties to the contract of sale. Accordingly, the study seeks to clarify whether or not the liability is regulated under both international instruments and Jordanian law.

Clarifying these matters is important to expose problematic scenarios under either international instruments or Jordanian law which could affect the interests of contracting parties to the contract of sale in terms of transfer of risk and ownership. This includes those related to the area of insurance and sales in transit, as both are substantially affected by passage or risk and ownership. Answering this question will contribute to the evolving knowledge of the law of international contracts of sale, shipping law and marine insurance, which can be achieved by proposing essential and substantial legal solutions to be applied in the context of the international trade law.

1.4 Methodology

The objectives of the study are twofold. Firstly, it investigates the legal effect of the marine carrier on passage of risk and ownership in the context of the contract of sale involving carriage of goods by sea. Secondly, it examines the liability that might be incurred as a consequence of a marine carrier failure in transferring of risk and ownership between parties to a contract of sale.

Doctrinal legal methodology was deployed as the basis for this legal research, as it enabled the study to examine the position of the law in terms of the role of the marine carrier in passing risk and ownership, and afforded the opportunity to gather, analyse and synthesise the international instruments (CISG, Hamburg Rules and Incoterms

2010 Rules) and substantive law (JCC, JMCL and JCL) for the purpose of formulating an accurate and complete statement of the law with respect to the topic of the study.[19]

To clarify the role of a marine carrier in operating transfer of risk and ownership and to draw the legal framework of the marine carrier's liability borne in this respect, the study employs a qualitative approach as it aims to answer questions instead of examining a hypothesis.[20]

According to Dobinson & Johns, doctrinal research is a qualitative method which tends to select and weigh up the information that has been collected in accordance with hierarchy and authority.[21] Therefore, an assessment and authoritative analysis of the relevant rules of the international instruments and Jordanian law has been conducted to address the question of this study.

This study was library-based study and an argumentative approach was applied to support the solutions, texts and documents to gain a broader perspective, answer the legal questions and solve the research questions.[22]

Documentary analysis was applied to the relevant international instruments and domestic legislation to locate the relevant sources that are regulated in statutes in a direct manner.[23] Since the black latter law represents the well-established legal principles that are not subject to reasonable argument and accepted by a vast majority of courts, a 'black letter' approach was used to reveal the existence of the underlying legal system and its operation that are encapsulated in case law.[24] The study focused on a difficulty seen in the case law in terms of passing of risk and ownership, and the liability of the marine carrier under the judgements of the Jordanian Cassation Court. These judgments are discussed in relation to the relevant rules of the CISG, Incoterms 2010 Rules, and the Hamburg Rules, whereby the applicability of international rules will be examined to assess its capability in solving the disputes, which have been

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[19] Mark Van Hoecke, 'Legal Doctrine: Which Methods?' in Mark Van Hoecke (ed), *Methodologies of Legal Research: Which Kind of Method for?* (1st edn, Hart 2011) 8. Ian Dobinson & Francis Johns, 'Qualitative Legal Research' in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (EUP 2017) 18; Terry Hutchinson, 'Doctrinal Research: Researching the Jury' in Dawn Watkins and Mandy Burto (eds), *Research Methods in Law* (1st edn, Routledge 2013) 9, 10.
[20] Susan Bibler, 'Qualitative Research in Law and Social Sciences' (2012) 37 Mod L Rev 1.
[21] Dobinson & Johns, 'Qualitative Legal Research' in McConville and Chui (eds) (n 19) 21.
[22] Hoecke, 'Legal Doctrine: Which Methods?' in Mark Van Hoecke (n 19) 4.
[23] Dobinson & Johns, 'Qualitative Legal Research' in McConville and Chui (eds) (n 19) 27.
[24] Hutchinson, 'Doctrinal Research: Researching the Jury' in Watkins and Burto (eds) (n 19) 13.

inconsistently solved under Jordanian law. For more clarification on the attitude of the law in this regard, the study also had recourse to secondary sources such as textbooks, journal articles, research and other scholarly publications that have commented on the primary sources which address the same matters.[25]

The study also examines the shortcomings of the international instruments and of Jordanian law, and offers recommendations to overcome or mitigate the difficulty encountered when determining transfer of risk and ownership vis-à-vis the position of the marine carrier. This in turn, will achieve the aim of uniformity with international commercial law that takes foreign law into account.[26]

Having recourse to the rules of international instruments and Jordanian statutes helped the study to identify incompatibilities and similarities between these laws[27] and provides developed and enriched findings and recommendations.

This approach of examining of international law and international trade usage will contribute to identifying the differences and similarities between these sets and also will solve the common problems which extend beyond national boundaries.[28]

1.5 Structure of the study

The study is divided into seven chapters. Chapter one gives an overview of the topic and explaining the methodology. Chapter two discusses the basic tenets of the interrelationship between the marine carrier and international contract of sale involving carriage of goods by sea. Through this chapter, the study will clarify the main effects of the interplay between the two, and explain the concepts of the transfer of risk, transfer of ownership and liability of the marine carrier.

To explore the effect of the marine carrier on the transfer of ownership between parties to a contract of sale involving carriage of goods by sea, the study will devote Chapter three to examining the passage of ownership in a contract of sale involving carriage of goods by sea to expose the role of the marine carrier in operating passage of

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[25] Ibid 18.
[26] O Khan-Freund, 'On Uses and Misuses of Comparative Law' (1974) 1 SJA SS & SS 51.
[27] David Nelken, 'Comparative Law and Comparative Legal Studies' in Esin Orucu and David Nelken (eds), *Comparative Law* (1st edn, Hart 2007) 25.
[28] Edward J Eberle, 'The Method and Role of Comparative Law' (2009) 8 Wash U Global Stud L Rev 476.

ownership. This discussion is based on the related rules of Jordanian law (JCC, JMCL and JCL), and on the international rules and trade usage incorporated in the CISG and Incoterms 2010 Rules.

Chapter four also examines the function of the marine carrier in the context of the transfer of risk in a contract of sale involving carriage of goods by sea. It does this from two perspectives: the perspective of international rules embodied in the CISG and international usage embraced in the Incoterms 2010 Rules; and the view of the JCC on transfer of risk in a contract of sale. Here the study attempts to assess the possibility of applying the provisions of the JCC on the contract of sale involving carriage of goods by sea. In this way, the study illustrates the effect of the marine carrier on passing risk between parties to a contract of sale.

Chapter five addresses the influence of the marine carrier on the passage of ownership and risk while the goods are in transit (string sales). It investigates how a marine carrier can operate a transfer of ownership and risk in the goods sold in transit. Like earlier chapters, this chapter analyses the relevant provisions of the CISG, Incoterms 2010 Rules and the relevant Jordanian acts.

The marine carrier, while exercising its role in passing risk and ownership, might be liable for the failure of passing of risk or ownership between contracting parties to contract of sale, which may result in damage to the contracting parties. Chapter six examines the position of international and Jordanian law on this liability, in particular, the international conventions devoted to regulating liability of a marine carrier for the loss of and damage to goods and delay in delivery. Accordingly, it analyses the relevant provisions of the Hamburg Rules, as part of the Jordanian legal system, and the related-provisions of the JMCL, JCC and JCL to clarify their incompatibility. Through this analysis, the study further illustrates whether or not the liability of a marine carrier incurred in the context of transfer of risk and ownership is regulated by international conventions and Jordanian law.

The analysis from all chapters is drawn together by findings and recommendations in Chapter seven.

Chapter 2. Relationship between marine carrier and international contract of sale

This chapter focuses on the interplay between the marine carrier and the international contract of sale involving carriage of goods by sea, within which the marine carrier can play its role in either enabling or hindering the process of transfer of risk or ownership. The discussion will cover the studies that have addressed the mutual legal effects between marine carrier and contracting parties to the contract of sale involving carriage of goods by sea.

The position of the marine carrier in influencing transfer of risk and ownership lies in the association between the contract of sale and the marine carriage contract which is represented in the contract of sale involving carriage of goods by sea. Since the marine carrier is considered to be a third party to the contract of sale, the legal ground on which the marine carrier's performance can affect a transfer of risk and ownership cannot be drawn from the contract of sale, is on another legal basis whereby the effect of the marine carrier on a contract of sale can be rationalised. As a consequence, the contract of marine carriage in the contract of sale is the instrument that confers on the marine carrier the legal basis for operating a transfer of risk and ownership between parties to a contract of sale.[29] Thus, recourse must be made to the provisions of the marine carriage contract associated with the contract of sale, which will regulate the liability of the marine carrier for the damage to or loss of goods and for any delay in delivering them, which are regulated by a number of international conventions. As it is deemed to be a document of proof of the marine carriage contract, the role of the bill of lading in influencing a passing of risk and ownership will be critically analysed in this chapter. However, the widespread use of the expression 'shipper' may complicate the functionality of the bill of lading as a receipt, document of title and document of proof of the carriage contract, since the level of such complexity is influenced by terms of the contract of sale of which the marine carrier is not aware.[30] Earlier studies have been devoted to examining the role of the marine carrier as a party

[29] For example, CIF (Cost, Insurance and Freight) Contract, CFR (Carriage & Freight) Contract and FOB (Free on Board) Contract.

[30] Sir Richard Aikens, Richard Lord and Michael Bools, *Bills of Lading* (Informa Law 2006) 63; Andrew Tettenborn, 'Bills of Lading, Multimodal Transport Documents and Other Things' in Baris Soyer and Andrew Tettenborn (eds), *Carriage of Goods, by Sea, Land and Air/ Unimodal and Multimodal Transport in the 21st Century* (Informa Law 2014) 126, 144.

to the marine carriage contract, not as a third party to the contract of sale, as they have been devoted to examining the liability of the marine carrier under the relevant international conventions and various domestic legal systems, including Jordanian law.[31]

The relationship between a marine carrier and a contract of sale has a twofold implication. First, on the legal effects to the marine carrier under a contract of sale involving carriage of goods by sea, which are noted in a transfer of risk and ownership between contracting parties to contract of sale involving carriage of goods by sea. The second is the consequence of the fault of the marine carrier in performing this role, as the marine carrier might assume liability for non-performance.

The ICC has also developed a set of international commercial terms named Incoterms Rules. These terms have been dedicated to regulate sale contracts involving other kinds of contracts, such as carriage of goods and insurance contracts. The first version of these terms was issued in 1936,[32] and they have since been revised and reformed in 1980, 1990 and 2000, and with the latest revision in 2010.

Previous studies have neither illustrated the effective function of the marine carrier in terms of the transfer of risk or ownership, nor examined the liability that the marine carrier could incur as a consequence of preventing the transfer of risk or ownership.[33] However, the earlier literature was all based on the performance of the contracting parties in affecting such a passage, and discussed the transfer of risk on the basis of the seller's commitment to hand the goods over in accordance with the shipment sales, and they examined transfer of risk on the buyer's commitment to take the goods delivery, which was imposed by the destination sales.[34]

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[31] Al-Eteer (n 1) 271, 363; Koumani (n 18) 108, 161; Al-Miqdadi (n 18) 116, 157; Wilson (n 18) 115, 173; Shukri (n 18) 623, 672; Al-Ibrahim (n 18) 77, 102; Ababneh (n 13) 86, 183.
[32] Coetzee (n 7) 3, 4.
[33] Koumani (n 18) 108, 161; Al-Eteer (n 1) 271, 363; Al-Miqdadi (n 18) 116, 157; Ababneh (n 13) 86, 183; Wilson (n 18) 115, 173; Shukri (n 18) 623, 672; Al-Ibrahim (n 18) 102.
[34] Johan Erauw, 'Passing of Risk' in Stefan Kroll, Loukas Mistelis and Pilar Perales Viscasillas (eds), *UN Convention on Contracts for the International Sale of Goods (CISG): Commentary* (CH Beck/Hart/Nomos 2011) 878, 899; Pascal Hachem, 'Passing of Risk' in *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (Ingeborg Schwenzer (ed), 4th edn, Oxford University Press 2016) 950, 1000; Joseph Lookofsky, *Understanding the CISG* (4th edn, Kluwer Law International 2012) 90, 105; Gunter Hager and Martin Schmidt-Kessel, 'Passing of Risk' in *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (Ingeborg Schwenzer (ed), 3rd edn, Oxford University Press 2010) 921, 947; John O Honnold and Flechtner (n 4) 512, 546.

The previous research also discussed passage of ownership according to the position of the parties to a contract of sale, without pointing out the function of the marine carrier,[35] and only focussed on the liability of the marine carrier for loss of and damage to transported goods, and for delay in delivering them. None of them addressed the liability of the marine carrier in the context of the transfer of risk and ownership.[36]

This chapter is divided into two parts. The first is devoted to examining the literature on the transfer of risk and ownership, where the authors emphasise the commitment of the seller, as a contracting party to the contract of sale, which binds him to transfer ownership and risk to the buyer in accordance with the provisions of the contract of sale.

The second section will focus on the literature that has discussed the liability of the marine carrier under international conventions dedicated to uniform rules of liability of the marine carrier for damage to or loss of goods and delay in delivery, and those which have examined the same liability under Jordanian law.

2.1 Transfer of risk and ownership through international contract of sale

2.1.1 Transfer of risk

From the moment a contract of sale is concluded until the moment a buyer receives the goods, those goods might be exposed to incidents that might cause damage or deterioration while they are in the seller's warehouse, during transportation or within the period when they are in the buyer's premises.[37] Transfer of risk is one of the important features that may emerge from the conclusion of the contract of sale and may give rise to various kinds of disputes. Therefore, international endeavours have been devoted to formulating uniform rules to govern the matters of the contract of sale,

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[35] Audile BK Plegat, 'France' in Alexander von Ziegler et al (eds), *Transfer of Ownership in International Trade* (2nd edn, Kluwer Law International 2011) 183; Karsten Thorn, 'German' in Alexander Von Ziegler et al (eds), *Transfer of Ownership in International Trade* (2nd edn, Kluwer Law International 2011) 206; Debattista (n 17) 273.

[36] The studies that examined the liability for loss of damage to goods and delay in delivery include Shukri (n 18) 623, 672*;* Al-Eteer (n 1) 271, 363; Ababneh (n 13) 86, 183; Brian Harris, *Ridley's Law of the Carriage of Goods by Land Sea and Air* (8th edn, Thomson Reuters 2010) 145, 330; Al-Ibrahim (n 18) 102; Todd, *Principles of the Carriage of Goods by Sea* 309, 334*;* Al-Miqdadi (n 18) 116, 157.

[37] Goodfriend (n 17) 577; Hager and Schmidt-Kessel (n 34) 922.

including the transfer of risk between contracting parties in the form of the CISG[38] and of the Incoterm Rules.[39]

The damage, loss or deterioration sustained by sold goods are all deemed to be aspects of risk which could be transmitted from a seller to a buyer by virtue of the contract of sale. Hence, the risk represents a deformity in the contract of sale that may reflect some legal effects in this contract.[40]

It is generally agreed that the main principle of the risk of loss is the chance of physical loss. However, the prerequisite condition for the chance of transfer of loss of or damage lies in the fact that neither the damage nor the loss is imputable to the act or omission of the contracting parties.[41] It is further argued that the act or omission of the contracting party does not require a breach of the contract of sale's obligation. Rather, the seller's acts or omissions include all accidental incidents that could be incurred by the sold goods due to the acts or omissions.[42] The applicable rule on transfer of risk plays a decisive function in the context of a contract of sale and allows the parties to identify which bears the risk.[43] Despite the importance of the transfer of risk, the CISG does not explain the notion of risk transfer in a contract of sale.[44] Like the CISG, Jordanian law does not explain the concept of risk, but it does emphasise the time at which the risk transmits between contracting parties to the contract of sale in general.[45] To demonstrate the concept of risk, different authors suggest various cases that could be referred to under the concept of risk. For example, Erauw states that the CISG contains several words under the concept of risk, such as loss, damage, perished goods and deteriorated goods.[46]

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[38] Honnold and Flechtner (n 4) 5; Gabriel (n 4) 4, 6; *Schlechtriem & Schwenzer* (n 2) 1.
[39] Pamboukis (n 7) 126; Coetzee (n 7) 4; Ostendorf (n 7) 68.
[40] Hager and Schmidt-Kessel (n 34) 921.
[41] Pipkova (17) 131, 132; Hachem (n 34) 958; Hager and Schmidt-Kessel (n 34) 921; Dan Dokter, 'The Vienna Convention on the International Sale of Goods' in Koppenol-Laforce et al (n 17) 206, 207.
[42] Dokter (n 41) 206.
[43] Hachem (n 34) 950. Hager and Schmidt-Kessel (n 34) 922.
[44] Pipkova (n 17) 131.
[45] Section 472 of the JCC.
[46] Articles 66 and 68 of the CISG; Article 82(2)(b) of the CISG; Erauw, 'CISG Articles 66-70: The Risk of Loss and Passing It' 211.

Flambouras assumes that the risk in the contract of sale may comprise incidental physical loss, or deterioration of or damage to goods sold by a seller to a buyer.[47] Erauw extends the scope of the notion and suggests that delays in delivery associated with deterioration of the quality of goods is an aspect of risk, which is deemed to be a breach of the obligation of delivery that must be achieved on a certain date agreed to in the contract of sale.[48]

Concerning the categories of risk, Pipkova believes that risk can be classified into two types. The first is that of price, where the financial consequences are borne as a result of the materialisation of the risk. The second consists in the risk of performance in which the contracting party endures the loss of or damage to the goods.[49] It has also been argued that the concept of the transfer of risk may include different incidents, such as disappearance of the subject matter that might be attributable to theft, the mislaying of goods, the passing of goods to the wrong destination or person, damage by a third party or the goods may have got mixed up with other goods.[50] Erauw argues that the physical risk can also include other features such as the loss of the related documents, which might be governed by the rules on risk of the CISG as a consequence of its transfer with the risk of goods, where the time and the place of the tendering of documents are normally identical to the time and place of the delivery of goods, as provided in Article 34 of the CISG.[51]

Another view is that, although the wording of the CISG leads to the exclusion of legal risks from the ambit of the risk's rules, such risks should also be embraced under the risk rules, where the confiscation and prohibiting of commercial use or possession of goods of the government authorities may deprive the buyer of the benefit of the goods.[52] However, Gillette and Walt do not agree with this assumption, and argue that government intervention is addressed under the impediments to contract of sale performance, as indicated in Article 79 of the CISG, and not under the provisions of

[47] Flambouras (n 17) 115.
[48] Erauw, 'CISG Articles 66-70: The Risk of Loss and Passing It' 215.
[49] Pipkova (n 17) 133.
[50] Erauw, 'CISG Articles 66-70: The Risk of Loss and Passing It' 204; Pipkova (n 17) 132.
[51] Erauw, 'CISG Articles 66-70: The Risk of Loss and Passing It' 205; Article 34 of the CISG.
[52] Ibid 205.

Article 66 where the relation between transfer of risk and the obligation to pay the price is set out.[53]

Gillette and Walt are correct, but it could be added that the consequences of the transfer of risk are not confined only to the loss of or damage to the goods but also to delay in delivery. Erauw also presumes that the damage caused by the goods themselves is encompassed in the risk of loss, where the seller shall be liable for delivering non-conforming goods, though the damage or deterioration took place after the time of the delivery of goods.[54] He argues that, in accordance with Articles 66-70 of the CISG, the economic risks such as fluctuation of market price and currency rate are excluded from the rules of the passing of risk, as these incidents will transfer at the time when the agreement has been concluded between contracting parties.[55]

Hachem also believes that when the transported goods have been redirected to another destination, this leads to further expenses and he recommends that these expenses should be classified in the area of risk. Thus, the seller has to bear such expenses, provided that he is bound to arrange for the carriage of goods.[56]

Pipkova argues that Article 66 of the CISG stipulates that if the loss or damage materialises after the risk has been assumed by the buyer, the latter cannot refrain from paying the entire price of the goods sold, even if the quantity of the goods is decreased and he has to pay extraordinary transport expenses that have arisen after the transfer of risk.[57]

Erauw holds the view that the risk of loss must include the buyer's risk of paying a price, which should not surpass the goods' price agreed in the contract of sale, but in case the loss is associated with a breach by the seller, the loss of the buyer shall be reduced by the amount of damage caused by the act or omission of the seller.[58] However, Pipkova, holds a view more accurate than this, where he suggests that the buyer shall be discharged of the obligation of paying a price if the damage or loss is

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[53] Clayton P Gillette and Steven D Walt, *The UN Convention on Contracts for the International Sale of Goods: Theory and Practice* (2nd edn, Cambridge University Press 2016) 275, 276; Articles 66 and 79(1) of the CISG.
[54] Erauw, 'CISG Articles 66-70: The Risk of Loss and Passing It' 208. See Article 36(2) of the CISG.
[55] Erauw, 'CISG Articles 66-70: The Risk of Loss and Passing It' 206; Hachem (n 34) 951.
[56] Hachem (n 34) 962.
[57] Pipkova (n 17) 133.
[58] Erauw, 'Passing of Risk' 885.

imputable to an act or omissions of the seller, as provided in Article 66 of the CISG.[59] The operation of transporting goods often encounters many obstacles, as the goods will be exposed to potential loss or damage depending on the distance of carriage that may include multiple carriers, multimodal carriage and the loading and discharging process, all of which can increase the complexity of determining the time of damage of goods.[60]

The function of the marine carrier in operating transfer of risk under the CISG can be exercised in three ways. First, when the carriage of goods is undertaken via a 'combined transport document' issued by a marine carriage operator. Here the marine carrier is entirely responsible for the whole operation of the transportation carried out via a multimodal carriage, irrespective of whether the damage or the loss has materialised during the sea voyage or while the goods have been carried by other means of transportation.[61] The second is when a marine carrier performs its obligation of taking delivery of the goods as a first carrier, or delivers the goods to the buyer at the destination place in accordance with destination sales. There is a third way in which the marine carrier performs such a role by virtue of an explicit agreement between contracting parties, who might agree that the risk is transferred once the marine carrier takes delivery of the goods, or by incorporating the Incoterms 2010 Rules in the contracts of sale involving carriage of goods by sea.[62] The function of the marine carrier in operating transfer of risk in a sale contract involving carriage of goods by sea can be seen under the Incoterms 2010 Rules as CIF (Cost, Insurance and Freight), FOB (Free On Board) and CFR (Carriage and Freight). All explicitly stipulate that the risk passes to the buyer when the goods are delivered to the marine carrier, specifically when the goods are placed on board the vessel,[63] even if the goods were later moved elsewhere on board the vessel for operational purposes.[64]

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[59] Pipkova (n 17) 133.
[60] Gillette and Walt (n 53) 269.
[61] Aikens, Lord and Bools (n 30) 28.
[62] Honnold and Flechtner (n 4) 516. This was set out in Article 6 of the CISG, which declares: 'The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions'. Erauw, 'Passing of Risk' 888.
[63] Gillette and Walt (n 53) 276.
[64] Roberto Bergami, 'The Newest Revision of Delivery Terms' (2012) 15(2) Acta Univ. Bohem. Merid 37.

Articles 67-69 of the CISG set out the time at which the risk passes between contracting parties to the contract of sale, and how it is transferred to the buyer at the time and place of delivery.[65] Honnold, however, argues some facts should be taken into account when allocating the time at which a risk transfers between the contracting parties to the contract of sale. He believes that these relate to the party who is able to assess the loss better than another party, and then claim the damage from the insurer. He also suggests that such a party's position entitles them to salvage or dispose of the damaged goods and get the best price for the insurance cover in accordance with commercial practice.[66] The importance of the rule of transfer of risk can be further identified in the condition of the goods' conformity which has to be met at the same time as a passage of risk that is supposed to be determined on a particular rule.[67] Regardless of the fact that the obligation of the conformity of goods has been widely addressed in the CISG, the rules of the CISG have not provided a clear definition on conformity of goods.[68]

While settling the matter of transfer of risk under the provisions of the CISG, another disposition should be kept in mind. This can be derived from Article 70 of the CISG, which provides that the loss might coincide with a breach by the seller that could keep the risk on the seller's account or return it back to him. This might be avoided where the contract of sale is terminated and the provisions of Articles 81-84 of the CISG govern the risk of loss.[69] It has been further assumed that, if a non-conformity is identical to the time at which the risk transfers between parties to a contract of sale, the liability of the seller as to the non-conformity will not transfer to the buyer.[70]

Various theories have been adopted for the sake of ascertaining the time at which the risk transfers to the buyer. This is due to the importance of transfer of risk as one of the implications of the contract of sale, which is one of the considerable concerns of contracting parties and to insurers. These have been developed following different approaches. One theory adopted the rule of linking transfer of risk to the conclusion

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[65] Erauw, 'Passing of Risk' 878.
[66] Honnold and Flechtner (n 4) 509.
[67] Pipkova (n 17) 133, 134.
[68] Nisreen Mahasneh, 'The Ratification of the United Nations Convention on Contracts for the International Sale of Goods by Jordan: The Legal Perspective and Impact' (2011) 16 Unif L Rev 853.
[69] Erauw, 'Passing of Risk' 879.
[70] Ibid 887. This has been derived from Article 36 of the CISG. See Appendix 1.

time of the contract of sale, which can be recognised under the provisions of the Swiss Code of Obligations in Article 185(1).[71] Some jurisdictions have linked transfer of risk to the time of transfer of ownership, as stipulated in Articles 1138 and 1583 of the French Civil Code and Section 20(1) of UK's Sale of Goods Act (SGA)1979.[72] However, Greek law has dopted the principle of linking the risk to the seller's obligation in the delivery of goods, which is expressly stated in Article 522 of the Greek Civil Code (GCC).[73]

The last approach is also encompassed in the CISG, in which the risk is based on the fulfilment of the delivery of goods, as provided in Articles 67 and 69. Jordanian law has adopted the same rule, where the time of transfer of risk has been established on the time of the delivery of the goods that shall be performed by the seller.[74] However, Gillette and Walt believe that the basis of linking transfer of risk to the time of a transfer of ownership cannot be followed by the CISG, because the latter has omitted passing of ownership from its provisions and established transfer of risk in the goods sold in transit on the conclusion time of the contract.[75]

In examining the literature that has addressed transfer of risk in the context of the contract of sale, it is also important to draw a distinction between transfer of risk in the context of shipment contracts and that which takes place within destination contracts, as each has its own principle to ascertaining the time and place of transfer of risk.

2.1.1.1 Transfer of risk through shipment sale contract

One aspect of the international endeavours of regulating transfer of risk can be seen in the shipment contracts, where the time of the transfer of risk is determined by the seller's obligation of handing the goods over as has been stipulated in CISG and the Incoterms 2010 Rules. Since Jordan is not a signatory to the CISG and there is no particular act regulating international contracts under Jordanian law, there are no rules

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[71] Flambouras (n 17) 88. As provided in Article 185(1) of the Swiss Code of Obligations 2017 (see Appendix 2).
[72] Gillette and Walt (n 53) 269. See Articles 1138 and 1583 of French Civil Code and Sections 19 and 20(1) of UK's Sale of Goods Act (SGA)1979. (see Appendix 2).
[73] Hachem (n 34) 951, 954; Flambouras (n 17) 88. Article 522(1) of the Greek Civil Code (see Appendix 2).
[74] Section 472 of the JCC that will be analysed later in this study.
[75] Gillette and Walt (n 53) 269, 270.

of the transfer of risk in sales involving carriage of goods by sea, and thus the role of the marine carrier in terms of transfer of risk cannot be seen. The only way of resolving the dispute arising in the context of the transfer of risk is to resort to the general rules of passing of risk enshrined in the JCC, provided no agreement provides otherwise.

Fulfilment of the seller's obligation to deliver under a contract of sale involving carriage of goods by sea requires that the seller should hand the goods to the marine carrier in the shipment port.[76] Hence, it can be inferred that the failure of the marine carrier in taking delivery of the goods or in delaying the discharge of the seller's obligation to deliver would disrupt or delay the delivery of the seller and in turn, the parties' interest would be affected, as the risk has not been transferred to the buyer as agreed in the contract of sale.

The role of the marine carrier in the fulfilment of delivery is impliedly recognised under the CISG provisions, in contrast to the Incoterms 2010 Rules in which the role of the marine carrier can clearly be seen.[77]

To clarify the seller's obligation to deliver through which the buyer assumes a responsibility for risks, the literature examines the nature of the delivery performed by the seller to the marine carrier. According to Piltz, a contract of sale involving carriage of goods binds neither the buyer to take delivery from the seller's place of business, nor the seller to hand the goods over at the buyer's place of business, unless the agreement between the parties to the contract, trade usage and practices between contracting parties provide otherwise.[78] Lookofsky suggests that handing the goods over from a seller to the first carrier in accordance with Article 31(a) of the CISG is a default delivery, which discharges the seller's obligation of delivery against a buyer, even if the delivery of the goods is performed to a third party. He also assumes that Article 32(1) of the CISG states that the delivery of unidentified goods to a first carrier is deemed to be a default delivery, provided a notice of consignment has been given

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[76] Article 67 of the CISG and Article A5 and B5 of CIF, CFR and FOB of the Incoterms 2010 Rules.
[77] Articles A4, A5 and B5 of CIF, CFR and FOB of the Incoterms 2010 Rules, where the passage of risk was established based on placing the goods on board the vessel. However, Article 67 of CISG can be applied to any mode of carriage as it has been provided that the passage of risk takes place once the goods are handed over to the first carrier.
[78] Burghard Piltz, 'Delivery of the Goods and Handing Over of Documents' in Stefan Kroll, Loukas Mistelis and Pilar Perales Viscasillas (eds), *UN Convention on Contracts for the International Sale of Goods (CISG): Commentary* (Beck/Hart/Nomos 2011) 412, 413.

to the buyer from the seller's side.[79] Thus, the concept of delivery is not clearly explained under the provisions of the CISG. This ambiguity has created a divergence in interpreting the relevant provisions of the CISG.

Accordingly, it has been presumed that placing sold goods at the carrier's disposal would not be enough to discharge the seller's obligation to deliver, as the seller should be responsible for transporting the goods to the first carrier, handing them over, and loading them into the carrier's means of transport.[80] However, this assumption is not shared by Luchinger, who believes that discharging the seller's obligation to deliver does not entail having the goods loaded into the carrier's facility, and he suggests that a transfer of custody between a seller and an independent carrier should suffice to release the seller from the obligation of goods delivery.[81] This perspective is more accurate than the earlier proposition, and it is also consistent with the provisions of Article 31(a) of the CISG, which does not stipulate loading of goods into the carriage's facility for the seller's obligation to be discharged. It can be concluded, therefore, that discharging the seller's obligation to deliver by relinquishing custody of goods to the marine carrier by virtue of the shipment contract is sufficient to allocate the risk to the buyer under the provisions of the CISG, notwithstanding that the goods have been delivered to a third party, like a marine carrier.

A bill of lading can also affect the obligation of the delivery of goods, because the date indicated in the bill of lading might be contested to prove the date of the goods delivery to the marine carrier. This can be used to determine whether or not the goods have been handed over on time.[82] The delivery of goods might further be proved by the date indicated in the bill of lading, issued in terms of a portion of undivided bulk goods, regardless of the fact that most of the bulk goods were shipped before that date.[83]

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[79] Lookofsky (n 34) 64.
[80] Piltz (n 78) 416.
[81] Widmer Luchinger, 'Delivery of the Goods and Handing Over of Documents' in Ingeborg Schwenzer (eds), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (4th edn, Oxford University Press 2016) 527. See also, Ingeborg Schwenzer, Christiana Fountoulakis and Mariel Dimsey, *International Sales Law/A Guide to the CISG* (2nd edn, Hart 2012) 492; Hager and Schmidt-Kessel (n 34) 929.
[82] Fayyad Al-Qudah and Ahmad Ziyadat, 'The Legal Principles of Bill of Lading: A Comparative Study between the Provision of the Jordanian Maritime Law & Hamburg Rules' (2004) 31 (1) SSS&L 164.
[83] Aikens, Lord and Bools (n 30) 47.

The significant function of the bill of lading can also be seen in the obligation of the delivery of goods at the place of destination, as the marine carrier should not hand the goods over to a buyer (consignee), unless the bill of lading is tendered.[84] The bill of lading performs another distinctive duty in the context of goods sold in transit, where a mere surrendering of shipping documents including a bill of lading is sufficient to discharge the obligation of delivery of goods imposed on the seller.[85]

Not only the manner of the delivery of goods is ambiguous under the provisions of the CISG, but its position is also unclear with respect to delivery to a third party, other than the marine carrier in the shipment port. Previous studies have tried to clarify the legal effect of the delivery of goods performed to a 'freight forwarder' in the context of shipment contract. These studies are all in agreement that the delivery to the freight forwarder would discharge the seller's obligation to deliver, but differ regarding the rationalisation.[86]

Piltz and Flambouras both argue that the delivery to an independent freight forwarder might be equivalent to that which is performed to the first carrier, provided that the freight forwarder is performing the duty of taking the goods over and the duty of arranging the carriage, or where a freight forwarder is obliged by the seller to carry out the carriage operation himself or using a subcontractor.[87] However, Flambouras adds that the delivery made by a seller to a freight forwarder could be equivalent to the delivery to the first carrier if the goods have been taken over by a carrier in accordance with the instructions of the freight forwarder.[88] Luchinger suggests that the delivery to an independent freight forwarder will satisfy the seller's obligation to deliver, as the goods are deemed to be delivered in accordance with Article 31(a) of the CISG when a seller renounces custody of the goods to an independent freight forwarder by arrangement.[89] It has been also assumed that, to discharge the seller's

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[84] Todd, *Principles of the Carriage of Goods by Sea* 348; Wilson (n 18) 133.
[85] Sir Guenter Treitel and FMB Reynolds, *Carver on Bills of Lading* (4th edn, Thomson Reuters 2017) 323; Luchinger (n 81) 545.
[86] Flambouras (n 17) 115; Luchinger (n 81) 528; Piltz (n 78) 417; Erauw, 'CISG Articles 66-70: The Risk of Loss and Passing It' 211.
[87] Bugden and Lamont-Black (n 11) 380; Piltz (n 78) 417; Flambouras (n 17) 115; Luchinger (n 81) 528.
[88] Flambouras (n 17) 118.
[89] Luchinger (n 81) 528.

obligation to deliver, the freight forwarder should be in the position of the bailee of goods even if physical possession has not been achieved.[90]

It can be inferred from this that delivery made to an independent freight forwarder can meet the requirement of the delivery of goods as stipulated in the CISG provisions because it means that the goods' custody has been transferred from a seller to a freight forwarder who will transport the goods, which would be adequate to discharge the seller's obligation to deliver.

Luchinger goes on to state that delivery made to the supplier can also be invoked by contracting parties to determine whether or not the risk has passed to the buyer by virtue of such delivery. He illustrates this with a case where the seller instructs the supplier to transport the goods directly to the buyer. He argues that such a delivery would not discharge the seller's obligation to deliver, as the custody of the goods has not passed from the supplier to the seller, and because the supplier does not perform the duty of the independent carrier but rather, he performs the seller's obligation of delivery.[91] Luchinger describes another case where the carrier undertakes to perform the transportation duty, but before transmission to the buyer and due to transportation obstacles the carrier temporarily stores the goods somewhere. He believes that in such a case the goods would be deemed to be delivered in accordance with Article 31(a) of the CISG.[92] The temporary storage of goods by a marine carrier before shipping does not preclude the transfer of risk under the CISG, and the risk is deemed to be transferred when the seller hands the goods over to the independent marine carrier. However, neither the CISG nor the earlier studies discussed delivery to a port authority or customs authority, and such an omission could result in disagreement over the time of the transfer of risk.

The seller's delivery to the carrier is not only examined under the CISG provisions but also under the Incoterms 2010 Rules. Coetzee assumes that application of Article 31(a) of the CISG contradicts international trade usage, as the delivery of the goods will take place when they are placed on board the vessel in the shipment port, whereas under the provisions of Article 31(a) of the CISG, delivery is deemed to be when custody of

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[90] Simon Baughen, *Shipping Law* (5th edn, Routledge 2012) 166.
[91] Luchinger (n 81) 527.
[92] Ibid 529.

the goods is renounced by a seller to a first independent carrier.[93] Therefore, the principle adopted under the provisions of the CISG for specifying the moment at which the risk transfers to the buyer varies from that specified under the Incoterms 2010 Rules.

In examining the essence of the delivery obligation of the seller, it is also necessary to consider the legal effect of the shipping documents on the effectiveness of delivery. Honnold recommends that the seller's obligation to deliver is discharged under the provisions of the CISG when the goods are handed over to the first independent carrier to be transported to the buyer.[94] The goods are deemed to be delivered and thus the transfer of risk takes place when the seller hands the goods over to the marine carrier, notwithstanding that the related documents have not been tendered. Luchinger offers another perspective and proposes that the obligation to surrender the shipping documents to the buyer differs from the obligation of handing the goods over. However, this suggests that such an assumption does not apply to goods sold in transit, where the mere tendering of the relevant documents will suffice to discharge the seller's obligation to deliver.[95]

It is also assumed that the seller's obligation to hand over the goods to the carrier and the obligation to surrender the relevant documents to the buyer are both integral obligations, which are part of the original obligation of delivery.[96] Thus, the delivery obligation means not putting the goods at the disposal of the buyer but rather, they have to be handed over to the carrier along with the related documents. In this way, the delivery of the goods becomes a transfer of the physical possession of the sold goods from a seller to a carrier, whereas a constructive delivery would be achieved once the seller tenders the shipping documents that entitle the buyer to have physical possession of the goods.[97]

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[93] Coetzee (n 7) 13.
[94] Honnold and Flechtner (n 4) 312.
[95] Luchinger (n 81) 545.
[96] Ahmad Alsaeed Alzoqord, *Principles of International Commercial Law/International Sale of Goods* (2nd edn, Modern Bookshop 2010) 167; Al-Miqdadi (n 18) 170; Koumani (n 18) 194.
[97] See James M Klotz, *International Sales Agreements/An Annotated Drafting and Negotiating Guides* (Kluwer Law International 2008) 160; Alzoqord (n 96) 167; Al-Miqdadi (n 18) 170; Koumani (n 18) 194; Treitel and Reynolds (n 85) 317; Rhidian Thomas, 'International Sale Contracts and Multimodal Transport Documents' in Baris Soyer and Andrew Tettenborn (eds), *Carriage of Goods, by Sea, Land and Air/ Unimodal and Multimodal Transport in the 21st Century* (Informa Law 2014) 149.

Honnold argues that the handing over of the sold goods is sufficient to discharge the seller's obligation to deliver and corresponds to the obligation of the delivery intended in Article 31(a) of the CISG. This conclusion can be justified under an assertion derived from the provisions of this Article, where neither a tendering of the relevant documents nor loading of the goods is stipulated for the sake of discharging the seller's obligation to deliver. It can be concluded that the obligation of handing goods over is an independent commitment which is different from the obligation to tender the documents, and that fulfilment of one does not influence the other. The mere handing over of goods to the marine carrier is enough to transmit the risk from a seller to a buyer by virtue of the shipment contract, which in turn can simplify the process of determining the time of the transfer of risk.

If the case is being ruled in a Jordanian court and neither the Incoterms 2010 Rules nor the CISG are applicable, Jordanian law undertakes the duty of governing the contract of sale with recourse to the general rules of the contract of sale set out in the JCC. However, the notion of the seller's obligation to deliver under the JCC is more ambiguous than under international instruments. This increases the complexity of ascertaining the time of the transfer of risk. This can be seen in the ambiguity of the JCC's position, in particular on the delivery of goods to the marine carrier, surrendering the shipping documents, and the delivery of goods sold in transit. The presence of such ambiguity can be explained by the fact that the JCC is designed to regulate contracts of sale in general. To determine whether or not the seller's obligation to deliver is discharged in accordance with the shipment contract governed by CISG provisions, there should be recourse to Articles 31(a) and 67(1) to determine the time at which the transfer of risk has taken place. However, if the Incoterms 2010 Rules were incorporated in such a contract, the delivery obligation would be governed by Article A4 of the Incoterms 2010 Rules, while Articles A5 and B5 would govern the transfer of risk.

2.1.1.2 Transfer of risk through destination sale contract

Notwithstanding that the general rule of linking a transfer of risk to the obligation of the delivery of goods under a shipment contract is consistent with that under a destination contract, both types of sales adopt different rules as to the delivery criteria and the place at which delivery has to be discharged.

According to the implied meaning of the provisions of the destination sales under the CISG, the seller's obligation to deliver is discharged when the goods are placed at the disposal of the buyer, as opposed to the shipment sales, where the disposition of the goods would not suffice to discharge the obligation of delivery, as it is required that the custody of the goods be renounced by a seller to a marine carrier.[98]

Another aspect of dissimilarity can be seen in the place of delivery, where the delivery of the goods under a shipment contract will be performed at the shipment port. However, this obligation must be performed in the place of the delivery at the destination place, as agreed in the destination sale contracts and as can be inferred from Article 69(2) of the CISG and Articles A4, A5 and B5 of the destination sales in Incoterms 2010 Rules.[99] The same inference drawn in the context of the seller's obligation to deliver under the shipment sales can be further adopted in the context of the destination contracts, where the marine carrier can play a considerable role in affecting the seller's obligation to deliver at the agreed place of destination.

Accordingly, the marine carrier's breach of handing the goods over to the buyer could disrupt or delay fulfilment of the seller's obligation to deliver.[100] As the transfer of risk is one of the most important effects that could result from the fulfilment of the goods delivery, the marine carrier can further obstruct or delay the operation of the transfer of risk, which is supposed to take place in the destination, by virtue of this kind of contract.[101]

2.1.2 Transfer of ownership through international sale contract

A transfer of ownership in the contract of sale might be affected by the performance of the marine carrier imposed by virtue of a marine carriage contract. However, the related matters of ownership in international commercial law are less arguable than the other matters of international commercial law.[102] This is because the international approach regarding a transfer of risk has been based on goods' delivery rather than a

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[98] See Hachem (n 34) 993; Honnold and Flechtner (n 4) 533, 534*;* Hager and Schmidt-Kessel (n 34) 939, 941; Piltz (n 78) 416.
[99] Hachem (n 34) 993.
[100] Girvin, *Carriage of Goods by Sea* 158.
[101] The legal implication of the seller's obligation to deliver in a destination sale contract can be inferred from Article 69(2) of the CISG and Articles A5, B5 of DDP, DAT and DAP of the Incoterms 2010 Rules which all have established the passage of risk on placing the goods at the disposal of the buyer in the destination place.
[102] Koppenol-Laforce et al (n 17) 174.

transfer of ownership and since the ownership matters have been left to the domestic rules that should be decided in accordance with the rules of conflict of laws.

Ascertaining the time at which the ownership transfers to the buyer in the context of the contract of sale plays a determining role. In a jurisdiction such as France, a transfer of risk is linked to the time of passage of ownership, from which the buyer would not be able to reject the goods that do not conform to the contract of sale, while the seller can enjoy the right of claiming the full amount of an unpaid price in addition to a profit, whereas the buyer will be entitled to right of action.[103]

2.1.2.1 Concept of ownership

The definition of ownership performs a substantial function in the context of the contract of sale, as it can determine the scope of the seller's rights in relinquishing its interests in the sold goods to the buyer.[104] However, the CISG neither regulates a transfer of ownership between contracting parties nor provides a clear definition for the sales contract. Rather, it appears to expressly disregard the rules of the ownership.[105] It is important that there is general access to the rules of the applicable domestic law for the sake of governing the ownership-related issues that are not regulated under the provisions of the CISG. A definition of ownership can be derived from the definitions provided in the domestic legal systems where it has been suggested that ownership is a 'comprehensive and exclusive right that includes the rights to enjoy (dispose of) the thing and to exclude others'.[106]

However, ownership is defined in English law as 'the general property in goods', which is accepted amongst lawyers as an expression to title or ownership.[107] Another view assumes that the general concept of ownership lies in a package of rights of one person over others over something owned by him, and hence the acquirer of the ownership has the right to renounce these rights to another person when they conclude a contract of sale or through a gift.[108] A transfer of ownership involves many effects

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[103] Klotz (n 97) 153. See Articles 1138, 1583 of the French Civil Code.
[104] Ho (n 18) 597.
[105] See Article 4(b) of the CISG.
[106] Gashi (n 17) 43. See Article 544 of French Civil Code, Article 903 of German Civil Code and Article 149 of Albanian Civil Code 1994 in Appendix 2.
[107] See Section 61 of SGA 1979 and Section 4(1) of Consumer Rights Act 2015 in Appendix 2; John N Adams and Hector Macqueen, *Atiyah's Sale of Goods* (12th edn, Pearson Education 2010) 305.
[108] Ho (n 18) 571.

that influence the relationship between parties to a contract of sale, where the buyer can procure the seller's right to claim ownership of the goods that can entitle him to have title to the goods sold, which can be asserted before a third party.[109] Bugden and Lamont-Black argue that, in addition to possession of the goods, the ownership may encompass the unlimited use and unrestricted disposition exercised through limitless time, provided that these rights are exercised within the scope of possessory rights.[110] Bridge points out the legal effect of the passage of ownership, recommending that the significant features of a transfer of ownership between parties to a contract of sale involving carriage of goods lies in the buyer's right to sue a third party. The buyer can have the right to claim against the carrier to recover damages sustained by the goods while being transported.[111] Hence, the implications of the transfer of ownership rules reflect not only the buyer's rights against the seller obtained from the contract of sale, but also affect the buyer's right vis-à-vis a third party.

Having recourse to applicable domestic law will offer the opportunity of clarifying the essence of the relationship between the contract of sale and transfer of ownership. Such a relationship can be seen in the fact that domestic legal systems normally tend to establish the contract of sale on the basis of a transfer of property in exchange for the payment of an agreed price.[112]

2.1.2.2 Principles of transfer of ownership

Normally, domestic legal systems governing ownership matters abide by 'situs rules', which state that all ownership issues must be governed by the law of the place where the goods have been located when the title of goods was obtained.[113] Passage of ownership is also covered by the situs rules.[114] Given that the applicable law on

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[109] Ibid 597; Adams and Macqueen (n 107) 308.
[110] Bugden and Lamont-Black (n 11) 62.
[111] MG Bridge, *The International Sales of Goods* (3rd edn, Oxford University Press 2013) 312, 313. This assumption is also set out in Article 73 of the JCL.
[112] See the definition of the sale contract indicated in Section 1(2) of the SGA 1979, Article 184(1) of the Swiss Code of Obligations 2017, Article 1582 of French Civil Code and Section 433 of German Civil Code (BGB).
[113] Ostendorf (n 7) 39, 41; Martin Davis, 'Australia' in Alexander Von Ziegler et al (eds), *Transfer of Ownership in International Trade* (2nd edn, Kluwer Law International 2011) 2; Zekos (n 17) 5; Axel Flessner, 'Choice of Law in International Property Law – New Encouragement from Europe' in Roel Westrik and Jeroen van der Weide (eds), *Party Autonomy in International Property Law* (2011) European Law Publishers < http://www.beck-shop.de/fachbuch/leseprobe/9783866531734_Excerpt_003.pdf > accessed 13 October 2018.
[114] Koppenol-Laforce et al (n 17) 174, 175.

ownership under Jordanian law is based on the situs rules, transfer of ownership would also follow these rules.[115]

Since the Middle Ages, ownership rights have been applied to immovable property, but the laws were improved in the twentieth-century so that movable and immovable property became subject to the same rules, notwithstanding the complexity of movable property which entails some divergence from the situs rules.[116]

In terms of the functionality of ownership in a contract of sale, Bridge holds the view that a seller is the only person who has a first priority right on the goods, as he presumes that the buyer will not acquire ownership in the sold goods, unless a valid performance has been undertaken by the seller, whereas he believes that the seller must bear the liability in a breach of a contract of sale if he fails to carry out any perquisite act for the passage of ownership.[117] Since the passage of ownership could hinge on the seller's particular performance,[118] the seller may invoke the performance of the marine carrier for the purpose of proving the achievement of the obligation to transmit the ownership, such as invoking the bill of lading issued by a marine carrier to prove identification of goods.[119]

Due to the lack of regulation of ownership matters by international instruments, domestic law has to regulate transfer of ownership in the context of international sales contracts.[120] However, although the domestic legal systems agree on the situs rules as the basis of law on a transfer of ownership between parties to a contract of sale, there is no agreement as to the guidelines that should be considered to identify the moment at which a transfer of ownership takes place,[121] and domestic laws differ in the time of the transfer. For example, some legal systems link transfer of ownership to the time of the conclusion of the contract of sale, such as Article 1583 of the French Civil Code and Section 18 of the UK's SGA, whereas Section 929 of the German Civil Code stipulates that an independent contract should be concluded for the sake of determining

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[115] Situs rules can also be derived from the wording of Section 19 of the JCC.
[116] Koppenol-Laforce et al (n 17) 174.
[117] Bridge, *The International Sales of Goods* 311.
[118] Ingeborg Schwenzer and Pascal Hachem, 'Sphere of Application and General Provisions' in *Schwenzer & Schlechtriem: Commentary on the UN Convention on the International Sale of Goods (CISG)* (Ingeborg Schwenzer (ed), 4th edn, Oxford University Press 2016) 93.
[119] Section 1147 of the JCC.
[120] Schwenzer and Hachem (n 118) 93.
[121] Koppenol-Laforce et al (n 17) 174.

a transfer of ownership, while a passage of ownership might depend on a particular act being previously satisfied, such as the act of a delivery of goods.[122]

Another area of disagreement between these jurisdictions can be seen in the movability concept. Unlike civil law legal systems, the distinction between movable and immovable property has not been adopted by the common law systems, and the latter have only embraced such an approach in the context of private international law.[123] Although many of the jurisdictions have distinguished between movable and immovable property, some have adopted different approaches to the concept of movability.[124]

The application of situs rules to the ownership rights of movables has been harshly criticised.[125] According to Debattista, the main reason for this difficulty lies in the fact that situs has an ambiguous nature, which may give rise to queries regarding the applicable law, namely whether the law of the shipment or the law of the country where the goods are at the time of the conclusion of the contract should be used.[126] He also assumes that the applicable law should be the law of the place where the goods are located when the contract of sale has been concluded, rather than the place of shipment, because a transfer of ownership is one of the implications of the sale contract, not of the carriage contract. The situation becomes more complicated once the goods are sold while they are in the high seas, where the law of the ship's flag will also compete.[127]

Koppenol-Laforce suggests that, to determine the applicable law for goods sold in transit, the law of the place of production of the relevant documents should be the applicable law on all matters in respect of the ownership,[128] and that in the absence of such documents, the law of the place where the carriage of goods commenced should regulate this matter. Nevertheless, she believes that the general approach should be for

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[122] Schwenzer and Hachem (n 118) 93. See Article 18 SGA, Article 1583 of the French Civil Code and Section 929 of the German Civil Code in Appendix 2. Plegat (n 35) 183; Thorn, 'German' in von Ziegler (n 35) 206. See also, § 2-401(2) of the United States' Uniform Commercial Code-Sales (UCC).
[123] Koppenol-Laforce et al (n 17) 174. See s 30(1) of the UK's Civil Jurisdiction and Judgements Act 1982, Section 7 of New Zealand Property (Relationships) Act 1976.
[124] Ibid 174.
[125] Ibid 176.
[126] Debattista (n 17) 273.
[127] Ibid 273.
[128] Koppenol-Laforce et al (n 17) 179, 180.

a transfer of ownership to be governed by the law of the destination.[129] Some domestic legal systems such as that of Switzerland do not comply with the situs rules, as contracting parties are given the right to determine the rules that may govern ownership so as to have the same law regulate such matters.[130] France, Germany, the United Kingdom, and a majority of other states do not grant the contracting parties the right to select the applicable law that regulates ownership rights, and the situs rules prevail.[131]

2.1.2.3 Role of Bill of Lading in Affecting Transfer of ownership

One of the most important commitments imposed on the marine carrier can be exercised through a bill of lading, which might be used to satisfy the seller's obligation to identify the goods in the contract of sale, and which is imposed on the seller in the context of a contract of sale such as the Jordanian Law, where the ownership in fungible goods shall not transfer to the buyer unless the goods are identified to the sale contract. A bill of lading is a document concluded between a shipper and a marine carrier for the purpose of considering the consignee or holder as a party to the document.[132] According to Article 1(7) of the Hamburg Rules, the bill of lading is:

> 'a document which evidences a contract of carriage by sea and the taking over or loading of the goods by the carrier, and by which the carrier undertakes to deliver the goods against surrender of the document'.

It is further defined as;

> 'a two-sided one page of document usually issued by or on behalf of the carrier, acknowledging that the goods have been shipped on board a particular vessel bound for a particular destination'.[133]

The obligation to issue a bill of lading and the right to receive such a document can only be generated from:[134]

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[129] Ibid 179, 180.
[130] Article 104(e) of Switzerland's Federal Code on Private International Law 178 (CPIL); Zekos (n 17) 6.
[131] Koppenol-Laforce et al (n 17) 176, 177. See Article 43 of the German Introductory Act to the Civil Law, Article 3(2) of the French Civil Code and s 30(1) UK's Civil Jurisdiction and Judgements Act 1982.
[132] Aikens, Lord and Bools (n 30) 67.
[133] Filippo Lorenzon and Yvonne Baatz, *Sassoon C.I.F and F.O.B Contracts* (6th edn, Thomson Reuters 2017) 114.
[134] Aikens, Lord and Bools (n 30) 40.

1. An express agreement incorporated in the marine carriage contract or in a separate contract;
2. An implied requirement of the marine carriage contract of issuing a bill of lading;
3. A relevant statute or regulation, such as an international convention on carriage of goods by sea.

Generally, the marine carrier performs a conclusive role through the bill of lading, within which the parties to a contract of sale may rely on the contents of the bill of lading to prove their rights that are generated by the contract.[135] Todd states that a bill of lading is a shipping document produced by a marine carrier, as a receipt for goods shipped or received for shipment, which evidences the facts and terms of a marine carriage contract.[136]

The substantial role of the bill of lading as a negotiable document of title has given the shipper's endorsement the legal effect to transfer the ownership in the goods sold in transit, which will authorise a transferee to claim delivery of the goods at the unloading port.[137] This role will be clearly identified under common law when the buyer endorses the 'negotiable bill of lading', in which case a sole endorsement will suffice to enable the ownership in the goods sold in transit to transfer to the buyer, provided that the bill of lading has been surrendered and that both parties have intended to transfer the ownership.[138] Under Jordanian law, a sole endorsement will not suffice to let the ownership in nonfungible goods pass to the buyer, unless the endorsement has been associated with the time at which it was made, and this time can be further invoked as

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[135] Ewan Mckendrick, 'C.I.F Contracts' in Ewan Mckendrick et al (eds), *Sale of Goods* (LLP 2000) 656.
[136] Todd, *Principles of the Carriage of Goods by Sea* 238. See also, Ilian N Djadjev, Law and Practice of the Obligations of the Carrier Over the Cargo/The Hague-Visby Rules (Ulrik Huber Institute for Private International Law 2016) 10; WE Astle, The Hamburg Rules (Fairplay 1981) 13; Catherine Emsellem-Rope, 'Ocean Logistics' in George Eddings, Andrew Chamberlain and Rebecca Warder (eds), Shipping Law Review (4th edn, Law Business Research 2008) 2; Kelly T McGowan, 'The Dematerialisation of the Bill of Lading' (2007) 7 Hibernian LJ 73.
[137] Mckendrick (n 135) 656; Gabriel (n 4) 21; Aikens, Lord and Bools (n 30) 15; Astle (n 136) 13; Wilson (n 18) 6; Jonas Malfliet, 'Incoterms 2010 and the Mode of Transport: How to Choose the Right Term' (Conference on Management Challenges in the 21st Century: Transport and Logistics: Opportunity for Slovakia in the Era of Knowledge Economy, Bratislava, April 2011) 172 <https://biblio.ugent.be/publication/1212622> accessed 11 December 2018.
[138] Wilson (n 18) 6. Nick Francis, 'Transferring Rights of Suit under Bills of Lading: The Conflict of Laws Implications' (2006) 20 Austl. & N.Z. Mar. L. J 29.

the date of the goods' identification so as to prove the time of passage of ownership in fungible goods.[139]

The buyer can also invoke the information included in a foul bill of lading as prima facie evidence proving the lack of conformity of the goods sold. Similarly, a statement of non-qualification that has been added by the marine carrier to a negotiable bill of lading may negatively affect the interests of the consignee (buyer), who intends to sell the goods in transit.[140] A significant role of the bill of lading can also be seen in 'goods identification' where the goods in transit can be ascertained by issuing documents containing the name of the buyer, such as a consignment note and bill of lading through which the buyer can transfer the risk to a sub-buyer.[141] While the marine carrier performs its role in terms of the delivery of goods, taking the goods over and producing a bill of lading, it could assume liability for breaching any of these obligations or for a failure of its agents or servants of performing such obligations, all of which may result in deterring or preventing transfer of risk and ownership between parties to a contract of sale.

2.2 Liability of marine carrier

To clarify the essence of the liability of a marine carrier that with regard to the transfer of risk and transfer of ownership, this section will cover studies that have examined this liability with respect to damage to or loss of shipped goods or delay in delivering them and determine whether or not the liability for failure in handing over, taking over and issuing a bill of lading can be embraced under this liability. It will then be possible to clarify whether the liability of the marine carrier incurred in the context of the passage of risk and ownership can be embraced under the rules of liability for loss of and damage to goods and delay in delivery under the rules of the marine carriage contract, as stated in international conventions and domestic laws.[142]

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[139] The same meaning can be inferred from the view of Al-Qudah and Ziyadat (n 82) 168. Also, from the provisions of Section 204 of the JMCL and Sections 199 and 1147 of the JCC.
[140] Wilson (n 18) 118, 119.
[141] Honnold and Flechtner (n 4) 319. See also, Mckendrick (n 135) 656.
[142] International conventions that have regulated the marine carrier's liability for loss of, damage to goods and delay in delivery are embodied in Brussels Convention 1924 (Hague-Visby Rules), Hamburg Rules 1978 and Rotterdam Rules 2009.

The liability of the marine carrier as a consequence of fault in the context of transfer of risk or ownership in the contract of sale can be established by a breach of its obligation to take over the goods in shipment sales, or breaching its obligation in handing the goods over in the context of destination sales and also, on a breach in the obligation of the marine carrier in the issuance of a bill of lading or any other relevant shipping document.[143]

Liability of the marine carrier for transfer of risk and ownership in shipment sales will rest with the marine carrier if they infringe the obligation of taking the goods over as a first carrier, or breach such an obligation imposed on them in accordance with a 'multimodal (combined) transport document',[144] the instrument that has been produced for the purpose of solving the complexity of multimodal carriage resulting from the revolution of containerisation.[145] Thus, the marine carrier's responsibility is not only confined to the transhipment process, but also extends to encompass multimodal carriage. The marine carrier could assume liability even though the risk materialised under a non-marine leg.[146] Identifying the leg in which the damage was sustained will determine the legal instrument that could govern the liability of the marine carrier. Otherwise, the multimodal transport operator will impose carrier -friendly terms, agreed upon between contracting parties to a marine carriage contract.[147] The carrier -friendly terms, could be understood as the rules which are not set out in the related-legal instruments, which also should maintain the balance between the rights of both parties.

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[143] Article 67 of the CISG; Article A4, A5, B5 of CIF, CFR and FOB of the Incoterms 2010 Rules. Some JCC provisions also regulate transfer of ownership in the sale contract in general.
[144] Klotz (n 97) 167; Article 67 of the CISG.
[145] Lorenzon and Baatz (n 133) 160; Wilson (n 18) 6. For further details see, Girvin, *Carriage of Goods by Sea* 48, 54; Treitel and Reynolds (n 85) 550; Craig Neame, 'Who Contracts with Whom? An Analysis of Chinese Exports to the United Kingdom' in Baris Soyer and Andrew Tettenborn (eds), *Carriage of Goods, by Sea, Land and Air/ Unimodal and Multimodal Transport in the 21st Century* (Informa Law 2014) 116. A multimodal transport document is a shipping document issued by a marine carrier who undertakes to carry out the whole voyage, i.e. even if the goods have been transhipped, during this voyage, to other marine carriers, the responsibility of the marine carrier *vis-à-vis* goods, interests for any damage to or loss of the shipped goods shall remain on the account of the marine carrier who had issued such a bill. Todd, *Principles of the Carriage of Goods by Sea* 245, 246. For details see also, David A Glass, *Freight Forwarding and Multimodal Transport Contracts* (2nd edn, Informa Law 2012) 248, 277; Emsellem-Rope (n 136) 22; Aikens, Lord and Bools (n 30) 28.
[146] Lachmi Singh, *The Law of Carriage of Goods by Sea* (Bloomsbury Professional 2011) 253, 254; Treitel and Reynolds (n 85) 557, 560. See Article 26 of Rotterdam Rules.
[147] Neame (n 145) 118.

Despite the absence of any authority to determine negotiability of a multimodal or (combined) transport document, the negotiability of such a document and its function as a document of title is broadly recognised in commercial and legal articles, unless a notation or stipulation on such a document provides otherwise.[148] It can be concluded that a multimodal transport document can perform a crucial function in shipment sales, through which the marine carrier will be able to operate or even disrupt the seller's obligation to deliver.[149] In this case, the transfer of risk that shall reflect from this delivery would be obstructed as well.[150]

In the course of performing the carriage operation associated with a contract of sale, the marine carrier might have to bear the responsibility against the parties to the contract of sale for any potential damage to or loss of the goods, or might also be liable for the delay in delivering them.[151]

Having said that, transfer of risk in the context of the contract of sale involving carriage of goods by sea is determined by the marine carrier's obligation to take the goods delivery in the shipment sales. Such a passage cannot take place in destination sales, unless the marine carrier performs its obligation of handing the goods over to the buyer (consignee) in the destination place.[152]

2.2.1 Breaching the marine carrier's obligation of taking and handing the goods over

The liability of the marine carrier for failure in the transfer of risk in shipment sales might be incurred when the carrier breaches its obligation of enabling the shipper (seller) to fulfil the delivery obligation imposed by the shipment sale contract, or once they deprive the buyer of discharging its obligation of taking delivery, which is levied by virtue of the destination sale contract involving carriage of goods by sea. To prove a breach of the marine carrier's obligations, a claimant may invoke the facts included by the marine carrier in a bill of lading, which might be asserted to prove the marine carrier's infringement of the goods' custody.[153] Since the transfer of risk is linked to a

[148] Lorenzon and Baatz (n 133) 130; Thomas (n 97) 149.
[149] Article 31 of the CISG; Article A4 of CIF, CFR and FOB of the Incoterms 2010 Rules.
[150] Article 67(1) of the CISG; Articles A5 and B5 of CIF, CFR and FOB of the Incoterms 2010 Rules.
[151] Article 17(1) of Rotterdam Rules.
[152] Articles 31(a), 31(b), 69(2) and 67(1) of the CISG; Articles A4, A5 and B5 of CIF, CFR, FOB, DAT, DAP, DDP of Incoterms 2010 Rules.
[153] Debattista (n 17) 273.

transfer of custody under the CISG, the breach of requirements of the transfer of the goods' custody will result in placing the liability with the marine carrier.

For the sake of discharging the obligation, the goods must be delivered to the buyer indicated in the bill of lading or to the endorsee to whom the buyer has properly endorsed the negotiable bill of lading.[154] The marine carrier cannot discharge its obligation to deliver in the context of a destination sale through sole warehousing or by placing the transported goods, but is compelled to give the buyer (consignee) a reasonable time to take a delivery of goods after they have been discharged or warehoused at the disposal of the buyer.[155] As a result, the marine carrier will incur liability for the lack of delivery that has caused damage to or loss of goods or delay in delivery if he merely warehouses or places the goods at the disposal of the buyer. This liability cannot be released by placing the goods at the disposal of the buyer; they have to be handed over.[156] Thus, the liability of the marine carrier should be based on the infringement of their commitments under the marine carriage contract. As a result, recourse must be made to the provisions of the marine carriage contract for the purpose of determining the obligations of the marine carrier.

The marine carrier can also rely on the provisions of the marine carriage contract as a defensive measure, and can refute the allegation of the buyer or consignee pertaining to the marine carrier's refusal to deliver the goods without tendering a bill of lading. The marine carrier will also be entitled to invoke the contractual defences derived from the marine carriage contract, or prove that the goods have been delivered in exchange for an original bill of lading.[157]

If the marine carrier breaches its obligation of handing the goods over to the buyer in the context of the destination sales, a transfer of risk operation would be negatively affected, as the passage of risk would not take place, or would at least be delayed. In this case, the marine carrier would be liable to the shipper (seller or buyer) as the risk had not transferred to the buyer, and similarly, they might be liable for not taking

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[154] Wilson (n 18) 81.
[155] Ibid 81.
[156] Case No 1148/1992 Jordanian Cassation Court (n 499); Case No 657/1984 Jordanian Cassation Court, Ala'a Fatehi Samad and Wadee' Salameh Sawaqed, *Judgements of the Cassation Court in the Commercial Cases* 172; Case No 855/1989 Jordanian Cassation Court, Ala'a Fatehi Samad and Wadee' Salameh Sawaqed, *Judgements of the Cassation Court in the Commercial Cases* 178.
[157] Todd, *Principles of the Carriage of Goods by Sea* 354.

delivery or handing over goods according to the marine carriage contract. According to Todd, the marine carrier's performance of delivering the goods without production of bill of lading makes them liable, provided that they have delivered the goods without presentation of the original bill of lading, unless they have included a clear stipulation in a bill of lading which exempts them from the liability of such delivery.[158] However, according to Wilson, this kind of delivery is a fundamental breach of the obligations of the marine carriage contract, irrespective of whether it has been performed to the person indicated in the bill of lading or mistakenly to another.[159] Delivery made to the wrong consignee will deprive the marine carrier the exemptions incorporated in the bill of lading.[160] Also, a marine carrier who attempts to deliver goods without producing a bill of lading would not enjoy the insurance cover provided by P&I Clubs.[161]

Due to the ambiguity of the implications of goods delivery performed without production of a bill of lading, such a matter must be examined by worldwide experts experienced in the discipline of international trading, shipping and banking.[162] The marine carrier's liability might be borne as a consequence of delivering mixed or unidentified goods, as this is one aspect of the breach of the delivery obligation, unless the reason for the loss is excluded from the liability of the marine carrier.[163] This handing over or taking delivery is related to the obligation of the marine carrier, imposed by virtue of marine carriage contract, and should be considered for the sake of determining the duration of the liability of marine carrier for loss of, damage to the goods and delay in delivery. Therefore, to allocate the liability of the marine carrier for hindering or delaying transfer of risk or ownership under the contract of sale, recourse can be made to applicable domestic law decided in accordance with the rules of conflict of laws, or to the CISG if its rules are applicable, because the guidelines of

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[158] Ibid 355. See also *London Joint Stock Bank v British Amsterdam Maritime Agency* (1910) 16 Com Cas 102; Chan Leng Sun, 'Holder of a Bill of Lading' (1995) 7 SAcLJ 355, 362.
[159] Wilson (n 18) 155. The same view was adopted in Aikens, Lord and Bools (n 30) 99, 100; McGowan (n 136) 74. See the judgment of Judge Diamond QC in *The Future Express* [1992] 2 Lloyd's Rep 79 at 99. Sun (n 158) 362.
[160] Wilson (n 18) 156.
[161] Singh (n 146) 292; Han, 'A Study on the Liability of the Carrier and the Actual Carrier for Delivery of Goods without a B/L in China' 275, 287.
[162] Han, 'A Study on the Liability of the Carrier and the Actual Carrier for Delivery of Goods without a B/L in China' 287.
[163] Wilson (n 18) 82, 83.

the delivery of goods and handing over are to do with the transfer of risk are related to the provisions of the contract of sale rather than the marine carriage contract.

2.2.2 Marine carrier's breach of issuing a bill of lading

The bill of lading is essential in the transfer of ownership between parties to a contract of sale involving carriage of goods by sea. It can be impliedly derived from the provisions of some domestic laws that the failure to issue a bill of lading can, in certain cases, deprive a buyer of procuring the ownership in the goods, as the sold goods have not been identified in the contract of sale. Jordanian law is one of the domestic legal systems in which a bill of lading can perform a conclusive role in determining the time of transfer of ownership between contracting parties to a sale contract. This is provided in Section 1147 of the JCC, which states that the passage of ownership in fungible goods entails that they have to be identified to the contract of sale. Such identification can be satisfied by issuing a bill of lading in the context of a sale involving carriage of goods by sea. Given that a non-transfer of ownership might result from the lack of a bill of lading, the liability for such a fault will be with the marine carrier who should have issued a bill of lading in accordance with the marine carriage contract.

The liability of the marine carrier is not only confined to its commitment to issue a bill of lading, taking delivery and delivering the goods to the consignee, but also incorporates the carriage stage when the goods might be damaged or lost. This will also affect transfer of risk and the transfer of ownership that could take place through sales concluded in transit. The related international conventions and domestic laws do not address the liability of marine carrier arising in the context of the passage of risk and property, which can be attributable to the failure in delivery, the taking over of goods or to not issuing a bill of lading, all of which may hinder or prevent transfer of risk or ownership between parties to a contract of sale involving carriage of goods by sea but rather, they only address the liability of the marine carrier for loss of or damage to goods and for the delay in delivery.

2.3 Summary

This brief review of the studies has revealed that some authors have confined their discussion in terms of the sale contract to the CISG's Articles, which regulate a transfer of risk between parties to the contract of sale, whereas others have adopted comparative analysis between the CISG and particular domestic laws from different

jurisdictions. This review has also shown studies which have broadly discussed the position of the marine carrier as a party to the marine carriage contract, where they analysed the liability of the marine carrier for the loss of and damage to the shipped goods and delay in delivering them.[164] Some studies have tackled the role of the marine carrier within the marine carriage contract in particular legal systems, while others have discussed the perspectives of the international conventions or examined the position of the different domestic laws.

In spite of the intensive efforts devoted for the purpose of examining transfer of risk and ownership in the contract of sale and the studies that have addressed the liability of the marine carrier, some gaps have been found in the literature. For example, some studies do not address the role of the marine carrier in operating transfer of risk and ownership. Neither do they consider the consequences of the fault of the marine carrier, as they do not examine the liability of the marine carrier incurred under passing risk and ownership. Rather, they all discuss these matters from the perspective of the obligations of the parties to a contract of sale, but do not examine the role of the marine carrier under such transfer.[165] Determining the time of transfer of risk and ownership on the obligation of the parties to a contract of sale may not be easily achieved in some cases, unless the position of the marine carrier is taken into consideration.

Likewise, these studies do not discuss the liability of the marine carrier under the transfer of risk and ownership; instead, all emphasise the liability of the marine carrier in terms of the loss of or damage to the goods or the delay in delivery.[166] However, it would not be sufficient to address the liability of the marine carrier for hindering or preventing transfer of risk and ownership between parties to a contract of sale. Since a passage of risk may affect the right of the parties to recover the damages from insurers, and because of the effect of the passage of ownership on buyers' right of title, it is necessary to clarify the legal framework of the liability under a transfer of risk and ownership. As the review shows, commentators on Jordanian law have not

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[164] Wilson (n 18) 115, 173; Koumani (n 18) 108, 161; Al-Eteer (n 1) 271, 363; Al-Miqdadi (n 18) 116, 157; Ababneh (n 13) 86, 183; Shukri (n 18) 623, 672; Al-Ibrahim (n 18) 102.
[165] Goodfriend (n 17) 577; Hager and Schmidt-Kessel (n 34) 922; Dokter (n 41) 206; Hachem (n 34) 950; Pipkova (n 17) 131; Erauw, 'CISG Articles 66-70: The Risk of Loss and Passing It' 205; Gillette and Walt (n 53) 275; Honnold and Flechtner (n 4) 516; Piltz (n 78) 412; Luchinger (n 81) 527.
[166] Wilson (n 18) 115, 173; Komani (n 3) 108, 161; Al-Eteer (n 1) 271, 363; Al-Miqdadi (n 18) 116, 157; Ababneh (n 13) 86, 183; Shukri (n 18) 623, 672; Al-Ibrahim (n 18) 77, 102.

clarified the doctrine concerning the time at which the risk transfers from a seller to a buyer in a contract of sale involving carriage of goods by sea, nor specified what happens in destination sales when the seller delivers the goods to the consignee or the buyer at the destination port. Previous studies do not explain the implications when the marine carrier does not enable the buyer or the consignee to take a delivery, and in so doing obstruct or postpone the transfer of risk between parties to a destination sale.[167]

Some have been dedicated to addressing the transfer of ownership between parties to a contract of sale, but none have clarified the position of the marine carrier in such a transfer. Studies of Jordanian law do not discuss transfer of ownership in the goods sold in transit, nor examine the effect of the conclusion time of the contract of sale on the passage of ownership in such contracts, in which a clear incompatibility between Jordanian law and CISG can be seen.[168]

With respect to the liability of the marine carrier, the earlier literature addressed this with regard to the marine carriage contract but not the liability of the marine carrier for non-passage of risk or ownership, and left ambiguity over Jordanian law's position on some of the features of this liability. They examined neither the position of Jordanian law nor the perspective of international commercial law over the consequences of the breach of the marine carrier's obligations in taking a delivery from the seller in the port of shipment, delivering the goods to the buyer in the destination port, or non-issuance of a bill of lading, all of which play a crucial role in transfer of risk and ownership between parties to a contract of sale.

The deficiency of the JMCL and the incompatibility of its provisions with the Hamburg Rules regarding liability of the marine carrier, might be solved by amending the JMCL that have to be made in accordance with the provisions of the Hamburg Rules. A new act could also be enacted to solve the shortcoming in the Jordanian law in regulating international contracts of sale, which would be inspired by the provisions

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[167] Establishing a transfer of risk on the seller's delivery to the buyer at the destination place was adopted in Article 69(2) of the CISG and in Articles A5 and B5 of DDP, DAT and DAP of the Incoterms 2010 Rules.

[168] The contradiction between the JCC and the CISG can be seen in Article 68 of the CISG that has linked the time of passage of risk to the conclusions time of the sale contract.

of the CISG and the JCC that do not contradict the rules of the CISG, which should therefore be ratified prior to enactment of this law.

These suggestions will contribute to generating rules that clarify the position of the marine carrier through which the ambiguity seen under the JCC, in terms of the time of transfer of risk and ownership, and the liability borne in this regard, can be eliminated or at least mitigated.

Chapter 3. Transfer of ownership in sale contract involving carriage of goods by sea

To have a broader view about the role of the marine carrier in operating a transfer of ownership within international sales, this chapter is going to examine international instruments, namely the relevant rules of the CISG and Incoterms 2010 Rules. Then, this role will be critically scrutinised under the provisions of the Jordanian law in particular, the relevant provisions of the JCC shall be critically examined and analysed.

3.1 Transfer of ownership under international instruments

UNCITRAL has drawn up a worldwide uniform law governing the contract of sale, which was embodied by the CISG.[169] Similar international action can also be seen in the Incoterms 2010 Rules, produced by the ICC to unify rules on contracts of sale and their use.

To clarify the rules of transfer of ownership in the CISG and Incoterms 2010 Rules, this study will examine both of them in the following sections.

3.1.1 The CISG

The CISG has determined the ambit of the application of its provisions through Articles 1-6, where Articles 1, 2, 3 and 6 set out how the contracts of sale are governed, while Articles 4 and 5 determine the components of these contracts.[170] Article 4 is related to the person who is in charge of solving the dispute, with guidance on how he may determine the specific point at which the application of the CISG provisions stop and where domestic law can be applied.[171] Pursuant to Article 4 of the CISG:

> 'This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in the Convention, it is not concerned with: (a) the validity of the contract or of any of its provisions or of any usage; (b) the effect which the contract may have on the property in the goods sold'.

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[169] Schwenzer & Schlechtriem (n 128) 2.
[170] Schwenzer and Hachem (n 118) 18; Milena Djordjevic, 'Sphere of Application' in Stefan Kroll, Loukas Mistelis and Pilar Perales Viscasillas (eds), *UN Convention on Contracts for the International Sale of Goods (CISG): Commentary* (Beck/Hart/Nomos 2011) 63, 65.
[171] Djordjevic (n 170) 63.

According to this Article, the validity of a contract of sale and ownership matters are not included in the scope of governance of the CISG.[172] However, one can infer from the expression 'in particular', that the CISG exclusions are confined to not only ownership and validity matters but also, to other matters such as the limitation periods of actions, jurisdictional matters and retrieval of attorney's fees.[173] Article 4 of the CISG explicitly excludes the matters that are related to the ownership in the goods sold via a contract of sale regulated by the CISG provisions. Hence, to settle the dispute of the ownership in the goods, it should be resorted to complementary rules. In this case, the applicable domestic legal system will be the eligible law that may govern a dispute, regardless of the commitment of the seller to transfer the ownership in the goods that is stipulated in Article 30 of the CISG.[174] However, in the view of the CISG drafters, it is not important and it is impossible to make the rules of a transfer of ownership uniform between parties to a contract of sale.[175] As a consequence, Article 4 of the CISG follows in the track of the Uniform Law on the International Sale of Goods 1964 (ULIS), where both stipulate that a transfer of ownership under the contract of sale should be governed by the applicable domestic law.[176] Attempts by UNCITRAL to eliminate the variation between the rules of a transfer of ownership under different legal systems have proved futile; for example, German law requires an independent contract to be concluded for passing ownership and French law considers the conclusion time of the contract of sale, while under English law a transfer of ownership is hinged on the intention of the contracting parties to the sale contract.[177]

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[172] Lookofsky (n 34) 67.
[173] Djordjevic (170) 67; Schwenzer and Hachem (n 118) 93.
[174] Lookofsky (n 34) 23. According to Article 30 of the CISG: 'The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention'.
[175] Herbert M Sampson, 'The Title-Passage Rule: Applicable Law under the CISG' (1989-1990) 16 Int'l Tax J 143.
[176] This presumption is derived from the provisions of Article 7 of the CISG.
[177] Article 4(4) of Secretariat Commentary on Article 4 of the 1978 draft. <https://www.cisg.law.pace.edu/cisg/text/secomm/secomm-04.html> accessed 07 October 2018; Article 1583 of the French Civil Code; Article 18 of the UK Sale of Goods Act (SGA); Section 929 of the German Civil Code; Schwenzer and Hachem (n 118) 92.

Despite the fact that the contract of sale embodies transfer of ownership and other obligations imposed on parties,[178] the CISG has neither provided a definition of the contract of sale nor clarified the relation between contract of sale and the ownership.[179]

However, other aspects of ownership are regulated by the CISG. For example, in Articles 41 and 42 the seller is compelled, for the benefit of the buyer, to liberate the goods from a third party's claims but there are no rules about the issue of cutting off the third party's rights to the sold goods.[180] Article 30 provides that the seller is committed to pass the ownership to the purchaser whether this obligation is imposed by the CISG rules or by an agreement of the parties to the contract of sale.[181] In the absence of the CISG, in provisions on transfer of ownership between parties to a contract of sale, there has to be recourse to the rules of conflict of laws to identify the legal system that can governs a transfer of ownership.[182] Therefore, the limitation of the seller's right to restitution of goods through the reservation of title to protect creditors' rights is one of the important issues that is governed by domestic law.[183]

3.1.2 The Incoterms 2010 Rules

The Incoterms 2010 Rules were created by the ICC to interpret the international terms of shipment used in international contracts of sale.[184] The Incoterms 2010 Rules can be used to interpret or replace the default rules of the CISG, or to complement CISG provisions.[185] They are also a bundle of terms that can be applied to the contract of sale, but not to a carriage contract.[186]

Due to the changeable nature of the meaning of trade terms, the CISG does not provide definitions, but such terms that govern the delivery of goods, transfer of risk and other related issues can be found in the Incoterms 2010 Rules,[187] that are incorporated in a contract of sale, which also have an effect on the carriage of goods contract attached

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[178] Liviu Stănciulescu, 'Under the New Civil Code: The Sale Contract is Translated Property or Creator Only of Obligations?' (2012) 1 LE SI J 26.
[179] Sampson (n 175) 138.
[180] Honnold and Flechtner (n 4) 83. Articles 41 and 42 of the CISG.
[181] Article 30 of the CISG.
[182] Honnold and Flechtner (n 4) 83.
[183] Article 81(2) of the CISG. See Djordjevic (n 171) 76; Lookofsky (n 34) 23.
[184] Susan Hawker, 'International Sale of Goods' in Michael Furmston and Jason Chuah (eds), *Commercial and Consumer Law* (Person Education 2010) 266.
[185] Coetzee (n 7) 4.
[186] Hawker (n 184) 266.
[187] Ostendorf (n 7) 67; Coetzee (n 7) 3.

to the contract of sale, where a contract of sale like CIF, FOB or CFR cannot be performed unless sea travel is involved, which also requires a bill of lading to discharge the obligations of the parties.[188] The Rules are not substantive law; they are merely designed to guide the commitments of a buyer and seller, such as in the delivery of goods, transfer of risk, allocating relevant expenses, procurement of insurance documents and carriage of goods, and some commitments arising under export and import goods.[189]

Generally, incorporating the Incoterms rules into the contract of sale does not serve to encompass the general features of all of the contracts, but rather to regulate the terms that have been defined. Therefore, it would appear that the Rules do not govern issues that may affect the validity of a contract of sale, transfer of ownership, misinterpretation, impossibility of fulfilment, seller's commitment as to quality of goods, buyer's commitment of payment, performance impediments caused by unavoidable or unpredictable incidents, and breaches and remedies of the contract of sale.[190] The point of passage of ownership between parties to a contract of sale is also not addressed.[191] They therefore present an imperfect view that presumes that the rules of the FOB and CIF terms can determine the time at which the ownership passes to the buyer, where it is assumed that the time of transfer of risk has to be established at that time.[192] Although the Rules address transfer of risk under the contract of sale, none of the terms regulates transfer of ownership between parties to the contract of sale.[193] Thus, passage of ownership is governed either by the agreement of the parties to a contract of sale, or by the applicable domestic law determined in accordance with the rules of conflict of laws.[194] It can be assumed that once the Incoterms 2010 Rules are incorporated into the contract of sale governed by the CISG, they will prevail over the CISG provisions related to delivery of goods and transfer of risk.[195]

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[188] Hawker (n 185) 268; Ostendorf (n 7) 39, 41.
[189] Roy Goode et al, *Transnational Commercial Law* (2nd edn, Oxford University Press 2012) 175; Bugden and Lamont-Black (n 11) 64; Coetzee (n 7) 4.
[190] Coetzee (n 7) 4; Hawker (n 184) 268.
[191] Klotz (97) 153; Davis, 'Australia' in Ziegler (n 113) 11; Lorenzon and Baatz (133) 37.
[192] Astle (n 136) 24.
[193] Bridge, *The International Sales of Goods* 313; Debattista (n 17) 267.
[194] Coetzee (n 7) 4.
[195] Ibid 4, CISG, Article 6.

However, the dominance of the provisions of the Incoterms 2010 Rules does not mean a disregard for CISG provisions, as the CISG may operate when the Incoterms 2010 Rules do not regulate a certain matter, and the CISG might be fully disregarded when the parties to the contract of sale expressly agree to opt out of these rules.[196]

3.2 Transfer of ownership under the JCC

Unless parties have agreed otherwise, the applicable domestic law must be the legal system that undertakes the burden of governing the sale-related matters, including transfer of ownership that has been disregarded in the CISG and Incoterms 2010 Rules.[197] Therefore, it cannot be agreed with the argument that the matters of ownership which are excluded from the provisions of the CISG should not include those which have arisen before the conclusion of the contract of sale, as it can be inferred from CISG Article 4(b).[198] For example, if Jordanian law is the applicable law to a contract of sale, the CISG provisions will have no effect on a dispute arising from such a contract, as Jordan is not a signatory to the CISG. Even though the contract of sale is governed by the provisions of the CISG, the ownership-relevant matters are not regulated by the CISG so the designated domestic law will prevail.

The application of the provisions of the JCC may give rise to some contradiction with the provisions of the CISG, and so it is important to clarify the terms of the passage of ownership in the general rules in the JCC, as the Jordanian legislation does not have a particular law regulating the provisions of international contracts of sale. This was seen in a case brought before the Jordanian Cassation Court.[199] The case was about 17 trucks bought via a string of contracts of sale where the buyer endorsed the relevant bill of lading to the endorsee, who has taken the trucks from the port in Aqaba to the Special Economic Zone. The endorsee brought an action before the Court to claim ownership of the trucks. The Court assumed that the ownership issues must be

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[196] Sampson (n 175) 143.
[197] Lorenzon and Baatz (n 133) 38. Bergami, 'Managing Incoterms 2010 Risks: Tension with Trade and Banking Practices' 327. See Article 4 of the CISG and also, Case No 105/2005 Tribunal of International Commercial Arbitration at the Russian Chamber of Commerce and Industry (13 April 2006).
[198] *Usinor Industeel v Leeco Steel Products, Inc* Case No 02 C 0540 U.S. District Court for the Northern District of Illinois, Eastern Division (28 March 2002).
[199] Case No 523/1991 Jordanian Cassation Court, Journal of Jordanian Bar [1993] 3 754.

governed by the rules of the JCC, and hence it was inferred that the actual ownership fell to the endorsee rather than the endorser. It was held that:

> 'Since the dispute is related to the matter of proving the ownership of the imported trucks, the competent court should resort to the general rules to govern such a dispute, rather than any other law'.

It can be inferred that since the general rules of ownership indicated in this judgement are set out in the JCC, such rules shall govern ownership issues, inter alia, of the transfer of ownership under the contract of sale as no contrary agreement was made.

However, in another judgement the Jordanian Cassation Court adopted an approach that contradicts this case.[200] The seller (National Company for Finance & Development) claimed payment for a consignment of rice sold and delivered to the buyer (Jordanian Ministry of Supply) under C&F terms. To refute the seller's claim, the buyer unsuccessfully argued non-conformity of goods at the court of first instance. This Court held that the buyer had to perform the obligation of payment, and the buyer unsuccessfully appealed. In the end, the buyer brought the dispute before the Jordanian Cassation Court which invoked the delivery obligation stipulated under C&F of the Incoterms Rules in order to determine the time of passage of risk and held:

> 'It is admitted that the enforcement date of the marine sales, as well as a transfer of ownership from a seller to a buyer or from a shipper to a consignee in these sales, have been categorised into two types: First, the shipment sales in which the delivery of goods, transfer of ownership and transfer of risks in the sold goods shall take place when the goods pass the ship's rail during the loading operation, same as in the goods sold via C&F. Second, the destination sales, where the delivery of goods, transfer of ownership and transfer of risk shall take place in the destination port'.

The Court clearly presumed that the Incoterms Rules, incorporated into the contract of sale, will govern the passage of ownership that takes place in the same time the goods pass the ship's rail; i.e. the same rule of delivery obligation adopted in the Incoterms 1990 Rules to determine transfer of risk.[201] As a consequence, the judgment

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[200] Case No 80/1993 Jordanian Cassation Court, Journal of Jordanian Bar [1993] 11 2096.

[201] The goods' delivery under the Incoterms Rules 1990 and 2000 were modified in the Incoterms 2010 Rules, where 'passing the ship's rail' was substituted by 'placing the goods on the ship's board'. C&F also became CFR in the new Rules. Drew M. Stapleton, *Vivek Pande and Dennis O 'Brien*, 'EXW, FOB or FCA? Choosing the Right Incoterms and Why it Matters to Maritime Shippers, (2014) 81(3) Journal of Transportation Law, Logistics and Policy 235; Bergami, 'The Newest Revision of Delivery Terms' 36; Malfliet (n 137) 171.

of the Jordanian Cassation Court links passage of ownership to the time at which the goods are delivered, which contradicts the general rules of the passage of ownership set out in the JCC, and its own presumption of recourse to the general rules of the JCC which had been adopted in the earlier case.[202]

3.2.1 General rule of transfer of ownership in the JCC

The general rule of passage of ownership under the contract of sale is set out in Section 485 of the JCC, and binds the seller to transfer the property to the buyer:[203]

> '1. The ownership of the sold property shall be transferred to the purchaser as soon as the sale is complete unless the law or the contract provides otherwise.
>
> 2. And each of the two parties to the sale shall fulfil its obligations except for those postponed'.[204]

This provides that the time at which the ownership transfers to the buyer must be identical to the conclusion time of the contract of sale, regardless of the goods' possession. However, a deviation from this might be allowed in two cases. First, by virtue of the law, where the law may stipulate that the ownership has to be transmitted at a specific time, other than that which is provided in this Section. The second is through the principle of 'party autonomy', through which the agreement of the parties to a contract of sale explicitly defines the time of the passage of ownership between parties. In the course of determining the time at which the ownership is transferred to a buyer, the JCC distinguishes between fungible and non-fungible goods. However, various theories were adopted by different jurisdictions.[205] For instance, French links the time at which the ownership is transferred to the buyer to the conclusion of the contract of sale, as stipulated in Section 1583 of the French Civil Code, whereas the English law hinges a passing of ownership on the intention of the contracting parties to the sale contract, as provided in Section 18 of the Sale of Goods Act.[206] Under German law the transfer is determined in an independent contract under Section 929

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[202] See Case No 523/1991 Jordanian Cassation Court, Journal of Jordanian Bar [1993] 3 754.
[203] Mohammad Al-Zaubi, Nominated Contracts/Explanation of the Sale Contract in Jordanian Law (1st edn, Dar Althaqafa 2006) 220.
[204] Section 485 of the JCC
[205] Koumani (n 18) 230.
[206] Schwenzer and Hachem (n 118) 92. The UK rule in this regard has been expressly adopted in Section 4 of the UK's Consumer Rights Act 2015.

of the German Civil Code,[207] or it could be hinged on a specific performance by the seller, as provided for in US law where a transfer of ownership is determined at the time of the delivery of the goods.[208]

The goods might be non-fungible, that enjoy a physical existence and appearance which satisfies the requirement of the identification of the goods, or it might be fungible as with the vast majority of international contracts of sale involving carriage of goods, in which the seller is compelled to identify the goods in the contract.[209] If the parties to the contract have agreed on a specific time when the ownership transfers from seller to buyer and domestic law does not ban such an agreement, the ownership can pass to the buyer at that time.[210] This was adopted in *Limited Liability Company Altair v Russian Tax Authorities* where it was held that:

> 'A right to property in goods passes either in accordance with the law of a state chosen by the parties or in accordance with the law of a state which a competent court finds applicable based on the conflict of law's provisions that it finds applicable'. [211]

Thus, ownership may be transferred between the parties to the contract in accordance with the law selected by the parties, or it can be transferred in accordance with the applicable law that has been decided under the rules of conflict of laws. The JCC provisions clearly identify the passage of ownership in fungible and non-fungible goods. The general basis of a transfer of ownership is found in Section 485, which must be read in line with Sections 487, 1147 and 199 as these Sections derogate from the general rule set out in Section 485. Essentially, Jordanian law gives parties the right to postpone the time at which the ownership passes from a seller to a buyer. This is stated in Section 487, which provides that:

> '1. The vendor may if the price is postponed or is subject to instalments stipulates that the transfer of ownership to the purchaser shall be subject to his payment of the full price even though the sold property is delivered.

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[207] Ibid 92.
[208] Sampson (n 175) 141. See § 2-401(2) of the Uniform Commercial Code-Sales (UCC) in appendix 2.
[209] Plegat (n 35) 184; Bugden and Lamont-Black (n 11) 66, 67.
[210] Koumani (n 18) 230. See Section 18(1) of the SGA and Section 485(1) of the JCC.
[211] *Limited Liability Company Altair v Russian Tax Authorities* Case No A56-15321/98 Federal Arbitration Court for the North-western Circuit (21 January 1999).

> 2. And if the price is fully received the ownership of the purchaser shall be deemed to have been acquired from the time of sale'.[212]

Thus, the seller has the right to delay the time at which the ownership transfers to the buyer regardless of whether the goods are fungible or non-fungible as the provisions of this section do not distinguish between both kinds of goods, which is deemed to be application of the principle of party autonomy. However, such a delay would not be effective unless the price of the goods is postponed or stipulated to be paid in instalments, so the ownership can be transferred once the seller procures the payment.[213] The seller's act of withholding the bill of lading indicates its intention to reserve title to the goods. This is because it is generally presumed that the transfer of the bill of lading indicates the intention to pass the ownership in the goods.[214] The role of the retained bill of lading demonstrates the importance of the role of the marine carrier in transferring ownership between parties to a contract of sale, as this document is issued by the marine carrier.

The second sub-Section states that the procurement of the ownership shall be attached to the goods, as from the conclusion time of the contract of sale, once the price has been fully received through instalments. Interestingly, application of this sentence may lead to an illogical conclusion, in that the seller and the buyer would both have owned the same goods from the conclusion of the contract to the time of making payment.[215] Another comment can be made on the second Section as it links a transfer of ownership retroactively to the conclusion time of the contract of sale. It can be recommended that a transfer of ownership should has not merely been confined to the conclusion time of the contract of sale, as this only applied in terms of passage of property on non-fungible goods, while under fungible goods the ownership shall pass once the goods have been identified to a contract of sale. It can be concluded from the provisions of this Section that, although the ownership in the goods has not been transferred, the buyer has the profits from the goods as from the conclusion time of the contract of sale, which is contrary to the legal requirement that the seller acquires the fruits of the

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[212] Section 487 of the JCC.
[213] Postponing the passage of ownership in this case is similar to the retention clause (Romalpa Clause) adopted under the common law; with the passage of title being suspended until the seller receives the consideration (payment). Klotz (n 97) 154; Lorenzon and Baatz (n 133) 39.
[214] Bugden and Lamont-Black (n 11) 68; Aikens, Lord and Bools (n 30) 114.
[215] Al-Zaubi (n 203) 235.

goods as long as the goods are owned by them.[216] The notion of postponing the passage of ownership on the payment of the price is an application of the provisions of Section 485(1) entitles the parties to agree on the time of the passage of ownership.

3.2.2 Transfer of ownership in fungible goods

If Jordanian law is deemed to be the relevant domestic law governing disputes arising from ownership in a contract of sale, the general rules of the JCC will be used to resolve such disputes, because international contracts of sale are not regulated under Jordanian law. To ascertain the exact point of time at which an ownership transfers to a buyer under the contract of sale, a distinction has to be drawn between whether the sold goods are fungible or non-fungible. Fungible goods are a specific quantity and quality of goods the physical existence of which cannot be recognised by the buyer at the time of the conclusion of the contract of sale.[217] Although fungible goods might be part of an identified bulk, they would not be considered as ascertained goods unless the bulk goods have already been divided.[218] Therefore, to determine the time of passage of ownership in fungible goods, the seller is compelled to take the necessary action of identifying the goods so that ownership can be transferred.

Section 1147 of the JCC determines the time of transfer of ownership in the fungible goods: 'The ownership of a movable not specified in kind shall not be transferred except after its identification in accordance with the law'. According to the provisions of this Section, a transfer of ownership in fungible goods cannot take place unless the sold goods are identified in the contract of sale. This is a precondition for the ownership in the fungible to be transferred to the buyer. Irrespective of the personal right of claiming identification and delivery of the goods, the buyer acquires no rights to the sold goods unless the seller has accomplished the identification of goods.[219] Even though the seller has not delivered the fungible goods to the buyer, the sole identification of the sold goods suffices to give the buyer the right to acquire title.[220] The identification of the goods undertaken under the transfer of ownership is found in Section 488 of the JCC which declares that: 'The vendor shall deliver the sold property

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[216] Ibid 235.
[217] Plegat (n 35) 185.
[218] Bugden and Lamont-Black (n 11) 66.
[219] Abdulhadi Al-Owbaidi, *Nominated Contracts/Sale and Lease Contracts* (Dar Althaqafa 2006) 86.
[220] Al-Zaubi (n 203) 224.

to the purchaser free of any other right and shall do all that is required of them to transfer the ownership to the latter'.[221]

This section should be read in conjunction with Section 1147 of the JCC and therefore, it can be inferred that the requirements intended in the mentioned Section may include the goods' identification imposed on the seller by virtue of Section 1147 of the JCC, as this identification constitutes a prerequisite condition that has to be met for the buyer to procure the ownership in the fungible goods.

In spite of the decisive function of this identification of goods, the JCC has not clarified the notion on which a transfer of ownership in fungible goods can be determined. Section 1147 states that even if the goods are not delivered, a disposition right could be exercised by the buyer from the time of the identification of goods to establish whether the disposition is performed via a contract of sale, gift contract or any other legal disposition.[222] In other words, the buyer would not be able to sell the goods in transit, unless the goods have already been identified in the contract of sale, which could be achieved by the shipping documents produced by the marine carrier, such as bill of lading, ship's delivery order or mate's receipt.[223]

However, it has been inaccurately suggested that the title in sold goods can be transferred to the buyer when the goods are properly identified in the contract of sale, without drawing distinction between fungible and non-fungible goods.[224]

3.2.3 Transfer of ownership in non-fungible goods

In contrast to the fungible goods, non-fungible goods cannot be interchanged or replaced, as the physical existence and appearance of such goods suffices to identify them. A seller is not bound to identify this kind of goods in the contract of sale, as they

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[221] Al-Owbaidi (n 219) 86.
[222] Al-Zaubi (n 203) 225.
[223] A ship's delivery order is the document issued by a marine carrier while the goods are under its custody through which the marine carrier undertakes to deliver the goods to the holder or to the order of the person named in such an order. Aikens, Lord and Bools (n 30) 16. However, the delivery order issued by the seller to the buyer would confer no rights vis-à-vis the marine carrier except after the attornment of the marine carrier. Stephen V Girvin, 'Carriage by Sea: The Sea Transport Documents Act 2000 in Historical and Comparative Perspective' (2002) 119 S. African L.J 322, 323. Mate's Receipt is a document produced to prove the shipment or receipt of the goods by the marine carrier or its representative. Treitel and Reynolds (n 85) 517.
[224] Al-Eteer (n 1) 375; Al-Miqdadi (n 18) 167. It is not only these views that have contradicted the JCC approach but also the judgments of the Jordanian Cassation Court which relate to international sale contracts.

are already determined by their nature.[225] Therefore, parties would be committed to the sale from the conclusion time.

The JCC adopts another approach to determine the time at which title passes in non-fungible goods:

> '1. The effect of the contract shall on its formation attach to the contracted object and its consideration without being conditional on possession or any other thing unless the law otherwise provides. 2. But in respect of the rights of the contract each of the two parties shall perform its obligations prescribed by the contract'.[226]

It can be inferred from the wording of this Section that the expression 'effect of the contract' refers to the main implications of the contract of sale. In other words, the buyer procures title, and similarly the seller acquires the price of the sold goods when the contract of sale is concluded, while the expression 'rights of the contract' indicates the obligations of parties arising from the contract of sale, which are closely connected to the implications of the contract of sale.[227] The ownership in the non-fungible goods can be transferred at the conclusion of the contract of sale, i.e. without hinging the passage of ownership on the delivery of goods.[228] This is also implied in Section 1147, which regulates transfer of ownership under fungible goods.[229] It can be inferred that a transfer of ownership in non-fungible goods is also referred to in the general rules in Section 485.[230] The specification of the time of the conclusion of the contract of sale can be found in Section 101 of the JCC.[231]

It would seem that the 'declaration theory' is the theory on which the formation time of the contract is determined by virtue of the JCC, i.e. the contract is considered to be concluded once the acceptance is declared by the offeree.[232] Consequently, the ownership in non-fungible goods will not be transmitted between parties to a contract

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[225] Plegat (n 35) 184; Bugden and Lamont-Black (n 11) 66, 67.
[226] Section 199 of the JCC.
[227] Anwar Sultan, Commitment Resources in Civil Law/Comparative Study with Islamic Jurisprudence (8th edn, Dar Althaqafa 2015) 177.
[228] Al-Zaubi (n 203) 228.
[229] Ibid 228.
[230] Ibid 228. Section 485 of the JCC.
[231] Section 101 of the JCC (appendix 2).
[232] Sultan (n 227) 80; Taleb Hassan Mousa, *The International Trade Law* (4th edn, Dar Althaqafa 2004) 221.

of sale, unless a buyer (offeree) declares their acceptance and the contract of sale is then deemed to be concluded.

3.2.4 Operating transfer of ownership in a sale contract involving carriage of goods by sea

The JCC draws a distinction between transfer of ownership in fungible goods and non-fungible goods. Ownership in fungible goods is transferred at the time of the identification of goods, while transfer of ownership in non-fungible goods will take place at the same time as the conclusion of the contract of sale.[233] A failure to identify fungible goods in a contract of sale will render the contract incomplete, and result in the contract being considered a promise of sale.[234] Some experts, however, do not agree with this presumption as they argue that the ownership in the sold goods will pass to the buyer when the goods are shipped, as they did not distinguish between a passage of ownership in fungible and non-fungible goods.[235] The Jordanian Cassation Court has also contradicted the general rules of the transfer of ownership in the JCC in case No 80/1993, as discussed above.[236] Another feature of incompatibility in this case can be seen in the disregarding of the fact that passage of ownership is not been regulated under the Incoterms Rules. The Court ruled in the same case that a passage of ownership in a contract of sale associated with the Incoterms Rules should be established according to the rules on delivery of goods. The apparent inconsistency between this decision and the JCC provisions may rest in the fact that deciding passage of ownership on the basis of the delivery of goods does not comply with the transfer of ownership rules in the JCC. For the Court to determine the time at which the ownership in fungible goods passed to the buyer, it should have referred to the time of the identification of the goods,[237] whereas the conclusion time of the contract of sale

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[233] Sections 199 and 1147 of the JCC.
[234] Bugden and Lamont-Black (n 11) 67. A promise of sale is an agreement whereby the potential seller and buyer undertake or one of them undertakes to conclude a sale contract within an agreed period and on certain terms (JCC, Section 105). See Appendix 2.
[235] Al-Miqdadi (n 18) 167; Al-Eteer (n 1) 375.
[236] Case No 80/1993 Jordanian Cassation Court, *Journal of Jordanian Bar* [1993] 11 2096. The same assertion was adopted in other decisions, such as the Case No 711/1989 Jordanian Cassation Court, Ala'a Fatehi Samad and Wadee' Salameh Sawaqed, *Judgements of the Cassation Court in the Commercial Cases* 187; Case No 806/1986 Jordanian Cassation Court, Ala'a Fatehi Samad and Wadeea' Salameh Sawaqed, *Judgements of the Cassation Court in the Commercial Cases* 180; Case No 276/2006 Jordanian Cassation Court.
[237] Section 1147 of the JCC.

has to be considered to determine the time of passage of ownership in non-fungible goods.[238]

According to Section 1147, ownership in fungible goods is deemed to be transferred to the buyer when they have been identified by the seller, and so determining the time at which the ownership passes to the buyer entails a specification to the instrument, which could be used to identify the fungible goods sold via a contract of sale involving carriage of goods by sea. The JCC provisions have not clearly explained the notion of the identification of goods, and neither does the JMCL clarify the concept of the goods' identification that needs to be satisfied.[239] Todd assumes that a bill of lading plays a substantial role in evidencing all of the facts and terms agreed to in a marine carriage contract,[240] and hence a bill of lading can be an adequate instrument to satisfy the requirement for the identification of fungible goods sold via the contract of sale involving carriage of goods by sea, in particular it links the sold goods to the buyer. Consequently, a transfer of title in such fungible goods has to take place at the same time as the issuing of the bill of lading. The role of the date of the bill of lading here in ascertaining the time of a transfer of ownership also indicates the importance of the marine carrier's position in determining the time of the passage of ownership. However, this cannot be derived from the provisions of the JCC that have not regulated international contracts of sale, in particular those involving carriage of goods by sea. This lacuna can be solved if the CISG is ratified by Jordan, as it has explicitly recognised means which can meet the requirements of identification of goods.[241] According to Article 67(2) of the CISG, the identification of goods is a prerequisite to transfer of risk in goods sold by contract of sale. Under the provisions of the same Article, the identification of goods can be achieved by having the goods marked, sending a notice by a seller to a buyer, shipping documents such as a bill of lading, or by any other suitable shipping document can satisfy the requirements of identification. It is obvious from the wording of this Article that the shipping documents can satisfy the goods' identification, and hence, a bill of lading, a ship's delivery order and a mate's receipt could be used to identify the goods in the contract of sale involving

[238] Section 199 of the JCC.
[239] The JCC has another deficiency as it does not address what happens when the seller refrains from identifying fungible goods.
[240] Todd, *Principles of the Carriage of Goods by Sea* 238.
[241] Articles 67(2) and 69(3) of the CISG.

carriage of goods by sea, which in turn can trigger the operation of passage of ownership in fungible goods. This clarification is found neither under the provisions of the JCC nor under the Incoterms Rules, which may lead to ambiguity in terms of the instrument that can be used to identify the goods to the sale contract. It could be suggested that this argument is one on the key reasons that should motivate Jordan to ratify the CISG.

The CISG has explicitly pointed to the role of the marine carrier in identifying the goods in the contract of sale, as it has given the listed documents legal effect in identifying the goods concerned.[242] Despite that the 'received for shipment bill' is not regarded as a bill of lading under some kinds of sales such as CIF and FOB, which will deprive this document of performing the function of a document of title,[243] this document can be used as an instrument of identification of goods, because of its capability of proving quality, quantity and other relevant factors related to fungible goods, which can satisfy the requirement of identification that entitles the ownership on the fungible goods to transfer to the buyer under the JCC.

It can be inferred that this document can further exercise the role of document of title as long as it meets the standards of the goods' control and expresses the intention of relinquishing possession by a shipper and taking it by a marine carrier.[244] Hence, it would seem that the obligation for identification imposed on the seller by virtue of the contract of sale can be discharged once the 'received for shipment bill' or the mate's receipt is issued by the marine carrier, and then the role of both documents will deemed to be another aspect of the marine carrier's role of facilitating transfer of ownership in fungible goods. This was stated by Lord Devlin: 'The form of mate's receipt used is similar to a bill of lading and there is no difficulty about treating it as an equivalent'.[245]

The ambiguity of the JCC provisions in terms of the identification of goods will cause a lack of clarity regarding the role of the marine carrier in identifying sold goods,

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[242] The concept of the passage of ownership in fungible goods was set out in Article 1147 of the JCC.
[243] Malfliet (n 137) 176. However, Aikens believes that nothing can deprive the received for shipment bill of being a document if title under CIF term. Aikens, Lord and Bools (n 30) 109.
[244] Lorenzon and Baatz (n 133) 155; Aikens, Lord and Bools (n 30) 110; Treitel and Reynolds (n 85) 519.
[245] *Kum and Another v Wah Tat Bank and Another* [1971] 1 Lloyd's Rep 439 Privy Council. Pamela Sellman, *Law of International Trade* (2nd edn, Old Bailey Press 2004) 43; Girvin, 'Carriage by Sea: The Sea Transport Documents Act 2000 in Historical and Comparative Perspective' 323.

which can be recognised through the issuing of a bill of lading, a received for shipment bill, ship's delivery order or mate's receipt. Such vagueness will also affect the passage of ownership in fungible goods sold via a contract of sale involving carriage of goods by sea. The unclear function of the marine carrier in operating passage of ownership under Jordanian law could be attributed to the non-ratification of the CISG, which has expressly clarified the decisive effect of the shipping documents in identifying the goods to the contract of sale. Since a transfer of ownership in the fungible goods is hinged on such identification, which has not been illuminated under the JCC, a ratification of the CISG would be the proper solution that can overcome such ambiguity which has given rise to contradictory decisions by the Jordanian Cassation Court.[246] Such a dilemma can be eliminated by enacting a law to regulate provisions of international sales, including those involving carriage of goods by sea.

The lack of clarity over the notion of the identification of goods under the JCC has led to further inaccuracy in the presumptions of the Jordanian Cassation Court. This was illustrated in a case about a vessel bought through an auction held in the Jordanian port of Aqaba. [247] At the due time of the vessel's delivery, a consignment of goods was found on board. To take delivery of the vessel, the buyer unloaded the consignment and then claimed the costs of unloading from the goods' owner who refused. As a consequence, the buyer filed suit before the First Instance Court, which held that the expenses of unloading had to be borne by the owner of the goods, who unsuccessfully appealed. The case eventually came before the Jordanian Cassation Court, and the owner asserted that litigation could not be brought against them as the goods had been previously sold to a buyer through a shipment sale. To determine who should bear the unloading costs, the Court made a decision on the basis of whether or not title to the goods was transferred to the buyer at the time of unloading. The Court held that transfer of ownership took place once the goods were delivered to the marine carrier in the port of shipment. This decision incorrectly linked transfer of ownership to delivery of goods. However, the role of the bill of lading in satisfying the goods'

[246] Incompatibility was observed in Case No 523/1991 Jordanian Cassation Court (n 200); Case No 276/2006 Jordanian Cassation Court (n 236); Case No 80/1993 Jordanian Cassation Court (n 200); Case No 711/1989 Jordanian Cassation Court, (n 236); Case No 806/1986, Jordanian Cassation Court (n 236).
[247] Case No 276/2006 Jordanian Cassation Court (n 236).

identification was not pointed out in this judgment. According to the Jordanian Cassation Court:

> 'It is impossible to determine the right of litigation, as neither the sale contract nor the bill of lading has been presented. Hence, the court will not be able to decide whether the ownership of the goods has been transferred to the buyer by shipping the goods onto the vessel at the shipment port'. [248]

Although there is much to agree with in this decision, instead of linking title to the time of the delivery to the marine carrier, the Court should have elaborated on the functionality of the bill of lading as an instrument of identification, through which it could perform a vital role in determining the time of transfer of ownership.[249] The inaccuracy of this judgment lies in the matter of deciding the transferability of title of goods on delivery to the marine carrier, where the court assumed that:

> 'The sale in the shipping port might be CIF or FOB, whereby the ownership in the goods transfers from a seller to a buyer when the goods pass the rail ship in the shipping port'.[250]

It can be understood from this judgment that transfer of ownership in the goods will take place at the same time as the goods' physical loading onto the ship, precisely when the goods pass the rail. Since the goods were found on board, title would have already passed to the buyer. However, this presumption contradicts the earlier wording of the same decision, which clarified whether or not ownership had transferred on producing a bill of lading and contract of sale, not on the delivery of goods. This confusion is the result of a lack of clarification of the role of the marine carrier and bill of lading. Moreover, the assertion of the Jordanian Cassation Court of hinging passage of title on the presentation of a bill of lading and a contract of sale does not work in the case where non-fungible goods are involved, in which the ownership passes at the time of the conclusion of the contract of sale, which is incompatible with JCC Section 199. Thus, the failure of the JCC provisions to clarify the essence of the goods' identification, and the ambiguity of the role of the marine carrier in this respect might be one of the reasonable factors that may encourage Jordan to ratify the CISG.

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[248] Case No 276/2006 Jordanian Cassation Court (n 236).
[249] The same opposing approach can be seen in Case No 80/1993 Jordanian Cassation Court (n 236); Case No 711/1989 Jordanian Cassation Court (n 236) 187; Case No 806/1986 Jordanian Cassation Court (n 236).
[250] Case No 276/2006 Jordanian Cassation Court (n 236).

The importance of the provisions of the CISG consists in the fact that they have explained the ways through which the goods' identification could be satisfied under the contract of sale involving carriage of goods by sea, where transfer of risk in fungible and non-fungible goods and transfer of ownership in fungible goods would be significantly affected by the identification, as stipulated in Articles 67(2) and 69(3) of the CISG.

It might be assumed that the incompatibility of the judgments is because the role of the marine carrier in terms of passage of ownership has not been clarified under Jordanian law, which has neither recognised the contract of sale involving carriage of goods by sea nor the international contract of sale in general. Therefore, the Court inaccurately asserted that a transfer of ownership in the contract of sale incorporating the Incoterms Rules shall take place once the delivery of the goods is achieved; that is when the goods have passed the vessel's rail. Due to the omission of the ownership-related matters in the Incoterms Rules, the Court should have resorted to the general rules included in the JCC.

The person in charge of solving such matters under Jordanian law must bear in mind two key factors prior to ascertaining the time of passage of ownership in fungible goods. Firstly, whether the goods are fungible or non-fungible. Secondly, the date of issue incorporated into the bill of lading or other shipping documents, irrespective of whether or not the goods have been shipped on board the ship. The marine carrier plays no part in the transfer of ownership in non-fungible goods under the provisions of the JCC, because it takes place at the time of the conclusion of the contract of sale, the time at which no act should be undertaken by a marine carrier. Despite that, the marine carrier does not have any legal effect on the transfer of ownership in non-fungible goods, and this effect can be seen under the goods sold in transit, irrespective of whether the goods are fungible or non-fungible.

3.3 Summary

This has shown that the marine carrier plays an important role in operating passage of ownership between parties in a contract of sale involving carriage of goods by sea. The decisive role of the marine carrier can be seen through the identification of goods to enable ownership in fungible goods to transfer to a buyer, which can be achieved through a bill of lading, a ship's delivery order, a received for shipment bill or mate's

receipt issued by the marine carrier or its agents. Although the CISG has disregarded matters of ownership, the role of the marine carrier in affecting a passage of ownership under the provisions of the CISG is clearer than that under Jordanian law.

One of the key reasons for the ambiguity of Jordanian law lies in its failure to pass a specific law governing international contracts of sale. This has led to the need to have recourse to the general rules of passage of ownership set out in the JCC, which are not a good fit for contracts of sale involving carriage of goods by sea. Second, CISG ratification will recognise the influence of the marine carrier on the passage of ownership in an international contract of sale involving carriage of goods by sea. This will contribute to overcoming the obstacles encountered by the Jordanian Cassation Court to identifying the time of transfer of ownership.

As discussed in this study, ownership in fungible goods can be transferred when the goods are identified in the contract of sale as stipulated in Sections 1147 and 199 of the JCC. However, the role of the marine carrier in terms of the goods' identification, that should be achieved for the sake of transfer of ownership in fungible goods, is not clearly identified under the provisions of the JCC. In contrast with the JCC, the CISG has provided some examples to clarify the identification of goods like shipping documents, to which a bill of lading, ship's delivery order and mate's receipt belong, as these are considered instruments through which the requirement of identification of goods can be met.[251] The function of the marine carrier in operating transfer of ownership in fungible goods is clearer under the provisions of the CISG than the provisions of the JCC. This argument can be invoked as a reason for Jordan to ratify the CISG.

[251] Article 67(2) of CISG, Appendix 1.

Chapter 4. Transfer of risk in sale contract involving carriage of goods by sea[252]

To clarify the position of Jordanian law on the passing of risk, it is necessary to address the relevant provisions of the JCC, which have regulated transfer of risk in the domestic contract of sale. However, this chapter will first address transfer of risk under the CISG and Incoterms 2010 Rules, as both have addressed transfer of risk in sales involving carriage of goods, which have not been regulated under the JCC.

4.1 Applicability of the CISG and Incoterms 2010 Rules

The parties to a contract of sale normally specify the time of transfer of risk through an express clause, or by attaching the Incoterms 2010 Rules to their contract; otherwise, the relevant rules of the CISG will apply if the dispute in a country which is a member state of the CISG.[253] However, case law shows that application of CISG provisions in civil law jurisdictions is more frequent than in common law ones.[254] Therefore, it could be presumed that application the CISG rules might be more appropriate under Jurisdiction of Jordanian courts. The Incoterms 2010 Rules also set out particular duties of parties to a contract of sale related to transfer of risk, goods delivery, costs, carriage, insurance, exporting and importing obligations, customs and marking or packing goods.[255]

Under the principle of freedom of contract enshrined in Articles 9 and 6 of the CISG, parties to a contract of sale can agree to derogate from the provisions of the CISG.[256] Such agreement could be observed through inclusion of the Incoterms 2010 Rules, which might also be applied as a trade usage if the parties have not expressly decided such application.[257] Hence, a dispute neither addressed nor sufficiently regulated in

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[252] This chapter has been published. See Derar Al-Daboubi, 'The Role of the Marine Carrier in Operating a Passage of Risk in International Sale Contract' (2018) 5 IL Diritto Marittimo – Quaderni 549-589.
[253] Erauw 'Passing of Risk' 903; Hachem (n 34) 969; Lookofsky (n 34) 94; *Frozen Chicken* Case No 15 U 29/92, Appellate Court (Oberlandesgericht) Karlsruhe (20 November 1992). Articles 6 and 12 of the CISG.
[254] Bruno Zeller, 'The CISG and the Common Law: The Australian Experience' in Ulrich Magnus (ed), *CISG vs. Regional Sales Law Unification/With Focus on the New Common European Sales Law* (Sellier European Law Publications 2012) 57.
[255] Pamboukis (n 7) 126; Bergami, 'Managing Incoterms 2010 Risks: Tension with Trade and Banking Practices' 326.
[256] Lookofsky (n 34) 95.
[257] Pamboukis (n 7) 127. Article 6 and Article 9 of the CISG.

the CISG, shall be solved in accordance with the Incoterms 2010 Rules and vice-versa, and recourse should not be had to the rules of conflict of law.[258] A dispute arising under the transfer of risk in a contract of sale in a member state of the CISG shall be governed by the relevant rules of the Convention, but if such rule fails to govern, the Incoterms 2010 Rules, as integral rules, might be applied to the dispute as a trade usage, although the parties were silent in terms of applicability of the Incoterms 2010 Rules. Incorporating the Incoterms 2010 Rules in a contract of sale does not mean a total disregard of the CISG rules governing the transfer of risk, but the Rules amend and complement the provisions of the CISG that may contradict the terms in the Incoterms 2010 Rules.[259] However, for the CISG to clarify any ambiguity in the Incoterms 2010 Rules, the parties must expressly indicate their intention of such an application in the contract, as incorporation of the Incoterms 2010 Rules tends to overrule the CISG.[260]

Should the provisions of transfer of risk or delivery of goods under the CISG contradict the rules of Incoterms 2010, the relevant rules of the latter will prevail over the former if the Rules are incorporated in the contract, or if they are applicable by virtue of trade usage, regardless of whether the sale belongs to a member state of the CISG.[261] Due to the voluntary nature of the Incoterms 2010 Rules, which cannot be classified under statutes or conventions, the parties could in certain circumstances use an exclusion clause to deviate from the Rules incorporated in the contract.[262]

4.2 Role of marine carrier in passing a risk in shipment sales governed by international instruments

The rules of the international contract of sale and shipment sales can be found in the CISG and Incoterms 2010 Rules, and the influence of the marine carrier will be derived from those documents.

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[258] Coetzee (n 7) 4, 21.
[259] Ibid 21.
[260] Harold J Berman and Monica Ladd, 'Risk of Loss or Damage in Documentary Transactions Under the Convention on the International Sale of Goods' (1988) 21 Cornell Int'l L J 431, 437; Klotz (97) 53.
[261] Coetzee (n 7) 4; Berman and Ladd (n 261) 423.
[262] Klotz (n 97) 53.

4.2.1 Function of marine carrier in transfer of risk in shipment sales governed by the CISG

The CISG does not clearly explain the notion of risk, but instead uses the expression 'loss of or damage to the goods' which suggests that both are used as aspects of risk.[263] The role of the marine carrier is stated in Articles 67(1) and 69(2) of the CISG. The plain wording of Article 67(1) and implied meaning of Article 69(2) point to the performance of handing the goods over in the contract of sale involving carriage of goods more than other contracts.[264]

Regardless of the mode of carriage, the CISG links transfer of risk in shipment sales to the obligation of the seller to hand over the goods to the first independent carrier.[265] This approach is described in the provisions of Article 67(1) which provide that:

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

According to this Article, the buyer must assume the risk from the moment the seller hands the goods over to the first independent carrier, provided that the seller is not bound to hand the goods over at a specific place.[266] Therefore, the risk can transfer when a seller discharges the goods if custody has passed to the independent marine carrier, where the buyer has to assume responsibility from that time, unless the parties have otherwise agreed.[267] The influence of the marine carrier can be seen in the provisions of Article 67(1) of the CISG in two cases: first, when carriage is undertaken via a multimodal (combined) transport document, and second, when the marine carrier performs the carriage as a first independent carrier.

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[263] Hachem (n 34) 958, 959.
[264] Hachem (n 34) 974.
[265] Erauw, 'Passing of Risk' 890; Flambouras (n 17) 87, 102.
[266] Article 67(1) of the CISG; Gabriel (n 4) 208; Erauw, 'Passing of Risk' 890, 891; Hachem (n 34) 980, 981; Flambouras (n 17) 102.
[267] Hager and Schmidt-Kessel (n 34) 929; Schwenzer, Fountoulakis and Dimsey (n 81) 492.

The second sentence of Article 67(1) of the CISG is normally applied to the carriage of goods which takes place by land leg and then by sea, whereby the seller hands the goods over to the carrier at a specific place and responsible for the risk during the land carriage.[268] However, notwithstanding that the goods have been handed over to a carrier other than the first carrier, the risk will pass once the goods are handed over to such a carrier in the place agreed on in the contract of sale.[269]

The significance of the application of Article 67(1) of the CISG was identified in a case regarding a consignment sold on CFR terms.[270] To determine the seller's right to payment, the tribunal at the China International Economic & Trade Arbitration Commission (CIETAC) based this right on the ground of whether or not a transfer of risk had taken place. Since the transaction was a shipment sale associated with the carriage of goods, the Tribunal resorted to Article 67(1) and ruled that, despite the expiry of the letter of credit, the seller was entitled to receive payment as the goods had already passed the ship's rail in the port of shipment at the agreed time. This shows how important the position of the marine carrier is. The tribunal determined the transfer of risk on the mere handing over of goods to the marine carrier at the time and place agreed on in the contract of sale, which was found by the Tribunal to confirm the seller's right to receive payment.

The transfer of risk might be hindered if the marine carrier does not arrive at the place of delivery or is late and so obstructs the relinquishing of custody under the CISG, where the fault of the marine carrier would affect the interests of the parties in terms of procuring insurance coverage, receiving payment, time of conformity of goods or they might be affected by a penalty clause imposed on them by virtue of the contract of sale. However, Article 67 of the CISG does not address the case where the seller is compelled to deliver the goods at the buyer's place.[271] This arose in the judgment of the Appellate Court of the Canton of Bern, Switzerland in a case in which the buyer refused to pay for goods sold through a destination sale.[272] To determine deficiency in delivery, the nonconformity of goods asserted by the buyer and the time of the transfer

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[268] Schwenzer, Fountoulakis and Dimsey (n 81) 493; Hachem (n 34) 974.
[269] Hachem (n 34) 974.
[270] *Art Paper* Case No CISG/1997/16, China International Economic & Trade Arbitration Commission (25 June 1997).
[271] Hager and Schmidt-Kessel (n 34) 928.
[272] Case No 304/II/2003/wuda/scch, Appellate Court (*Appellationshof*) of the Canton of Bern (2004).

of risk, the Court identified the time at which the delivery was exercised, as the goods' conformity, transfer of risk and payment right had to correspond to this time. Although Article 67(1) of the CISG addresses transfer of risk in a shipment sale, the Appellate Court resorted to this Article to identify the time of the delivery of goods performed by marine carriers in destination sales. It declared that:

> 'In general, under the CISG the risk passes from the seller to the buyer at the time of shipping (Art. 67(1) CISG). However, in the present case the parties have agreed that the seller should deliver the goods free buyer's address, custom duties unpaid (contract confirmation upon invoice, exhibit 3). Therefore, since a place of performance other than seller's place of business was stipulated, the risk passed to the buyer at the time of unloading at the place of performance in Ostermundigen in the present case'.[273]

Under the provisions of Articles 67 and 69 of the CISG, transfer of risk is based on the fulfilment of the sellers' obligation to hand over the goods.[274] It is neither linked to a transfer of ownership nor to the conclusion time of the contract of sale, except when the goods are sold in transit.[275]

In order for the risk to pass to the buyer in shipment sales, the delivery of goods has to meet the requirements stipulated in Article 31(a) of the CISG, where the possession of the goods must be relinquished from the seller to the carrier.[276] According to the CISG, merely handing or taking the goods over does not adequately let the risk pass to the buyer, unless the goods have been sufficiently linked to the buyer through identification.[277] Identification might be achieved through a bill of lading or via any other shipping document addressed to the buyer as a consignee, but naming the seller as a consignee does not satisfy the requirement of identification of goods, as the bill of lading in such a case does not link the goods to the buyer.[278] It has been suggested that the reason for stipulating identification of goods is to avoid false claims by the

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[273] Case No 304/II/2003/wuda/scch, Appellate Court (*Appellationshof*) of the Canton of Bern (2004). < http://cisgw3.law.pace.edu/cases/040211s1.htm l > accessed 4 February 2017.
[274] Hachem (n 34) 988.
[275] Ibid 954.
[276] Erauw, 'Passing of Risk' 878; Honnold and Flechtner (n 4) 520.
[277] Hager and Schmidt-Kessel (n 34) 931, 940; Erauw, 'Passing of Risk' 893, 907; Gabriel (n 4) 208. As stipulated in Article 67(2) of the CISG, Appendix 1.
[278] Gabriel (n 4) 208.

seller, who might pretend that the goods had already been sold to the buyer when the risk materialised.[279]

The identification of goods may play another crucial role when the buyer wants to insure the goods in transit, which entails identifying the unascertained goods which could be done using shipping documents.[280] This also relates to the influence of the marine carrier on the operation of a transfer of risk that hinges on the identification of goods, which can be achieved when a shipping document is issued by the marine carrier.

However, it cannot be agreed that the discharging of a seller's obligation to deliver implies a handing of goods over to the first carrier and surrendering the related documents.[281] This is because the seller's obligation of tendering documents is separate from handing the goods over, as each one has its own function and purpose.[282] Handing the goods over transfers possession from the seller to the carrier, while document tendering constitutes the constructive delivery of goods that entitles its holder to physical possession.[283] Simply handing goods over to the marine carrier shall suffice to operate a passing of risk in a shipment contract of sale involving carriage of goods by sea, regardless of whether the disposition documents securing payment are withheld.[284]

Goods transfer also transferring risk is consistent with the underlying rule of the CISG, which stipulates that the risk shall be assumed by the party who controls the goods.[285] This is because the control of the seller over the goods is deemed to be relinquished when he hands them over to the marine carrier in the shipment port.

The CISG does not address the case where the seller hands the goods over to a third party other than the marine carrier such as a port or customs authority. This contrasts

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[279] Honnold and Flechtner (n 4) 524; Schwenzer, Fountoulakis and Dimsey (n 81) 493.
[280] Nisreen Mahasneh, 'The Seller's Obligation of Delivery and Conformity under a Contract for Sale of Goods: The Approaches of Both English Law and The Vienna Convention on Contracts for the International Sale of Goods 1980' (PhD thesis, University of Aberdeen 2001) 116.
[281] Ibid 153.
[282] Goods' delivery was set out in Article 31 of the CISG, whereas document surrender was addressed under Article 34 of the CISG.
[283] Koumani (n 18) 194; Djadjev (n 136) 11; Girvin, *Carriage of Goods by Sea* 88, 89; Han, 'A Study on the Liability of the Carrier and the Actual Carrier for Delivery of Goods without a B/L in China' 275, 278. Documents tendering was stipulated in Article 34 of CISG.
[284] Hachem (n 34) 975. This inference is extracted from the provisions of Article 67(1) of the CISG.
[285] Gabriel (n 4) 208.

with the conventions of the carriage of goods by sea, that explicitly address such a handing over in the course of determining the liability of a marine carrier.[286] This lacuna will give rise to difficulty in terms of the time of the transfer of risk based on handing over of goods.

The parties may agree to deviate from the rules of the transfer of risk set out under the CISG.[287] This is illustrated in a case related to a contract of sale, through which the parties contracted on a 'free delivery, duty-paid, untaxed'.[288] According to the Court, the buyer should not be bound to pay the price of the goods under Articles 66 and 67(1) of the CISG. The Court held that the passing of risk had not taken place at the time when the seller handed the goods over to the carrier for transportation to the buyer as the condition of 'free delivery' imposed by the contract not only comprised the expenses of the carriage, but also the passing of the risk. This was because the parties had agreed that the transfer of risk should take place at the buyer's place of business in Germany, rather than the place of shipment provided in Article 67(1) of the CISG.

It is not only transfer of risk between parties to a contract of sale that can be affected by the fault of the marine carrier. The obligation of goods' conformity imposed on the seller is also influenced, as the time of considering such conformity is based on the time of the passing of risk to the buyer.[289] Lastly, the seller's right to gain payment is also influenced by the marine carrier's performance, as it has been linked to the time of transfer of risk that hinges on the performance of a marine carrier under the shipment contract of sale involving carriage of goods by sea.[290]

This was illustrated in the case concerning a contract of 'list price ex works', where the seller agreed to deliver video cameras and equipment to Japan after securing payment through a mortgage foreclosed on land belonging to the buyer.[291] The buyer argued that the reason for non-payment was attributable to the non-delivery of one consignment and claimed a discharge of the mortgage on the ground that a 'list price ex works' does not embrace a transfer of risk, while the seller contested that it should

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[286] Article 4 of the Hamburg Rules 1978 and Article 12 of the Rotterdam Rules 2009 that can be found. However, the Hague-Visby Rules 1968 did not recognise this kind of delivery.
[287] Lookofsky (n 34) 95.
[288] *Frozen Chicken* (n 253).
[289] This stipulation was provided in Article 66 of the CISG. Hager and Schmidt-Kessel (n 34) 932.
[290] Article 66 of the CISG.
[291] *Video Cameras and Equipment* Case No 2 U 175/95, Appellate Court Köln (9 July 1997).

encompass both price and transfer of risk. The dispute was brought before the Appellate Court of Köln, which clarified the time of transfer of risk so as to decide the admissibility of the mortgage. Court found that the seller had been unable to discharge its burden of proof that delivery to the first carrier had been made. A bill of lading which indicated that a container said to contain the specified brand name and number of goods had been delivered to a freight forwarder, but which did not indicate the name of the buyer as recipient, was not sufficient proof of delivery (Article 67(1) CISG), i.e. the goods identification as a prerequisite stipulation for passage of risk has not been satisfied by linking them to the buyer. Court held that, as the seller had no right to claim payment of the purchase price under article 61(1) of the CISG, it had no right to foreclose on the mortgage against the land.[292]

It can be inferred from this judgment that the Court believed the transfer of risk on the delivery of goods should be proved through the contents of the bill of lading. The Court held that the risk did not pass to the buyer as the marine carrier had not given the name of the buyer in the bill of lading, i.e., the goods have not been identified to the sale contract. This affected the seller's interest in terms of the right of payment that should coincide with the time of transfer of risk. This consequently deprived the seller of the ability to foreclose the mortgage on the buyer's land.

If a case with the same facts was decided in Jordan, it would likely have the result of this case, but the basis on which a transfer of risk can be denied is different from that which has been adopted in the aforementioned case. In order for the risk to transfer to the buyer under the JCC, the seller must deliver the goods to the buyer along with its relevant documents. Therefore, the default delivery cannot be considered in this case as the goods have not been linked to the buyer in the document of delivery (bill of lading), which has to be surrendered in company with the goods to allow the risk to transfer to the buyer.[293] Since the default delivery has not been considered and as the bill of lading has not included the name of the buyer, the risk will not pass under the provisions of the JCC. It can be inferred that the marine carrier shall be considered in breach of the marine carriage contract. The basis on which the marine carrier would

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[292] Case No 2 U 175/95, Appellate Court Köln (9 July 1997) <http://cisgw3.law.pace.edu/cases/970709g3.html > accessed 1 February 2017. The same approach was adopted in *Art Paper* (n 271).
[293] Sections 472, 490, 494(1) of the JCC.

owe the contractual obligation to issue a correct bill of lading lies in the provisions of Articles 14(1) and 15(1) of the Hamburg Rules and therefore, the marine carrier shall be liable for non-passage of risk when they breach this obligation that has resulted in hindering such passage.

The influence of the marine carrier via a bill of lading might further be clarified from a decision by a tribunal of international commercial arbitration at the Russian Federation Chamber of Commerce and Industry.[294] This dispute arose in a shipment sale concluded between the claimant (Indian buyer) and respondent (Russian seller). Payment had been made through letters of credit in exchange for bills of lading tendered by the seller to the issuing bank. However, the buyer claimed that two of the consignments had not been received at the agreed destination. The Tribunal based its award on whether the passing of risk had taken place. It concluded that the date indicated in the bill of lading would be considered the date of delivery to the carrier, on which the time of the transfer of risk and payment had to be considered, something drawn from the provisions of Article 67(1) of the CISG.

The tribunal dismissed the buyer's claim for loss of goods, as the risk has been already transferred to them and because he could not prove that the loss of the goods, which had taken place after the transfer of risk, was imputable to the seller's fault or omission.

4.2.2 Role of marine carrier in transfer of risk in shipment sales governed by the Incoterms 2010 Rules

Incoterms 2010 Rules establish the transfer of risk on the seller's obligation to deliver.[295] The rule of transfer of risk in shipment sales involving carriage of goods by sea can be derived from the provisions of the CIF, CFR and FOB, through which the risk passes to the buyer once the seller discharges the obligation of delivery prescribed in Article A4 of Incoterms 2010 Rules.[296]

Pursuant to that Article, delivery shall take place when the goods are handed over to the control of the independent marine carrier, who will undertake the goods'

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[294] Case No 62/1998 Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry (30 December 1998).
[295] Bugden and Lamont-Black (n 11) 80.
[296] Mckendrick (n 135) 682. This rule is derived from the provisions of Articles A5 and B5 of CIF, CFR and FOB.

transportation to the buyer and then the risk will transfer later.[297] However, the new shipment terms that regulate containerised carriage stipulate that the risk shall transmit to the buyer when the goods' custody transfers from a seller to a first carrier as envisaged in the Carriage Paid to (CPT) and Carriage and Insurance Paid (CIP) terms.[298] The delivery to the marine carrier by virtue of CFR, CIF, CPT and CIP is a default delivery, because the carrier is operating as an agent for the seller, whereas under Free Carrier term (FCA) and FOB they take the goods over on behalf of the buyer, which is considered actual delivery.[299]

The role of the marine carrier in operating a transfer of risk can be seen clearly in the Incoterms 2010 Rules, which have formulated particular terms regulating shipment sales involving marine and inland waterway carriage, such as FAS, CIF, CFR and FOB.[300] Article B5 of these terms states that: 'The buyer bears all risks of loss of or damage to the goods from the time they have been delivered as has been envisaged in A4'. The first sentence of Article A5 also confirms this approach. However, transfer of risk under this Article is based on the seller's obligation to deliver. Article A5 of the CIF, CFR and FOB states that: 'The seller bears all risks of loss of or damage to the goods until they have been delivered in accordance with A4'.

Article A4 of CIF, CFR and FOB terms should be the basis for Articles A5 and B5, as the norm of the delivery of goods, stipulated in both Articles, has been enshrined in Article A4. This provides that:

> 'The seller must deliver the goods either by placing them on board the vessel or by procuring the goods so delivered. In either case, the seller must deliver the goods on the agreed date or within the agreed period and in the manner customary at the port'.

From this, it can be concluded that Article A5 of these terms is similar to Article 67(1) of the CISG as each links a transfer of risk to the time of delivering the goods to an independent carrier.

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[297] Flambouras (n 17) 106; Mckendrick (n 135) 637, 638.
[298] Lookofsky (n 34) 95. As provided in Articles A4, A5 of CPT and CIP of the Incoterms 2010 Rules that have been discussed before and see also, see Articles A4 and B5 of CPT and CIP of the Incoterms 2010 Rules.
[299] Thorn, 'German' in von Ziegler (n 35) 209. This inference is based on the fact that the seller in CFR, CIF, CPT and CIP is the one of the contracting parties to the carriage contract, whereas the buyer is the party who contracts the carrier to transport the sold goods in FCA and FOB.
[300] Ostendorf (n 7) 69.

Another aspect of compatibility is seen under the documents' tendering. This is because the Incoterms 2010 Rules do not stipulate a surrendering of documents as a prerequisite for the transfer of risk. Article A5 of CIF, CFR and FOB of the Incoterms 2010 Rules expressly points out the position of the marine carrier under the transfer of risk. This contrasts with Article 67(1) of the CISG, which is applicable to different modes of carriage. Incompatibility between both sets is also identified in the norm of delivery as the CISG adopts the principle of transfer of custody, while the Incoterms 2010 Rules stipulates the placing of goods on board the ship. Variations between the CISG and Incoterms 2010 Rules might be because the CISG is deemed to constitute the general rules of the international sale contract, which may fill the lacunas created either by the parties' agreement or the Incoterms 2010 Rules, while the rules of the Incoterms deal with different kinds of sales where each has its own distinct characteristics.

The influence of the marine carrier on the passing of risk under the Incoterms Rules was pointed out in *Cerámicas SL v Hanjin Shipping Co Ltd*, where a Spanish buyer who had entered into a contract of sale with a Chinese seller to purchase goods which were subsequently damaged in transit.[301] The case against the Chinese marine carrier failed at first instance because the complainant did not enjoy ownership of the damaged goods at that time. The buyer appealed, asserting that the case should have been resolved in accordance with the provisions of Article 67(1) of the CISG. To clarify the right of suit, the Appellate Court invoked the time of transfer of risk and ruled that:

> 'The sales of goods contract which was signed between the seller and the buyer contained Incoterms that defined which of the parties was to hold the risk in case the goods were either lost or damaged. Risk in this case belonged, and was assumed in the appeal to belong, to the Buyer from the moment the goods were stowed in the transporting vessel'.[302]

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[301] *Cerámicas SL v Hanjin Shipping Co Ltd* Case No 739/2002, Valencia Appellate Court (15 February 2003). The position of the marine carrier in affecting passage of risk under Incoterms Rules can also be identified in *BP Oil International Ltd and BP Exploration & Oil Inc v Empresa Estatal Petroleos de Ecuador, et al and Saybolt Inc* Case No 02-20166, United States Court of Appeals (5th Circuit) [federal appellate court] (11 June 2003).

[302] *Cerámicas SL v Hanjin Shipping Co Ltd* Case No 739/2002, Valencia Appellate Court (15 February 2003)

This judgment shows that the buyer's right to claim damages was based on whether or not the risk had been assumed by the buyer, which was determined on the rule that the risk shall pass when the marine carrier takes the delivery of goods as envisaged in the Incoterms Rules. On this basis, the judgment of the First Instance Court was overturned.

Article A4 of the Incoterms 2010 Rules and Article 31(a) of the CISG confer on delivery to an independent carrier the same effect as actual delivery. Namely, the transfer of risk shall not take place unless such a delivery is discharged, regardless of non-tendering of the relevant documents.

However, Article A4 of the Incoterms 2010 Rules has deviated from Article 31(a) of the CISG on two points. First, Article A4 is only related to delivery made to the marine carrier, unlike Article 31(a) of the CISG that can apply to any sort of transportation. Second, the concept of the delivery of goods provided in Article A4 is better and clearer than that in Article 31(a) of the CISG, as delivery in the latter is stated to be completed by relinquishing custody of the goods, while it cannot be under Article A4 of the Incoterms 2010 Rules, unless the goods are placed on board the ship.[303]

The application of the principle of 'placing the goods on board the vessel' may also give rise to some practical obstacles, particularly when the container falls onto the ship during the loading process, in which case the risk does not pass to the buyer as the damage occurred prior to placing the goods on board the ship. The approach adopted in Article A4 of the Incoterms 2010 Rules is neither consistent with the approach of its drafters nor the current practice of the market [304] However, it is observed that no disputes brought before courts contesting or challenging the norm of delivery enshrined in Article A4 of the Incoterms 2010 Rules.[305]

To resolve the drawbacks of the principles in transfer of risk under the Incoterms 2010 Rules, Lorenzon recommends that the old version of the Incoterms Rules – those from

[303] Coetzee (n 7) 12; Lorenzon and Baatz (n 133) 17; Bergami, 'The Newest Revision of Delivery Terms' 35.
[304] Lorenzon and Baatz (n 133) 17.
[305] Stapleton, *Pande and O 'Brien* (n 201) 235.

2000 – would be the appropriate solution, as in these transfer of risk takes place when the goods pass the vessel's rail.[306]

It might be inferred that transfer of risk under CIF, CFR and FOB, which has been linked to placing the goods on board the ship, clearly illustrates the importance of the marine carrier in determining the point of time at which the risk transfers to the buyer. It entails availability of the vessel in the port, in addition to the role of the marine carrier through issuing of shipping documents that might be invoked to show the time of transfer of risk, on which the right of payment and time of goods conformity be decided. However, delivery under a multimodal transport document shall not be considered for the purpose of transfer of risk under the CIF, CFR and FOB, as it cannot be regarded as a shipped bill unless it is issued by the marine carrier at the time of shipment.[307]

The principle of renouncing the custody of goods to the marine carrier envisaged under the CISG also does not fit the CIF, CFR or FOB, particularly when the operator of a transport terminal takes the goods over before being transferred onto the vessel, which is the time during which the risk shall be assumed by the buyer who usually enjoys coverage insurance during a pre-shipment leg.[308] However, depending on the circumstances of each case, a multimodal transport document could be regarded for the sake of passing of risk in another kind of contract of sale associated with the Incoterms 2010 Rules, particularly under CIP and CPT terms, whereby the seller's obligation to deliver has been stretched to the inland mode.[309]

The function of the marine carrier might be further identified in a transfer of risk between parties to CIP and CPT, provided the marine carrier has undertaken the carriage through a multimodal transport document. The role of the marine carrier could be exercised through a bill of lading surrendered to the seller in exchange for the goods handed over to the marine carrier, and the seller could invoke this bill to prove the delivery of goods through which transfer of risk can be shown.[310]

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[306] Lorenzon and Baatz (n 133) 19.
[307] Glass (n 145) 248, 252. More details, see McGowan (n 136) 126, 144.
[308] Flambouras (n 17) 123. However, this rule suits containers sales such as FCA terms, see Erauw, 'Passing of Risk' 897; see Article 31(a) of the CISG and Article 67(1) of the CISG.
[309] Lorenzon and Baatz (n 133) 130; Stapleton, *Pande and O 'Brien* (n 201) 241, 242.
[310] Lookofsky (n 34) 96.

A mate's receipt produced by a marine carrier can also play a conclusive role in proving transfer of risk, as it can be considered to show transfer of custody from a seller to the first independent carrier under FCA, CPT and CIP sales, as opposed to CIF, CFR and FOB in which the risk does not pass until the goods are placed on board the vessel.[311] Thus the argument that a mate's receipt is capable of proving that the goods have been delivered on board the vessel does not appear particularly strong.[312] In order for the mate's receipt to be capable of exercising such a role, it should confer on the holder the required control over the goods through an express agreement or by such control being recognised under international custom.[313] A Received for Shipment bill of lading also does not operate to transfer risk in CIF, CFR and FOB, as it cannot prove the actual shipment for the purpose of passing the risk between parties to these sales.[314]

The influence of the marine carrier is also conceivable through the application of Article B5(b) of FOB, which states that a buyer shall not assume the risk if the marine carrier did not reach the place of delivery at the agreed time, or if the ship stopped loading goods prior to the time indicated in the buyer's notice.[315]

The effect of the marine carrier is further seen under CPT, which binds a seller to conclude the carriage contract, and in CIP in which a seller is committed to provide insurance coverage to the goods, provided the marine carrier has undertaken this carriage. Both these sales are not confined to the marine carrier but can also apply to other modes of carriage performed via air carrier, train carrier or even by truck.[316]

Pursuant to Articles A4, A5 and B5 of CPT and CIP, the buyer shall bear the risk once the seller hands the goods over to the carrier, with whom the seller has contracted to transport the sold goods from an agreed point of handing over, or in the absence of such agreement, from a place of handing the goods over to the destination, or to a particular point at destination.[317]

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[311] Singh (n 146) 256; Treitel and Reynolds (n 85) 518. Articles A4, A5 and B5 of the CIP and CPT of the Incoterms 2010 Rules and also Article A5, A4 and Article B5 of CIF, FOB and CFR.
[312] See the argument presented in Aikens, Lord and Bools (n 30) 377.
[313] Ibid 110.
[314] Singh (n 146) 256. For further details see, Lorenzon and Baatz (n 133) 122.
[315] Lorenzon and Baatz (n 133) 18. As extracted from Article B5(b) of FOB.
[316]. Article A3(b) of CIP.
[317] Articles A4, A5 and B5 of CPT.

Concerning the principle of delivery under CPT and CIP, Flambouras believes that it can be derived from the first sentence of Article 67(1) of CISG, i.e. the delivery is achieved once the goods' custody is renounced to the carrier at its premises, but he suggests that the risk shall not pass if the carrier has not physically procured custody, even though the goods have not been placed on board the means of carriage.[318]

The principle of renouncing the custody might give rise to disagreement, especially when the carrier assumes the goods' custody before loading, as this will lead to ambiguity as to the time at which the risk materialised.[319] Therefore, the seller should neither assume the risk while the goods are placed in the carrier store nor while the goods are being loaded, as the carrier is the only one who is responsible for looking after the goods placed under its control.[320]

Difficulties may arise if the CISG is not applied to this issue and domestic law clarifies the concept of delivery under CPT and CIP. This will reduce the uniformity of the sale rules. Accordingly, the Incoterms 2010 Rules must elaborate the delivery norm as this ambiguity will result in difficulty in terms of the time of passing of risk in both kinds of sales.

The role of operating the passing of risk is not only confined to the marine carrier in CPT and CIP terms, but can also apply to other kinds of carriage. Pursuant to Articles A5 and A4 of FCA, a transfer of risk shall take place once the goods are placed at the disposal of the carrier on the seller's facility of carriage.[321] A decisive function of the carrier seen in Article B5 of FCA is that if the carrier nominated by the buyer fails to take the goods over as prescribed in Article A4, then the buyer will assume the risk as from the time agreed, or in the absence of such agreement from the date of notifying the buyer about the lack of taking delivery within the agreed period, and in the absence of such date, from the expiry date of the period assigned for delivery.[322] Therefore, the fault of the marine carrier in refraining to take the delivery of goods will render the buyer liable for the risk before they have control over the goods in question, a situation that will negatively affect the interests of the buyer. The notice sent to the buyer could

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[318] Flambouras (n 17)118.
[319] Honnold and Flechtner (n 4) 519.
[320] Flambouras (n 17) 118; Luchinger (n 81) 529.
[321] Article A5, A4 of FCA.
[322] Articles B5 and A7 of FCA.

give rise to uncertainty in terms of the time of the transfer of risk,[323] whether it is to be considered from the date of dispatching the notice by the seller or when the notice is received by the buyer. It could be suggested that such time should start from the date of dispatching this notice, as decided under the provisions of Article 27 of the CISG in terms of note of consignment.

The compatibility between the CISG and Incoterms 2010 Rules might further be seen in terms of the shipping documents, because Article A8 of CIF, CFR and FOB and sentence three of Article 67(1) of the CISG do not base the transfer of risk on tendering the shipping documents that might be retained by the seller to secure its right to gain payment.[324]

Article 33(c) of the CISG, as an integral rule to Article A4 of the Incoterms 2010 Rules, can solve the problem encountered when neither the date of the delivery of goods nor the period of the performance of delivery have been ascertained, where it has provided that the delivery of goods in this case shall be fulfilled within a reasonable time beyond the conclusion of the contract of sale.[325] Thus, an assumption can be made that Article 67(1) of the CISG might also operate as a default rule to Articles B4 and B5 of CIF, CFR and FOB of the Incoterms 2010 Rules, which are all designed to regulate transfer of risk in shipment sale involving carriage of goods by sea.

4.3 Role of marine carrier in passing risk in destination sales governed by international instruments

Destination sales are the contracts of sale through which a delivery obligation shall be discharged, and the risk should transfer from a seller to a buyer in the place of destination agreed on between parties to the contract of sale.[326] The role of the marine carrier is also seen in the passing of risk in destination sales governed by the CISG, or those which are governed by the Incoterms 2010 Rules that have presented different kinds of destination sales adopting different criteria to determine the time of transfer of risk.

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[323] Article A7 FCA of the Incoterms 2010 Rules.
[324] Coetzee (n 7) 10.
[325] Ibid 14.
[326] Hachem (n 34) 993.

Notwithstanding the disagreement between the various terms of destination sales, the marine carrier can affect a transfer of risk between parties, provided that the delivery to the destination is performed by the marine carrier.

4.3.1 Role of marine carrier in passing risk in destination sales governed by the CISG

The basis for transferring risk in destination sales is not clearly set out in the CISG.[327] Therefore, this rule has been impliedly inferred from the provisions of Article 69 of the CISG.[328]

Article 69 of the CISG declares that:

> '(1) In cases not within articles 67 and 68 the risk passes to the buyer when he takes over the goods, or if he does not do so in due time, from the time when the goods are placed at his disposal and he commits a breach of contract by failing to take delivery.
>
> (2) However, if the buyer is bound to take over the goods at a place other than a place of business of the seller, the risk passes when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal at that place.
>
> (3) If the contract relates to goods not then identified, the goods are considered not to be placed at the disposal of the buyer until they are clearly identified to the contract'.

Accordingly, Article 69(1) shall apply only when the buyer is compelled to take the goods over at the place of the business of seller.[329] Namely, this Article targets the contracts which bind a buyer to take the goods over from a seller's place of business.[330]

Article 69(2) of the CISG might govern a transfer of risk in destination sales.[331] This assumption was explicitly adopted in a case brought before a German court.[332] The case was about pizza cartons received damaged. Although the buyer notified the Italian seller about the damage, no compensation was received.

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[327] The uncertainty of the position of the CISG regarding a transfer of risk in a destination sale has been considered in Case No 304/II/2003/wuda/scch, Appellate Court (*Appellationshof*) of the Canton of Bern (2004).
[328] Hager and Schmidt-Kessel (n 34) 922; Berman and Ladd (n 260) 431; Goodfriend (n 17) 577, 597.
[329] Hager and Schmidt-Kessel (n 34) 922.
[330] Honnold and Flechtner (n 4) 533, 534; Erauw, 'Passing of Risk' 905.
[331] Berman and Ladd (n 260) 431; Goodfriend (n 17) 597. Article 69(2) of the CISG.
[332] *Pizza Cartons* Case No 49 C 502/00, Court of Amtsgericht Duisburg (13 April 2000).

In a deal concluded later between both parties in which the consignment received conformed to the description in the contract of sale, the buyer refused to pay on assertion of seeking a set off the payment against the earlier sum that had not been recovered by the buyer. The buyer contested that transfer of risk in the earlier sale had to take place at the time and place the goods were delivered to the carrier, and so asserted that the risk had not transferred as delivery had taken place at a place other than the agreed one. Since the buyer had failed to prove the agreement on the place of delivery, the Court ruled that:

> 'The fact that Art. 69(1) CISG provides a general rule for cases not within Art. 67 and 68 does not lead to a change in the interpretation. This provision does not put the place of performance at the buyer's place of business. Art. 69(1) applies to cases in which the goods are placed at the disposal of the buyer at the seller's place of business. The Court follows this opinion because Art. 69(2) CISG contains a special rule for cases in which the goods are not taken over by the buyer at the seller's place of business'.[333]

Article 69(2) of the CISG can fill the gaps left by Articles 67, 68 and 69(1) of the CISG, namely it can govern the risk that may transfer through a third party in sales that are not addressed under Articles 67 and 68.[334] Even Article 69(2) would not suffice to illuminate the role of the marine carrier in operating transfer of risk in destination sales.

By virtue of Article 69(1), transfer of risk shall take place when the custody of the goods is relinquished to the buyer, thus placing the goods at the disposal of the buyer would not be adequate to pass the risk onto the buyer.[335] It can be concluded from Article 69(1) that the buyer's failure to take the delivery will result in resting the liability of risk on its account from the moment of placing the goods at the disposal of the buyer, while Article 69(2) entails that the sole act of placing the goods at the disposal of the buyer shall suffice to transfer the risk.[336]

Transfer of risk in a destination contract governed by the CISG might further be affected by the act of the marine carrier as its non-arrival or delay would contribute to keeping the risk on the seller's account. However, the marine carrier can also hinder

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[333] *Pizza Cartons* Case No 49 C 502/00, Court of Amtsgericht Duisburg (13 April 2000).
[334] Schwenzer, Fountoulakis and Dimsey (n 81) 498.
[335] Hager and Schmidt-Kessel (n 34) 937, 938.
[336] Ibid 939, 941.

the transfer of risk in destination sales by not taking the necessary action of placing the goods at the disposal of the consignee (buyer), which will result in preventing the buyer from taking delivery and the seller from renouncing the risk to the buyer.[337]

4.3.2 Role of marine carrier in passing risk in destination sales governed by Incoterms 2010 Rules

Destination sales under Incoterms 2010 Rules are represented in DAT (Delivered At Terminal), DAP (Delivered At Place) and DDP (Delivered Duty Paid), in which the delivery obligation has been adopted as a basis to determine transfer of risk.[338] Comparing with the other terms, these terms contain a highest level of risk as the seller shall assume the risk during transportation until arriving the goods at the destination.[339] The Incoterms 2010 Rules adopt the same rule of the CISG in determining transfer of risk on placing the goods at the disposal of the buyer in the agreed place of delivery without further stipulations, while they also stipulate that the seller must notify the buyer about the availability of goods or the fulfilment of delivery.[340]

The influence of the marine carrier on the transfer of risk under a contract of sale associated with the Incoterms 2010 Rules is more recognised than that under the CISG, as Incoterms 2010 Rules explicitly address destination sales.

It is quite clear under Incoterms 2010 Rules that the marine carrier's obligation of handing the goods over at the destination place will affect the transfer of risk between parties to destination sales, as the delivery of goods and transfer of risk shall take place when the carrier places the goods at the buyer's disposal at the agreed place of destination.[341] Article A4 of DDP and DAP states that:

> 'The seller must deliver the goods by placing them at the disposal of the buyer on the arriving means of transport ready for unloading at the agreed point, if any, at the named place of destination on the agreed date or within the agreed period'.

However, Article A4 of DAT states:

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[337] Article 69(2) of the CISG.
[338] Articles A4, A5 and B5 of DAT, DAP and DDP and Articles A5 and B5. Appendix 1.
[339] Bergami, 'Managing Incoterms 2010 Risks: Tension with Trade and Banking Practices' 330.
[340] Erauw, 'Passing of Risk' 908; Article A7 of DAT, DAP and DDP.
[341] Articles A4, A5 and B5 of DAT, DAP and DDP.

> 'The seller must unload the goods from the arriving means of transport and must then deliver them by placing them at the disposal of the buyer at the named terminal referred to in A3(a) at the port or place of destination on the agreed date or within the agreed period'.

It can be inferred from the wording of these Articles that the delay of the marine carrier's arrival, non-arrival, depriving the buyer of taking over the goods or preventing the seller of unloading the goods (in DAT) would prevent the seller from achieving its obligation to place the goods at the disposal of the buyer on time or within the agreed period which, in turn, would obstruct passage of risk in a destination sale.

4.4 Passing of risk in the JCC

The rule of transfer of risk in Jordanian jurisprudence can be derived from the provisions of Sections 472 of the JCC, which states:

> 'If the sold property shall be demolished while in the possession of the purchaser after he receives it, he shall be liable to pay the stipulated price to the vendor, and if it is demolished before delivery for a cause not related to the purchaser it shall be the responsibility of the vendor'.

This Section links the time of transfer of risk to the time of delivering the goods to the buyer. Namely, the buyer shall assume the risk once the goods are delivered to them by a seller according to the norm of delivery envisaged in the JCC.[342]

The rule of transfer of risk under Jordanian law is in line with the approach of the CISG and Incoterms 2010 Rules, with all of these basing transfer of risk on the delivery of goods.[343] However, the imperfect view that the buyer shall assume the risk at the same time as transferring ownership, namely, ownership and risk shall pass to the buyer once the goods are shipped on board the vessel, cannot be agreed.[344] The inaccuracy of this perspective can be shown through the provisions of Section 472 of the JCC that base transfer of risk on delivery of goods, and Section 1147 of the JCC, which bases transfer of ownership in fungible property on the goods' identification, while Section 199 links transfer of ownership in non-fungible goods to the time of

[342] Al-Owbaidi (n 219) 104.
[343] As provided in the first sentence of Articles 67(1) and 69(1) of the CISG. also, Articles A4, A5 and B5 of CIF, CFR, FOB, CPT and CIP of the Incoterms 2010 Rules.
[344] Al-Miqdadi (n 18) 168; Al-Eteer (n 1) 375.

conclusion of the contract of sale. The Jordanian Cassation Court adopted the same inaccurate approach in case No 80/1993, when it ruled that:

> 'The shipment sales in which the delivery of goods, transfer of ownership and transfer of risks take place when the goods pass the ship's rail during the loading operation, such as (C&F). Second, the destination sales, where the delivery of goods and passage of ownership and risk shall take place in destination port'.[345]

The confusion that the Jordanian Cassation Court has fallen into is attributable to the fact that Jordan does not regulate international contracts of sale, which means having to resort to the relevant rules of the JCC that have not recognised the role of the marine carrier in this regard. However, though the principle of linking a transfer of risk to the delivery of goods under the JCC is consistent with international principles set out in the CISG and the Incoterms 2010 Rules, the JCC is not in line with these instruments in terms of the concept of delivery.

Conformity of goods is a precondition for passing of risk, which can be considered the next aspect of the consistency between the CISG and the Incoterms 2010 Rules as international instruments, and the JCC as a domestic statute law, because the seller's obligation to deliver is not discharged unless the goods conform to the contract of sale.[346] This can be derived from the provisions of the JCC that require conformity of goods to be achieved for the purpose of discharging obligation of delivery of goods.[347]

However, there is a disagreement on the precondition of the conformity of goods, where some views argue that the conformity of goods is a prerequisite requirement for the risk to be transferred to the buyer under international instruments,[348] whereas the opposite perspectives believe that the modern approach of international trade has disregarded the effect of goods' conformity on transfer of risk, as it complicates the process of a transfer of risk between parties to a contract of sale.[349] They also stated that to avoid complexity in terms of passage of risk, UNCITRAL adopts the concept

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[345] Case No 80/1993 Jordanian Cassation Court (n 236).
[346] Articles 31(a) and 67 of the CISG; Articles A4, A5 and B5 of CIF, CFR and FOB of the Incoterms 2010 Rules; Sections 489 and 491 of the JCC.
[347] Sections 472 and 491 of the JCC.
[348] Gabriel (n 4) 307; Lorenzon and Baatz (133) 22.
[349]. Honnold and Flechtner (n 4) 313-315; Erauw, 'Passing of Risk' 891; Michael Bridge, 'UK Sale of Goods Act, the CISG and the UNIDROIT Principles of International Commercial Contracts' in Petar Sarcevic and Paul Volken (eds), *The International Sale of Goods Revisited* (Kluwer 2001) 129.
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of handing the goods over instead of the delivery principle adopted in Article 19(1) of ULIS to fulfil the delivery obligation and passage of risk. They have also argued that according to ULIS, the goods delivered must be in conformity with the sale contract, while under the CISG the concept of handing over does not require the goods to conform with the sale contract to transfer risk.

It can be suggested that the conformity of goods must be considered as a precondition for the risk passing to pass to the buyer in international contracts of sale. However, it could be noted that the contradiction between the aforementioned views might be attributable to the vagueness of the concept of conformity under international instruments. It might also be proposed that a distinction should be drawn between two different cases: First, if the goods generally do not conform to the descriptions in the international contract of sale, i.e., providing tomato instead of orange, the case in which the seller will be considered in a breach of its obligation to hand the goods over, which will not allow the risk to pass. Second, when the seller delivers the goods which conform to the generic description in the international contract of sale, but they do not conform to the other descriptions relating to the grade or weight of the goods, the case in which the obligation of handing over will be discharged and the risk be transferred to the buyer.[350]

It is worth mentioning that in spite of the consistency with the CISG and the Incoterms 2010 Rules, the rules of the transfer of risk under the JCC contradict that which are adopted in the CISG and the Incoterms 2010 Rules. This contradiction can be observed in: first, the JCC approach of not addressing delivery to the marine carrier; and second, the condition of surrendering of shipping documents.

4.4.1 Concept of goods' delivery under the JCC provisions

Since Jordanian law does not specifically regulate delivery performed by the seller to a marine carrier, under the contract of sale involving carriage of goods by sea, recourse must be made to the general rules on delivery of goods, where the JCC recognises two kinds of delivery.[351] The first can be achieved by renouncing physical possession of

[350] Commentary on the Draft Convention on Contracts for the International Sale of Goods prepared by the Secretariat "Secretariat Commentary"/ UN DOC. A/CONF. 97/5 <cisg-online.ch/index.cfm?pageID=644#Article 19> accessed 16 June 2019.
[351] Article 31 of the CISG. Articles A4 of the Incoterms 2010 Rules.

the goods, and the second consists of enabling the buyer to take the goods over from the seller's warehouse.[352] Both are set out in Section 494(1) of the JCC:

> 'Delivery of the sold property shall be either actual or by the vendor providing access to the sold property to the purchaser with permission for them to take it with no hindrance to his possession'.

Delivery of goods to a marine carrier cannot be classified under the provisions of this Section, as it deals only with the delivery of goods between parties to contract of sale, not that can be achieved through mediation of third party.

Like the CISG and Incoterms 2010 Rules, Jordanian law does not explain the legal effect of the delivery to a third party in a contract of sale, particularly one that might be performed to a port authority or customs authority. Vagueness over such delivery will give rise to uncertainty about the transfer of risk, as the delivery of goods is the basis on which a transfer of risk can be determined under both international instruments and Jordanian law.

It can be seen from earlier studies dedicated to clarifying the effect of the delivery to a third party how important the position of the marine carrier is in determining transfer of risk, as they assume that delivery to a freight forwarder shall not be considered unless it performs its duty as a carrier, which is the same argument on which delivery by the goods' supplier has been denied.[353] Even though the goods' custody has transferred from a seller to port authority or customs authority in a port, this shall not discharge the delivery obligation, as it does not perform the duty of taking goods over as a carrier, and thus it can be inferred that such delivery shall not operate a transfer of risk between parties to a contract of sale.

4.4.2 Tendering of shipping documents

This is the third stipulation that could obstruct the operation of transfer of risk under the JCC, because the act of handing the goods over cannot suffice to discharge the obligation of the delivery of goods under the JCC, unless the relevant documents have been surrendered.

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[352] Al-Owbaidi (n 219) 102; Al-Zaubi (n 203) 309.
[353] Piltz (n 78) 417; Luchinger (n 81) 527, 528; Flambouras (n 17) 115.

The position of Jordanian law on tendering shipping documents issued under international contracts of sale involving carriage of goods by sea can be derived from the provisions of Section 490 of the JCC:

> 'Delivery shall include the accessories of the sold property, its constant attachments, the provisions for its permanent use and all that is considered by custom to be accessory to the sold property even though they are not mentioned in the contract'.

According to this Section, the attachments that are deemed to be – by ordinary deal of parties or trade usage – accessories to the sold goods that must be delivered to the buyer along with the goods, irrespective of not being indicated in the contract of sale.[354] Although the JCC does not regulate the relevant documents, interpretation of the expression 'accessories' from Section 490 might embrace the contract of sale-relevant documents.[355]

The obligation of delivery of goods under the provisions of the JCC implies, in addition to handing the goods over, the tendering of their shipping documents. As such, handing the goods over would not be sufficient to transfer the risk to the buyer if the shipping documents have not been surrendered. Thus, the delivery of goods, conformity of goods and surrendering of shipping documents are all prerequisites for the risk to transfer to the buyer under the provisions of the JCC.

In contrast with the JCC, the CISG and Incoterms 2010 Rules both address the seller's obligation to surrender the documents as a separate obligation from the seller's obligation of delivery.[356] Furthermore, the CISG does not link passing of risk to the seller's obligation to tender the documents, but rather it expressly provides that a sellers' act of retaining the documents of the sold goods shall not affect a transfer of risk between parties to a contract of sale.[357]

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[354] Al-Owbaidi (n 219) 96; Al-Zaubi (n 203) 296.
[355] Mahasneh, 'The Ratification of the United Nations Convention on Contracts for the International Sale of Goods by Jordan: The Legal Perspective and Impact' 853, 856.
[356] Article 34 of the CISG and Article A8 of the Incoterms 2010 Rules that are focused on document tendering, while Article 31 of the CISG and Article A4 of Incoterms 2010 Rules regulate delivery of goods.
[357] Articles 31 and 67 of the CISG.

4.4.3 Role of marine carrier in operating transfer of risk under the JCC

The role of the marine carrier under transfer of risk in a contract of sale cannot be easily discerned under the provisions of the JCC, whereas the importance of the marine carrier's position can be implicitly extracted from the general rules of transfer of risk, but some aspects of compatibility can be identified between the relevant rules of the JCC and international instruments in terms of passing of risk.

The effect of the marine carrier on transfer of risk can be derived from the default delivery made to the first independent carrier, which has been prescribed for the purpose of passing risk under the CISG.[358] However, the role of the marine carrier can impliedly be inferred from the provisions of Section 496 of the JCC, which has given default delivery the same implication as actual delivery, provided that such an effect has been conferred by the law or by agreement of parties. Section 496 of the JCC provides that:

> 'If the two parties to the sale shall agree that the purchaser shall in a certain case be deemed to have taken delivery of the sold property or if the provisions of the law shall prescribe certain cases to amount to delivery, the delivery shall be deemed to have been completed'.

Pursuant to this Section, the parties could agree that if the buyer did not take the goods over at the agreed time and place, the goods would not be delivered either in the agreed place or at the agreed time.[359] This can be seen when parties agree to place the goods at the disposal of the buyer in the seller's warehouse, as the buyer was not able to take delivery of the goods directly from the seller.[360] It can be inferred that the fulfilment of the default delivery shall be considered for the sake of the transfer of risk, as a transfer of risk has been linked to the delivery of goods and, similarly, as the default delivery is recognised under the JCC.[361]

The role of the marine carrier in passing risk in a shipment sale governed by the JCC would not be identified, except when parties have previously agreed on the delivery to the independent marine carrier.[362] The synergy between the CISG and JCC can also

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[358] Article 67(1) and 68 of the CISG.
[359] Al-Owbaidi (n 219) 102.
[360] Al-Zaubi (n 203) 312.
[361] Section 472 of the JCC.
[362] This inference is established on Section 472 of the JCC that links a passage of risk to delivery and Section 496 of the JCC, which confers on default delivery the same legal effect as actual delivery,

be seen with the Incoterms 2010 Rules, in which the risk transmits by a mere delivery of the sold goods to the marine carrier, as envisaged under shipment sales.[363]

The function of the marine carrier with respect to transfer of risk was examined in a case between the Protection and Indemnity Club and the Jordanian Ministry of Supply filed before the Jordanian Cassation Court.[364] This case concerned a consignment of wheat delivered to the buyer (Jordanian Ministry of Supply) at Aqaba. The buyer discovered that the goods received did not correspond to the quantity agreed in the contract of sale. The court held that:

> 'The sale contract has been concluded in accordance with FOB terms. Thus, the risk shall transmit to the buyer once the goods have passed the rail of the vessel in the port of shipment. Since the goods have been delivered in good faith and in accordance to the sale contract, the responsibility for the damage or loss would has been rested with the marine carrier when the seller had shipped the agreed quantity onto the ship board'.[365]

This judgment shows that the Court rejected the liability of the seller for goods damaged. It based its judgment on the time of the transfer of risk, which had been determined according to the position of the marine carrier who has taken the goods delivery in the port of shipment.

The court should have distinguished between the concept of the goods delivery related to the liability of the marine carrier for loss of or damage to goods and delay in delivery, and the concept of the default delivery considered for the sake of transfer of risk. This is because the liability of the marine carrier starts when the custody of the goods has been relinquished to it in the port of shipment, as stipulated in Article 4 of the Hamburg Rules, whereas the risk passes when the goods have passed the ship's rail, as provided in the Incoterms 2010 Rules that had been attached to the contract of sale. Default delivery to the marine carrier cannot play this role under the JCC, except when the provisions of law have given this kind of delivery the same effect as actual

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provided that this way of delivery has been prescribed in the shipment sale involving carriage of goods by sea.

[363] Articles A4, A5 and B5 of CIF, CFR and FOB.

[364] Case No 3753/2004 Jordanian Cassation Court <http://www.qistas.com/jor/dec/461425?colorWord=3753%2F2004> Accessed on 04 June 2018. The same approach can also be seen in Case No 80/1993, Jordanian Cassation Court (n 236), 711/1989 Jordanian Cassation Court (n 236) and Case No 806/1986 Jordanian Cassation Court (n 236); and Case No 276/2006 (n 236).

[365] Case No 3753/2004 (n 364).

delivery, including transfer of risk, or if parties to a contract of sale have previously agreed to confer on the default delivery such an effect, which might be done by attaching Incoterms 2010 Rules to their contract.

Ratifying the CISG would be the best solution to regulate the default delivery made to the marine carrier, as the influence of the marine carrier on transfer of risk would be directly inferred from the plain meaning of Articles 31(a) and 67(1) of the CISG, irrespective of whether Incoterms 2010 Rules were incorporated into the contract of sale.

In absence of such ratification, the transfer of risk would not take place by delivering the goods to the marine carrier unless the parties to a contract of sale have agreed on such delivery, previous dealings between parties so indicated it, or the Incoterms 2010 Rules had been incorporated into the contract of sale.

The buyer may invoke the facts included by the carrier in a foul bill of lading as prima facie evidence of non-conformity of the sold goods.[366] Since Section 489 of the JCC stipulates conformity of goods for the purpose of passing risk, the contracting party to a contract of sale could rely on a foul bill of lading to prove non-conformity at the time of delivery, which can be asserted to rebut the allegation of transfer of risk.[367] Section 489 of the JCC declares: '[t]he vendor shall deliver the sold property to the purchaser in its condition at the time of sale'. Here, another role of marine carrier can be seen in affecting a transfer of risk that noted neither under the CISG nor the Incoterms 2010 Rules.

The word 'conformity' was inserted in Sections 468 and 469 of the JCC which address sale by sample, and the JCC in other areas uses the expression 'correspond[s] to the descriptions in the sale contract'.[368] Authenticity of the bill of lading under the provisions of Jordanian law has been inferred from the provisions of Section 203 of the JMCL, which addresses authenticity of the shipper declaration in terms of the description of the goods.[369] Section 203 of the JMCL states:

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[366] Melis Ozdel, 'The receipt function of the bill of lading: new challenges' (2017) 28(12) International Company and Commercial Law Review 6; Wilson (n 18) 115, 118.
[367] Articles 35 and 36(1) of the CISG. See Wilson (n 18) 118.
[368] Mahasneh, 'The Ratification of the United Nations Convention on Contracts for the International Sale of Goods by Jordan: The Legal Perspective and Impact' 854.
[369] Al-Qudah and Ziyadat (n 82) 164, 173; Al-Eteer (n 1) 253.

> ‘If the declaration of the shipper regarding the markings or the number of packages or the quantity, type or weight of the goods is incorrect, he shall be responsible towards the carrier for all damages which might arise from such declaration. The carrier may not, however, rely on such incorrect declaration to relieve himself from responsibility towards any party other than the shipper’.

Pursuant to this Section, the shipper (seller) shall be responsible to the marine carrier for inconsistency between the real description of the sold goods and the declaration provided by the seller concerning the marking, numbers, weight, type and quantity of the goods, but the marine carrier is debarred from asserting such incorrectness in front of a third party. Hence, application of the good faith principle means that the bona fide buyer, who is not aware of such a misdeclaration, should not be affected by a false statement given by the seller. The JMCL has thus conferred on the marine carrier a conclusive role in passing risk in the contract of sale involving carriage of goods by sea, which cannot be performed under the provisions of the CISG or Incoterms 2010 Rules.[370]

The Jordanian Cassation Court in a dispute between Agriculture Services Company (buyer) and Italian seller established its discretion to prove conformity of goods on the facts included by the marine carrier in the bill of lading by deriving the time of transfer of risk.[371] The Italian seller entered into a contract of sale with a Jordanian buyer for the sale of a consignment of trees and saplings. Due to the damage sustained, the buyer refrained from making full payment. The Court ruled as follows:

> ‘Since each of the bill of lading and certificates of survey issued in Italy indicates that the goods were handed over to the marine carrier in a good condition and free of lesions, the seller’s obligation to deliver would have been discharged at the shipment port and hence, the seller shall not be liable for the damages to the goods’.

This judgment was established on a number of factors. One was that the marine carrier made no observations on the bill of lading, and so the goods conformed to the contract of sale, and the second was on the delivery to the marine carrier which was supposed to correspond to the time of conformity under Jordanian law. From this, the Court held

[370] Bridge, ‘UK Sale of Goods Act, the CISG and the UNIDROIT Principles of International Commercial Contracts’ in Sarcevic and Volken (n 349) 129; Honnold and Flechtner (n 4) 314.
[371] Case No 1249/2014 Jordanian Cassation Court.

that the seller's obligation to deliver had been discharged at the shipment port, which was deemed to be the time that the risk passed from seller to buyer.

Authenticity of the bill of lading might also be invoked against a third party where the information inserted in such a document could be used to rebut the third party's allegation. This was illustrated in the judgment of the Jordanian Cassation Court in a case between insurer and marine carrier.[372] This case related to a marine carriage contract concluded between a Jordanian shipper and marine carrier to transport goods from St. John's in Canada to Aqaba in Jordan by means of a bill of lading issued by the marine carrier. The goods were neither handed over nor reached the port of destination. The Jordanian Cassation Court decided that the insurer should be remunerated by the marine carrier and should indemnify the shipper for the loss of the goods. This was because, although the insurer was a third party to the bill of lading, a bill of lading can refute the insurer's allegation of denying the loading of the goods into the vessel.[373] The Court ruled that:

> 'The information incorporated to a bill of lading can be asserted against a third party, but such information would be rebutted if a third party contested this assertion by proving facts refute this information, whereby he will be entitled to a 'Free of Proof' principle'.[374]

The discussion shows how important the role of marine carrier is in influencing the transfer of risk in the contract of sale governed by the JCC, which has been demonstrated through the shipping document issued by marine carrier, and in particular the bill of lading.

The influence of the marine carrier can further be seen in a transfer of risk in destination sales governed by the provisions of the JCC that, in order for the risk to pass to the buyer, the marine carrier should hand the goods over to the buyer as envisaged in the agreement of the parties.[375]

Like shipment sales, a transfer of risk in destination sales governed by the JCC is also complicated, as it would not take place unless physical delivery, conformity and

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[372] Case No 774/1986 Jordanian Cassation Court.
[373] Al-Qudah and Ziyadat (n 82) 173, 176.
[374] Case No 774/1986 Jordanian Cassation Court, Ala'a Fatehi Samad and Wadeea' Salameh Sawaqed, *Judgements of the Cassation Court in the Commercial Cases* 185.
[375] Sections 496 and 491 of the JCC (Discussed earlier). The same assertion was adopted by the Jordanian Cassation Court in Case No 369/1987, Journal of Jordanian Bar [1987] 1614.

document tendering have been satisfied. This contrasts with the CISG and Incoterms 2010 Rules in which the mere performance of placing the goods conforming to the sale contract at the disposal of the consignee or, in some cases, unloading of goods will suffice to operate a transfer of risk.

The substantial role of the delivery of goods in determining transfer of risk is clearly expressed in Section 491 of the JCC, which states that: 'If the vendor shall deliver the sold property to the purchaser in sound condition, he shall stop being liable for what may happen to it thereafter'. The JCC further provides that if the delivery of goods has been achieved before tendering the relevant documents, delivery of goods is not discharged until the related-shipping documents are tendered to the buyer and vice versa.[376] Hence, the seller would not be responsible for any damage to the sold goods after delivery, unless the damage can be attributed to its fault or refers to a latent defect that may exist while the goods have been in the possession of the seller.[377]

The implications of the goods' conformity on passing of risk can also been noted in a decision of the Jordanian Cassation Court, where the time of conformity must coincide with the delivery time.[378] Conformity of goods was considered in a dispute between National Company for Finance & Development and the Jordanian Ministry of Supply regarding a consignment of rice sold by C&F sale to the Ministry. To discharge the seller from the liability for damage to the goods, the Court decided to clarify the time of transfer of risk, as the damage did not exist when the seller handed the goods over to the marine carrier. The Jordanian Cassation Court held that:

> The seller has shown a certificate of survey, accredited by the Ministry of Supply, which proves that the damage to the sold rice was not exceeding 3 percent when the goods have been shipped at the port of shipment. Since this percentage is acceptable, the seller would not be responsible for the additional percentage of damage that has arisen at the destination port.

According to this decision, the risk transfers to the buyer when the seller delivers goods that conform to the international standard of damage at the port of shipment, and hence the buyer does not have the right to turn to the seller for indemnification

[376] Section 490 of the JCC.
[377] Al-Zaubi (n 203) 320.
[378] Case No 80/1993 Jordanian Cassation Court (n 236).

but can claim it from a third party.[379] However, if the goods were not in conformity with the contract of sale and that the buyer had claimed compensation from the insurer, the latter would refrain from compensating the buyer for damages since the risk had not transferred to the buyer. This extends the dominance of the marine carrier on the passing of risk in a contract of sale involving carriage of goods by sea, as the foul bill of lading might be invoked by the contracting party to prove a non-conformity of goods that will negate the allegation of passing of risk. A foul bill of lading might also be invoked by the insurer to rebut the buyer's right to be indemnified, as a risk would have not been assumed by the buyer due to a non-conformity.

Despite of this dominance, the approach of the JCC may give rise to uncertainty over the time of the passing of risk because of the stipulation of surrendering of shipping documents imposed on the seller by virtue of the contract of sale, in addition to the lacuna the lack of regulation over the delivery to the port authority or customs authority, which is also seen in international instruments.

4.5 Summary

The deficiency in the JCC in not recognising a transfer of risk in international sales has complicated the operation of the transfer of risk in such contracts, as the impact of the marine carrier on the transfer of risk cannot easily be inferred.

The influence of the marine carrier on the transfer of risk in a contract of sale involving carriage of goods by sea can be exercised through delivery by a seller to a marine carrier, which is explicitly prescribed under international instruments. Such delivery is derived from the general rules of the JCC that have pointed out the general rule of the default delivery, which will result in difficulties in determining the time of a transfer of risk under the JCC.[380]

Shipping documents such as a bill of lading, ship's delivery order and mate's receipt are other aspects that demonstrate the influence of the marine carrier on transfer of risk; the parties might invoke them to confirm or refute a transfer of risk. However, the study found that shipping documents could complicate a transfer of risk under the

[379] Effect of the obligation of goods' conformity is also expressed through Case No 1249/2014 Jordanian Cassation Court (n 373).
[380] Section 496 of the JCC.

JCC, as they must be surrendered for the purpose of passing risk between the parties. The effect of the marine carrier can be seen once they refrain from issuing the required document of shipment or even delaying in issuing such documents, which will further obstruct the transfer of risk under the JCC.[381]

The influence of the marine carrier on the transfer of risk under the JCC can also be seen in the goods' conformity; the parties may invoke a foul bill of lading to prove nonconformity of goods that shall negate a transfer of risk.[382]

Delivery of goods to or taking them over from a port authority or customs authority is one of the problematic issues encountering the transfer of risk under both the JCC and international instruments, as that delivery is not addressed under these sets. It has been further pointed out that transfer of risk in destination sales has not been adequately addressed under the CISG, therefore recourse used to be had to the provisions of Article 69(2) as an alternative solution. However, besides not addressing destination sales, this article does not specify the role of marine carrier in terms of transfer of risk. The ambiguity of the role of the marine carrier in operating transfer of risk under the provisions of the JCC and the incompatibility with the international approach has resulted in uncertainty which has found its expression in the judgments of the Jordanian Cassation Court.[383]

Therefore, it is proposed that the CISG, Incoterms 2010 Rules and JCC should address delivery to a third party such as a port or customs authority for the role of the marine carrier in passing risk to be clarified. To solve the problem of the transfer of risk in destination sales under the CISG, they should be explicitly addressed so that the influence of the marine carrier can be clearly seen and the exact point at which transfer of risk took place can be identified. Ratification of the CISG might be the best solution through which the complexity of the transfer of risk under the JCC can be overcome or at least mitigated, particularly in terms of the default delivery to a marine carrier, conformity of goods and the tendering of documents, which all obstruct transfer of

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[381] Section 490 of the JCC.
[382] See Sections 472 and 491 of the JCC (n 347).
[383] See, Case No 80/1993 Jordanian Cassation Court (n 236); Case No 711/1989 Jordanian Cassation Court (n 236). The same assertion was made in other decisions: Case No 806/1986 Jordanian Cassation Court (n 236); Case No 276/2006 Jordanian Cassation Court (n236).

risk in goods sold via an international contract of sale involving carriage of goods by sea.

Chapter 5. Transfer of ownership and risk in string contracts

Goods in transit are subject to a series of sales concluded through a negotiable bill of lading through which different obligations and implications are reflected, such as the obligation of delivery of goods, the right to receive payment, transfer of risk, and the passing of ownership between endorser (transferor) and endorsee (transferee). The sales that target goods during transit are called string sales, and have been clarified under the Incoterms 2010 Rules. However, the impossibility of achieving physical delivery of goods sold in transit could give rise to problems in terms of the time at which a transfer of risk and ownership happen.

Examining the role of a marine carrier in this regard, entails to explain the essence of the negotiability of a bill of lading, as it plays a substantive role in bringing about some of the implications of string sales.

5.1 Transfer of ownership in string contracts

The shipping documents can play a conclusive role in the passage of ownership in a contract of sale. These documents can be used as tools of identification to enable title over fungible goods to pass to the buyer in the context of the string sales, or they can be invoked by a transferor or a transferee as evidence of passage of ownership.[384] Functionality of a shipping document is also recognised in the passing of risk in goods sold in transit when the transferor endorses the negotiable bill of lading to a transferee as a consequence of selling the goods in transit.

5.1.1 Negotiability of a bill of lading

A 'negotiable bill of lading' can be transmitted to others by endorsement where the shipper or consignee can write its name on the other side of the bill of lading (endorsement in blank), or by 'endorsement in full' through which the expression 'deliver to' or 'order to' is inserted in the bill of lading.[385]

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[384] Section 1147 of the JCC.

[385] *Scrutton on Charterparties and Bills of Lading* (Sir Bernard Eder et al (eds), (23rd edn, Sweet & Maxwell 2015) 218; Hakan Karan, 'Transport Documents in the Light of the Rotterdam Rules' in Meltem Deniz and Güner-Özbek (eds), *The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea/An Appraisal of the 'Rotterdam Rules'* (Springer 2011) 234; Astle (n 136) 25; Aikens (n 61) 65, 66.

International conventions regulate a marine carriage contract, the negotiability of bills of lading and the role of such documents in transferring the rights acquired therein.[386] However, these conventions have not clearly explained the legal implications of the negotiable bill of lading.[387] Regrettably, except for Sections 204 and 205, the JMCL does not address negotiability of a bill of lading.[388] Sentence one of Section 204 of the JMCL states:

> 'The bill of lading may be made to a designated consignee or to order or to bearer. A bill of lading made to a designated consignee is not negotiable, and the master may not deliver the goods to any person other than the person named in the bill of lading'.

This Section shows that the JMCL recognises the negotiability of the bill of lading and distinguishes between a negotiable and a non-negotiable bill. To conferring on a buyer the right to sell the goods during transit, sentence two of Section 204 stipulates that the endorsement of a negotiable bill of lading must be attached with the date when the endorsement was made, which would be considered for the purpose of identifying the time from which the endorsee can be able to take the goods over in the destination place. Pursuant to the provisions of sentence 2 of Section 204 of the JMCL:

> 'A bill of lading made to order is negotiable by endorsement, which endorsement must be dated and the master may deliver the goods only to the bearer of the endorsed bill of lading, even if such endorsement is blank. A bill of lading made to bearer is negotiable by mere handing over of the bill of lading, and the master must deliver the goods to any person who presents it'.

Although Section 204 of the JMCL addresses the legal effect of the endorsement on the endorsee's right to take the goods over, it does not state the other implications that could arise from this endorsement, such as transfer of ownership and risk that are some of the essential implications which may result from the contract of sale concluded in transit.[389]

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[386] CHEN Liang, 'Bills of Lading's Freedom of Contract: With Special Reference to the Development of the International Legislation and to a Special Issue under the Chinese Law' [2013] China Oceans L Rev 225, 226.
[387] Xiaonian Li, 'Reunification of Certain Rules Relating to Sea Transport Documents: Some Observations on the UNCITRAL Draft Instrument on Transport Law' (2007) 12 Unif L Rev 139.
[388] Al-Qudah and Ziyadat (n 82) 164, 167.
[389] Wilson (n 18) 6.

Likewise, Section 205 of the JMCL governs some of the formalities of the negotiable bill of lading:

> 'The copies of a bill of lading which is made to order or to bearer must contain the expression 'negotiable' or 'not negotiable', as well as a statement indicating the number of copies made, and stipulating that the implementation of one copy shall render the other copies void'.

This sentence resolves the issue of many copies of bills of lading being invoked. Priority should be given to the copy that was implemented earlier, provided that such a priority has been clearly indicated in the negotiable bill of lading. Determining this can solve various problems, as the implementation proves that title to the goods would have been procured by the bearer who implemented the negotiable bill, whether from the conclusion time of the contract of sale concluded in transit, or from the endorsement date that might be asserted to prove the identification of goods which triggers a passage of ownership in the fungible goods.[390]

Likewise, the provisions of this sentence are key to proving the time of transfer of risk in destination sales, as the implementation of the negotiable bill of lading by the bearer or the endorsee means that the goods have been delivered to the bearer and the risk is assumed by them in the place of destination. This would avoid any ambiguity arising under a transfer of risk, particularly the vagueness that could be encountered with other bearers.[391]

Sentence two of Section 205 of the JMCL stipulates that, except where the endorsee performs its duty as an agent to the shipper, the marine carrier cannot invoke against the endorsee, the defences that can be invoked vis-a-vis the shipper by virtue of the marine carriage contract embodied in the negotiable bill of lading. Thus, the marine carrier will not be able to refute the allegation of the bearer or endorsee by asserting the terms imposed on the shipper by virtue of the negotiable bill of lading.[392]

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[390] This can also be inferred from the provisions of Sections 199 and 1147 of the JCC.
[391] Section 205 of JMCL, fifth sentence: 'After delivery of the goods to the bearer of one of the negotiable copies, priority cannot be given to the bearer of any other copy even if such copy bears an earlier date'.
[392] Section 205 of the JMCL, second sentence: 'The carrier may not rely, as against the bearer of a negotiable copy which has been duly endorsed, on the defence which may be used against the shipper unless it is established that such a bearer is acting as an agent of the shipper'.

Sentence three further determines the scope of the responsibility of the endorser against the endorsee: '[t]he endorser guarantees merely the existence of the goods shipped and the validity of the contract of affreightment'. This sentence provides that such endorsement can only be asserted vis-à-vis the endorser to prove the contract of carriage of goods by sea and the fact of availability of the goods sold in transit. In other words, the endorsement does not mean that the goods have been sold unless a transferor and transferee so intended, i.e. both parties have agreed to transfer ownership in goods through this endorsement. Here, the role of the marine carrier can be recognised under the contract of sale, in which parties may assert the endorsed bill of lading to prove some facts of the sale contract concluded in transit. Assuring of the validity of the marine carriage contract is also important, as the seller may invoke the time of shipment indicated in the bill of lading to prove the retroactive effect of transfer of risk that takes place when the goods have been handed over to the marine carrier.[393] The guarantee of validity of the marine carriage contract is also essential for string sales concluded under destination sales, as the nonvalidity will deprive the bearer or endorsee of taking delivery in place of destination that would postpone or obstruct a transfer of risk in particular in the destination sales.[394]

Apart from incorporating the Incoterms 2010 Rules into the string sales, the significant effect of guaranteeing the validity of the marine carriage on transfer of risk in string sales cannot be seen under the provisions of the JCC, which neither recognises destination sales nor shipment sales nor string sales. However, this effect could be easily recognised if the CISG is adopted in the Jordanian legal system.

Sentence four of the same Section draws a link between the stipulation of stating a priority of the implemented bill of lading provided in sentence one of the same Section and the stipulation of indicating the date of endorsement that has been set out in Section 204.[395] The date associated with endorsement can also perform a considerable role in determining the time of transfer of risk and ownership in string sales, as parties could assert this date to prove the conclusion time of this contract for the purpose of

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[393] Article 68 of the CISG; Articles A4, A5 and B5 of CIF, CFR and FOB.
[394] Article 69(2) of the CISG; Articles A4, A5 and B5 of DAT, DAP and DDP.
[395] Section 205 of the JMCL, fourth sentence: 'If any dispute arises among the bearers of several copies of a single negotiable bill of lading before delivery of the goods by the master, the copy which bears the earliest endorsement shall be given priority'.

proving a transfer of ownership in the nonfungible goods, or to proof the date of identification of goods that is considered for the sake of passing a ownership in fungible goods, which both can be invoked in front of the other endorsees or bearers.[396]

Transfer of ownership in the goods sold in transit is not governed either by international instruments or in the provisions of the Jordanian-relevant acts. Therefore, the rules of the JCC should be resorted to.[397] It is also assumed that the rules on negotiability of a bill of lading can also be derived from rules of negotiable instruments in the Jordanian Commercial Law (JCL).[398]

The Jordanian Cassation Court also adopted the same approach of considering a bill of lading as a bill of exchange that is regulated under the provisions of the JCL. The Jordanian Cassation Court found in a case that:

> '… as a bill of lading is deemed to be like a bill of exchange and thus, the relevant rules set forth in the Jordanian Commercial Law should govern this document, where the legal bearer shall be considered the one to whom the bill of lading issued and sent'.[399]

This assumption can easily be rebutted for many reasons. One of the most important reasons is that the subject matter of the negotiable instruments is the money paid on a specific date where the payment can be paid by an endorser or by a third party designated by the endorser.[400]

However, the subject matter of the bill of lading is not a sum of money but rather the goods embodied in the bill of lading. Namely, the negotiable instruments are considered to be documents of title representing a payment of money through which the ownership of the money shall transfer when this instrument is endorsed and delivered with an intention to transfer the ownership of the money in-subject.[401] The rules of the negotiable instruments should not be compared to a negotiable bill of lading as a transfer of a bill of lading cannot be liberated from equities, while a transfer of a negotiable instrument can enable a transferee to procure a title to the value better

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[396] Sections 1174 and 199 of the JCC.
[397] Such an assumption would not be considered unless conflict of laws rules determined that Jordanian law is the applicable domestic law that can govern passage of ownership in this respect.
[398] Al-Qudah and Ziyadat (n 82) 168.
[399] Case No 1060/1993 Jordanian Cassation Court, Journal of Jordanian Bar [1995] 3, 4 660.
[400] Jason Chuah, 'Payment and Payment Instrument' in Michael Furmston and Jason Chuah (eds), *Commercial and Consumer Law* (Longman 2010) 335.
[401] *Goode on Commercial Law* (Roy Goode and Ewan Mckendrick (eds), 4th edn, Penguin 2010) 52.

than the transferor which is supposed to be free of equities and defects, irrespective of the estoppel right that might be obtained by the transferee under the bill of lading.[402]

The bill of lading also performs its function as a document of title to the shipped goods but does not represent the property. Rather, it represents the constructive possession of the transported goods which will be transferred to the consignee by surrendering the endorsed document.[403] In other words, according to *mercantile custom*, the endorsement on the bill of lading and the delivery of such bill shall be performed post the shipping of goods onto the ship and prior the completion of the physical delivery of the goods to the holder, which will suffice -under common law- to pass the ownership in the goods to the holder.[404]

One more feature of dissimilarity between the documents is the fact that the bill of lading can be used as a receipt of goods that can prove a passage of risk in shipment sales, or as a document evidencing the facts of the marine carriage contract.[405] In contrast, negotiable instruments cannot play such roles as they do not have the same purpose as the bill of lading.

The next aspect of variation between these documents derives from Section 204 of JMCL. This stipulates that endorsement on the bill of lading should be associated with a date of endorsement, but this is not the case under the endorsement of the negotiable instruments.[406] This was illustrated in the judgment of the Jordanian Cassation Court in which the Court ruled:

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[402] Robert Bradgate, *Commercial Law* (3rd edn, Oxford University Press 2005) 615, 616; Anthony Rogers, Jason Chuah and Martin Dockray, *Cases and Materials on the Carriage of Goods by Sea* (4th edn, Routledge 2016) 303; ER Hardy Ivamy, *Carriage of Goods by Sea* (13th edn, Butterworths 1989) 92; McGowan (n 136) 73, 74; Sun (n 158) 355, 361 .Also, the expression of Lord Devlin in *Kum and Another v Wah Tat Bank and Another* [1971] 1 Lloyd's Rep 439 Privy Council. The estoppel right of the transferee under the bill of lading is noted when the transferee invokes the representations in the bill of lading to prove its detriment or to deprive the marine carrier of freeing itself from such representations, as expressed in *Compania Naviera Vasconzada v Churchill Sim* [1906] 1 KB 237. Ozdel (n 366) 6.

[403] Girvin, *Carriage of Goods by Sea* 321; Klotz (97) 160; Djadjev, (n 136) 11; Bugden and Lamont-Black (n 11) 65; Aikens, Lord and Bools (n 30) 106, 111; Sun (n 158) 357; Han, 'A Study on the Liability of the Carrier and the Actual Carrier for Delivery of Goods without a B/L in China' 275, 277.

[404] Eder et al (n 385) 219. See, *Lickbarrow v Mason* (1794) 5 T.R. 683.

[405] Bradgate (n 402) 736, 743; Tettenborn (n 30) 126, 127; Ivamy (n 402) 84, 92; Chen (n 386) 225, 226; Rouhshi Low, 'Replacing the Paper Bill of Lading with an Electronic Bill of Lading: Problems and Possible Solutions' (2013) 5 Int'l Trade & Bus L Ann 159, 163; Klotz (n 97) 160; McGowan (n 136) 69, 72.

[406] Al-Qudah and Ziyadat (n 82) 167.

> 'Endorsing a bill of lading without including the date at which such endorsement has been done shall infringe the provisions of Article 204 of the JMCL, which have stipulated that indicating the date of endorsement is a prerequisite condition shall be met for the sake of affecting a negotiability of bill of lading'.[407]

In addition to the fact that the endorsed bill of lading serves as a document of title, the endorsement on such document can link the goods to the endorsee and can also prove the facts related to the transported goods. Therefore, it can be concluded that the endorsed bill of lading should suffice to transfer the ownership in the fungible goods sold in transit because of its ability to satisfy the requirement of goods' identification stipulated by the JCC for the purpose of transferring ownership in fungible goods.[408]

Since a multimodal transport document normally operates as a 'received for shipment', and as the delivery of goods exercised by virtue of this document takes place on land, the functionality of this bill as a document of title can be a difficult issue.[409] An endorsed multimodal transport document cannot be regarded as a document of title unless it has been issued by a sea operator. Otherwise, an express and direct relation should be made to the marine carrier in its terms, and thus the negotiability of such a bill will be regarded from the time of relinquishing possession of the goods to the marine carrier, whereas its transferability shall end when the goods are not in transit, even though the goods are not on the high seas.[410]

It can be inferred from this discussion that the negotiability of the bill of lading as a document of title is not in its full legal sense as in the bill of exchange.[411] This is because the transferability of the bill of lading does not entitle a bona fide transferee a title better than the transferor.

5.1.2 Role of marine carrier in operating a transfer of ownership in string sales

The seller might ship the sold goods without indicating the party which should take delivery, whether as a purchaser or consignee, or the goods could be sent in bulk to be

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[407] Case No 523/1991 Jordanian Cassation Court, Journal of Jordanian Bar [1993] 3 754.
[408] Section 1147 of the JCC; Article 67 of the CISG.
[409] Baughen (n 90) 166.
[410] Glass (n 145) 252; Singh (n 146) 273; Malfliet (n 137) 176.
[411] Francis (n 138) 29.
Zekos (n 17) 215, 216.

subject to various sales where the goods in-subject will be identified by a competent tool related to each sale.[412]

Transfer of ownership is one of the difficult issues arising in these contracts. This has been left by international instruments to be regulated under the provisions of domestic laws which adopt different theories in terms of the transfer of ownership.[413] The marine carrier can play a decisive role through the bill of lading used as a document of title,[414] and this function will continue to be performed as long as the goods are in the possession of the marine carrier, regardless of whether they have been unloaded.[415]

Hence, the fungible goods sold in transit shall be identified to the contract of sale at the same time as endorsing a bill of lading, namely, the ownership will be deemed to be transferred to the bearer on the same date as endorsing the bill of lading provided that both the endorser and endorsee intended to conclude a contract of sale.[416]

However, a 'ship's delivery order' can solve a shortage of bills of lading in terms of delivering portions of bulk goods sold in transit, where the marine carrier shall cancel and substitute this bill by split bills, but a ship's delivery order can neither operate as a receipt of goods nor as a marine carriage contract nor as a document of title, but rather it can only operate as a document entitling a consignee to receive the goods at destination under the contract of sale. As a result, one may conclude that, since the ship's delivery order can identify and link the sold portion of goods to the buyer, the marine carrier can affect the passage of ownership in the bulk goods where a ship's delivery order can be used to satisfy the obligation of the goods' identification stipulated for passing ownership in fungible goods that could be sold in transit.[417]

It is clear how important the role of the marine carrier is in operating a transfer of ownership in fungible goods sold in transit. Unless parties otherwise agreed, the ownership shall not transfer under the JCC provisions without issuing a negotiable bill

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[412] Hager and Schmidt-Kessel (n 34) 931.
[413] The CISG approach of disregarding the goods' ownership was expressly indicated in Article 4 of the CISG in which the applicability has been given to the jurisdiction decided in accordance with rules of conflict of laws.
[414] Wilson (n 18) 6.
[415] Bradgate (n 402) 735.
[416] Section 1147 of the JCC that addresses transfer of ownership in fungible goods, and Section 204 of the JMCL in which the date of endorsement has been stipulated for of affecting the implications of the endorsement.
[417] Section 1147 of the JCC.

of lading through which the goods can be identified to the contract of sale concluded in transit.[418]

Passage of ownership in fungible goods sold in transit might also be impeded by the fault of the marine carrier, as not incorporating the expression 'negotiable' will render the endorsed bill ineffective to identify the fungible goods, which would result in postponing a transfer of ownership to an endorsee.[419] Contrary to bill of exchange that is initially negotiable unless the negotiability has been expressly denied.[420] An absence of a number of copies of the negotiable bill of lading, or of not indicating the priority of these copies, could result in confusion with respect to the applicable copy of the bill of lading that may operate a transfer of ownership between transferor and transferee.[421]

The paramount role of the marine carrier is in conferring on the parties to the contract of sale the right to use a bill of lading as a document of proof, which can play a conclusive role in transferring ownership in a contract of sale involving carriage of goods by sea.[422] The shortcomings of the JCC in not recognising string sales would give rise to a lack of clarity as to the implications of this kind of contract. Passing of ownership is one of the ambiguous issues that might be obviously recognised under fungible goods.

A transfer of ownership in non-fungible goods can also be influenced by the absence of emphasis on string sales in the JCC, where the time of the conclusion of this contract has not been addressed under the JCC. Therefore, recourse must be made to the general rules of the contract of sale in the JCC which has adopted a theory of conclusion of contract that deviates from that prescribed under the CISG.[423]

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[418] Sections 485, 487 of the JCC, under which the contracting parties to the sale contract are entitled to agree on the time when an ownership is transferred or postponed.
[419] Section 205 of the JMCL.
[420] Zek (n 18) 215.
[421] Section 205 of the JMCL which tries to resolve the dispute that may arise in terms of the copies of the negotiable bill of lading.
[422] Emsellem-Rope (n 136) 21; Hani Dweedar, *Carriage by Sea and Air* (Al-Halabi Legal Publications 2008) 217, 222. Section 202 of the JMCL in Appendix 2.
[423] The CISG adopted 'receipt theory' to ascertain the conclusion time of the sale contract (Articles 18(2) and 23). Jordan adopted the 'declaration of acceptance theory' (Sections 90 and 101 of the JCC). Mahasneh, 'The Ratification of the United Nations Convention on Contracts for the International Sale of Goods by Jordan: The Legal Perspective and Impact' 853; Franco Ferrari, 'Formation of the Contract' in Stefan Kroll, Loukas Mistelis and Pilar Perales Viscasillas (eds), *UN Convention on Contracts for the International Sale of Goods (CISG): Commentary* (Beck/Hart/Nomos 2011) 216, 236; Maria del Pilar Perales Viscasillas, 'Contract Conclusion under

These obstacles and lacunae could be overcome if Jordan ratified the CISG. In so doing, the role of the marine carrier in operating the passage of ownership in string sales would be easily identified, which would eliminate the obstacles to determining the time of transfer of ownership.

5.2 Passing risk through string sales

Since the time of the transfer of risk under destination sales varies from that under shipment sales, a distinction should be drawn between transfer of risk under a string sale concluded under the shipment sale and that which takes place in the string sale concluded under the destination sale. This distinction should be kept in mind while addressing this issue under the provisions of the CISG, Incoterms 2010 Rules and JCC as each has adopted a rule that varies from the others.

5.2.1 Role of marine carrier in passing risk through string sales governed by CISG

Two rules are adopted in the CISG in terms of the rule on passing risk in string sales. This inference can be extracted from the provisions of Article 68 that regulate such passage:

> 'The risk in respect of goods sold in transit passes to the buyer from the time of the conclusion of the contract. However, if the circumstances so indicate, the risk is assumed by the buyer from the time the goods were handed over to the carrier who issued the documents embodying the contract of carriage. Nevertheless, if at the time of the conclusion of the contract of sale the seller knew or ought to have known that the goods had been lost or damaged and did not disclose this to the buyer, the loss or damage is at the risk of the seller'.

Transfer of risk here has been linked to the conclusion time of the contract of sale as a general rule,[424] as neither the commencement of the carriage operation nor the goods loading has been stipulated for the passing of risk for goods sold in transit.[425]

To overcome the difficulty of determining the time of transfer of risk whether it has materialised before or after the conclusion of the string sale, the second sentence of this Article provides that the risk can, in particular circumstances, retroactively

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CISG' (1996-1997) 16(2) J L & Com 319, 321; Belkis Vural, 'Formation of Contract According to the CISG' (2013) 6 Ankara B Review 145; Alzoqord (n 96) 156.

[424] Honnold and Flechtner (n 4) 566; Hachem (n 34) 981. Hager and Schmidt-Kessel (n 34) 934.

[425] Hachem (n 34) 981. Hager and Schmidt-Kessel (n 34) 934.

transfer from the time of having the goods handed over to the carrier on production of the shipping documents.[426]

However, the ambiguity of the expression 'if the circumstances so indicate' can give rise to contradictory constructions between exporters and importers as the former tends to stretch the interpretation of this sentence while the latter strives to limit its scope; such incompatibility will contradict the provisions of Article 7(1) of the CISG.[427] Hence, it is suggested that expression of 'if the circumstances so indicate' entails that the parties shall expressly indicate the time of passing risk in the goods sold in transit, which shall be equivalent to the basis of handing the goods over to the carrier who issued a bill of lading.[428]

A prevailing view presumes that this sentence is related to cases where the buyer enjoys insurance coverage during the carriage time, as seen in CIF and CIP,[429] through which the buyer will be more able to claim the indemnification from the insurer.[430] It has also been recommended that the purpose of resorting to the carriage's documents is aimed at identifying the carrier who has taken the goods over so as to ascertain the time of the transfer of risk,[431] where the importance of the role of the marine carrier can be clearly identified in determining the time of transfer of risk. It should be taken into consideration that in spite of the vagueness of this sentence, a predominant interpretation provides that application of this rule requires the seller to act in good faith. Otherwise, the risk shall remain with the seller.[432]

The function of the marine carrier in terms of a transfer of risk, which has been established on the time of delivery to the carrier, can be inferred from the role of the related shipping documents, including a bill of lading that might be used as a document

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[426] Hachem (n 34) 981.
[427] Article 7(1) of the CISG. Hager and Schmidt-Kessel (n 34) 933; Hachem (n 34) 981. The lack of compliance with the provisions of Articles 7 and 8 of the CISG in terms of interpretation of the sale contract has resulted in the prevalence of the CISG provisions in civil law jurisdictions more than in common law jurisdictions. Zeller (254) 57.
[428] Goodfriend (n 17) 577, 588.
[429] Hager and Schmidt-Kessel (n 34) 934; Flambouras (n 17) 87, 149; Honnold and Flechtner (n 4) 528, 529; Schwenzer, Fountoulakis and Dimsey (n 81) 498.
[430] Goodfriend (n 17) 586.
[431] Berman and Ladd (n 260) 431.
[432] Hachem (n 34) 984.

of proof that may be invoked for the sake of proving the time and facts of the delivery of goods that can be asserted to prove the time of transfer of risk.[433]

Article 68 might apply to bulk goods provided that the seller is permitted through agreement or trade usage to perform such a transaction whereby the risk will transfer to the individual purchaser at the time of the conclusion of the relevant contract of sale.[434] Application of this Article in the case where the seller is entitled to deliver collective shipments should not contradict the provisions of Article 67(2) which requires a clear identification of the goods sold for the purpose of enabling the risk to transfer to the buyer.[435]

If the seller is not allowed to sell the goods in bulk, the buyer shall assume the risk from the time the goods are clearly identified to the contract of sale.[436] This identification might also be fulfilled by a note of consignment whereby the risk transfers at the time of dispatching such a note, not at the time the note is received by the buyer, as stipulated in Article 27 of the CISG:[437]

> 'Unless otherwise expressly provided in this Part of the Convention, if any notice, request or other communication is given or made by a party in accordance with this part and by means appropriate in the circumstance, a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication'.

The role of marine carrier in identifying the goods in bulk that have been sold in transit is recognised through ship's delivery order which can also be used to identify the sold portion of goods for the sake of transfer of risk. However, Todd believes that the risk in the goods sold in transit shall pass from the time of shipment, where no stipulation has been pointed out in terms of the special circumstances that have to exist to apply this rule.[438] This view is incoherent with the provisions of Article 68 of the CISG, in

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[433] *Video Cameras and Equipment* (n 291); *Art Paper* (n 271); Case No CISG/1997/16, China International Economic & Trade Arbitration Commission (25 June 1997); Case No 62/1998 Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry (30 December 1998). These have all extracted the fact of the passage of risk from the content of the bill of lading with which they have been able to resolve the disputes that have been brought before them.
[434] Hachem (n 34) 986.
[435] According to Article 67(2) of the CISG. *Schlechtriem & Schwenzer* (n 2) 936.
[436] Honnold and Flechtner (n 4) 526; Hachem (n 34) 986.
[437] Hager and Schmidt-Kessel (n 34) 931.
[438] Paul Todd, *Cases and Materials on International Trade Law* (Sweet & Maxwell 2002) 610.

addition to the rule of time of shipment applied in particular circumstances, adopts a rule of the conclusion time of the contract of sale so as to determine the time of transfer of risk in the sales concluded in transit.

The role of the marine carrier in operating transfer of risk can further be seen in sentence two of Article 68 of the CISG, which establishes the transfer of risk according to the time the goods were handed over to the carrier who issued the shipping documents. Thus, nonexistence of the documents evidencing the carriage contract will prevent application of Article 68 of the CISG though the circumstances allow such application,[439] such when the conclusion of the carriage contract is performed through electronic methods that do not involve a human component.[440] The risk will rest with the buyer from the time when the marine carrier takes the goods over from a seller, provided always that the marine carrier has issued documents which represent the carriage contract like a negotiable bill of lading or a negotiable combined transport document that both can play a vital role in evidencing the facts of the marine carriage contract.

Another aspect of the important function of the marine carrier lies in the endorsed bill of lading. The parties may in some cases rely on this document to prove the conclusion time of a string sale, and through which the risk might also transfer between the parties in the conclusion time of the string sale, which could be derived from the date associated with the endorsement on the negotiable bill of lading that has been produced by a marine carrier.

The marine carrier performs one more role that can be clearly seen from the wording of Article 68 of the CISG which links the transfer of risk to the time at which the goods have been handed over to the first independent carrier,[441] whether in exchange for a bill of lading or a multimodal transport document.

Application of Article 68 of the CISG on transfer of risk in goods sold in transit might give rise to an illogical result which can be identified in the string sale concluded under destination sales. The contradiction in Article 68 of the CISG consists in the fact of establishing a transfer of risk between endorser and endorsee on handing the goods

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[439] Erauw, 'Passing of Risk' 901; Hachem (n 34) 983.
[440] Hachem (n 34) 983.
[441] Ibid 972.

over to the carrier who issued documents of carriage in the shipment port or on the conclusion time of the string sale as it illogically prescribes that both shall take place before the transferor assumes the risk under destination sales, which shall take place when the goods are delivered in the place of destination.

5.2.2 Role of marine carrier in operating transfer of risk in string sales governed by Incoterms 2010 Rules

The effect of the marine carrier on a transfer of risk can be further seen under string sales governed by the Incoterms 2010 Rules. Unlike the CISG, the Incoterms 2010 Rules have clearly regulated transfer of risk in goods sold in transit.

They are an attempt to solve the impossibility of achieving actual delivery in terms of goods sold in transit. To this end, the Incoterms 2010 Rules include the phrase 'procuring the goods so delivered' to the seller's obligation of delivery as an alternative to the delivery that could be performed in a shipment port or destination place, which may take place by placing the goods on board the ship in some shipment sales or by placing the goods at the disposal of the buyer in destination sales.[442]

The Incoterms 2010 Rules explain the essence of the string sales prior to discussing the relevant rules. This essence has been addressed in the introduction of the Incoterms 2010 Rules which declares that:

> 'In the sale of commodities, as opposed to the sale of manufactured goods, cargo is frequently sold several times during transit 'down a string'. When this happens, a seller in the middle of the string does not 'ship' the goods because these have already been shipped by the first seller in the string. The seller in the middle of the string therefore performs its obligations towards its buyer not by shipping the goods, but by 'procuring' goods that have been shipped. For clarification purpose, Incoterms Rules include the obligation to 'procure goods shipped' as an alternative to the obligation to ship goods in the relevant Incoterms rules'.[443]

This text shows that the Incoterms 2010 Rules adopted the principle of 'procuring the goods' under string sales, which is deemed to be an equivalent norm to that which is adopted in shipment and destination sales governed by the Incoterms 2010 Rules, in which the seller's obligation to deliver would be discharged by shipping the goods

[442] This can be derived from the introduction of the Incoterms 2010 Rules.
[443] As provided in point 9 (string sales) of the introduction of the Incoterms 2010 Rules.

onto the vessel's board, relinquishing custody of the goods and placing the goods at the disposal of the buyer.[444]

One may infer that reference should be made to Article A4 of CIF, CFR and FOB for the purpose of determining the time at which the delivery is discharged, as has been provided in Articles A5 and B5 of CIF, CFR and FOB which all link transfer of risk to delivery of the goods to the marine carrier in the shipment port which has been set out in Article A4 of the same terms. Likewise, recourse should be made to Article A4 of CIF, CFR and FOB in terms of transfer of risk in the goods sold in transit where the Article provides that the delivery obligation can also be discharged by 'procuring the goods so delivered'. If documentary sales belong to shipment sales, the risk will be assumed by the bearer of the bill of lading from the placing of the goods on the vessel's board, but if they have been concluded under destination sales, the risk will transmit to the buyer once the carrier arrives at the agreed place in the destination.[445] In other words, if a string sale has been concluded under CIF, CFR and FOB sales, the risk will be retroactively assumed by the endorsee (transferee); namely, the risk will be assumed by the buyer from the time of placing the goods on board the ship.

The role of the marine carrier can also be recognised in the string contract of sale through these terms as the risk under such sales is hinged on the act of placing the goods on board the vessel. However, the risk will also retroactively transfer to the endorsee in the string sale contracted under FCA, CPT and CIP where transfer of risk takes place by renouncing custody of the goods to the marine operator who has undertaken carriage of goods through a multimodal transport document.[446]

However, Lorenzon believes that a difficulty may arise in ascertaining the time of transfer of risk in string sales concluded under the CIF and CFR contracts, because the seller (endorser) would not be able to relinquish the risk retroactively to the buyer (endorsee) which can make the situation more controversial, particularly, when the conclusion time of the contract of sale coincides with the time at which the risk materialises or when the risk has already occurred prior to the conclusion of the string

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[444] The rule about placing the goods on board the vessel is found in CIF, CFR and FOB, while the rule about renouncing custody of goods is prescribed in FCA, CPT and CIP. However, the concept of placing the goods at the disposal of a buyer is found under Ex-Work, FAS, DAP, DAT and DDP.
[445] Lookofsky (n 34) 96.
[446] Stapleton, *Pande and O 'Brien* (n 201) 234.

contract of sale.[447] However, it cannot be agreed with this view that misinterprets the phrase of 'procuring the goods so delivered'.[448] This confusion means that this view only establishes transfer of risk on the conclusion time of the string sale rather than the goods delivery (procuring the goods so delivered) envisaged by virtue of the provisions of Article A4 on which Articles A5 and B5 of CFR and CIF are established so as to regulate a transfer of risk in these string sales.

The role of the marine carrier in determining the time of transfer of risk under the Incoterms 2010 Rules can further be seen in string sales concluded through destination sales, where the risk will take place at some point of time after concluding the string sale, i.e. when the goods are placed at the disposal of the buyer (endorsee) in the destination place.[449] The importance of the marine carrier's role in passing risk in this case is imputable to its function of putting the goods at the disposal of the buyer at the destination, which discharges the seller's obligation of delivery that can reset the risk on the buyer's account.

However, if the goods have been lost prior to the conclusion of the string contract of sale concluded under the shipment contract, which is neither governed by the rules of the CISG nor by the Incoterms 2010 Rules, the provisions of applicable domestic law shall govern the passing of risk between the parties to such a contract.[450]

It is clear that transfer of risk in string sales under Incoterms 2010 Rules is better regulated than that which is under the CISG. This is because that the rule of passage of risk in string sales governed by the Incoterms 2010 Rules can apply to string sales concluded under shipment sales and those concluded in destination sales, which

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[447] Lorenzon also suggests that the approach adopted in A4 of the Incoterms 2010 Rules is neither consistent with the intention of its drafters nor current practice in the market. Lorenzon and Baatz (n 133) 17; Daniel E Murray, 'Risk of Loss of Goods in Transit: A Comparison of the 1990 Incoterms with Terms from other Voices' (1991) 32(1) U M Inter-American LR 125, 126.

[448] This phrase is provided in Article A4 of CIF, CFR and FOB, which regulate obligation of goods delivery.

[449] DAT, DAP and DDP of the Incoterms 2010 Rules.

[450] See Stefan Vogenauer, 'Introduction' in Stefan Vogenauer and Jan Kleinheister kamp (eds), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (1st edn, Oxford University Press 2009) 5. See also, Larry A DiMatteo and Andre Janssen, 'Interpretive Methodologies in the Interpretation of the CISG' in Larry A DiMatteo (ed), *International Sales Law/A Global Challenge* (Cambridge University Press 2014) 95, 96; Klotz (n 97) 22, 24; Gabriel (n 4) 11; Bridge, 'UK Sale of Goods Act, the CISG and the UNIDROIT Principles of International Commercial Contracts' in Sarcevic and Volken (n 355) 128, 129; Aleksandar Goldštajn, 'Lex Mercatoria and the CISG: The Global Law Merchant' in Peter Šarčević and Paul Volken (eds), *The International Sale of Goods* (Kluwer Law International 2001) 252, 253; Murray (n 446) 126, 127.

contrasts with the CISG which adopted two rules without distinguishing between destination sales and sales of shipment. This may lead to an illogical outcome, particularly under destination contracts, which has been explained earlier in this study.[451]

It is worth mentioning that the obligation to 'procure goods shipped', provided in the introduction of the Incoterms 2010 Rules, has been only indicated in Article A4 of CIF, CFR and FOB. Given that this obligation is applicable under the other terms such as FCA, CIP, CPT, DAT, DAP, DDP -as it is understood from the introduction of the Incoterms 2010 Rules- it is suggested that the next Incoterms version should clearly indicate this obligation under the rest of its terms with a stipulation that the multimodal transport document issued in the context of these sales should be produced by a marine operator. It can be proposed that – for the purpose of eliminating any aspect of controversy in terms of string sales- the ICC can allocate a particular section of the forthcoming terms to regulate obligations, passage of risk and the other related matters of the string sales.

It can be concluded that a transfer of risk in string sales would be affected by the fault of the marine carrier as the non-issuance of a bill of lading and the lack of details inserted in the negotiable bill of lading may affect the negotiability, transferability and authenticity of such a document. Therefore, the role of the bill of lading in linking a contract of carriage with a contract of sale in transit should always be taken into consideration in the course of determining its role in proving the contract of carriage.[452]

The role of the marine carrier can further be recognised in their breach in non-arrival, delay of arrival or not placing the goods at the disposal of the endorsee in the place of destination which will prevent transfer of risk in string sales concluded under destination sales.

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[451] This can be inferred from Article 68 of the CISG and Article A4, A5 of CIF, CFR and FOB.
[452] Francis (n 138) 29.

5.2.3 Role of marine carrier in passing risk in string sales governed by the JCC

String sales are not addressed under the provisions of the JCC. Consequently, disregarding such sales will give rise to difficulty in terms of the time at which the risk shall transmit to the buyer. As explained earlier, incorporating the Incoterms 2010 Rules in the contract of sale will address such a lacuna, as the role of the marine carrier in operating transfer of risk in the goods sold via this contract could be clearly identified, and thus the time of transfer of risk would be easily determined.

Since Jordan is not a signatory to the CISG and presuming that the Incoterms 2010 Rules are not applicable to the contract of sale, transfer of risk in string sales is governed by the general rules of risk transfer under the JCC.[453] By virtue of the provisions of the JCC, transfer of risk shall take place by delivering the goods that conform to the contract of sale and tendering shipping documents as prescribed in the relevant rules of the JCC.[454]

Because physical delivery is impossible in goods sold in transit, the situation will be more complicated if transfer of risk is governed by the JCC rules which have neither addressed delivery in such a case nor when transfer of risk should be determined in this delivery. Despite the fact that the rules of the JCC impliedly extend the dominance of the marine carrier to passing risk through string sales, transfer of risk under these rules is a controversial issue more than that which is under international instruments.

As transfer of risk is linked to delivery of goods that conform to the contract of sale and to the surrendering of the shipping documents, transfer of risk in string sales will take place when a marine carrier delivers or takes over goods -which conforms to the string sale- whether agreed to be delivered at shipment port or destination port, provided the relevant documents have been tendered as well. The twofold role of the marine carrier can be seen in the endorser's obligation to surrender the shipping documents issued by the marine carrier, and through the physical delivery of goods that will take place when a marine carrier hands the goods over to the endorsee or holder in destination sale.

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[453] Sections 472 and 491 of the JCC.
[454] Sections 490 and 494(1) of the JCC.

Transfer of risk through string contracts governed by the JCC will be considered when the endorser discharges their obligation to surrender shipping documents and to deliver goods to the endorsee in the manner agreed between contracting parties. This approach will mainly obstruct the process of transfer of risk and similarly complicate the duty of determining the time of transfer of risk, which will in turn give rise to disputes. However, the matter of delivery of goods might be easily settled if the parties to a contract of sale have already agreed on the manner of the delivery of goods, within which they might agree to consider the delivery of the document as a default delivery, or they could link transfer of risk to the physical delivery to the marine carrier in the shipment port or to the mere delivery by the marine carrier in the destination port.[455]

Consequently, a conclusion can be drawn that the general rule of transfer of risk under the JCC entails that the delivery of the conforming goods and surrendering of shipping documents should be accomplished together unless the agreement of the parties to the string sale provided otherwise.[456] The time of transfer of risk that could be ascertained in accordance with this assumption would not be the same as the time at which the risk transfers by virtue of the provisions of the CISG where passing of risk shall take place at the conclusion time of the contract of sale or in specific circumstances when the goods have been delivered to the carrier who issued the shipping documents.[457] It should also be kept in mind that, although parties to a contract of sale concluded in transit have not agreed on default delivery, they might agree on a particular time to be considered for the purpose of the transfer of risk even if the goods have not been handed over to the buyer. Parties to string sales governed by the JCC could further agree that the mere tendering of documents or the sole delivery of goods could be used as a basis on which the risk shall transmit from seller to buyer, regardless of the non-fulfilment of another obligation. However, the situation may become more complicated when parties to a string contract of sale agree neither on the time of the transfer of risk nor the type of default delivery on which the time of transfer of risk could be determined. The extent of the role of the marine carrier on operating transfer of risk through string sales governed by the JCC should hinge on the agreement of the

[455] Under Section 496 of the JCC, the contracting parties to a sale contract are entitled to determine the time at which delivery is accomplished.
[456] Sections 489, 490, 491 and 496 of the JCC.
[457] Article 68 of the CISG.

parties to such sales. They may agree to link this time to the date of endorsing a negotiable bill of lading, i.e. the date indicated by the parties on the back of the endorsed bill of lading, to the time of taking the goods over by a marine carrier in the port of shipment, to the time of handing the goods over to the buyer at the destination or by surrendering the related documents.

5.3 Summary

The crucial role of the marine carrier under string sales is fulfilled through the endorsed negotiable bill of lading and the ship's delivery order as both can be used to identify fungible goods to the string sale, and this will enable the ownership to transfer to the sub-buyer (endorsee).

However, a marine carrier may obstruct the passage of ownership in a string sale by omitting the expression 'negotiable', which will deprive such a document of being used as a tool of identification that is satisfactory enough for the ownership in the fungible goods sold in transit to be transferred to the endorsee.[458] Another fault that hinders the passage of ownership in fungible goods sold in transit is the marine carrier's failure of determining the priority of the copies of the negotiable bill of lading.[459]

The influence of the marine carrier on the passage of ownership in the goods sold in transit is also recognised in terms of non-fungible goods as the parties can use the document produced by the marine carrier (the bill of lading) to invoke the date attached to the endorsement on the negotiable bill of lading as prima facie evidence of the date of the conclusion of the string sale for the sake of settling two issues: passage of ownership in non-fungible goods,[460] and transfer of risk in goods sold in transit in case the buyer does not enjoy insurance for the sold goods, provided that the CISG rules are applicable.[461]

Even when goods sold in transit are covered by insurance, a marine carrier can play an influential role in determining the time of the transfer of risk under the CISG, which

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[458] Section 205 of the JMCL.
[459] Section 205 of the JMCL tries to resolve a dispute which may arise in terms of the copies of a negotiable bill of lading.
[460] Section 199 of the JCC.
[461] Article 68 of the CISG.

would not take place unless the goods have been delivered to the marine carrier who issued the shipping documents, including the bill of lading.[462]

Jordanian law does not recognise string sales and so the role of the marine carrier in passing risk and ownership in the goods sold via string sales not being regulated. This has given rise to ambiguity in terms of the time at which transfer of risk and ownership in the goods sold in transit takes place. One feature of this vagueness is realised in the way that the functionality of the endorsed negotiable bill of lading is not clarified under goods' identification, which is stipulated as a prerequisite condition that should be satisfied to allow transfer of ownership in the fungible goods.

The Jordanian legal position has led to difficulties in ascertaining the time of passage of ownership in non-fungible goods. This can be blamed on the insufficiency of the rules on the negotiability of bills of lading under the provisions of the JMCL, as it has not clarified the importance of the date of endorsement in proving the time of the conclusion of a string sale, where parties can assert this time so as to prove a passage of ownership in the non-fungible goods.

Non-recognition of string sales and the lack of regulation of negotiability of bills of lading under Jordanian law have further caused uncertainty under the transfer of risk. This shortcoming has given rise to ambiguity with respect to the time of the transfer of risk because Jordanian law links transfer of risk to the goods delivery which comprises, in addition to the goods being handed over, conformity of goods and delivery of related documents. The difficulty in this regard is attributable to two reasons. First is the impossibility of performing physical delivery in contracts concluded while the goods are in transit, and the second is the concept of the delivery of goods that should incorporate document tendering and conformity of goods.

This approach contradicts the international commercial approach of considering a delivery of shipping documents such as a bill of lading as a separate obligation from the delivery of goods. Contrary to the international approach, the approach of Jordanian law will also prevent the retroactive application of transfer of risk through which the risk could pass from the delivery of goods made to the marine carrier who issued the shipping documents. Moreover, the stipulation of conformity of goods

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[462] Article 68 of the CISG.

might also deter a transfer of risk in string sales, as the risk will not transfer to the endorsee if a lack of conformity exists before or at the time of delivery of the goods.

All of these obstacles noted under the application of the Jordanian law can be attributable to the lack of clarification of the position of the marine carrier in operating transfer of risk and ownership within string sales. Ratifying the CISG would be the perfect solution for Jordan in this respect. However, ratification of CISG is not enough unless Article 68 of the CISG is amended to avoid the non-satisfactory situation seen under transfer of risk in the string sales concluded under the destination sales. This Article shall also clearly clarify the meaning of the ambiguous phrase 'if the circumstances so indicate', which has given rise to various interpretation in the context of the passage of risk in string sales.

In spite of the capability of the Incoterms 2010 Rules in regulating a transfer of risk in string sales concluded in the context of CIF, CFR and FOB, there is a possibility of controversy in terms of passing of risk in the string sales concluded under the other terms of the Incoterms 2010 Rules. The lack of clarity -in this regard- can be solved by an explicit indication to the phrase 'procuring the goods so delivered' under the rest of the terms, as provided in Article A4 of CIF, CFR and FOB. However, it is much better if the Incoterms 2010 Rules set out string sales in dedicated section in these rules.

Chapter 6. Liability of the marine carrier under Jordanian law

The marine carrier's liability is not confined to the damage to or loss of the goods or delay in delivering them, but also includes other aspects of liability such as fault or negligence that may impede transfer of risk and ownership in a contract of sale involving carriage of goods by sea.

To clarify the essence of the liability arising from obstructing a transfer of risk and ownership, a distinction has to be drawn between this kind of liability and that which arises from the loss of or damage to the goods and delay in delivery. This chapter will examine the related articles of the Hamburg Rules, which has been ratified by Jordan, and also to the rules of JMCL and JCL, all of which regulate the liability of the marine carrier.[463]

This chapter will extract the relevant general rules set out in the JCC from which the study will be able to sketch the legal framework for liability of the marine carrier arising under passing risk and ownership.

6.1 Loss of or damage to goods or delay in delivery

To clarify the ambiguous provisions of Jordanian law pertaining to the liability of the marine carrier, the first section will be dedicated to analysing the related provisions of the Hamburg Rules and JMCL.

6.1.1 Liability

The incompatibility of the Jordanian legal system in terms of the concept of the marine carrier's liability has led to confusion over the essence of this liability. Because the liability under the JMCL is a contractual liability established based on the commitment of the marine carrier to achieve a result, not on the obligation to exercise due diligence that has been adopted under the Hamburg rules.[464]

The inaccuracy of this view stems from a misunderstanding of the prevailing rules, because it has contradicted the legal rule that a convention should prevail over

[463] The Hamburg Rules 1978 were ratified by Jordan on 10 May 2002 and entered into force on 1 June 2002 under decision of the Jordanian Cabinet of Ministers which was published in edition number 4484 of the Official Gazette on 16 April 2001. Ababneh (n 13) 139.
[464] Al-Eteer (n 1) 313; Shukri (n 18) 641; Ababneh (n 13) 99; Koumani (n 18) 118.

domestic law. Thus, precedence has to be granted to the Hamburg Rules.[465] This inference can be impliedly derived from Article 33(2) of the Constitution of Jordan 1952 which stipulates that:

> 'Treaties and agreements which involve financial commitments to the Treasury or affect the public or private rights of Jordanians shall not be valid unless approved by the National Assembly'.

The terms 'treaties' and 'agreements' are related to political and economic interests such as 'Treaties of Alliance'.[466] Thus, as they neither comprise financial obligations to the Treasury nor do they affect the public or private rights of Jordanian citizens, the Hamburg Rules should come into force without approval of the National Assembly, even though the provisions of the Hamburg Rules contradict the JMCL approach. This assumption can be further extrapolated from a Jordanian Cassation Court judgment which held that:[467]

> 'Jordanian accession to United Nations Convention on Carriage of Goods by Sea, which has been fulfilled through approval and ratification of Jordanian government, does not violate the Constitution of Jordan, although the consent of the National Assembly has not been obtained'.

This judgment was based on Article 33(2) of the Constitution of Jordan 1952 as the court ruled that the Hamburg Rules should prevail over the rules of the JMCL. The dominance of international conventions and treaties, inter alia, the Hamburg Rules 1978, has been decided by the consensus of jurisprudential opinions and courts of law that all assume that these conventions and treaties shall prevail over the domestic laws, where such dominance must be maintained irrespective of the contradiction between them.[468]

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[465] Al-Eteer (n 1) 313; Shukri (n 18) 641; Ababneh (n 13) 99; Koumani (n 18) 118.
[466] Higher Council for the Interpretation of the Constitution (1/1962), Journal of Jordanian Bar [2008] 10-12 1972; Treaties of Alliance are: 'Written agreement, signed by official representatives of at least two independent states, that include promises to aid a partner in the event of military conflict, to remain neutral in the event of conflict, to refrain from military conflict with one another, or to consult/cooperate in the event of international crises that create a potential for military conflict'. Brett Leeds et al. 'Alliance Treaty Obligations and Provisions, 1815-1944' (2002) 28(3) International Interactions 238, 239.
[467] Case No 2353/2007 Jordanian Cassation Court, Journal of Jordanian Bar [2008] 10-12 1957.
[468] See Case No 1483/2011 Jordanian Cassation Court, Journal of Jordanian Bar [2011] 10-12 1524.

From this discussion, it can be concluded that the marine carrier's liability shall be decided in accordance with the 'presumed fault' as a general rule, and 'due diligence' as exceptional rule, which both have been provided in the Hamburg Rules.[469]

The marine carrier's liability under Jordanian law might further be decided on the ground of liability in tort where the marine carrier shall assume liability to a third party on the basis of tortious liability rather than contractual liability decided by virtue of the provisions of the marine carriage contract.[470] However, the marine carrier cannot invoke exemptions of liability through the exemption clause included by them in the bill of lading.[471]

To conclude, the nature of the civil liability of the marine carrier could be a contractual liability determined in accordance with the marine carriage contract that shall be governed by the Hamburg Rules, where the JMCL rules perform as integral rules to the Hamburg Rules. Likewise, it can be based on tortious liability that shall be determined by virtue of the provisions of the JCC.

The liability of the marine carrier for damage to, loss of goods or delay in delivery has to be decided in accordance with the provisions of the marine carriage contract which compels the marine carrier to transport the shipped goods from the place of shipping to the agreed destination.[472] Accordingly, it is necessary to critically analyse the concept and duration of this liability and then point out the position of the Hamburg Rules, JMCL and in some areas the position of the JCL from the marine carrier's liability arising from lack of transfer of risk and transfer of ownership.

6.1.2 Liability under Jordanian law

To examine the concept of the marine carrier's liability, light must be shed on the legal basis of this liability under the provisions of the Hamburg Rules which diverges from that which is provided under the JMCL. This divergence is attributable to the

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[469] Articles 4 and 5 of the Hamburg Rules 1978.
[470] Ababneh (n 13) 99; Koumani (n 18) 118. This inference can be taken from the provisions of Article 7(1) of the Hamburg Rules 1978. Harris (n 36) 298. See Appendix 1.
[471] Ababneh (n 13) 99; Section 215 of the JMCL. Appendix 2.
[472] Articles 4 and 1(6) of the Hamburg Rules 1978 adopted the principle of port-to-port liability. Baughen (n 90) 133. However, the principle of tackle-to-tackle liability was introduced in Section 177 of the JMCL. Concerning the perspective of modern international law, the duration of the marine carrier's liability can be derived from Article 12 of the Rotterdam Rules 2009. This adopted the principle of door-to-door through which the liability encompasses all modes of carriage. Singh (n 146) 45, 46.

international conventions adopting the doctrine of due diligence that aims at mitigating the legal effects of the liability of the marine carrier, in contrast to domestic legal systems which adopt the doctrine of 'achieving the result'.[473]

6.1.2.1 The Hamburg Rules 1978

Article 5 of the Hamburg Rules adopted a 'presumed fault' doctrine to determine liability of the marine carrier for damage to or loss of goods and delay in delivery, within which the claimant must prove that the damage to the goods materialised while the goods were under the custody of the marine carrier.[474]

A shipper can only show a clean bill of lading to prove this liability whereas a marine carrier can invoke Article 5(1) of the Hamburg Rules to rebut such a presumption.[475] Consequently, this presumption will be refuted if the marine carrier proves that it or its servants or agents have exercised 'due diligence' as expected from a cautious carrier under similar circumstances.[476] Article 5(1) of the Hamburg Rules provides that:

> 'The carrier is liable for loss resulting from loss or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in article 4, unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences'.[477]

The Hamburg Rules derogate from the presumed fault doctrine when the goods are affected by a fire during carriage by sea. Pursuant to this Article, the marine carrier would not be liable unless the claimant proves that the fire is imputable to the fault or omission of the marine carrier, its employees or agents, for not taking reasonable measures to extinguish the fire or to obviate or diminish the subsequent effects of the fire.[478]

To allocate the marine carrier's liability, the Hamburg Rules follows two doctrines: first, the doctrine of presumed fault, which is adopted as a general basis for the liability

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[473] Shukri (n 18) 642.
[474] Singh (n 146) 40; Hoeks (n 12) 329; Baughen (n 90) 133. Al-Eteer (n 1) 314, 315.
[475] Ababneh (n 13) 142.
[476] Al-Eteer (n 1) 315; Ababneh (n 13) 142, 143; Astle (n 136) 98; Hoeks (n 11) 328.
[477] Article 4(2) of the Hamburg Rules 1978.
[478] Singh (n 146) 211; Ababneh (n 13) 143; Al-Eteer (n 1) 315; As stipulated in Articles 5(4) and 4(3) of the Hamburg Rules 1978.

of the marine carrier, except in the case of fire risk; and second, the doctrine of due diligence provided in Article 5 of the Hamburg Rules, which entitles the marine carrier to assert such a doctrine to refute the liability based on presumed fault.[479]

6.1.2.2 The JMCL

The concept of liability of the marine carrier is one of the key inconsistencies between the Hamburg Rules and the JMCL. According to Section 213 of the JMCL: '[t]he carrier shall be liable for any loss or deterioration of the goods or damage thereto'.

This Section follows the doctrine of 'achieving a result' which entails the marine carrier delivering the goods in the same quantity and condition in which they were received from the shipper.[480] Unless the parties agreed otherwise, the goods shall also be delivered within a reasonable time.[481]

Accordingly, the consignee is not required to prove the fault of the marine carrier but rather that the goods have been received damaged or short in quantity or weight, or that the goods have not been received at the agreed time.[482] However, for the purpose of discharging its liability, the marine carrier must prove that the damage to or loss of goods, or delay in delivery is imputable to force majeure, the shipper's fault, consignee's fault or nature of the goods.[483] Namely, the marine carrier's proof of exercising 'due diligence' would not suffice to negate its liability. It is generally accepted under the main principles of contract law enshrined in the JCC that the contracting parties can agree to deviate from the doctrine of achieving a result, provided that such derogation does not breach the provision of the law, public order or morals.[484] Therefore, it can be understood from the provisions of the JMCL that the

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[479] In terms of the Rotterdam Rules, it can be observed from a reading of Articles 17 and 18 that the doctrine of due diligence is applied since Article 17 imposes a burden of proof as to the marine carrier's fault or as for the unseaworthiness on the consignee's part, which is difficult for the consignee to prove during the carriage operation, or to prove the vessel's unseaworthiness. See, Fehmi Ülgener, 'Obligations and Liabilities of the Carrier' in Meltem Deniz and Güner-Özbek (ed), *The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea/An Appraisal of the 'Rotterdam Rules'* (Springer 2011) 144; Shukri (n 18) 644; Katsivela (n 18) 413, 423, 425; Hoeks (n 11) 328.
[480] Al-Eteer (n 1) 313.
[481] Shukri (n 18) 641.
[482] Ibid 641; Singh (n 146) 211.
[483] Shukri (n 18) 641. Section 213 of the JMCL.
[484] This can be inferred from the implied meaning of the provisions of Sections 163(2) and 213 of the JCC. Appendix 2.

doctrine of achieving a result cannot be modified by express terms of the contract of carriage, as such modification might be done for the purpose of alleviating responsibilities of the marine carrier imposed on them by virtue of the law.[485] However, the marine carrier may rely on reservations made on the bill of lading so as to modify the principle of Achieving Result and hence, burden of proof will be shifted to the shipper or consignee.[486] The inclusion of inaccurate factual information in the bill of lading constitutes a breach of contract by the marine carrier, because the marine carrier must reflect the key particulars furnished by the shipper, on which both parties have already agreed to be contracted.[487] This inaccuracy will negatively affect the role of the bill of lading as a document proves the marine carriage contract and adversely affect its function in operating a transfer of risk and ownership. It can be noted from the earlier discussion that the contradiction between the Hamburg Rules 1978 and the JMCL, in terms of the concept of liability, is imputable to the fact that the latter adopts 'Achieving Result' principle while the former adopts 'Presumed Fault' and 'Due Diligence' principles, as discussed before.

6.1.3 Duration of liability under Jordanian law

Specifying the point of time at which the liability of the marine carrier begins and ends will assist in defining the ambit of the marine carrier's liability. The next two subsections will focus on these to clarify the extent under the provisions of the Jordanian law, and hence the perspective of the Hamburg Rules.

6.1.3.1 Scope of Liability of the marine carrier under the Hamburg Rules

The Hamburg Rules adopted the 'doctrine of integrity' of the marine carriage contract, through which the duration of the contract covers all of the carriage modes associated with the sea leg.[488] This can be extrapolated from the definition of the marine carriage

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[485] This can be derived from the provisions of Section 215 of the JMCL. Appendix 1.
[486] According to Section 72(2) of the JCL: 'The carrier is required to substantiate the evidence negates its liability, unless they have made reservations at the time of delivery due to insufficiency of packaging, which can be considered an evidence could be refutable by the shipper or the consignee, where appropriate'.
[487] This presumption can be inferred from the provisions of Article 15 of the Hamburg Rules, Appendix I.
[488] Articles 10 and 11 of the Hamburg Rules 1978 are both devoted to resolving the absence in Article I(b) of the Hague-Visby Rules, which is only confined to the responsibility of the marine carrier for a sea leg carriage. Harris (n 36) 297, 298; Al-Ibrahim (n 18) 77, 93.

contract set out in Article 1(6) of the Hamburg Rules. Pursuant to the provisions of Article 1(6) of the Hamburg Rules:

> 'Contract of carriage by sea means any contract whereby the carrier undertakes against payment of freight to carry goods by sea from one port to another; however, a contract which involves carriage by sea and also carriage by some other means is deemed to be a contract of carriage by sea for the purpose of this Convention only in so far as it relates to the carriage by sea'.

This Article provides a definition of the marine carriage contract encapsulating the other modes of carriage in the marine carriage contract, while Article 4(1) has been designed to address the scope of liability of the marine carrier for loss of, damage to goods and delay in delivery during carriage by sea and during other modes of carriage. However, the Rotterdam Rules 2009 have also adopted the doctrine of integrity of the marine carriage contract in Article 26, and the doctrine can be drawn from the definition of marine carriage contract set out in Article 1(1) and also in Article 12 of the Rules. However, Article 82 of the Rotterdam Rules 2009 stipulates that if the damage to or loss of the goods or incident that resulted in delay in delivery happens before loading on ship or after the unloading from the ship, it will be governed by the provisions of the relevant convention governing carriage by air, road, inland water-ways or rail.[489]

Hence, the marine carrier assumes liability for loss of, damage to goods and delay in delivery under Hamburg Rules once custody transfers from a shipper (seller or buyer) to the carrier and cover the period during which the goods are loaded onto the vessel, the carriage by sea segment and the conclusion of the unloading operation at the destination port.[490] It has also been assumed that the period during which the goods are kept in the container terminal after unloading would be included in the marine carrier's liability.[491] Therefore, the Hamburg Rules have succeeded in diminishing the ambiguity arising under the liability of the marine carrier for damage to or loss of

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[489] Hoeks (n 11) 332; Ivamy (n 402) 106, 107. Shukri (n 18) 585; Girvin, *Carriage of Goods by Sea* 288, 289; Treitel and Reynolds (n 85) 557, 560.
[490] Article 4(1) of Hamburg Rules 1978. Baughen (n 90) 133; Astle (n 136) 304; Singh (n 146) 211; Harris (n 36) 297; Al-Ibrahim (n 18) 91; Shukri (n 18) 583, 584. Ababneh (n 13) 142.
[491] Todd, *Principles of the Carriage of Goods by Sea* 363.

goods during a carriage by tackles or lighters and during the loading and unloading process.[492]

Article 4 of the Hamburg Rules resolves the problem when the marine carrier takes the goods over from a third party in shipment port or hands the goods over to a third party in a destination port, as it provides that liability of the marine carrier may commence when they take the goods over from the authority or from a third party in a port to which the goods should be delivered by virtue of the applicable law or in accordance with the regulations at the port of loading.[493] However, such kind of delivery that may takes place in the destination will not make the marine carrier liable for handing the goods over without the bill of lading.[494] Hence, this delivery is deemed to be a default delivery under the Hamburg Rules which suffices to discharge the marine carrier's obligation of handing the goods over imposed on them by virtue of the marine carriage contract. It would also be enough to discharge them from the liability for damage to the shipped goods or for delay in delivery.[495] Taking delivery from a third party will also release the marine carrier from its obligation of taking delivery where the goods' custody would be relinquished from the shipper to a third party in the shipping port.

6.1.3.2 Ambit of liability of the marine carrier under JMCL

The duration of liability of the marine carrier for loss of, damage to goods and delay in delivery -under the JMCL- is not consistent with that provided in the Hamburg Rules, as the JMCL adopted a tackle-to-tackle approach, instead of port-to-port principle, which is applied under the provisions of the Hamburg Rules.[496] This can be derived from the wording of Section 211 of the JMCL which has limited the marine carrier's liability to the sea segment:[497]

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[492] Al-Eteer (n 1) 304.
[493] Article 4(2) of the Hamburg Rules 1978; Baughen (n 90) 133; Astle (n 136) 133; Shukri (n 18) 615.
[494] Similar to the approach adopted in Article 4(2) of the Rotterdam Rules 2009. Lixin Han, 'An Analysis of the Grounds for Defending the Carrier's Delivery of Goods without Original Bill of Lading-Based on 165 Effective Written Judgement' (2005) 39 China Oceans L Rev 427.
[495] Shukri (n 18) 615.
[496] Rotterdam Rules 2009 extended the liability of the marine carriage, as it can be inferred from the provisions of Article 1(1) in which the principle of Door-to-Door is adopted.
[497] Al-Eteer (n 1) 305; Al-Ibrahim (n 18) 91.

> 'The provisions of this part shall apply only to carriage by sea in respect of which a bill of lading must be issued, and as from the time when the goods are loaded on board the ship until they are off-loaded at their destination'.

According to this Section, the periods during which the goods are loaded into and unloaded from the ship shall be excluded from the ambit of the marine carrier's liability, i.e. carriage of goods by a tackle or lighters from a quay to a vessel and vice versa would not be governed by the JMCL.[498] Therefore, the general rules shall apply to these periods of time which would result in depriving the marine carrier of invoking the exemptions or limitations of its liability.[499]

The incompatibility between the JMCL and the Hamburg Rules might further be deduced from provisions of Section 178 of the JMCL which declares:

> 'The ship must be ready to load at the specified time at the agreed or usual place of loading. The master must receive the goods at the expense of the operator under ship's tackle and must deliver them to the consignee under ship's tackle at the port of destination'.

This Section also gives rise to uncertainty in terms of the applicability of the JMCL rules during the time of carrying goods by a tackle or lighters from the ship to the quay and vice versa whereas the Hamburg Rules have eliminated such uncertainty by calculating duration of liability for loss of damage to goods and delay in delivery according to the renouncing of goods' custody between the marine carrier on the one side and shipper or consignee on the other.[500]

However, the Jordanian Cassation Court contradicted the provisions of both Sections in a case concerning a consignment of goods transported from Japan to Aqaba.[501] The Court ruled that the duration of the marine carrier's liability shall not be discharged unless the actual delivery is performed to the consignee in the destination place. Namely, the liability of the marine carrier will continue after unloading until the goods are duly delivered to the consignee. To determine the period, of prescription, the Court adopted the concept of the actual delivery. It held that:

> According to the provisions of Section 219 of the JMCL, the delivery of goods is the legal act through which the marine carrier places the

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[498] Shukri (n 18) 583, 584.
[499] Al-Eteer (n 1) 304, 305; Al-Ibrahim (n 18) 91.
[500] Al-Eteer (n 1) 304.
[501] Case No 1148/1992 Jordanian Cassation Court, Journal of Jordanian Bar [2008] 10-11 2074.

> goods at the disposal of the consignee or at the disposal of its agents and thus, tendering the receipt permission to the consignee's agent after payment of fees can be interpreted as an actual delivery.[502]

Notwithstanding that such a decision contradicts the scope of the marine carrier's liability under the JMCL, this decision is consistent with its liability provided in the Hamburg Rules.[503]

However, the opposite approach was adopted in another judgment of the same Court, in which it was held:[504]

> 'The marine carrier is not responsible for a pre-loading and post discharging of goods, provided that he should prove that the shortage occurred in any of the abovementioned periods'.

This judgment shows that the Court has confined the liability of the marine carrier - for loss of, damage to goods and delay in delivery- to the sea leg as provided in Section 211 of the JMCL, which does not stipulate the actual delivery. Rather, the JMCL provides that this liability ends when the tackle picks up the goods for unloading.[505] However, this contradicts what is stipulated in Article 1(6) of the Hamburg Rules which incorporates pre-loading and post discharging of goods into the liability of the marine carrier.

The approach of the JMCL of confining the contract of marine carriage to the sea leg is inconsistent with the 'integrity of the marine carriage contract' that requires the incorporation of the other modes of carriage, which has been adopted by the Hamburg Rules to solve some practical problems.

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[502] Section 219 of the JMCL states: '[t]he right to submit a claim in court against the carrier for loss or damage shall be lost by prescription in all cases after the lapse of one year as from the date of delivery of the goods, or as from the date on which they should have been delivered in case of non-delivery'. The same approach was adopted in Case No 657/1984 Jordanian Cassation Court, Ala'a Fatehi Samad and Wadee' Salameh Sawaqed, *Judgements of the Cassation Court in the Commercial Cases* 172; Case No 855/1989 Jordanian Cassation Court, Ala'a Fatehi Samad and Wadee' Salameh Sawaqed, *Judgements of the Cassation Court in the Commercial Cases* 178.

[503] Article 4(1) of Hamburg Rules 1978.

[504] Case No 340/1983 Jordanian Cassation Court, Ala'a Fatehi Samad and Wadee' Salameh Sawaqed, *Judgements of the Cassation Court in the Commercial Cases* 169. The same perspective was adopted in Case No 349/1983 where the Jordanian Cassation Court ruled: 'The scope of the bill of lading is limited, where it does not embrace the pre-loading and post-unloading, and such a limit is consistent with the provisions of Section 211 of the Maritime Commercial Law'. Ala'a Fatehi Samad and Wadee' Salameh Sawaqed, *Judgements of the Cassation Court in the Commercial Cases* 169.

[505] Section 178 of the JMCL.

However, complexity may arise if the marine carrier takes the goods over from a third party in a shipment port or hands the goods over to a third party in a destination port as this is not regulated under the JMCL.[506]

The deficiency of the provisions of the JMCL in terms of the implications of handing the goods over to a third party has led to contradictory interpretations by the Jordanian Cassation Court. Specifically, the Jordanian Cassation Court does not recognise delivery to a third party. This court considers that such delivery does not discharge the duty, and delivery to a customs or port authority shall not discharge the liability of the marine carrier for damage to, loss of goods or for delay in delivery.[507]

The overlap between the duties of the freight forwarder and port corporation has resulted in incompatibility between the decisions of the Jordanian Cassation Court [508] because of the vagueness of the provisions of the JMCL which do not clarify the implications of the marine carrier's act of handing the goods to and taking the goods from a third party, both of which may affect the extent of the marine carrier's liability. The Court does not recognise such a transfer to a third party like a port or customs authority as it considers it insufficient to discharge the liability of the marine carrier.

The perspective of the Cassation Court on delivery to a third party can be seen in a dispute about a consignment of margarine transported from Malaysia to Aqaba, where the consignee noted that the goods received were damaged.[509] The marine carrier denied responsibility for reimbursement on the grounds that its liability had ended when the goods were unloaded in the port, not when they were unloaded in the Free Zone. However, the court based its judgment on actual delivery and ruled that:

> 'The damage sustained by the goods while they were being handled and unloaded by the Port Corporation as well as while they were being carried to the 'Free Zone' are deemed to have occurred prior to actual delivery and thus the marine carrier shall be liable for these damages'.[510]

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[506] This shortcoming has resulted in a contradiction between judgements of Jordanian Cassation Court pointed out in the earlier subsection.
[507] Shukri (n 18) 615. See, for example, Case No 424/1992 Jordanian Cassation Court, Ala'a Fatehi Samad and Wadee' Salameh Sawaqed, *Judgements of the Cassation Court in the Commercial Cases* 195.
[508] Al-Ibrahim (n 18) 92.
[509] Case No 1943/1997 Jordanian Cassation Court, Journal of Jordanian Bar [1998] 7-8 2585.
[510] Section 4 of the Law of Ports Corporation provides that: 'The Corporation alone undertake the duty of constructing ports in the kingdom, administrate, develop and maintain them as well as perform operations of loading to, unloading from vessels, lashing and loading trucks in addition to

Even after ratifying the Hamburg Rules, the Court made recourse to the provisions of the JMCL which adopted the basis of actual delivery, where the Court held that the liability for damage to and loss of goods should be assumed by a marine carrier even though the goods had been delivered to the Port Corporation.[511] The Court ruled that:

> 'Section 219 of the JMCL did not articulate how and when the delivery of the goods is deemed to be fulfilled and hence, the actual delivery should be considered for the sake of ascertaining the prescription right, where the consignee or its representative would be able to survey and inspect the goods that should conform to their condition'.[512]

After throwing light on the liability of the marine carrier under the provisions of the Jordanian law, it is necessary to address the liability that could be borne under transfer of risk and ownership in contracts of sale involving marine carriage.

6.2 Liability of marine carrier for non-transfer of risk and ownership

Liability of the marine carrier in terms of transfer of risk and ownership is not regulated in international conventions whose focus has instead been on the marine carrier's liability for loss of, damage to goods and delay in delivery.[513] All of these conventions have been devoted to harmonising the rules of the marine carriage contract, including those governing the liability of the marine carrier for the damage to or loss of the shipped goods and the delay in delivering them.

6.2.1 Liability

This lack of regulation does not mean that it is impossible to make recourse to the main principles of liability of the marine carrier addressed under the Hamburg Rules. This is justified as the liability of the marine carrier for failure to pass risk and ownership could be established on the provisions of the marine carriage contract concluded between the shipper and marine carrier.

Hence, the principle of the 'presumed fault' can be considered as the general principle for the contractual liability of the marine carrier for transfer of risk and ownership which can be refuted by proving the due diligence of the marine carrier, its employees

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other services related to the ports'. The same approach was adopted in Case No 920/1991 Jordanian Cassation Court, Journal of Jordanian Bar [1993] 10-11 2008.

[511] Case No 571/2005 Jordanian Cassation Court, Journal of Jordanian Bar [2006] 4-6 615.

[512] Ibid.

[513] As observed from the Brussels Convention 1924, Hague-Visby Rules 1968, the Hamburg Rules 1978 and the Rotterdam Rules 2009.

or agents that is expected from a cautious carrier performing under the same circumstances.[514] The due diligence concept can be derived from common sense and the opinion of experts or it can be extracted from national or international case law.[515]

6.2.2 The legal nature of the liability of marine carrier for non-passing of risk and ownership

The nature of liability of the marine carrier for lack of transfer of risk and ownership shall be determined in accordance with the doctrine of 'privity of contract'. Namely, the essence of this kind of liability has to be determined on whether or not the claimant is a contracting party to the marine carriage contract.

Accordingly, the liability of the marine carrier to a seller in a contract of sale involving carriage of goods by sea like CIF, CFR and CIP would be considered a contractual liability because the seller is the contracting party to the marine carriage contract. However, liability of the marine carrier to the seller shall be determined in accordance with the tortious liability if the buyer is the party who has contracted with the marine carrier to transport the goods.[516]

This can be inferred from the fact that the obligation of transfer of risk and ownership is imposed on the seller's account who is therefore liable to the buyer for non-transfer of risk or ownership, where the seller can resort to the marine carrier if the failure to transfer risk and ownership is attributable to the latter's fault or that of its servants, agents or representatives.

6.2.3 Applicable rules on liability

The marine carrier may endure a liability for the failure of passing of risk under the contract of sale involving carriage of goods by sea. Such liability can be established based on the lack of delivery or handing over of the good by the marine carrier by virtue of the marine carriage contract. In addition, the marine carrier's liability might

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[514] Article 5(1) of the Hamburg Rules 1978. Appendix 1.
[515] NJ Margetson, 'Duties of the Carrier' in HL Hendrikse, NH Margetson and NJ Margetson (eds), *Aspects of Maritime Law/Claims Under Bills of Lading* (Wolters Kluwer 2008) 68.
[516] This liability is based on the fact that the seller is not obliged to conclude the marine carriage contract, whereas the carriage in the context of such sales should be arranged by the buyer, such as the case under FOB and FCA sales. Bergami, 'Managing Incoterms 2010 Risks: Tension with Trade and Banking Practices' 329.

be determined on the failure to issue bill of lading or because some of the contents of the bill of lading were overlooked, which may disrupt transfer of risk and ownership.

The international conventions have all addressed the liability of the marine carrier for loss of, damage to the shipped goods, and the delay in delivering them, except for the Hague-Visby Rules which omitted delay in delivery.[517]

The JMCL has also pursued the same approach of the international conventions in not regulating the liability of the marine carrier for the failure to transfer ownership and risk, which can be determined on the basis of the fault of the marine carrier in taking and handing the goods over or in issuing a bill of lading.[518] It might be concluded that to govern the liability of the marine carrier for non-transfer of risk or ownership, recourse should be made to the JCL that have regulated the general rules of carriage contract and then to the JCC which has addressed the main elements of the civil liability instead of the JMCL and the Hamburg 1978 Rules.

6.2.3.1 Contractual liability

Contractual liability is the liability related to the breach of the parties of the obligations imposed by virtue of the contract concluded between them.[519] Therefore, it is necessary before allocating the contractual liability -arising from an infringement of obligation of marine carriage contract- to ascertain the duration of this contract, which can be derived from Article 1(6) of the Hamburg Rules that has included a carriage by sea involving other modes of carriage under the concept of the marine carriage contract. This also can be derived from the provisions of Section 70 of the JCL, which states:

> 'A contract of carriage is deemed to be concluded once the contracting parties agree upon its elements and terms even before handing the goods over by the shipper to the carrier unless the parties have explicitly or implicitly agreed to postpone the conclusion of the contract to be after the delivery'.

Pursuant to the provisions of this Section, unless the parties otherwise agreed, the duration of the contract of carriage shall start when the shipper and carrier agree on

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[517] Article 5(1) of the Hamburg Rules 1978; Article 17(1) of the Rotterdam Rules 2009.
[518] Section 213 of JMCL.
[519] Sultan (n 227) 230.

the terms and elements of a contract of carriage, even if the goods have not yet been delivered to the carrier. Namely, unless the parties otherwise agreed, the marine carrier's commitments -imposed by marine carriage contract- shall commence from the time of conclusion of the marine carriage contract, rather than the time of delivery stipulated in the Hamburg Rules 1978 and JMCL in terms of the liability for loss of, damage to the goods and delay in delivery.[520]

Given that the failure of the marine carrier in passing a risk and ownership is based on the breach of the obligations levied on them by virtue of the marine carriage contract, an inference can be made that the liability of the marine carrier resulted from non-passing of risk and ownership shall be determined according to the provisions of the marine carriage contract. Thus, such a liability might be a contractual liability in the same way as liability for damage to or loss of goods and delay in their delivery.[521]

However, establishing the claimant's right to claim damages arising under transfer of risk or ownership on the basis of the contractual liability of the marine carrier requires the claimant to be a party to the marine carriage contract. Three elements have to be satisfied to establish contractual liability in terms of transfer of risk and ownership by the marine carrier. Liability shall be assumed when it or its servants or agents breach the obligations imposed by virtue of the marine carriage contract. Since a transfer of risk and ownership is determined by virtue of the contract of sale, the marine carrier shall be responsible to the shipper, seller or buyer for obstructing transfer of risk or ownership between parties to a contract of sale if a non-transfer resulted from the breach of the marine carrier to an obligation levied by the marine carriage contract. Such inference might be impliedly inferred from the judgments of the Jordanian Cassation Court through which the liability of the marine carrier for damage to and loss of the goods has been addressed.

In these judgments, the court explicitly states that the liability of the marine carrier for the damage to and loss of the goods is a contractual liability. This was shown in *Jordan*

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[520] The principle of the conclusion time of the contract of sale can be induced from Section 101 of the JCC (Appendix 2). See Article 4(1) of the Hamburg Rules 1978 and Section 211 of the JMCL that have been examined earlier in this study.

[521] The obligations of the marine carrier that can affect a passage of risk and ownership comprise obligation of taking the goods over from the shipper, handing them to the consignee and issuing bill of lading or other shipping documents, which all arise from the conclusion of the marine carriage contract that has taken place in earlier time.

French Insurance Company v Pearson Shipping Company Ltd. The case was about a consignment of beans received damaged by the consignee in Aqaba Port. Since the consignee was compensated by the insurance company, the latter subrogated them to recover the compensation from the shipowner, Pearson Shipping. The Jordanian Cassation Court dismissed the claim on the basis that the marine carrier is not the shipowner, but rather the party who is bound by virtue of the marine carriage contract to transport the goods. Thus, the Court decided the contractual liability of the charterer as a contracting party to the marine carriage contract embodied in the bill of lading. The Court held:

> 'Jurisprudence has argued that the marine carrier's liability is a contractual liability, whereas the liability of the ship's owner, who did not undertake the position of the carrier, should be determined on the liability in tort'.[522]

However, mere fault would not suffice to establish this liability unless the fault has caused damage to the shipper (seller or buyer) via a causal relationship linking the fault of the marine carrier to the damage that the shipper has sustained.

The marine carrier's fault

The fault committed by a marine carrier or its servants or agents is the first element on which this liability is established. This must be done by proving the fact of breaching the obligations imposed on the marine carrier by virtue of the marine carriage contract.[523] This fact can be derived from the bill of lading or any other documents issued by a marine carrier that might be used as prima facie evidence of taking or handing the goods over by the marine carrier or achieving the goods identification.[524]

To determine its liability arising in the context of transfer of risk in shipment sales, a marine carrier or its servants or agents must breach the obligation to take over the goods, which could hinder or prevent a transfer of risk between contracting parties to

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[522] Case No 2188/1998 Jordanian Cassation Court, Journal of Jordanian Bar [1999] 5 1297. The same meaning was adopted by the Jordanian Cassation Court in Case No 128/1985, Ala'a Fatehi Samad and Wadee' Salameh Sawaqed, *Judgements of the Cassation Court in the Commercial Cases* 174.
[523] Harris (n 36) 298.
[524] Ibid 297; Articles 16 and 18 of the Hamburg Rules 1978.

the shipment sale.[525] The fault of the marine carrier in this regard might be decided on the basis of the time of delivery or loading of the goods that has been expressly agreed upon between contracting parties to a marine carriage contract. Hence, the delay of the marine carrier or its servants or agents in taking delivery of goods from a shipper in shipment port or the delay in loading them onto the vessel is deemed to be a breach to the time agreed upon in the marine carriage contract. Such breach could be considered a fault interrupting the operation of the transfer of risk between parties to a shipment sale. However, contracting parties to a marine carriage contract may not agree on the time at which the goods have to be handed over to the marine carrier or the time of loading them onto the ship. Therefore, the fault of the marine carrier in delaying the operation of taking goods delivery in this case shall be determined on the basis of the reasonable time of taking the goods over by a diligent marine carrier performing this obligation under same circumstances.[526]

Another aspect of lack of performance can be seen in the refusal of the marine carrier or its servants or agents to take delivery of goods as prescribed in a marine carriage contract. Such fault can also prevent a transfer of risk between contracting parties to shipment sale. In order to determine whether or not the marine carrier is at fault, recourse should be made to the agreement of the contracting parties to a marine carriage contract, who may agree that the goods have to be delivered to the marine carrier in a specific point in land. This sort of agreement can be performed through a combined transport document issued by marine operator. Also, this could be applied in the context of FCA, CPT and CIP of the Incoterms Rules.[527] The imposition of the obligation of taking delivery by the marine carrier is set out in Article 4(1) of Hamburg Rules 1978, which states:

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[525] Article 67 of the CISG; Articles A5 and B5 of FOB, CFR and CIF of Incoterms 2010 Rules; Section 472 of the JCC.

[526] Reasonable time is that which can be derived from the applicable local and general customs, provided that circumstances of each case have been taken into consideration. This inference can be impliedly derived from Section 170 of the JMCL which declares: 'In all matters regarding which there is no provision in the agreement or the law, the judge shall apply local or general customs'. Also, Article 5(2) of the Hamburg Rules that has been dedicated to the delay in delivery in destination port. This article provides that: 'Delay in delivery occurs when the goods have not been delivered at the port of discharge provided for in the contract of carriage by sea within the time expressly agreed upon or, in the absence of such agreement, within the time which it would be reasonable to require of a diligent carrier, having regard to the circumstances of the case'.

[527] See Article A3(a) and A4 of CIP and CPT and also, Article A3(a), A4 and B3 of FCA, appendix I.

> 'The responsibility of the carrier for the goods under this Convention covers the period during which the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge'.

This Article provides that the obligation of taking delivery imposed on the marine carrier by virtue of a marine carriage contract entails that they should take a necessary action to take over the custody of goods that should be relinquished from the shipper to them in the port of shipment.[528] However, Section 211 of the JMCL contradicts this approach by determining the delivery of goods on the basis of shipping the goods on board the ship in the shipment port.[529] This contradiction has given rise to inconsistency between judgements of Jordanian Cassation Court.[530] Thus, it is suggested that the principle of transfer of custody should be applied on the obligation of the marine carrier to take the goods over, as Jordan is a contracting state to the Hamburg Rules that must prevail on the provisions of the JMCL, according to the principle of hierarchy of norms.

In order to define the applicable rules that may govern the liability of the marine carrier for the failure to transfer the risk, a distinction has to be drawn between the delivery under the contract of sale taking place outside the duration of the marine carrier's liability provided in the Hamburg Rules, and the delivery that will be carried out during this period. Namely, the delivery under the contract of sale involving carriage of goods by sea -performed through combined transport document- will take place before commencement of the duration of liability of the marine carrier enshrined in the Hamburg Rules.[531] Thus, the liability of the marine carrier for a failure of passing risk, that is based on the infringement of this delivery, will not be governed by the Hamburg Rules, rather, it must be governed by the general rules of the JCL and JCC. This is because the Hamburg rules shall regulate the liability of the marine carrier from

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[528] Astle (n 136) 304; Singh (n 146) 211; Harris (n 36) 297.
[529] Al-Ibrahim (n 18) 91; Shukri (n 18) 583, 584. Ababneh (n 13) 142.
[530] See Case No 1148/1992 Jordanian Cassation Court (n 498); Case No 340/1983 Jordanian Cassation Court (n 504); Case No 657/1984 Jordanian Cassation Court, Ala'a Fatehi Samad and Wadee' Salameh Sawaqed, *Judgements of the Cassation Court in the Commercial Cases* 172; Case No 855/1989 Jordanian Cassation Court, Ala'a Fatehi Samad and Wadee' Salameh Sawaqed, *Judgements of the Cassation Court in the Commercial Cases* 178; Case No 349/1983 Jordanian Cassation Court, Ala'a Fatehi Samad and Wadee' Salameh Sawaqed, *Judgements of the Cassation Court in the Commercial Cases* 169.
[531] This kind of delivery can be noted in CPT and CIP, where the goods' delivery and transfer of risk take place when the custody of goods be relinquished from the seller to the carrier in point of time precedes the arrival of goods at the port of shipment.

the moment the goods' custody transfers from the shipper to the marine carrier in the port of shipment, while the delivery under contract of sale associated with combined transport document must take place in earlier time.[532] However, the delivery to the marine carrier during the duration of liability of the marine carrier defined in the Hamburg Rules shall be governed by these rules. This delivery is observed under other types of sales of shipment such as CIF, CFR and FOB, through which the delivery obligation and transfer of risk take place when the goods are placed on board the vessel, the point of time that comes after the commencement of the duration of the marine carrier's liability under the Hamburg Rules.

Concerning the applicable rules on the liability of the marine carrier for non-passage of risk in destination sales like DAT, DAP and DDP is also within the duration of liability of the marine carrier under the Hamburg Rules; this is because a passage of risk under these terms shall take place before renouncing of the custody of goods from the marine carrier to the consignee in the destination port.[533]Also under destination sales the delivery obligation imposed on the marine carrier by virtue of the marine carriage contract is set out in Article 4(1) of the Hamburg Rules, which stipulates that the liability of the marine carrier terminates once they relinquish the custody of goods to the consignee in the destination port.

Contracting parties to a marine carriage contract may agree on the time at which the goods should be delivered by the marine carrier to the consignee in the destination port,[534] but if there is no agreement has been made in terms of the time of delivery at the destination port, the delay of the marine carrier in delivering the goods will be decided in accordance with the reasonable time of delivery.[535]

The basis on which the marine carrier would owe contractual obligation that may affect the time of transfer of risk can also be found in the agreement between the shipper and marine carrier in the marine carriage contract concluded in in the context of the destination sale.[536]The basis of delivery obligation imposed on the marine carrier can be derived from the provisions of Article 1(7) of the Hamburg Rules, which

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[532] Article 4(1) of the Hamburg Rules.
[533] As provided in Articles A4, A5 and B5 of DAT, DAP DDP.
[534] Sub-paragraph (*n*) Article 15(1) of the Hamburg Rules.
[535] Article 5(2) of the Hamburg Rules, Appendix I.
[536] This presumption is adopted in accordance with the principle of party autonomy.

provides that: '[t]he carrier undertakes to deliver the goods against surrender of the document'.[537] The delivery obligation norm can be derived from the agreement of the contracting parties to a marine carriage contract, and in the absence of such agreement a recourse should be had to judgements of Jordanian Cassation Court that have only recognised the actual delivery, as this delivery has been regulated neither under JMCL nor JCL.[538] However, the Hamburg Rules expressly recognises the delivery that does not amount to the actual delivery such as that which is made to custom authority or port authority in destination port.[539]

It might also be agreed that the delivery should be performed once the goods are shipped onto the vessel's board in the port of shipment, which is observed under CIF, CFR and FOB of the Incoterms Rules.[540] Refusal of marine carrier to allow such way of shipping in the agreed time is deemed to be an infringement to the obligation of taking delivery imposed on them by virtue of the marine carriage contract. This breach could be invoked so as to prove the fault of the marine carrier on which the liability owed in the context of transfer of risk can be decided. If there is no agreement on the time of loading the goods onto the ship, this time could be ascertained on the basis of the customary practice at the port of shipment.[541]

The fault of the marine carrier in delaying or refusing of handing the goods over to the consignee at the place of destination would further obstruct the risk transfer. The infringement of the marine carrier's commitment will also trigger its liability as it can be said to have hindered or obstructed transfer of risk between parties to a destination contract of sale.

The delivery under destination sales can be seen under DDP, DAT and DAP of the Incoterms Rules. The marine carrier can be deemed to be in breach of its obligation to transfer the risk in a destination sale associated with Incoterms 2010 Rules when it

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[537] See Article 1(7) of the Hamburg Rules, Appendix I.
[538] Case No 1943/1997 Jordanian Cassation Court (n 509).
[539] Article 4 of the Hamburg Rules.
[540] See Article A3(a) and A4 of CIF and CFR as well as, Article A3(a), A4 and B3 of FOB, appendix I.
[541] Al-Miqdadi (n 18) 119. This can be inferred from the provisions of Section 170 of the JMCL under chapter 1 of Chartering of Ships and Contracts of Affreightment. This Section declares: 'In all matters regarding which there is no provision in the agreement or the law, the Judge shall apply local or general customs'.

does not enable the buyer to take the goods over in the place of destination within the decided in accordance with the reasonable time of delivery.[542]

One of the important aspects of determining the applicable rules lies in the fact of identifying the principle on which such liability can be decided. Application of Hamburg rules entails that the liability of the marine carrier in the context of the passage of risk and ownership has to be determined on the basis of the 'presumed fault' as a general rule, and 'due diligence' as the exceptional rule.[543] In other words, to prove the fault of the marine carrier that has hindered the transfer of risk or ownership, the claimant only needs to prove that the marine carrier has infringed the obligation on which such passage is based, such as the obligation of taking delivery, handing over or issuing a bill of lading or any relevant shipping documents, where proving of any one of them shall suffice to prove the fault of the marine carrier.[544] However, the marine carrier can refute such liability if they prove that themselves, its servants or agents have exercised due diligence expected from a cautious person to obviate this fault and its consequences.[545]

In case that the general rules in the JCL and JCC should have the governance on the dispute arising in the context of such liability, applicability shall be given for Section 72(1) of the JCL.[546] It can be impliedly deduced from the provisions of this Section that the liability of the marine carrier for the transfer of risk and ownership is in accordance with the principle of 'Achieving Result'. However, this liability can be rebutted when the carrier proves that non-performance was attributable to force majeure or the fault of the shipper. Therefore, the marine carrier may rely on the false declaration of the shipper to rationalise non-issuance of a bill of lading which has resulted in hindering the passage of ownership in the fungible goods,[547] or he could assert the lack of delivery from the shipper's side or the delay of the consignee in

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[542] This can be derived from the provisions of Article 5(1) of the Hamburg Rules. See, Article A7 of DAT, DAP and DDP of the Incoterms 2010 Rules.
[543] Articles 4 and 5 of the Hamburg Rules 1978.
[544] Sultan (n 227) 246.
[545] Article 5(1) of the Hamburg Rules 1978.
[546] Section 72(1) of the JCL: 'The carrier shall be responsible for damage to, loss of and shortage of goods except for the case of force majeure, old defect in the movable property or fault of shipper'.
[547] Contrary to the provisions of the Hamburg Rules 1978, Article 216 of the JMCL has considered the false declaration of the shipper as one of the exemptions of the liability of the marine carrier for the damage to or loss of the goods and for the delay in delivery.

taking delivery; this is to discharge its liability for the failure in transferring risk and ownership, that could also be negated by proving force majeure.

The next implication of distinguishing the applicable rules on the liability of the marine carrier for the failure of passage of risk and ownership is observed in the matter of the exemptions and limitations of this liability. These exemptions and limitations cannot be asserted unless the liability of the marine carrier for the failure to transfer the risk and ownership falls within the duration of liability of marine carrier under the Hamburg Rules, i.e. the obligation of the marine carrier on which a transfer of risk and ownership is decided has to be performed while the goods are under the custody of the marine carrier from the port of shipment to the destination port.[548]

It can be inferred from the provisions of the JCC and JCL that the liability of the marine carrier for non-transfer of risk could be established on the principles of achieving result, where the fault of non-issuing a bill of lading or lack of delivery can be sufficient to rest the liability with the marine carrier for non-passage of risk.[549] This liability can be negated if the marine carrier proves that the non-passage was due to fault of shipper or force majeure, provided that the marine carrier's obligation triggering a passage of risk should have taken place outside the duration of liability under the JMCL.[550] Performing the aforesaid obligation during the period of liability under the JMCL can further entitle the marine carrier to assert the exemptions and limitations set out in the JMCL.[551]

However, under the provisions of the JCC, the marine carrier's liability for the failure in transferring risk would be considered if the marine carrier did not take the delivery of goods at the port of shipment or if it did not produce the bill of lading that represented the shipped goods because transfer of risk under the JCC not only hinges solely on actual delivery of conforming goods but also on tendering of the shipping documents.

Since the time of transfer of risk has not been clearly recognised in any of its judgments, the Jordanian Cassation Court came to an incorrect conclusion in a case

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[548] Article 4 of the Hamburg Rules.
[549] This presumption is induced from Sections 490 and 472 of the JCC as well as Section 72(1) of the JCL.
[550] Section 72(1) of the JCL.
[551] Sections 211, 213 and 214 of the JMCL.

filed by a buyer against a shipper (seller) and marine carrier for damage to a consignment of rice transported and delivered by the latter.[552] The shipper invoked the time of transfer of risk in the shipment sale where he asserted that the risk transmitted to the buyer when the goods passed the rail of the ship in the shipment port.[553] However, the Court placed the liability with the shipper (seller) as a contracting party to the marine carriage contract, rather than the contract of sale. Accordingly, the Court ruled:

> '1. The enforcement of the marine carriage contract entails that both parties (Shipper and Marine Carrier) perform certain obligations imposed on them in Sections 213, 214 and 216 of the JMCL. Therefore, one may believe that it is unfair to presume that the shipper's role ends once the goods pass the rail of ship in the port of shipment.
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> 2. A bill of lading is an accredited document for the fulfilment of the obligation of taking and handing the goods over.
>
> 3. Pursuant to Section 214 of the JMCL, the shipper shall remain party to the bill of lading from shipping time until the ship's arrival at the destination port or discharging port'.

It can be noted that no distinction has been drawn between the delivery imposed by virtue of the marine carriage contract and that which is prescribed in the contract of sale, where the delivery under the marine carriage is envisaged under the provisions of Section 214 of the JMCL that determine the duration of the liability of the marine carrier for loss of or damage to the goods and delay in their delivery, whereas the delivery imposed by virtue of the contract of sale is prescribed for the purpose of the transfer of risk.[554]

One may also argue that the judgment focusses on the marine carriage contract concluded between the shipper and marine carrier, whereas the court should have resorted to the provisions of the contract of sale to which the injured buyer (Consignee) and the seller (shipper) had committed. This is because the time of the transfer of risk is determined by the delivery imposed by virtue of the contract of sale, rather than that

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[552] Case No 619/1990 Jordanian Cassation Court, Journal of Jordanian Bar [1991] 9-11 2106.
[553] This is the time at which the risk is deemed to be transferred between contracting parties to shipment sales and is prescribed in the earlier Incoterms 1990 Rules.
[554] Article 67 of the CISG; Articles A4, A5 and B5 of the Incoterms 2010 Rules; Section 472 of the JCC.

which has been imposed in the marine carriage contract to determine applicability of the provisions of the JMCL on the marine carrier's liability.

Concerning the current situation under Jordanian law, the time at which the goods are taken over by the marine carrier shall be determined in accordance with the provisions of the marine carriage contract ruled by the Hamburg Rules, which deviates from that which is adopted under the provisions of the contract of sale ruled by the JCC, on which a transfer of risk shall be decided.[555] Handing goods over in accordance with the contract of sale governed by the JCC does not suffice to discharge the delivery obligation on which a transfer of risk shall be decided unless two conditions have already been satisfied:[556] conformity of goods and the surrendering of shipping documents by the seller.[557]

The marine carrier's fault can also be seen through the issuance of a bill of lading or some shipping documents. Issuing a document other than a bill of lading can only be used as *prima facie* evidence of the conclusion of the marine carriage contract and the fact of taking over of the goods -embodied in this document- by the marine carrier.[558] The legal basis on which the contractual obligation to issue a bill of lading is imposed on the marine carrier or its representative is set out in Article 14(1) of the Hamburg Rules, which stipulates that the marine carrier must issue a bill of lading once they undertake a custody of goods, provided that the shipper has demanded this issuance, whereas the legal basis of this obligation can be found neither in the JCL nor the JMCL.[559] Not issuing a bill of lading or omitting some essential facts in such a bill can negatively affect the interests of the shipper (seller or buyer), who might rely on such contents to prove transfer of risk to rebut its liability for the passage of risk in the context of the shipment sale governed by Article 67 of the CISG. Thus, the marine carrier might be liable for obstructing a transfer of ownership in fungible goods as such a liability could be established on the fault of the carrier of issuing a bill of lading

[555] According to Sections 472, 490 and 489 of the JCC, the risk will transfer to the buyer once the goods conforming to the sale contract are delivered along with its accessories, including a bill of lading. Also, Article 4(2) of the Hamburg Rules 1978.
[556] Section 211 of the JMCL; Section 472 of the JCC.
[557] Sections 489 and 490 of the JCC.
[558] Article 18 of the Hamburg Rules. Appendix I.
[559] See Article 14(1) of the Hamburg Rules, Appendix I.

or any other shipping documents that might be used by the seller for the purpose of identifying the sold goods.[560]

Not issuing a bill of lading can be one of the marine carrier's faults that may hinder the operation of a transfer of ownership, as the seller will be deprived of performing the obligation of identification of goods prescribed by the JCC as a prerequisite condition for a transfer of ownership in fungible goods.[561] Presumed fault could further be considered for the sake of determining the liability of the marine carrier for the failure to passage of ownership in the fungible goods where a contracting party to a contract of sale can invoke the failure to issue a bill of lading or ship's delivery order imposed on the marine carrier by virtue of the marine carriage contract, with a view to proving liability of the marine carrier for failure of transfer of ownership.[562]

The fault of the marine carrier can be clearly realised in the contents of the bill of lading, mate's receipt, ship's delivery order, multimodal transport document and other shipping documents that may satisfy the obligation of identification of goods, if the marine carrier disregards or omits some key details or facts that should be included in these documents.[563] The marine carrier's obligation to include the main contents of the bill of lading is imposed by virtue of Article 15(1) of the Hamburg Rules.[564] Namely, the marine carrier would be in breach of its obligation to issue a bill of lading if they overlooked any of the contents of the bill of lading provided in the aforementioned Article. This, in turn, could prevent, obstruct or delay transfer of ownership in fungible goods that hinges on identification of goods. For example, disregarding the issuing of a date in a bill of lading will give rise to ambiguity over the time at which the goods' identification has been made which will result in

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[560] Section 1147 of the JCC. The role of the bill of lading as one of the means of identification, which might be used for the purpose of the passage of ownership, can be inferred from the provisions of Section 67(1) of the CISG.
[561] The role of goods' identification that can be achieved through the bill of lading is set out in Articles 67(1) and 69(3) of the CISG, while it can be implicitly derived from the provisions of Section 1174 of the JCC.
[562] The role of the bill of lading that may be performed in the context of the goods' identification can be inferred from the provisions of Article 67(2) of the CISG in which it is provided that the identification could be performed by the shipping documents.
[563] This effect can be inferred from the provisions of Section 201 of the JMCL, which declares: 'Any copy of the bill of lading which does not contain the aforesaid particulars may only serve as inconclusive written evidence which may be corroborated by oral testimony'. See *Video Cameras and Equipment* case (n 291).
[564] See Article 15(1) of the Hamburg Rules, Appendix I.

difficulty over the time of transferring the ownership. Also, the fault of not including the date of taking the goods over by the carrier at the port of shipping will complicate the process of determining the time of transfer of risk, as this fault will lead to a vagueness regarding the time of handing the goods over to the marine carrier or the time of shipping the goods on board the ship.[565]

The significance of the bill of lading has been illustrated by the judgments of the Jordanian Cassation Court which has assumed that it is a shipping document that contains the key facts of the shipped goods, comprising type, quantity, quality and weight of the sold goods.[566] Furthermore, the fault of the marine carrier arising under the issuance of a bill of lading or its contents could also be witnessed in a transfer of ownership and risk in the goods sold in transit, with such passage not taking place unless the negotiable bill of lading is already produced by the marine carrier.[567] Hence, the marine carrier's fault in not issuing a bill of lading or a ship's delivery order, in relation to bulk goods, or even omitting the date of issuance, can make it liable for hindering or obstructing a transfer of risk or ownership under the provisions of the JCC.

Likewise, the marine carrier's fault of issuing a bill of lading without incorporating the feature of negotiability shall deprive the endorser of the ability to enforce a contract of sale in transit because such a bill would not enable them to sell the goods in transit.[568] As the contract of sale has not been proved, in this regard, neither transfer of risk nor ownership can be reflected from the endorsement that has been inserted in such a bill. The obligation of the marine carrier to include the expression of negotiability in the bill of lading can be derived from provisions of Section 205 of the JMCL, provided the contracting parties to the marine carriage contract have agreed to be a negotiable bill of lading, while the legal basis of this obligation has neither been embraced under the provisions of the JCL nor the JMCL.[569]

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[565] See subparagraph (f) of Article 15(1) and Article 15(2) of the Hamburg Rules.
[566] Case No 433/1985 Jordanian Cassation Court, Ala'a Fatehi Samad and Wadeea' Salameh Sawaqed, *Judgements of the Cassation Court in the Commercial Cass* 175.
[567] Articles 204 and 205 in which it is stated that for the sake of the negotiability of the bill of lading, such a bill must be made to order. Also, the term 'negotiable' should be inserted in addition to the number of original bills. Al-Qudah and Ziyadat (n 82) 164, 168.
[568] This obligation is imposed on the marine carrier by virtue of Section 205 of JMCL, which has been analysed under the title of negotiability of bill of lading of this study.
[569] See Sections 204 and 205 of the JMCL, appendix 2.

With a view to determining contractual fault, a distinction should be drawn between intentional and unintentional fault. The marine carrier will remain responsible for intentional fault, and thus would neither be able to insure such liability nor be entitled to the exemptions thereof.[570] However, unintentional fault of the marine carrier confers on it the right to refute the liability for transfer of risk and ownership, which can be achieved by proving the extraneous reason or exercising due diligence expected from a cautious carrier under same circumstances.[571]

The damage

The damage that the shipper or consignee may sustain is the second element of the contractual liability of the marine carrier that arises under the transfer of risk and ownership in a contract of sale involving carriage of goods by sea. With this, the marine carrier shall not assume liability for lack of transfer of risk and ownership unless the shipper has suffered direct damage that resulted from a breach of the carrier's obligation levied by virtue of the marine carriage contract.

The damage has to be a 'natural result' due to the fault of the marine carrier which might be embodied in physical damage or loss of goods, or it could be embodied in additional expenses incurred by the contracting party. Determining direct damage on the basis of 'natural result' means that the creditor (buyer or seller) was not able to obviate this result through reasonable efforts.[572]

Therefore, the 'natural result' is conceivable under the transfer of risk where the shipper would have no ability to transfer the risk to the buyer unless the marine carrier takes or hands the goods over in accordance with the provisions of the JCC, CISG or the Incoterms 2010 Rules, as the case may demand.

It can be seen from the provisions of the JCC that the fault of not issuing a bill of lading cannot be overridden by the seller, who should tender such a document to enable the risk transfers to the buyer.[573] The non-issuance of the bill of lading or any

[570] Section 358(2) of the JCC provides: 'In any case the debtor shall remain liable for its deceit or gross default'. Sultan (n 227) 232.
[571] Section 448 of the JCC; Article 5(1) of the Hamburg 1978 Rules.
[572] Sultan (n 227) 242.
[573] Section 490 of the JCC.

essential shipping document used as an identification tool might also hinder transfer of ownership as this may lead to direct damage to the shipper or consignee.[574]

Contracting parties to international sale might negatively be affected by the fault of the marine carrier in different cases. For example, a non-transfer of risk resulted from the fault of the marine carrier in not issuing of bill of lading,[575] or in disregarding the name of the consignee,[576] will result in depriving the buyer (consignee) of recovering the damages resulted from loss of goods from the insurer, because the risk has not yet transferred to them.[577] Omitting name of the consignee from the bill of lading or non-issuing of bill of lading may also postpone the operation of transfer of ownership in fungible goods sold via international contract of sale, as the goods had not been identified to the sale contract, which supposed to be done through issuance of bill of lading. This fault and the fault of omitting expression of negotiable could result in a damage to the buyer who will be deprived of re-selling the goods in transit, the case in which the consignee (buyer) might bear liability in front of sub-buyer as they could not fulfil the obligation of endorsing the bill of lading or because of the reason that the endorsement on the bill of lading is in effective as it has been made on a non-negotiable bill of lading. Further, the suspension of the sale contract or a non-passing of ownership resulted from the fault of the marine carrier in omitting fundamental particulars may result in the buyer refraining from concluding the contract of sale, the case in which the seller will suffer the loss of profit.

The marine carrier's fault of delaying its performance of taking the goods over from the shipper in the port of shipment or the delay in handing them over in destination port may increase the possibility of damage to the goods, as this delay may contribute in extending the period of shipping during which the goods will be exposed to different kinds of risk its variety depends on the nature of the goods. This could result in a complexity in determining the time at which the damage has occurred and hence, the damaged party may lose its insurance coverage due to this ambiguity that might be

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[574] Section 1147 of the JCC.
[575] This is deemed to be a breach to the obligation of issuing a bill of lading imposed by virtue of Article 14(1) of the Hamburg Rules.
[576] Disregarding name of the consignee is considered to be a breach to the marine carriage under the provisions of Article 15 of the Hamburg Rules, whereas this cannot be considered as a breach to the marine carriage contract under Section 200 of the JMCL, which does not stipulate inclusion of the consignee's name to the bill of lading. See Article 200 of the JMCL in Appendix II.
[577] See case *Video Cameras and Equipment* (n 291).

resulted from the elapsing of the period of action as the party was not sure about its right to recourse to the insurer for a compensation.

It is important to note that the marine carrier's liability for lack of transfer of risk in shipment sales is allocated in accordance with its obligation to take the goods over by virtue of the marine carriage contract, but this would not be sufficient to allocate such liability, unless the relation between lack of delivery under marine carriage contract and non-passage of risk has been proved. This relation can be substantiated by having recourse to the rule of delivery envisaged in the contract of sale rather than that is prescribed under the provision of the marine carriage contract ruled by the Hamburg Rules or by the JMCL.[578]

Penalty clause is the another aspect that may negatively affect the interest of contracting parties to the contract of sale, as a consequence of the fault of the marine carrier in hindering or preventing the operation of transfer of risk or ownership, where the seller might incur extra expense vis-a-vis the buyer for a non-fulfilment of the obligations of the contract of sale that have adversely affected the implications of this contract, particularly in terms of passage of risk and ownership. For instance, a non-issuing of bill of lading could postpone the operation of transfer of ownership. This in turn, will not allow the buyer to resell the goods in transit and hence, the buyer will suffer the loss of profit or even will bear extra expenses attributable to the penalty clause.

In accordance with the provisions of the 'subsidiary responsibility', the principal shall be liable for the fault of the subsidiary, although the principal can resort to the subsidiary to recover in accordance with the 'contractual responsibility'.[579] Hence, the marine carrier might be entitled to compensation from the subsidiary (servant or agent) as it made the marine carrier liable for the failure in transfer of risk or ownership.

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[578] Sections 472,489 and 490 of the JCC.

[579] Sultan (n 227) 236. According to Section 288 of the JCC: '1 No person shall be liable for the act of another and yet the court may on the application of the injured person and if it finds it justifiable hold liable for the awarded damages: … b Any person who had actual power to supervise and direct the person who had inflicted the damage even though he himself had no free choice if the injurious act was committed by the supervised person while or because of performing the duties of its post. 2 And the person who pays the damages may revert for them on the person adjudged to pay them'.

The causal relationship

The causal relationship under any contract has two aspects. The first is the presumed relationship between non-performance and fault where the debtor is obliged to achieve a result, and the second is the relationship between the fault committed by the debtor and the damage endured by the creditor.[580] The shipper is only compelled to prove that the marine carrier did not perform the relevant obligation which is considered as a presumed fault for the purpose of placing liability for non-passing of risk or ownership on the seller. To prove the liability of the marine carrier for failing to transfer risk and ownership, the damage incurred should be linked to the fault of the carrier based on breach of obligations arising from the contract of sale, which can be substantiated by having recourse to the rules of the contract of sale with respect to passing of risk and ownership. This can be refuted when the carrier proves that non-performance was imputable to force majeure or the fault of the shipper or consignee, or they might assert the exercising of due diligence to refute this liability.[581]

A breach of the marine carrier's obligations imposed by virtue of the marine carriage contract shall confer on another party the right to damages if the fault attributable to the marine carrier is deemed to be a contractual breach.[582]

However, it is important to clarify the position of the consignee (seller or buyer), who is not a party to a contract of carriage concluded with a marine carrier, as the nonexistence of the contractual relationship might result in establishing the claim of the consignee on the basis of tortious liability instead of contractual liability. The consignee in the position of non-contracting party to the marine carriage contract can find the legal basis to sue the marine carrier in the general rules of the contract of carriage set out in the JCL, which are deemed to be an exception to the principle of privity of contract. Pursuant to Section 73 of the JCL:

> The consignee has the right to bring a direct action against the carrier in terms of the contract that has been concluded between the carrier and the shipper whereby he will be entitled to claim delivery or

[580] Sultan (n 227) 246.
[581] Section 72(1) of the JCL.
[582] Girvin, *Carriage of Goods by Sea* 160.

> compensation where appropriate for the lack of completion the duty in whole or in part.[583]

This Section provides that the consignee, who is not a party to the contract of carriage, is entitled to direct action against a marine carrier, through which he can enjoy the same rights as the contracting party (shipper). Namely, the buyer who has not concluded the marine carriage with the marine carrier, can claim the goods' delivery in destination and likewise, has the right of indemnification in case of the goods' damage or loss, both of which would be established on the basis of the contractual relationship. In other words, the buyer in this case can sue the marine carrier for failure of passing of risk and ownership in accordance with the provisions of the contractual liability, though the buyer was not a contracting party to the marine carriage contract.

It can further be inferred from the principle of privity of contract that the seller, who has not concluded the marine carriage contract, would not be able to sue the carrier on the basis of contractual liability.[584] This is because the seller in this case is neither a party to the contract of marine carriage nor has been granted such a right under Jordanian law. Thus, the liability of the marine carrier for non-passage of risk and ownership in this case shall be based on the rules of liability in tort, as no privity of contract exists between the seller and the marine carrier.

6.2.3.2 Tortious liability for non-transfer of risk and ownership

Tortious liability is assumed when the person infringes a commitment not to harm others which is imposed by virtue of the law.[585] Namely, tortious liability is the basis on which the liability shall be determined where no contractual relationship exists between a claimant and tortfeasor. In order to determine the tortious liability of the marine carrier against a non-contracting seller, recourse has to be made to the general rules of the JCC as the relevant rules of the marine carrier's liability in international conventions and Jordanian law have not regulated this kind of liability. Liability in

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[583] Direct Action is: a legal means by which the creditor, in its name and for its account, is entitled by a legal provision to have recourse against the debtor's debtor for the purpose of collecting its debt. Yassin Mohammad Al-Jbouri, 'Direct Action in Jordanian Civil Law' (2012) 94(260) Journal of Sharia and Law 6.

[584] The position of the seller in this case is observed in FOB and FCA, through which the carriage operation has to be on the buyer's account, who should conclude the contract of carriage with the carrier.

[585] Sultan (n 227) 288.

tort is based on three elements: an injurious act, damage to a party to the contract of sale (non-contracting party to contract of carriage), and a causal relationship.

Concerning the injurious act, the JCC establishes that: '[e]very injurious act shall render the person who commits it liable for damages even if he is a non-discerning person'.[586] This means that the injurious act does not stipulate that the person should be at fault but rather, any harmful act could raise the liability of the person who has made it.

Therefore, the marine carrier's act of not taking delivery or not issuing a bill of lading or a delay in performance will negatively affect the interest of the third party to the marine carriage contract, i.e., the seller in the FOB and FCA, as they could be responsible against the buyer for non-transfer of risk or ownership both of which deemed to be among the main implications of the contract of sale. The damage in this case can be seen through the penalty clause which will be applied once a party to a contract of sale infringes an obligation levied on them by virtue of the contract of sale.

To allocate the tortious liability under the provisions of the JCC the injurious act should cause damage to the person concerned.[587] Hence, to establish tortious liability with the marine carrier, the seller should have been subjected to damage attributable to the marine carrier's failure in passing of risk or ownership.

However, the marine carrier would not be subject to a tortious liability unless the injurious act, committed by it or its servants or agents, was the reason that caused the damage to the contracting party to a contract of sale (the seller in FCA and FOB) and hence, the injured is required to prove the relationship between the damage sustained in the context of non-transfer of risk and ownership and the injurious act of the marine carrier that had caused the non-passage of risk or property.

It is worth mentioning that the marine carrier will be deprived of asserting limitations and exemptions of liability in the context of the tortious liability. This is because these limitations and exemptions are only applied under the contractual liability incurred within the duration of liability enshrined in the Hamburg Rules.[588]

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[586] Section 256 of the JCC.
[587] Sultan (n 227) 330.
[588] Article 4 of the Hamburg rules. Appendix I.

6.2.4 Compensation for damage due to passing of risk and ownership

If a contracting party has infringed the contract, the injured party will be indemnified on the basis of the position he would have been in had the contract been appropriately performed.[589] Unfortunately, neither the Hamburg Rules nor the provisions of JMCL have set out guidelines on which compensation can be assessed with respect to the liability of the marine carrier for the failure of transfer of risk and ownership. Neither has the rule on which compensation can be determined in terms of the liability of the marine carrier for loss of or damage to the goods or delay in delivery been specified.[590]

Given the ambiguity of the provisions of the Hamburg Rules and the JMCL, two rules have been suggested to be adopted to assess the amount of indemnification that shall be paid by a marine carrier to a shipper.[591] The first requires that the indemnity shall be assessed on the basis of a bill of lading where the indemnification amount would be derived from the goods value inserted in the bill of lading in accordance with the declaration of the shipper, unless decisive evidence provides otherwise.[592] The second could be applied when the value of the goods has not been declared by the shipper or where the goods' value has been disregarded in the bill of lading provided no objection has been made by the shipper.

Under the second rule, the liability of the marine carrier will be limited to a certain amount designated for each unit, with the indemnification not exceeding the actual value of the unit.[593]

To evaluate the liability of the marine carrier following a failure of transfer of risk and ownership, a distinction must be drawn between whether the breach of the marine carrier has taken place outside the duration provided in the Hamburg Rules, or whether it has occurred during this period, as the marine carrier in the former case would be deprived to benefit from the exemptions and limitations provided in the Hamburg Rules, contrary to the second scenario in which the marine carrier would be entitled to invoke such exemptions and limitations. However, the fault of the marine carrier may

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[589] Girvin, *Carriage of Goods by Sea* 160.
[590] Shukri (n 18) 658.
[591] Ibid 659.
[592] This assumption has been derived from the provisions of Article 214 of JMCL and Article 4(5) of the Hague-Visby Rules, while the Hamburg Rules 1978 do not mention this.
[593] Article 6 (1)(a) of the Hamburg Rules 1978.

not result in damage to or loss of goods, rather, it could only lead to additional expenses or economic loss caused to contracting parties to the contract of sale.

The two earlier rules suggested to be adopted to measure the amount of indemnification do not apply where economic loss is borne as a consequence of a failure of transfer of risk and ownership, even though the goods are not physically damaged or lost. Thus, for the purpose of determining compensation for such expenses, recourse should be made to the relevant general rule in the JCC.[594]

The general rule of the JCC provides that, regardless of the loss of profit, the measurement of compensation should be based on the actual damage as long as the compensation is determined neither in by the designated law nor by the parties' agreement.[595] This rule can be applied to the two cases of compensation arising from the failure of the marine carrier in operating transfer of risk and ownership which has resulted in loss of or damage to the sold goods. However, should a contracting party to a contract of sale only have endured economic loss, then the compensation must be limited to the actual expenses regardless of the loss of profit, provided that the liability has been established based on the contractual liability.

Hence, one cannot agree with the conclusion reached by the Jordanian Cassation Court in a lawsuit brought by a consignee against a marine carrier for the purpose of claiming indemnification for the damage that the shipped goods had sustained during carriage. It ruled that:[596]

> 'By virtue of Section 266 of the JCC, the damage shall be evaluated in accordance with the amount of the damage inflicted on the injured person and thus, the amount of damage should be measured upon the goods' value when it has been received, which comprises, in addition to the value of the goods in country of origin, the freight that has been paid for carriage from the country of origin to Aqaba Port'.

It can be seen that, since the rules for assessing the amount of the compensation have been omitted under the Hamburg Rules and JMCL, the Court resorted to provisions of Section 266 of the JCC to assess the compensation that had to be paid to that claimant by the marine carrier. The Court should have resorted to Section 363 of the JCC that

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[594] Section 363 of the JCC: 'If the damages shall not be estimated under the law or in the contract the Court shall estimate them as those equal to the actual damage at the time it was inflicted'.
[595] Sultan (n 227) 244.
[596] Case No 1317/1992 Jordanian Cassation Court, Journal of Jordanian Bar [1993] 10-11 2081.

addresses assessment of damage arising from contractual liability rather than Section 266 of the JCC which deals with the damage resulting from the injurious act. This is because the consignee is deemed to be a party to the contract of carriage, which entails that the compensation should be assessed in accordance with the contractual liability provided in Section 363 of the JCC.[597]

The importance of applying Section 363 of the JCC instead of Section 266 lies in the fact that the compensation under the latter shall be estimated from the amount of the inflicted damage and the loss of profit, contrary to the way of measurement set out in Section 363 of the JCC which is solely determined by the actual damage without embracing loss of profit. Section 266 of the JCC states that:

> 'Damages shall in all cases be estimated by the amount of the damage inflicted on the injured person and its loss of profit provided that the same shall be the natural result of the injurious act'.

This argument is supported by the approach that the Court has adopted in many cases where it clearly held that the marine carrier's liability is based on the principle of contractual liability.[598]

Section 266 should be applied where the contracting party to a contract of sale (seller) is not a contracting party to the marine carriage contract.[599] Therefore, the liability for a non-transfer of risk and ownership has to be decided in accordance with the rules of tortious liability. This assumption is derived from the principle of privity of contract, as explained earlier in this study.

The marine carrier's failure in terms of transfer of risk and ownership should be indemnified if the failure has caused damage or loss to the goods, or if additional cost has been incurred by a contracting party to a contract of sale due to this failure, even though neither the damage nor the loss has been sustained by the goods in subject.

6.3 Summary

Like the liability of the marine carrier for damage to or loss of goods and delay in delivery, the liability of the marine carrier for a failure in the transfer of risk and

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[597] See Section 73 of the JCL.
[598] This approach was confirmed in Case No 2188/1998 Jordanian Cassation Court, Journal of Jordanian Bar [1999] 5 1297.
[599] This is noted under FOB and FCA sales.

ownership might be a contractual liability. Also, this failure can be determined according to the liability in tort, if the contracting party to the sale contract has no privity of contract with the marine carrier. This inference can be drawn from the judicial consensus in the judgments of the Jordanian Cassation Court in terms of the liability of the marine carrier for the damage to or loss of the goods and delay in delivery. The contractual liability of a marine carrier arising under passing risk and ownership must be determined in relation to the infringement of the obligations of the marine carriage contract incorporated in the contract of sale. The liability for transfer of risk under the shipment sale must be established according to whether or not the marine carrier had breached its obligation to take the goods over in the shipment port or for infringement of the obligation of issuing the relevant shipping documents. However, the liability of the marine carrier in terms of transfer of risk under the provisions of the destination sale contract shall be established on the fulfilment of the marine carrier's obligation of handing the goods over at the destination port or non-issuing of related documents.[600]

For the purpose of determining the liability of the marine carrier for the failure in transfer of risk in shipment sales, a distinction should be drawn between the concept of delivery -stipulated to specify the duration of the liability of the marine carrier for loss or damage to goods and delay in delivery- on which the fault of the marine carrier should be considered,[601] and the concept of the delivery imposed by virtue of the contract of sale on which the relationship can be substantiated between marine carrier's fault and the damage arising from non-passage of risk in order to allocate the liability on the marine carrier.[602] The person in charge of solving a dispute arising in this respect has to distinguish between the delivery envisaged to delimit the scope of the liability of the marine carrier for loss of, damage to goods and delay in delivery in the destination place under the Hamburg Rules,[603] and the delivery stipulated for the purpose of the transfer of risk in the destination sales,[604] where the second delivery

[600] Article 69(2) of the CISG; Articles A4, A5 and B5 of DAT, DAP and DDP of Incoterms 2010 Rules.
[601] Article 4(2)(a) of the Hamburg Rules 1978; Section 211 of the JMCL.
[602] Article 31(a) of the CISG; Article A4 of CIF, CFR and FOB of Incoterms 2010 Rules.
[603] Article 4(2)(b) of the Hamburg Rules 1978; Section 211 of the JMCL.
[604] Article 31(a) of the CISG; Article A4 of DAT, DAP and DDP of Incoterms 2010 Rules.

should be considered for the purpose of proving the liability of the marine carrier for transfer of risk.

The situation becomes more complicated under Jordanian law for two reasons. The first, which can be attributed to the fact that Jordan has not ratified the CISG, is that the guidelines for delivery that determine the transfer of risk must be derived from the provisions of the JCC which are not a good fit to regulate the handing and taking over of goods performed by a marine carrier.[605] The second relates to the rule of delivery adopted to determine the scope of liability of the marine carrier for loss or damage to goods or delay in delivery as the JMCL adopts a principle that differs from that adopted under the Hamburg Rules, and so such incompatibility creates a difficulty regarding the liability of the marine carrier, particularly as both legislations belong to the Jordanian legal system. Due to this, the study recommends that Jordanian law should adopt the approach of the Hamburg Rules that has been ratified by Jordan, which should be given priority of application in accordance with a hierarchy of norms.[606]

With respect to the liability of the marine carrier under a transfer of ownership in fungible goods, it can only be established on issue of shipping documents that satisfy the requirement of identification, such as a bill of lading, mate's receipt, ship's delivery order or multimodal transport document, where the seller will be able to assert the fault of the marine carrier for not issuing such documents, deferring issue or disregarding some of their contents to place the liability for failure in the passage of ownership on the marine carrier's account.

Neither the Hamburg Rules nor the JMCL address the responsibility of the marine carrier to issue documents or a bill that complies with the conditions agreed on between parties to a contract of sale, such as the negotiability feature of the bill of lading. Thus, recourse should be made to the general rules of contract set out in the JCC which might also give rise to ambiguity in terms of the legal effect of these documents on passage of ownership as their rules have not been tailored to fit the contract of sale involving carriage of goods by sea. The estimation principle of the damage to the injured seller arising from a non-passage of ownership and risk is not

[605] Sections 489 and 490 of JCC.
[606] Article 4(2) of the Hamburg Rules 1978.

provided either in the Hamburg Rules or in the JMCL. Consequently, the JCC is be resorted to, which may also result in imperfect conclusions or judgments.

The obstacles encountered in the regulation of liability of the marine carrier in terms of the transfer of risk and ownership might be eliminated if it is regulated under the provisions of international conventions, as particular rules could unify these rules. Concerning the position of Jordanian law, one may propose that Jordan should take a step forward to ratify the CISG as it is devoted to governing international contracts of sale, including those involving carriage of goods by sea, and through this the interrelationship between the contracts could be clearly identified.

To resolve the incompatibility in the provisions of the JMCL and the Hamburg Rules, Jordan should modify the JMCL to be in line with the Hamburg Rules which occupies a higher legal position than what the JMCL enjoy. With this, the overlap between the implications of the contract of sale and the marine carriage contract can be identified and amended, which in turn will contribute to resolving the contradiction between the aforesaid judgments.

Chapter 7. Conclusion

The interrelationship between the contract of sale and the marine carrier requires that the contract of sale should involve carriage of goods by sea, which confers on the marine carrier the ability to operate transfer of risk and ownership between parties to a contract of sale.

The analysis of the relevant provisions of Jordanian law reveals that the role of the marine carrier in the transfer of risk and ownership cannot be easily identified. Rather, the implied meaning extracted from the general rules of the JCC and the provisions of the CISG, Incoterms 2010 Rules and Hamburg Rules can be used to recognise the functions. However, the aim of assuming applicability of the optional rules (CISG and Incoterms Rules) is to examine the international approach regarding that role.

Uncertainty over the marine carrier's role under Jordanian law has given rise to ambiguity over the time of transfer of risk and ownership and the liability borne in the context of such transfer. This is clearly identified in the contract of sale involving carriage of goods by sea, which has also affected the consistency of judgments of the Jordanian Cassation Court. However, the uncertainty under the JCC is attributable to the fact that it does not address the contract of sale involving carriage of goods by sea, but only regulates the general rules of the contract of sale.

Examination of the CISG shows that it addresses the general rules of the international contract of sale, but within this the role of the marine carrier in operating transfer of risk and ownership is not clear, as the CISG has been designed to apply to contracts of sale that may involve different modes of carriage. Therefore, the CISG rules are applicable to the contract of sale, whether or not they involve carriage of goods and irrespective of the mode of carriage. The second aspect of the vagueness of the role of marine carrier under the CISG is related to passage of ownership, which is disregarded in the provisions of the CISG, as it is impossible to unify the rules of transfer of ownership due to the various principles adopted under the different jurisdictions.

The function of the marine carrier in affecting the rights and obligations of parties to a contract of sale which can be seen under the provisions of the CISG, can only be recognised under passing of risk between parties to a contract of sale involving carriage of goods by sea, which is regulated under the provisions of Articles 67 and 68 of the CISG, whereas

such role can be impliedly derived from Article 69(2) that might be applied to destination contract of sale.

Unlike the CISG, the Incoterms 2010 Rules are explicit on the role of the marine carrier in a transfer of risk. These rules have embraced some specific terms designed only for the contract of sale associated with marine carriage, such as those embodied in CIF, CFR and FOB. However, the role of the marine carrier in operating a passage of risk between contracting parties to contract of sale could impliedly be derived from Articles A4 and A5 of FCA, CPT and CIP as shipment contracts, and Articles A4 and A5 of DAP, DAT and DDP as destination contracts, that all can be applied to different modes of carriage.

These Articles offer guidelines on delivery and rule of transfer of risk in the contract of sale involving carriage of goods by sea in particular, and also a transfer of risk in string sales. However, in terms of the transfer of ownership between parties to a contract of sale involving carriage of goods by sea, the Incoterms 2010 Rules have adopted the same approach under the CISG of omitting passage of ownership.

In the absence of rules of transfer of ownership under the CISG and the Incoterms 2010 Rules, if the rules of conflict of laws so indicate, the JCC should be the legal text that governs the matter.

Under the JCC, transfer of ownership is dealt with in the general context of the contract of sale within which the function of the marine carrier with respect to passage of ownership cannot be illustrated. Hence, although transfer of ownership has been excluded from the scope of the CISG and Incoterms 2010 Rules, the role of the marine carrier in the transfer of risk under the JCC may not be easily clarified save by resorting to the relevant provisions of the CISG and Incoterms 2010 Rules, in which the marine carrier's position is explicit.

The study also found that, due to the role of the marine carrier in influencing transfer of risk and ownership in the contract of sale involving carriage of goods by sea, the marine carrier might incur a liability to the parties to this contract if the carrier impedes or prevents the transfer of risk or ownership. This liability has neither been regulated in the international conventions nor in the domestic laws, as all been dedicated to addressing the liability of the marine carrier for loss of or damage to shipped goods and for delay in delivery.

Because of the absence of international and national rules governing the liability of the marine carrier under the transfer of risk and ownership, the general rules of the applicable domestic law shall apply to this kind of liability. Presuming that Jordanian law is the applicable law, recourse shall be made to the general rules of contractual liability in the JCC to identify the legal basis on which the liability of the marine carrier for the passing of risk and ownership can stand.

However, the study also found that the liability of the marine carrier for the failure in transfer of risk and ownership could be established on liability in tort, provided that the contracting party to the contract of sale involving carriage of goods by sea (claimant) is not a party to the marine carriage contract.[607]

The study devoted one of its chapters to examining the role of the marine carrier with respect to transfer of ownership between parties to a contract of sale involving carriage of goods by sea. It examined the general rules of transfer of ownership under Jordanian law, and the JCC in particular, and then tried to assess the potential for applying these rules on the contract of sale involving carriage of goods by sea. Within this, it scrutinised the approach of the JCC through which it distinguished between transfer of ownership in fungible and non-fungible goods. It concluded that the role of the marine carrier in passing ownership between parties to a contract of sale involving carriage of goods by sea is obviously identified in the fungible goods, and that the ownership shall transmit to the buyer at the same time as achieving identification of goods.

However, the notion of identification of goods is not clear under the JCC, particularly under a contract of sale involving carriage of goods by sea, which is not regulated in the JCC. Therefore, it is necessary to be clearer in the provisions of the JCC, where the ambiguity of this notion could be eliminated by answering two questions: first, how can the identification of goods be made for goods sold via a contract of sale involving carriage of goods by sea; and second, what instruments might be used to achieve this identification. The study found that the answers to both questions can be derived from the provisions of Article 67 of the CISG, which indicates several ways in which goods' identification might be fulfilled, including through shipping documents.

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[607] Such as the seller in FCA and FOB sales.

Accordingly, this study suggests that the shipping documents used to prove the identification of goods should meet the requirement of the goods' identification, such as a bill of lading, ship's delivery order, multimodal transport document and mate's receipt. These contain the type, quantity, quality and descriptions of goods, and also the date of issuing such documents that might be invoked to prove the time of identification of goods to determine the time of the passage of ownership in the fungible goods, which is deemed to be one aspect of the role of the marine carrier under the contract of sale involving carriage of goods by sea.

In the conclusion of chapter two, it was recommended that Jordan ratify the CISG to fill the gaps left by Jordanian law, which is impeding the transfer of ownership in the goods sold via a contract of sale involving carriage of goods, in which the marine carrier performs a considerable role.

Another reason for suggesting this ratification is to eliminate the incompatibility between the provisions of Jordanian law and the CISG, particularly in terms of determining the time the passage of ownership takes place in non-fungible goods sold in transit. This shall be determined on the basis of the conclusion time of the contract of sale; the JCC adopts an approach which differs from that embraced in the CISG, and such ratification will contribute in consolidating the principle of harmonisation of the rules of international commercial law.

The study also investigated transfer of risk through a contract of sale involving carriage of goods by sea, which was discussed in light of the provisions of the JCC and the rules of the CISG that represent the international rules, and the Incoterms 2010 Rules as international trade usage. Incorporating the CISG and Incoterms 2010 Rules into this discussion was done to assess the extent of the harmonisation between the JCC and international trade rules and usage, and to clarify the function of the marine carrier in operating transfer of risk between parties to a contract of sale involving carriage of goods by sea, as the international contract of sale is not addressed under Jordanian law.

Transfer of risk is one of the issues of the international contract of sale that is not governed under the JCC; the rules of risk in the JCC are only tailored to regulate transfer of risk under a general contract of sale. The study found that transfer of risk rules under the JCC are not sufficient to ascertain the time of the transfer of risk in a contract of sale involving carriage

of goods by sea, which is mainly dependent on the existence of the marine carrier who performs a conclusive function in passing a risk between parties to a contract of sale.

It was found through these analyses that the JCC adopted the strategy of linking transfer of risk to the seller's obligation to deliver imposed by contract of sale in general. It was also concluded that, by analogy with the role of the marine carrier in transmitting the risk under the provisions of the CISG and Incoterms 2010 Rules, the delivery to the marine carrier under the provisions of the JCC might be considered a default delivery for the sake of deciding the time of the transfer of risk. However, the study found that, in spite of the consistency between the CISG, Incoterms 2010 Rules and JCC in terms of determining the transfer of risk on the seller's obligation to deliver, there is incompatibility in the essence of such delivery. The study also noted that, unlike the CISG and Incoterms 2010 Rules, the JCC has stipulated that the delivery obligation shall not be satisfied unless the accessories (documents) of the goods are surrendered in addition to fulfilling the condition of conforming to the description provided in the contract of sale.

The contradiction in this respect consists in the fact that the JCC approach is not in line with international instruments, as both of the CISG and Incoterms 2010 Rules consider that mere delivery is sufficient to enable the risk to transmit to the buyer without stipulating the obligation of surrendering the related documents which is set out in a separate Article.[608]

This study found that such contradictions will result in a variation in the time at which the risk is deemed to be transferred to the buyer, as the risk shall transfer under the JCC when both obligations are completed, whereas under the CISG and Incoterms 2010 Rules the transfer of risk will take place solely by delivery of the goods, irrespective of whether or not the related documents are delivered.[609] Therefore, the study suggested that Jordanian law should comply with international rules and amend the related rules so as to allow the risk to pass solely by delivery of goods.

The study has further inferred that the JCC provisions are consistent with the rules of the international instruments in terms of the stipulation of the goods' conformity. The JCC

[608] Section 490 of the JCC; Article A8 of the Incoterms 2010 Rules; Article 34 of the CISG.
[609] Article 67 of the CISG; Articles A5 and A4 of the Incoterms 2010 Rules; Section 472 of the JCC.

stipulates that to enable the risk to pass to the buyer, the seller is bound to deliver goods that conform to the contract of sale.[610]

These dilemmas and obstacles arising from the application of the provisions of the JCC on transfer of risk under the contract of sale involving carriage of goods by sea have led to a lack of clarity of the role of the marine carrier in operating and effecting such a transfer, which results in complexity in determining the time of transfer of risk.

The CISG and JCC do not address delivery to a third party such as port authority and customs authority. This deficiency has affected the judgments of the Jordanian Cassation Court, particularly in terms of the time of transfer of risk. The importance of addressing such a delivery lies in its role as a basis for determining whether the transfer of risk takes place under the contract of sale involving carriage of goods by sea. The study suggested that such delivery shall not be considered under the CISG, because the port or customs authority does not perform the act of taking over or handing over as a carrier and hence, it recommends that the CISG and JCC should clearly regulate this matter.

The study also proposed that Jordan should go forward in ratifying the CISG to overcome the dilemmas arising from application of the provisions of the JCC in passing risk in a contract of sale involving carriage of goods by sea, in particular when the Incoterms 2010 Rules are not involved.

Transfer of risk and ownership also was examined under string sales in chapter five of this study. The study found that Jordanian law does not regulate such sales and therefore, it was suggested that like international instruments, Jordanian law must regulate the rules of string sales.

The function of marine carrier is also noted under the transfer of ownership in goods sold in transit wherein the bill of lading plays a decisive role in effecting passage of ownership between a sub-seller (endorser) and sub-buyer (endorsee). Hence, the study inferred that the ownership in the goods sold through string sales is also affected by the bill of lading, where the existence of the negotiable bill of lading may perform an essential function in

[610] Section 489 of the JCC.

proving the conclusion time of such contracts that could be derived from the date of endorsement.[611]

Since the time of conclusion of the string contracts can be derived from the date associated with the endorsement on the back of a bill of lading, the time at which the ownership in non-fungible goods transferred to the sub-buyer (endorsee) can be easily ascertained, which shall be determined by the time at which the identification of goods is undertaken that can be performed through the endorsed negotiable bill of lading.

The functionality of negotiable bill of lading also shows the conclusive role of the marine carrier who issues this document that can satisfy a requirement of sufficiency in terms of negotiability and creditability, both of which can affect a transfer of ownership in goods sold in transit.

The study further inferred that neither Jordanian law nor the relevant conventions adequately regulate negotiability of a bill of lading, as they only emphasise the function of a negotiable bill of lading in terms of delivery of goods without explaining its effect on the other aspects of the contract of sale concluded in transit. The study noted that such ambiguity will give rise to complexity in determining the time of passage of ownership between parties to a string sale, because the role of the marine carrier in ascertaining that time has not been clarified. To avoid this uncertainty and complexity, the study proposed that a negotiability of bill of lading should be addressed under both international conventions and Jordanian law. The effects of negotiability on transfer of risk and ownership has to be clearly addressed under these legal instruments because of their impact on the ability to attain insurance cover and the right of reselling the goods.

After examining the uncertainty and drawbacks of Jordanian law which have affected the role of the marine carrier in transfer of risk and ownership, the study investigated the consequences that may follow from this role under the Hamburg Rules, JCC, JCL and JMCL. It examined the liability that the marine carrier incurs while exercising its role under transfer risk and ownership. It was found that such liability has neither been addressed under the relevant international conventions nor under the JMCL. Not regulating this

[611] See Section 204 of the JMCL.

liability is a gap in the international conventions and Jordanian law. As a consequence, recourse was made to the general rules of civil liability provided in the JCC.

The study concluded that liability could be determined on the basis of contractual liability even between the marine carrier and the consignee who does not have a privity of contract with the former, where the provisions and terms of the marine carriage contract incorporated in international sale can be invoked to determine the liability arising under the transfer of risk and ownership, which can be substantiated on the basis of the rules of transfer of risk and property provided in the contract of sale involving carriage of goods by sea. It was also determined that this liability can be established under liability in tort provided that the seller (claimant) is not a party to the marine carriage contract, who may incur extra expenses against the buyer for lack of performance resulted from the fault of the marine carrier. This is conceivable under penalty clause that could be enforced once the seller fails to fulfil the obligation to pass the ownership as a consequence of the marine carrier's fault.

The study demonstrated that the liability of the marine carrier endured under the transfer of risk and ownership is not regulated under international conventions, as they have been designed to regulate the liability of the marine carrier arising from loss of or damage to the goods and delay in delivering them. Therefore, the study suggests that the applicable domestic law should be resorted to, where an opportunity can be found to resolve the disputes arising from the liability of the marine carrier for failure of transfer of risk and ownership, which will stand on the general rules of the civil liability. However, as such recourse will adversely affect the harmonisation of international commercial rules, the study recommends that the liability of the marine carrier borne under the passing of risk and ownership must be regulated in the international conventions.

If Jordanian law is the applicable law, the specific laws that addresses the liability of the marine carrier will be the JMCL and the JCL. Like the international conventions, the JMCL and JCL do not regulate the liability of the marine carrier under passage of ownership and risk. Therefore, the study recommends that recourse shall be made to the general rules of the contractual liability or liability in tort in the JCC. This was established based on the argument that both the JMCL and Hamburg Rules regulate the marine carrier's liability for

loss or damage to goods and delay in delivery, but neither govern the liability for transfer of risk or of ownership.

Since transfer of risk is governed by the JCC, the study argues that to substantiate the relationship between the fault of the marine carrier under a marine carriage contract from one side and the non-passage of risk resulted in a damage to contracting parties to the sale contract in another side, the recourse should be made to the guidelines on delivery set out in the JCC.

Similarly, the study found that although Jordan has ratified the Hamburg Rules, the provisions of the JMCL that address the legal framework of the marine carrier's liability contradicts those embraced under the provisions of the Rules.

It has been also concluded that the discrepancy of both legal instruments is incompatible with the provisions of the Constitution of Jordan, which provides that, in accordance with the principle of hierarchy of norms, the provisions of substantive law should comply with the provisions of conventions; i.e. the Hamburg Convention shall prevail over the provisions of the JMCL.

It was further seen that the incompatibility between the provisions of the Hamburg Rules and JMCL for the marine carrier's liability has resulted in inconsistencies in the judgments of the Jordanian courts, where the provisions of the Hamburg Rules have been applied in some cases but not in others.

One discrepancy between the JMCL and Hamburg Rules is the basis of the marine carrier's liability, where the JMCL has established the liability of the marine carrier on the principle of 'achieving a result', unlike the Hamburg Rules in which the liability of the marine carrier is based on the principle of 'presumed fault' absent 'due diligence'.

The study also found that the duration of the liability of the marine carrier differs between the JMCL and the Hamburg Rules. Under the JMCL, the marine carrier's liability starts once the goods are placed under the ship's tackle and discharged when the goods are unloaded at destination (tackle-to-tackle). Under the Hamburg Rules, it starts once the goods' custody is relinquished to the marine carrier in the port of shipment and ends when it relinquishes such custody at destination (port-to-port). To address this, the study suggests that the related provisions of the JMCL should be modified to follow the approach of the

Hamburg Rules, which is deemed to be part of the Jordanian legal system. The inconsistency seen in the judgments of the Jordanian court regarding the liability of the marine carrier would thus be eliminated.

The study concluded that adopting such liability in the JMCL would create an opportunity to regulate the liability of the marine carrier resulting from the transfer of risk and ownership, particularly where the parties to the contract of sale may suffer loss even if the goods were not damaged or lost. For example, the fault of the marine carrier which hindered the passage of ownership will deprive the buyer of selling the goods in transit due to a non-passage of ownership to the buyer, which could make the latter liable vis-à-vis the endorsee, which can be seen in the case where a penalty clause has been attached to the string sale.

Overall, it is recommended that the first step for Jordan should be to ratify the CISG, particularly as all of the signatory countries to the Hamburg Rules have also ratified it. Being a signatory country would enable Jordan to be in line with the international approach of unifying the rules of the contract of sale, including those involving carriage of goods by sea, and to take advantage of making rules consistent with international contracts of sale which has been neglected in Jordanian law. This would enable the issues arising under transfer of risk and ownership in contracts of sale involving carriage of goods by sea to be overcome.

The second suggestion is to enact a specific law that complies with the rules of the CISG. The ambiguity regarding transfer of risk and ownership in such contracts would be clarified in this law, which should ensure the related provisions of the CISG and the provisions of the JCC that are in line with the CISG rules. In this case the problematic situations -pointed out in this study- can be solved even if contracting parties opt out of the CISG or they do not include the Incoterms 2010 Rules, provided that the Jordanian law is the applicable law. The shortcomings of the JMCL and the contradiction of its provisions with the Hamburg Rules over the marine carrier might be solved by modifying the JMCL to match the provisions of the Hamburg Rules. The study also proposes that the JMCL and international conventions including the Hamburg Rules should address the liability of the marine carrier for the failure in passing of risk and ownership that would consolidate the harmonisation of the rules of international commercial law.

Lastly, the significance of this study may lie in the fact of providing an opportunity for other studies to discuss the legal effects of the interplay between the marine carrier and international contract of sale from the perspective of other domestic legal systems or the perspective of the other conventions regulating carriage of goods by sea. It could also open the door for future research to scrutinise the possibility of insuring the liability of the marine carrier for failure in the transfer of risk and ownership, which can be achieved through the P&I coverage provided by Protection and Indemnity Clubs (P&I Clubs).

Appendix 1

International Rules and Terms

International Rules on Sale of Goods

Article 4 of the CISG:

'This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not connected with: (a) the validity of the contract or of any of its provisions or of any usage; (b) the effect which the contract may have on the property in the goods sold'.

Article 7 of the CISG:

'(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of goods faith in international trade. (2) questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law'

Article 8 of the CISG:

'(1) For the purpose of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was. (2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to understanding that a reasonable person of the same kind as the other party would have had in the same circumstances. (3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including negotiations, any practices which the parties have established between themselves, usage and any subsequent conduct of the parties'.

Article 9 of the CISG:

'(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves. (2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned'.

Article 12 of the CISG:

'Any provision of article 11, article 29 or part II of this Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under article 96 of this Convention. The parties may not derogate from or vary the effect of this article'.

Article 23 of the CISG:

'A contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with the provisions of this convention.'

Article 31 of the CISG:

'If the seller is not bound to deliver the goods at any other particular place, his obligation to deliver consists : *(a)* if the contract of sale involves carriage of the goods-in handing the goods over to the first carrier for transmission to the buyer; *(b)* if in cases no within the preceding subparagraph, the contract relates to specific goods, or unidentified goods to be drawn from a specific stock or to be manufactured or produced, and at the time of the conclusion of the contract the parties knew that the goods were at, or were to be manufactured or produced at, a particular place -in placing the goods at the buyer's disposal at that place; *(c)* in other cases -in placing the goods at the buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract'.

Article 34 of the CISG:

'If the seller is bound to hand over documents relating to the goods, he must hand them over at the time and place and in the form required by the contract. If the seller has handed over documents before that time, he may, up to that time, cure any lack of conformity in the documents, if the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention'.

Articles 35 of the CISG:

'(1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract. (2) except where the parties have agreed otherwise, the goods do not conform with the contract, unless they: *(a)* are fit for the purpose for which goods of the same description would ordinarily be used; *(b)* are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstance show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement; *(c)* possess the qualities of goods which the seller has held out to the buyer as a sample or model; *(d)* are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods. (3) The seller is not liable under the subparagraph *(a)* to *(d)* of the preceding paragraph for any lack of conformity of the goods if, at the time of the conclusion of the contract, the buyer knew or could not have been unaware of such lack of conformity'.

Article 36 of the CISG:

'(1) The seller is liable in accordance with the contract and this Convention for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time. (2) The seller is also liable for any lack of conformity which occurs after the time indicated in the preceding paragraph and which is due to a breach of any of his obligations, including a breach of any guarantee that for a period of time the goods will remain fit for their ordinary purpose or for some particular purpose or will retain specified qualities or characteristics'.

Article 66 of the CISG:

‘Loss of or damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price, unless the loss or damage is due to an act or omission of the seller’.

Article 67(2) of the CISG:

‘Nevertheless, the risk does not pass to the buyer until the goods are clearly identified to the contract, whether by markings on the goods, by shipping documents, by notice given to the buyer or otherwise’.

Article 69 of the CISG:

‘(1) In cases not within articles 67 and 68, the risk passes to the buyer when he takes over the goods or, if he does not do so in due time, from the time when the goods are place at his disposal and he commits a breach of contract by failing to take delivery. (2) However, if the buyer is bound to take over the goods at a place other than of business of the seller, the risk passes when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal at that place. (3) If the contract relates to goods not then identified, the goods are considered not to be placed at the disposal of the buyer until they are clearly identified to the contract’.

Article 79(1) of the CISG:

‘A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequence’.

Article 81(2) of the CISG:

‘A party who has performed the contract either wholly or in part may claim restitution from the other party of whatever the first party has supplied or paid under the contract. If both parties are bound to make restitution, they must do so concurrently’.

Article 82(2)(b) of the CISG:

‘If the goods or part of the goods have perished or deteriorated as a result of the examination provided for in article 38.’

Article 18(2) of the CISG which states that:

‘An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the speed of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.’

Article 19(1) of ULIS:

‘Delivery consists in the handing over of goods which conform with the contract’.

International Rules on Carriage of Goods by Sea

Rotterdam Rules 2009

Article 1(1) of Rotterdam Rules 2009:

'For the purpose of this Convention: 1. "Contract of Carriage" means a contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another. The contract shall provide for carriage by sea and it may provide for carriage by other modes of transport in addition to the sea carriage'.

Article 4 of Rotterdam Rules 2009:

'1. Any provision of this Convention that may provide a defence for, or limit the liability of, the carrier applies in any judicial or arbitral proceeding, whether founded in contract, in tort, or otherwise, that is instituted in respect of loss of, damage to, or delay in delivery of goods covered by a contract of carriage or for the breach of any other obligation under this Convention against: (a) The carrier or a maritime contracting party; (b) The master, crew or any other person that performs services on board the ship; or (c) Employees of the carrier or a maritime performing party. 2, Any provision of this Convention that may provide a defence for the shipper or the documentary shipper applies in any judicial or arbitral proceeding, whether founded in contract, in tort, or otherwise, that is instituted against the shipper, the documentary shipper, or their subcontractors, agents or employees'.

Article 12 of Rotterdam Rules 2009:

'1. The period of responsibility of the carrier for the goods under this Convention begins when the carrier or a performing party receives the goods for carriage and ends when the goods are delivered. 2. (a) If the law or regulations of the place of receipt require the goods to be handed over to an authority or other third party from which the carrier may collect them, the period of responsibility of the carrier begins when the carrier collects the goods from the authority or other third party. (b) If the law or regulations of the place of delivery require the carrier to hand over the goods to an authority or other third party from which the consignee may collect them, the period of responsibility of the carrier ends when the carrier hands the goods over the authority or other third party. 3. For the purpose of determining the carrier's period of responsibility, the parties may agree on the time and location of receipt and delivery of the goods, but a provision in a contract of carriage is void to the extent that it provides that: (a) The time of receipt of the goods is subsequent to the beginning of their initial loading under the contract of carriage or; (b) The time of delivery of the goods is prior of the completion of their final unloading under the contract of carriage'.

Article 17(1) of Rotterdam Rules 2009:

'The carrier is liable for loss of or damage to the goods, as well as for delay in delivery, if the claimant proves that the loss, damage, or delay, or the event or circumstance that caused or contributed to it took place during the period of the carrier's responsibility as defined in chapter4'.

Article 18 of the Rotterdam Rules 2009:

'The carrier is liable for the breach of its obligations under this Convention caused by the acts or omissions of: (a) Any performing party; (b) The master or crew of the ship; (c)

Employees of the carrier or performing party; or (d) Any other person that performs or undertakes to perform any of the carrier's obligations under the contract of carriage, to the extent that the person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control'.

Article 26 of Rotterdam Rules 2009:

'When loss of or damage to goods, or an event or circumstances causing a delay in their delivery, occurs during the carrier's period of responsibility but solely before their loading onto the ship or solely after their discharge from the ship, the provisions of this Convention do not prevail over those provisions of another international instrument that, at the time of such loss, damage or event or circumstance causing delay: (a) Pursuant to the provisions of such international instrument would have applied to all or any of the carrier's activities if the shipper had made a separate and direct contract with the carrier in respect of the particular stage of carriage where the loss of, or damage to goods, damage or event or circumstance causing delay in their delivery occurred; (b) Specifically provide for the carrier's liability, limitation of liability, or time for suit; and (c) Cannot be departed from by contract either at all or to the detriment of the shipper under that instrument'.

Article 79 of Rotterdam Rules 2009:

'1- Unless otherwise provided in this Convention, any term in a contract of carriage is void to the extent that it: (a) Directly or indirectly excludes or limits the obligations of the carrier or a maritime performing party under this Convention; (b) Directly or indirectly excludes or limits the liability of the carrier or a maritime performing party for breach of an obligation under this Convention; or (c) Assign a benefit of insurance of the goods in favour of the carrier or a person referred to in article 18. 2- Unless otherwise provided in this Convention, any term in a contract of carriage is void to the extent that it: (a) Directly or indirectly excludes, limits or increase the obligations under this Convention of the shipper, consignee, controlling party, holder or documentary shipper; or (b) Directly or indirectly excludes, limits or increase the liability of the shipper, consignee, controlling party, holder or documentary shipper for breach of any of its obligations under this Convention'.

Article 82 of Rotterdam Rules 2009:

'Nothing in this Convention affects the application of any of the following international conventions in force at the time this Convention enters into force, including any future amendment to such conventions that regulate the liability of the carrier for loss of or damage to the goods: (a) Any convention governing the carriage of goods by air to the extent that such convention according to its provisions applies to any part of the contract of carriage; (b) Any convention governing the carriage of goods by road to the extent that such convention according to its provisions applies to the carriage of goods that remain loaded on a road cargo vehicle carried on board a ship; (c) Any convention governing the carriage of goods by rail to the extent that such convention according to its provisions applies to carriage of goods by sea as a supplement to the carriage by rail; or (d) Any convention governing the carriage of goods by inland waterway to the extent that such convention according to its provisions applies to a carriage of goods without trans-shipment both by inland waterways and sea'.

Hamburg Rules 1978

Article 4 of the Hamburg Rules 1978:

‘1. The responsibility of the carrier for the goods under this Convention covers the period during which the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge. 2. For the purpose of paragraph 1 of this article, the carrier is deemed to be in charge of the goods (a) from the time he has taken over the goods from: (i) the shipper, or a person acting on his behalf; or (ii) an authority or other third party to whom, pursuant to law or regulations applicable at the port of loading, the goods must be handed over for shipment; (b) until the time he has delivered the goods: (i) by handing over the goods to the consignee; or (ii) in cases where the consignee does not receive the goods from the carrier, by placing them at the disposal of the consignee in accordance with the contract or with the law or with the usage of the particular trade, applicable at the port of discharge; or (iii) by handing over the goods to an authority or other third party to whom, pursuant to law or regulations applicable at the port of discharge, the goods must be handed over. 3. In paragraphs 1 and 2 of this article, reference to the carrier or to the consignee means, in addition to the carrier or the consignee, the servants or agents, respectively of the carrier or the consignee’.

Article 5 of the Hamburg Rules 1978:

‘1. The carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in article 4, unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences. 2. Delay in delivery occurs when the goods have not been delivered at the port of discharge provided for in the contract of carriage by sea within the time expressly agreed upon or, in the absence of such agreement, within the time which it would be reasonable to require of a diligent carrier, having regard to the circumstances of the case. 3. The person entitled to make a claim for the loss of goods may treat the goods as lost if they have not been delivered as required by article 4 within 60 consecutive days following the expiry of the time for delivery according to paragraph 2 of this article. 4. (a) The carrier is liable (i) for loss of or damage to the goods or delay in delivery caused by fire, if the claimant proves that the fire arose from fault or neglect on the part of the carrier, his servants or agents; (ii) for such loss, damage or delay in delivery which is proved by the claimant to have resulted from the fault or neglect of the carrier, his servants or agents in taking all measures that could reasonably be required to put out the fire and avoid or mitigate its consequences. (b) In case of fire on board the ship affecting the goods, if the claimant or the carrier so desires, a survey in accordance with shipping practices must be held into the cause and circumstances of the fire, and a copy of the surveyor's report shall be made available on demand to the carrier and the claimant. 5. With respect to live animals, the carrier is not liable for loss, damage or delay in delivery resulting from any special risks inherent in that kind of carriage. If the carrier proves that he has complied with any special instructions given to him by the shipper respecting the animals and that, in the circumstances of the case, the loss, damage or delay in delivery could be attributed to such risks, it is presumed that the loss, damage or delay in delivery was so caused, unless there is proof that all or a part of the loss, damage or delay in delivery resulted from fault or neglect on the part of the carrier, his servants or agents. 6. The carrier is not liable, except in general average, where loss, damage or delay in delivery resulted from measures to save

life or from reasonable measures to save property at sea. 7. Where fault or neglect on the part of the carrier, his servants or agents combines with another cause to produce loss, damage or delay in delivery, the carrier is liable only to the extent that the loss, damage or delay in delivery is attributable to such fault or neglect, provided, that the carrier proves the amount of the loss, damage or delay in delivery not attributable thereto'.

Articles 6 of the Hamburg Rules 1978:

'1. (a) The liability of the carrier for loss resulting from loss of or damage to goods according to the provisions of article 5 is limited to an amount equivalent to 835 units of account per package or other shipping unit or 2.5 units of account per kilogram of gross weight of the goods lost or damaged, whichever is the higher. (b) The liability of the carrier for delay in delivery according to the provisions of article 5 is limited to an amount equivalent to two and a half times the freight payable for the goods delayed, but not exceeding the total freight payable under the contract of carriage of goods by sea. (c) In no case shall the aggregate liability of the carrier, under both subparagraphs (a) and (b) of this paragraph, exceed the limitation which would be established under subparagraph (a) of this paragraph for total loss of the goods with respect to which such liability was incurred. 2. For the purpose of calculating which amount is the higher in accordance with paragraph 1 (a) of this article, the following rules apply: (a) Where a container, pallet or similar article of transport is used to consolidate goods, the package or other shipping units enumerated in the bill of lading, if issued, or otherwise in any other document evidencing the contract of carriage by sea, as packed in such article of transport are deemed packages or shipping units. Except as aforesaid the goods in such article of transport are deemed one shipping unit. (b) In cases where the article of transport itself has been lost or damaged, that article of transport, if not owned or otherwise supplied by the carrier, is considered one separate shipping unit. 3. Unit of account means the unit of account mentioned in article 26. 4. By agreement between the carrier and the shipper, limits of liability exceeding those provided for in paragraph 1 may be fixed'.

Article 7 of the Hamburg Rules 1978:

'1. The defences and limits of liability provided for in this Convention apply in any action against the carrier in respect of loss of or damage to the goods covered by the contract of carriage by sea, as well as of delay in delivery whether the action is founded in contract, in tort or otherwise. 2. If such an action is brought against a servant or agent of the carrier, such servant or agent, if he proves that he acted within the scope of his employment, is entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under this Convention. 3. Except as provided in article 8, the aggregate of the amounts recoverable from the carrier and from any persons referred to in paragraph 2 of this article shall not exceed the limits of liability provided for in this Convention.'

Articles 10 of the Hamburg Rules 1978:

'1. Where the performance of the carriage or part thereof has been entrusted to an actual carrier, whether or not in pursuance of a liberty under the contract of carriage by sea to do so, the carrier nevertheless remains responsible for the entire carriage according to the provisions of this Convention. The carrier is responsible, in relation to the carriage performed by the actual carrier, for the acts and omissions of the actual carrier and of his servants and agents acting within the scope of their employment. 2. All the provisions of this Convention governing the responsibility of the carrier also apply to the responsibility

of the actual carrier for the carriage performed by him. The provisions of paragraphs 2 and 3 of article 7 and of paragraph 2 of article 8 apply if an action is brought against a servant or agent of the actual carrier. 3. Any special agreement under which the carrier assumes obligations not imposed by this Convention or waives rights conferred by this Convention affects the actual carrier only if agreed to by him expressly and in writing. Whether or not the actual carrier has so agreed, the carrier nevertheless remains bound by the obligations or waivers resulting from such special agreement. 4. Where and to the extent that both the carrier and the actual carrier are liable, their liability is joint and several. 5. The aggregate of the amounts recoverable from the carrier, the actual carrier and their servants and agents shall not exceed the limits of liability provided for in this Convention. 6. Nothing in this article shall prejudice any right of recourse as between the carrier and the actual carrier'.

Articles 11 of the Hamburg Rules 1978

'1. Notwithstanding the provisions of paragraph 1 of article 10, where a contract of carriage by sea provides explicitly that a specified part of the carriage covered by the said contract is to be performed by a named person other than the carrier, the contract may also provide that the carrier is not liable for loss, damage or delay in delivery caused by an occurrence which, takes place while the goods are in the charge of the actual carrier during such part of the carriage. Nevertheless, any stipulation limiting or excluding such liability is without effect if no judicial proceedings can be instituted against the actual carrier in a court competent under paragraph 1 or 2 of article 21. The burden of proving that any loss, damage or delay in delivery has been caused by such an occurrence rests upon the carrier. 2. The actual carrier is responsible in accordance with the provisions of paragraph 2 of article 10 for loss, damage or delay in delivery caused by an occurrence which takes place while the goods are in his charge'.

Article 13 of the Hamburg Rules 1978:

'1. The shipper must mark or label in a suitable manner dangerous goods as dangerous. 2. Where the shipper hands over dangerous goods to the carrier or an actual carrier, as the case may be, the shipper must inform him of the dangerous character of the goods and, if necessary, of the precautions to be taken. If the shipper fails to do so and such carrier or actual carrier does not otherwise have knowledge of their dangerous character: (a) the shipper is liable to the carrier and any actual carrier for the loss resulting from the shipment of such goods, and (b) the goods may at any time be unloaded, destroyed or rendered innocuous, as the circumstances may require, without payment of compensation. 3. The provisions of paragraph 2 of this article may not be invoked by any person if during the carriage he has taken the goods in his charge with knowledge of their dangerous character. 4. If, in cases where the provisions of paragraph 2, subparagraph (b), of this article do not apply or may not be invoked, dangerous goods become an actual danger to life or property, they may be unloaded, destroyed or rendered innocuous, as the circumstances may require, without payment of compensation except where there is an obligation to contribute in general average or where the carrier is liable in accordance with the provisions of article 5.'

Article 14(1) of the Hamburg Rules 1978:

'When the carrier or the actual carrier takes the goods in his charge, the carrier must, on demand of the shipper, issue to the shipper a bill of lading.'

Article 15 of the Hamburg Rules 1978:

‘1. The bill of lading must include, inter alia, the following particulars:

(a) the general nature of the goods, the leading marks necessary for identification of the goods, an express statement, if applicable, as to the dangerous character of the goods, the number of packages or pieces, and the weight of the goods or their quantity otherwise expressed, all such particulars as furnished by the shipper; (b) the apparent condition of the goods; (c) the name and principal place of business of the carrier; (d) the name of the shipper; (e) the consignee if named by the shipper; (f) the port of loading under the contract of carriage by sea and the date on which the goods were taken over by the carrier at the port of loading; (g) the port of discharge under the contract of carriage by sea; (h) the number of originals of the bill of lading, if more than one; (i) the place of issuance of the bill of lading; (j) the signature of the carrier or a person acting on his behalf; (k) the freight to the extent payable by the consignee or other indication that freight is payable by him; (l) the statement referred to in paragraph 3 of article 23; (m) the statement, if applicable, that the goods shall or may be carried on deck; (n) the date or the period of delivery of the goods at the port of discharge if expressly agreed upon between the parties; and (0) any increased limit or limits of liability where agreed in accordance with paragraph 4 of article 6.

2. After the goods have been loaded on board, if the shipper so demands, the carrier must issue to the shipper a "shipped" bill of lading which, in addition to the particulars required under paragraph 1 of this article, must state that the goods are on board a named ship or ships, and the date or dates of loading. If the carrier has previously issued to the shipper a bill of lading or other document of title with respect to any of such goods, on request of the carrier the shipper must surrender such document in exchange for a "shipped" bill of lading. The carrier may amend any previously issued document in order to meet the shipper's demand for a "shipped" bill of lading if, as amended, such document includes all the information required to be contained in a "shipped" bill of lading. 3. The absence in the bill of lading of one or more particulars referred to in this article does not affect the legal character of the document as a bill of lading provided that it nevertheless meets the requirements set out in paragraph 7 of article 1.’

Article 18 of the Hamburg Rules 1978:

‘Where a carrier issues a document other than a bill of lading to evidence the receipt of the goods to be carried, such a document is prima facie evidence of the conclusion of the contract of carriage by sea and the taking over by the carrier of the goods as therein described’.

Article 24 of the Hamburg Rules 1978:

‘1. Nothing in this Convention shall prevent the application of provisions in the contract of carriage by sea or national law regarding the adjustment of general average. 2. With the exception of article 20, the provisions of this Convention relating to the liability of the carrier for loss of or damage to the goods also determine whether the consignee may refuse contribution in general average and the liability of the carrier to indemnify the consignee in respect of any such contribution made or any salvage paid.’

Hague-Visby Rules 1968

Article I(b) of the Hague-Visby Rules 1968:

‘’Contract of Carriage’ applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document pf title regulates the relations between a carrier and a holder of the same’.

Article 4(5) of the Hague-Visby Rules 1968:

‘(a) Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding the equivalent of 666.67 units of account per package or unit or units of account per kilo of gross weight of the goods lost or damaged, whichever is the higher. (b) The total amount recoverable shall be calculated by reference to the value of such goods at the place and time at which the goods are discharged from the ship in accordance with the contract or should have been so discharged. The value of the goods shall be fixed according to the commodity exchange price, or, if there be no such price, according to the current market price, or, if there be no commodity exchange price or current market price, by reference to the normal value of goods of the same kind and quality. (c) Where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the bill of lading as packed in such article of transport shall be deemed the number of packages or units for the purpose of this paragraph as far as these packages or units are concerned. Except as aforesaid such article of transport shall be considered the package or unit. (d) The unit of account mentioned in this Article is the special drawing right as defined by the International Monetary Fund. The amounts mentioned in sub-paragraph *(a)* of this paragraph shall be converted into national currency on the basis of the value of that currency on a date to be determined by the law of the Court seized of the case. (e) Neither the carrier nor the ship shall be entitled to the benefit of the limitation of liability provided for in this paragraph if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result. (f) The declaration mentioned in sub-paragraph *(a)* of this paragraph, if embodied in the bill of lading, shall be prima facie evidence, but shall not be binding or conclusive on the carrier. (g) By agreement between the carrier, master or agent of the carrier and the shipper other maximum amounts than those mentioned in sub-paragraph *(a)* of this paragraph may be fixed, provided that no maximum amount so fixed shall be less than the appropriate maximum mentioned in that sub-paragraph. (h) Neither the carrier nor the ship shall be responsible in any event for loss or damage to, or in connection with, goods if the nature or value thereof has been knowingly mis-stated by the shipper in the bill of lading’.

International Commercial Terms

Article A5 CPT and CIP:

'The seller bears all risks of loss of or damage to the goods until they have been delivered in accordance with A4, with the exception of loss or damage in the circumstances described in B5'.

Article B5 CPT and CIP:

'The buyer bears all risks of loss of or damage to the goods from the time they have been delivered as envisaged in A4. If the buyer fails to give notice in accordance with B7, it must bear all risks of loss of or damage to the goods from the agreed date or the expiry date of the agreed period for delivery, provided that the goods have been clearly identified as the contract goods'.

Article A3(b) CIP:

'Contract of insurance. The seller must obtain at its own expense cargo insurance complying at least with the minimum cover as provided by Clause (C) of the Institute Cargo Clauses (LMA/IUA) or any similar clauses. The insurance shall be contracted with underwriters or an insurance company of good repute and entitle the buyer, or any other person having an insurable interest in the goods, to claim directly from the insurer'.

Article B5 DAT, DAP DDP:

'The buyer bears all risks of loss of or damage to the goods from the time they have been delivered as envisaged in A4. If a) the buyer fails to fulfil its obligations in accordance with B2, then it bears all resulting risks of loss of or damage to the goods; or b) the buyer fails to give notice in accordance with B7, then it bears all risks of loss of or damage to the goods from the agreed period for delivery, provided that the goods have been clearly identified as the contract goods'.

A5 of DAT, DAP and DDP:

'The seller bears all risks of loss of or damage to the goods until they have been delivered in accordance with A4 with the exception of loss or damage in the circumstances described in B5'.

Article A7 of DAT, DAP and DDP:

'The seller must give the buyer any notice needed in order to allow the buyer to take measures that are normally necessary to enable the buyer to take delivery of the goods'.

Article A3(a) DAT:

'Contract of carriage. The seller must contract at its own expense for the carriage of the goods to the named terminal at the agreed port or place of destination. If a specific terminal is not agreed or is not determined by practice, the seller may select the terminal at the agreed port or place of destination that best suits its purpose'.

Article B5 FCA:

'The buyer bears al risks of loss of or damage to the goods from the time they have been delivered as envisaged in A4. If a) the buyer fails in accordance with B7 to notify the

nomination of a carrier or another person as envisaged in A4 or to give notice; or b) the carrier or person nominated by the buyer as envisaged in A4 fails to take the goods into its charge, then, the buyer bears all risks of loss of or damage to the goods: (i) from the agreed date, or in the absence of an agreed date , (ii) from the date notified by the seller under A7 within the agreed period; or, if no such date has been notified, (iii) from the expiry date of any agreed period for delivery, Provided that the goods have been clearly identified as the contract goods'.

Article A5 FCA:

'The seller bears all risks of loss of or damage to the goods until they have been delivered in accordance with A4, with the exception of loss or damage in the circumstances described in B5'.

Article A4 FCA:

'The seller must deliver the goods to the carrier or another person nominated by the buyer at the agreed point, if any, at the named place on the agreed date or within the agreed period. Delivery is completed: a) If the named place is the seller's premises, when the goods have been loaded on the means of transport provided by the buyer. b) In any other case, when the goods are placed at the disposal of the carrier or another person nominated by the buyer on the seller's mean of transport ready for unloading. If no specific point has been notified by the buyer under B7 d) within the named place of delivery, and if there are several points available, the seller may select the point that best suit its purpose. Unless the buyer notifies the seller otherwise, the seller may deliver the goods for carriage in such a manner as the quantity and/or nature of the goods may require'.

Articles A7 FCA:

'The seller must, at the buyer's risk and expense, give the buyer sufficient notice either that the goods have been delivered in accordance with A4 or that the carrier or another person nominated by the buyer has failed to take the goods within the time agreed'.

Article B5 FOB:

'The buyer bears all risks of loss or damage to the goods from the time they have been delivered as envisaged in A4. If a) the buyer fails to notify the nomination of a vessel in accordance with B7; or b) the vessel nominated by the buyer fails to arrive on time to enable the seller to comply with A4, is unable to take the goods, or closes for cargo earlier than the time notified in accordance with B7; then, the buyer bears all risks of loss or damage to the goods: (i) from the agreed date, or in the absence of an agreed date, (ii) from the date notified by the seller under A7 within the agreed period, or, if no such date has been notified, (iii) from the expiry date of any agreed period for delivery, provided that the goods have been clearly identified as the contract goods'.

Appendix 2

Domestic Laws

Albania

Article 149 of Albanian Civil Code of 1994:

'Ownership is the right to enjoy and dispose the thing freely, within limitation provided by law'.

France

Article 3(2) of the French Civil Code:

'Statutes concerning public policy and safety are binding on all those living on the territory. French law governs immovables, even those possessed by aliens. Statutes concerning the status and capacity of persons govern French citizens even those residing in a foreign country.'

Article 544 of French Civil Code:

'Ownership is the right to enjoy and dispose of a thing in the most absolute manner, provided they are not used in a way prohibited by statutes or regulations'.

Articles 1138 of French Civil Code:

'The obligation to deliver a thing is perfect by the mere consent of the contracting parties. It makes the obligee-creditor the owner and places the thing at his risks as from the time when it should have been delivered, although the delivery has not taken place, unless the obligor-debtor has been put in default to deliver it; in this case, the thing remains at the risk of the latter. A debtor is put in default either through a formal demand or any other equivalent act such as a personal'.

Article 1582 of French Civil Code:

'A sale is an agreement by which one person binds himself to deliver a thing, and another to pay for it. It may be made by an authentic instrument or by an instrument under private signature'.

Article 1583 of French Civil Code:

'It is complete between the parties and the ownership is acquired as of right by the buyer with regard to the seller as soon as they have agreed on the thing and on the price, although the thing has not yet been delivered nor the price paid'.

Germany

Article 43 of the German Introductory Act for Civil Law:

'(1) Interests in property are governed by the law of the country in which the property is situated. (2) If an item, to which property interests attach, gets into another country, these interests cannot be exercised in contradiction to the legal order of that country. (3) If a property interest in an item that is removed from another country to this country, has not been acquired previously, as to such acquisition in the country, facts that took place in another country are considered as if they took place in this country.'

Section 433 of German Civil Code (BGB):

'Typical contractual duties in a purchase agreement: (1) By a purchase agreement, the seller of a thing is obliged to deliver the thing to the buyer and to procure ownership of the thing for the buyer. The seller must procure the thing for the buyer free from material and legal defects. (2) The buyer is obliged to pay the seller the agreed purchase price and to accept delivery of the thing purchased'.

Section 903 of German Civil Code (BGB):

'The owner of a thing, to the extent that a statute or third-party rights do not conflict with this, deal with the thing at his discretion and exclude others from every influence'.

Section 929 of the German Civil Code (BGB):

'For the transfer of the ownership of a movable thing, it is necessary that the owner delivers the thing to the acquirer and both agree that ownership is to pass. If the acquirer is in possession of the thing, agreement on the transfer of the ownership suffice'.

Greece

Article 522(1) of the Greek Civil Code:

'as from the time of delivery of the thing sold the risk of destruction by fortuitous event or deterioration shall be borne by the purchaser'.

Jordan

Section 19 of the JCC:

'Possession, ownership and other rights in rem shall be governed by the law of site of immovable property and for movable property the law of the place where it exists at the time the cause for acquisition or loss of possession, ownership or other material rights has arisen.'

Section 90 of the JCC:

'The contract shall be made as soon as the offer is joined with acceptance subject to the conditions which the law in addition prescribed.'

Section 101 of the JCC declares that:

If at the time of contracting the two contracting parties shall not be present the contract shall be deemed to have been made in the place and at the time of acceptance unless there is an agreement or legal provision to a different effect.

Section 105 of the JCC:

'1. An agreement by virtue of which both contracting parties undertake or either of them undertakes to make a certain contract in the future shall not be valid unless all the basic matters of the contract to be made and the period of time during which the contract shall be made are specified. 2. And if the law stipulates a certain form for the completion of the contract that form shall also be adopted in the agreement comprising the promise to make that contract.'

Section 163(2) of the JCC:

‘And if the legislator prohibits dealing in a thing or if it shall be contrary to public order or morals the contract shall be void’

Section 213 of the JCC:

‘The fundamental principle of the contract is the consent of the two contracting parties and their obligations in contracting’.

Section 256 of the JCC:

‘Every injurious act shall render the person who commits it liable for damages even if he is a non-discerning person.’

Section 489 of the JCC:

‘The vendor shall deliver the sold property to the purchaser in its condition at the time of sale.’

Section 495 of the JCC:

‘If the sold property shall before the sale be in the possession of the purchaser in whatever capacity or for whatever cause that possession shall amount to delivery unless it is otherwise agreed’.

Section 496 of the JCC:

‘If the two parties to the sale shall agree that the purchaser shall in a certain case be deemed to have taken delivery of the sold property or if the provisions of the law shall prescribe certain cases to amount to delivery, the delivery shall be deemed to have been completed.’

Section 497 of the JCC:

‘Delivery shall be deemed completed by registration of the sold property in the name of the purchaser when the provisions of the law subject the transfer of ownership to official registration’.

Section 498 of the JCC:

‘Delivery shall also be deemed effective: 1-if the vendor keeps the sold property in his possession at the request of the purchaser. 2- if the vendor serves a writing upon the purchaser for payment of the price and taking delivery of the sold property within a reasonable period of time and otherwise, he would be deemed to have taken delivery, and he does not comply.’

Section 73 of the JCL:

‘The consignee has the right to bring a direct action against the carrier, which is related to the contract concluded between the shipper and the carrier, where he will be entitled to claim the delivery and compensation, where appropriate, that might be resulted from non-achievement of the task or part of it.’

Section 198 of the JMCL:

‘A contract for the chartering of a ship or for the carriage of goods by sea must be confirmed in writing. Such written document shall be referred to as a charterparty or as a bill of lading

depending on the type of carriage of the goods by sea. The contracting parties shall not, however, be required to prepare a written document in the case of coastal navigation.'

Section 200 of the JMCL:

'The bill of lading is a document given by the master for the goods shipped, and it is prepared in three copies: one copy to be given to the shipper, a second copy to the consignee and a third copy to the master. A bill of lading must contain the following particulars: a. The names of the contracting parties, the operator and the charterer. b. Specifications of the type, weight volume and markings of the goods and the number of packages. c. The name, nationality and tonnage of the ship. d. The terms of carriage including the freight and the ports of departure and destination. e. Date on which the bill of lading is delivered. f. The number of copies prepared by the master. g. The signature of the master or owner of the ship or his agent, and of the shipper.'

Section 202 of the JMCL:

'The marking and the number of packages, and the quantity, type and weights of the good shall be recorded in the bill of lading on the basis of the written statements submitted by the shipper before shipment. The marking must be adequate for the identification of the goods and shall be so affixed as to remain easily legible until the end of the voyage. The carrier may refuse to record the declaration of the shipper in the bill of lading if he has good reason to doubt their correctness, or if he is unable to verify them by ordinary means. In such a case the carrier must state the reason for this refusal, whereupon the onus of proving any shortage shall be on the shipper or on the consignee. The document which is given to the shipper upon his request before loading his goods instead of after such loading, shall be considered as a legal of lading. A bill of lading which is given in accordance with the form prescribed above shall constitute proof of receipt of the goods as described therein by the carrier, unless proof to the contrary is submitted.'

Section 204 of the JMCL:

'The bill of lading may be made to a designated consignee or to order or to bearer. A bill of lading made to a designated consignee is not negotiable, and the master may not deliver the goods to any person other than the person named in the bill of lading. A bill of lading made to order is negotiable by endorsement, which endorsement must be dated; and the master may deliver the goods only to the bearer of the endorsed bill of lading, even if such endorsement is blank. A bill of Lading made to bearer id negotiable, by mere handing over of the bill of lading, and the master must deliver the goods to any person who presents it.'

Section 205 of the JMCL:

'The copies of a bill of lading which is made to order or to bearer must contain the expression "negotiable", "or not negotiable", as well as a statement indicating the number of copies made, and stipulating that the implementation of one copy shall render the other copies void. The carrier may not rely, as against the bearer of a negotiable copy which has been duly endorsed, on the defences which may be used against the shipper unless it is established that such bearer is acting as an agent of the shipper. The endorser guarantees merely the existence of the goods shipped and the validity of the contract of affreightment. If any dispute arises among the bearers of several copies of a single negotiable bill of lading before delivery of the goods by the master, the copy which bears the earliest endorsement shal1 be given priority. After delivery of the goods to the bearer of one of the negotiable

copies priority cannot be given to the bearer of any other copy even if such copy bears an earlier date.'

Section 214 of the JMCL:

'The liability of the Marine Carrier for loss of or damage to goods shall not in any event exceed an amount to be determined by regulations to be enacted after the publication of this law, for each packet or unit of goods, unless the nature and value of such goods have been declared by the shipper before loading on the ship. Such declaration shall be embodied in the bill of lading and may be relied on against the carrier unless he can prove the contrary. If the carrier denies the correctness of such declaration when it is made, he may record his reservations and the reasons therefore in the bill of lading. Such reservations shall shift the onus of proof of the actual value onto the shipper or the consignee. Any stipulations whereby the carrier's liability is limited to an amount which is less than the amount prescribed in this section shall be void. The amount prescribed above may be reconsidered and altered by regulations to be enacted in accordance with fluctuations in foreign rates.'

Section 215 of the JMCL:

'(a)- Any condition contained in a bill of lading or any document for carriage by sea issued in the Hashemite Kingdom of Jordan or outside which is directly or indirectly intended to release the carrier from the responsibility and liability imposed on him by law generally, or by this law in particular, or to shift the burden of proof from any party on whom such burden of proof lies under the laws in force or under this law, or to violate the rules of legal jurisdiction shall be null and void and shall have no effect. A condition which makes the carrier the beneficiary from insurance on the goods, or any similar condition shall be deemed to be a release condition. (b)- Not withstanding any provision to the contrary in any other law or in the bills of lading, judicial documents in court cases filed against the carrier under the provisions of this law may be served on the ships agent in the Hashemite Kingdom of Jordan. Such service shall be considered as due service on the carrier, provided that the ships agent shall not be liable in such court cases except for any default which was committed by his employees or other persons working for him.'

Article 216 of the JMCL:

'The carrier shall not be responsible for loss or damage to goods if the shipper knowingly gives a false statement of their value.'

Article 217 of the JMCL:

'Goods of an inflammable or explosive or dangerous nature which the carrier or his agent would not have consented to carry with knowledge of their nature and character, may at any time be landed or destroyed or rendered innocuous by the carrier without compensation, after he prepares a report indicating his reasons for taking such action, and furthermore the shipper of such goods shall be liable for all damages and expenses resulting from such shipment. If the carrier was aware of the nature of such goods when he consented to load them on the ship he may not land destroy or render them innocuous unless they become a danger to the ship or cargo in which case he may do so without liability on his pan except to general average, if any.'

New Zealand

Section 7 New Zealand Property (Relationships) Act 1976:

‘(1) This Act applies to immovable property that is situated in New Zealand. (2) This Act applies to movable property that is situated in New Zealand or elsewhere, if one of the spouses or partners is domiciled in New Zealand (a) at the date of an application made under this Act; or (b) at the date of any agreement between the spouses or partners relating to the division of their property; or (c) at the date of his or her death.(3) Despite subsection (2), if any order under this Act is sought against a person who is neither domiciled nor resident in New Zealand, the court may decline to make an order in respect of any movable property that is situated outside New Zealand.’

Switzerland

Article 104(e) of Switzerland's Federal Code on Private International Law (CPIL):

‘1- The parties may submit the acquisition and loss of an interest in movable property to the law of the State of shipment or the State of destination or to the law applicable to the underlying legal transaction. 2- The choice of law shall not be applied against a third party’

Article 184(1) of the Swiss Code of Obligations 2017:

‘A contract of sale is a contract whereby the seller undertakes to deliver the item sold and transfer ownership of it to the buyer in return for the sale price, which the buyer undertakes to pay to the seller’.

Article 185(1) of the Swiss Code of Obligations 2017:

‘The benefit and risk of the object pass to the buyer on conclusion of the contract, except where otherwise agreed or dictated by special circumstance’.

United Kingdom

Section 4(1) of UK’s Consumer Rights Act 2015:

‘In this Chapter ownership of goods means the general property in goods, not merely a special property’.

Section 29 of UK’s Consumer Rights Act 2015:

‘(1) A sales contract is to be treated as including the following provisions as terms.

(2) The goods remain at the trader’s risk until they come into the physical possession of—

(a) the consumer, or

(b) a person identified by the consumer to take possession of the goods.

(3) Subsection (2) does not apply if the goods are delivered to a carrier who—

(a) is commissioned by the consumer to deliver the goods, and

(b) is not a carrier the trader named as an option for the consumer.

(4) In that case the goods are at the consumer’s risk on and after delivery to the carrier.

(5) Subsection (4) does not affect any liability of the carrier to the consumer in respect of the goods.

(6) See section 2(5) and (6) for the application of this section where goods are sold at public auction'.

Section 18(1) of UK's Sale of Goods Act (SGA) 1979:

'Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer. Rule 1.-Where there is an unconditional contract for the sale of specific goods in a deliverable state the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed'.

Section 19 of UK's Sale of Goods Act (SGA) 1979:

'(1) Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled; and in such a case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee or custodier for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.

(2) Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is prima facie to be taken to reserve the right of disposal.

(3) Where the seller of goods draws on the buyer for the price, and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him'.

Section 20(1) of UK's Sale of Goods Act (SGA) 1979:

'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'.

Section 61(1) of UK's Sale of Goods Act (SGA)1979:

'… "property" means the general property in goods, and not merely a special Property; ….'

Section 30(1) UK's Civil Jurisdiction and Judgements Act 1982:

'The jurisdiction of any court in England and Wales or Northern Ireland to entertain proceedings for trespass to, or any other tort affecting, immovable property shall extend to cases in which the property in question is situated outside that part of the United Kingdom unless the proceedings are principally concerned with a question of the title to, or the right to possession of, that property.'

United States

§ 2-401(2) of the Uniform Commercial Code-Sales (UCC):

‘Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place; …’.

Table of abbreviations

CFR: Cost and Freight**.**

CIETAC: China International Economic & Trade Arbitration Commission.

CIF: Cost, Insurance and Freight.

CIP: Carriage and Insurance Paid To**.**

CISG: The United Nations Convention on Contracts for the International Sale of Goods (1980).

CPIL: Switzerland's Federal Code on Private International Law.

CPT: Carriage Paid To**.**

DAP: Delivered At Place**.**

DAT: Delivered At Terminal**.**

DDP: Delivered Duty Paid**.**

EXW: Ex Works**.**

FAS: Free Alongside Ship**.**

FCA: Free Carrier.

FOB: Free On Board.

GCC: Greek Civil Code.

ICC: International Chamber of Commerce**.**

Incoterms: International Commercial Terms.

JCC: Jordanian Civil Code**.**

JCL: Jordanian Commercial Law.

JMCL: Jordanian Maritime Commercial Law**.**

P&I Clubs: Protection and Indemnity Clubs.

PICC: Principles of International Commercial Contracts**.**

SGA: UK Sale of Goods Act 1979.

UCC: The Uniform Commercial Code-Sales.

ULIS: Uniform Law on the International Sale of Goods**.**

UNCITRAL: United Nations Commission on International Trade Law.

UNIDROIT: International Institute for the Unification of Private Law.

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