Articles

Elisa de Belvis*

Delivery, Property and Risk in the Law of Sale

DOI 10.1515/ercl-2017-0002

Abstract: Directive n. 2011/83/EU, commonly known as the Consumer Rights Directive (CRD), increases the purchaser's protection against any event which might occur to the goods sold during the period between the parties' agreement on sale and the consumer's actual reception of them (Articles 18 and 20 CRD). This Article analyses whether it would be advisable to reform such national legal systems, like the one based on Italian Civil Code which not only follows the principle *res perit domino*, or *casum sentit dominus* as it relates to the passing of risk, but also combines it with the consent's real effects regarding the transfer of ownership due to the contract of sale. Such a reform, by extending the criterion of delivery as a general risk rule of sale, would satisfy the need for full harmonization, not only inside the single national system considered (in Italy, as of 13 June 2014, d lgs n 21/2014, implementing Directive n 2011/83/EU, innovates Articles 63 and 61 it cod cons which are the Italian Consumer Code's rules regarding risk), but also from a European Contract Law perspective.

Résumé: La directive n°2011/83/UE, connue sous l'appellation Directive sur les droits des consommateurs (DDC), augmente la protection de l'acquéreur contre tout événement qui pourrait affecter les biens vendus au cours de la période entre l'accord des parties sur la vente et leur réception effective par le consommateur (articles 18 et 20 de la directive). Cet article propose une analyse sur la question de savoir s'il serait judicieux de reformer les systèmes juridiques qui, comme le Code civil italien, non seulement suivent le principe res perit domino, ou casum sentit dominus realtif au transfert des risques, mais le relient aux effets réels du consentement s'agissant du transfert de la propriété dans le contrat de vente. Une telle réforme, qui étendrait le critère de la réception en tant que principe general relatif aux risques, serait de nature à réaliser une pleine harmonisation, non seulement au sein du droit considéré ici (en Italie, à partir du 13 juin 2014, la loi

***Corresponding author: Elisa de Belvis,** University of Padova , Department of Private Law and Critique of Law DDPCD, Padova, Italy, E-Mail: elisa.debelvis@unipd.it

n 21/2014, mettant en oeuvre la Directive n 2011/84/EU, modifie les Articles 63 and 61 du code de la consommation, relatifs aux risques dans la vente), mais aussi de la perspective du droit européen des contrats.

Kurzfassung: Die EU-Verbraucherrechte-Richtlinie (Richtlinie 2011/83/EU) verbessert den Käuferschutz für jede Verschlechterung der Ware, die zwischen Vertragsschluss und Lieferung und Empfangnahme eintritt (Art. 18 und 20 der Richtlinie). Der vorliegende Beitrag widmet sich der Frage, ob es sinnvoll ist, diejenigen nationalen Rechte grundlegend zu reformieren, die (wie der italienische Codice Civile) in Fragen des Gefahrübergangs dem Grundsatz folgen res perit domino oder casum sentit dominus und dies mit dem Übergang des Eigentums bereits bei Abschluss des Kaufvertrags verbinden. Solch eine Reform, in der die Lieferung allgemein als der für den Gefahrübergang maßgebliche Zeitpunkt festgeschrieben würde, würde zugleich auch dem Vollharmonisierungsgrundsatz entsprechen. Dies gälte dann nicht nur innerhalb des einzelnen nationalen Systems (in Italien wurden mit Wirkung vom 13.6.2014 – decreto legislativo n. 21/2014 – die Regeln zum Gefahrübergang in Art 63 und 61 des Verbraucherschutzgesetzes angepasst), sondern auch aus der Perspektive eines Europäischen Schuldvertragsrechts.

I Introduction

The new EU rules on risk concern the contracts where the trader dispatches the goods to the consumer; the risk of loss or damage to the goods passes to the consumer when they, or a third party indicated by the consumer themselves, has acquired the physical possession of the goods. The impossibility of fulfilling the trader's obligation to deliver the goods leads to the termination of the contract.

Both the Uniform Law of International Sales of 1967 and the United Nation Convention on Contracts for the International Sale of Goods, in order to standardize their regulations, have already chosen a criterion based on delivery to determine the transfer of the risk (Article 97 ULIS and Article 67 CISG). Even if the meaning of delivery is different in the two contexts of international sales and European consumer sales, as a consequence of the new EU Law, the same parameter is now applied to B-to-C contracts.

The same criterion is adopted in the Draft Common Frame of Reference (Article IV.A.-5:102 DCFR) and then in the Proposal for Regulation of the European Parliament and by the Council on Common European Sales Law (COM(2011) 635 final) under Article 143 CESL.

However, the delivery rule is not the only one which is used for determining the place where the risk passes in contracts of sale where both the parties and the goods are not together in the same place. Consequently, it is not the only way of answering the question of *who* has to bear such a risk in the intermediate time between the parties' agreement on the contract of sale and the delivery of the goods to the purchaser.

Some national legal systems, such as the English, French and Italian ones, adopt a different solution. Under the Italian Civil Code, the risk of loss or damage to the goods passes to the purchaser with the ownership, which is transferred by virtue of the parties' agreement. This general rule of sale becomes relevant insofar as delivery has to be postponed to a later date than the completion of the contract, as when the distance between the parties requires the physical forwarding of the goods to the purchaser. As a consequence of the rule for risk, therefore, the impossibility of fulfilling the vendor's obligation to deliver the goods, due to accidental loss or destruction, does not exclude the right to the counter-performance.

Beyond these different rules a twofold option distinctly emerges, which is based on whether or not the risk shall be allocated in connection with the title as owner. Actually, it is not an accident that the draftsmen of the supranational laws have never gone through the issue of the transfer of property, leaving the national drafters at liberty to decide as to the mode to approach it. On the other hand, this implies that by adopting a national legal system's perspective the matter becomes a little more complex than it is from a supranational viewpoint.

Firstly, the complexity of the topic emerges in those European legal systems which follow the principle that risk attaches to property. Therefore, it may not to be amiss to recognize here that if risk attaches to ownership, the difference which characterizes the concrete effect upon risk, and as a consequence upon the purchaser's protection, it is due more to the rule adopted to govern the transfer of property than to the one established on the risk itself.

Secondly, as for those national provisions which disconnect the passing of risk from the transfer of the real right, the complexity pertains to the necessity to establish the logical justification according to which the risk is allocated and to compare it with the one followed by the risk rules belonging to EU Law and International Laws on Sale.

What is worth analysing is what might be the most efficient, or even equitable, between these two options (risk attached to or separated from title). It is important not from a merely abstract perspective. Actually, this issue encroaches upon the peculiar consequences arising from the introduction of the delivery criterion as it relates to the passing of risk in those legal systems, like the Italian

one, which are based on a rule, as for the transfer of ownership, that treats it as the result of the parties' mere consent.

Neglecting the Consumer Rights Directive, the matter related to the modes the property is transferred, it is not geared specifically towards the type of sale based upon the consent's real effects, with which in Italy it purports to deal. Thus, the Italian enactment of its provisions leads to a separation between the property right (or rather: the title as owner) and the burden caused by the allocation of the risk in (consumer) sale contracts. Such a separation evokes the one already established under the Roman Law but in an inverse perspective. As we will see later, while in the Roman *emptio venditio* the purchaser was bound to bear the *periculum* without having become the *dominus* of the thing, now it is the vendor who, without being the owner any more, (seems to) have to lose both the thing and the price when the former perishes not by his own fault.

How does this separation work? Which consequences does it imply, in itself and upon both the analytical structure of the contract of sale and the remedies the parties are entitled to? Are those consequences coherent within a legal system in which the *res perit domino* rule is combined with the consent's real effects? And, at least, is a risk rule based on the delivery criterion the best solution for finding an equitable balance in the conflict between the protection of the purchaser and the requirements of trade and commerce? Or, due to the above mentioned separation between ownership and risk, does it compromise the position (and the interest) of the vendor too much?

These are the questions this Article wants to find an answer to. Therefore, starting from the sale contracts in which the goods must be dispatched by the seller to the buyer, it concerns the criterion based on delivery as the general benchmark for determining when the risk of loss or damage to the goods passes in contracts of sale.

The supranational perspective, which allows for the evaluation of the adequacy of this solution with respect to the purposes of the Consumer Rights Directive and the CESL and of the CISG, in the first part of the Article (II), will be followed by a comparative analysis of the different criteria which are applied in some European legal systems in the second part (III). The comparative perspective will determine if the delivery criterion indeed offers, because of its objectivity, a better protection to the purchaser (without compromising the market efficiency) than the formal and legal one which builds on the completion of the contract.

In its following parts, the Article will focus on a single national legal system, among the EU Member States, which follows the principle *res perit domino* in combination with the consent's real effects. The Italian Law of Contracts is chosen as a paradigmatic one, in order to find out how the rule based on delivery could work within it, both in terms of its coherence with the national provisions and in

terms of uniformity. From the aspect of coherence, the Article suggests that, as a consequence of the Consumer Code new rules regarding risk, the nexus of synallagma in consumer sales is modified and now includes the obligation to deliver the goods. From the second aspect, uniformity, the Article concludes by examining whether it would be advisable to reform the Law on Sale of Goods contained in the Italian Civil Code by finally abandoning the *res perit domino* rule, or whether there are compelling reasons which exclude this possibility. Such a reform could represent an important goal in a perspective of full harmonization, both from an internal viewpoint (levelling out the Consumer Code and the Civil Code rules on risk) and as a stronger basis for a European Contract Law made of provisions which would be as widely shared as possible.

II Supranational perspective

Among the many risks run by a party to a contract of sale, here it is important to define 'the risk' we are referring to. It deals with the physical loss or damage which occurs to the thing sold without any of the parties' fault in the period between the completion of the contract and the performance of the duty to deliver it to the purchaser. As a consequence of such an event, the buyer does not receive the thing bought or they receive it in a damaged state. At the same time, the vendor is discharged from any obligation because his non-performance is excused, according to a general principle,[1] due to an impediment beyond the parties' control.

However, this hazard, which is connected to the performance, is not the risk related to the contract of sale. The latter is in fact the risk linked to the counter-performance.[2] Thus, the vendor being freed from his duty of delivery, what about the vendee's duty to pay the price? If it is affected from the extinction of the vendor's obligation to deliver, due to the mutual link between the two obligations recognized by the law, the transferee may not be compelled for payment. In this case, it is maintained that the risk continues with the transferor. On the contrary, if the obligation to pay the price subsists, the risk is born by the purchaser.[3]

As a general remark, it is important to note here that the rules governing the passing of risk are not applicable when the loss or damage to the thing is due to

1 See art 88.1 CESL; art III.-3:104 DCFR.

2 F. Oliva Blásquez, 'Passing of risk', in J. Plaza Penadès and L.M. Martínez Velencoso, *European Perspectives on Common European Sales Law* (Cham *et al*: Springer, 2015) 184.

3 That risk of non-delivery can be a narrow definition, see L.S. Sealy, '"Risk" in the Law of Sale' (1972) *Cambridge Law Journal* 230–231.

the vendor's fault, amounting to a breach of his obligation to deliver (as happens when he packs the goods in an insufficient or incorrect manner or when the act or omission is made by the persons for whom the seller is responsible). In such a case the vendee may invoke all the remedies for non-performance (Article 196 CESL).[4]

Furthermore, as for the sales of a generic good, the loss or the destruction of such a thing, which is not properly identified until the specification, does not concern the allocation of risk with delivery still remaining as a possible option because of the *genus numquam perit* maxim.

As we will see later, the allocation of the risk does not represent a problem in the simplest type of sales, as in cash purchase, where the whole transaction is accomplished at one time and possession passes to the vendee along with title.[5] *Vice versa*, in the most relevant types of modern sale (*eg* contract of sale involving carriage of goods, goods sold in transit, contract of sale on credit, the delivery on approval) the transaction is composed of various stages which involve a period of time. In such a case, it is not easy to establish at exactly what stage the risk shall pass to the vendee. In order to solve that problem, the national legal systems usually adopt metaphysical and abstract concepts, linked with the title or the completion of the contract, whereas the international trade practice needs to govern it through flexible solutions and certain rules. Flexibility is important with regard to the changing conditions of commercial dealings and the various situations arising in the trade reality. Equally important is certainty, which often implies specific rules provided independently from the legal frame of the (analytic and dogmatic) structure of each national system.

4 The risk rules do not concern the events due to the seller's legal act, which are connected with the legitimate exercise of a right of him; they do not concern the economic risks, that are linked to the fluctuation of the goods' market value or to the exchange-rate fluctuation, because of their connection to the concept of the normal contractual hazard. With regard to the legal risks, such as the acts of State (*eg* confiscation of the goods, embargo, export or import bans), they are in principle governed by the International Trade Law; thus they are not treated under the risk rules, but when the parties have not adopted a trade term (Incoterms) to deal with them: G. Hager, 'Art. 66', in P. Schlechtriem and I. Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)* (Oxford: Oxford University Press, 2005) 677; J. Erauw, 'The Risk of Loss and Passing It' (2005–2006) 25 *Journal of Law and Commerce* 204.

5 K. Llewellyn, 'Through Title to Contract and a Bit Beyond' (1938) 15 *New York University Law Quarterly Review* 159, 167.

1 The delivery criterion: the rule's adequacy with respect to the purposes of the Law and the requirements of trade

As has been stated above, the supranational drafters deal with the problem of risk using a typological approach. If this method, avoiding general principles, potentially leads both to lack of regulation[6] and to obsolescence of the law[7] with regard to the variety and richness of the situations in which the international sales are involved and the emergence of the new contractual models, it could potentially go beyond the limitation which is linked with the use of the delivery criterion. This limit derives from the acknowledgment that delivery only in principle means the transference of the thing sold into the power and possession of the buyer.[8]

This is true if we consider that, much like the concept of ownership, the concept of possession has heterogeneous interpretations as well. It is interesting to note briefly that it was the lack of an unambiguous construction of delivery, which would reveal actuality as an essential feature of its performance, which had also led to that disconnection between the transfer of property and the transfer of possession, that even now represents one of the most remarkable distinctions among the Laws on Sale of Goods. As we will see later, the physical transfer of the goods has ceased to be considered as a basic element for the transfer of property specifically through the medium of the conceptualization of fictitious or constructive types of delivery (such as the *traditiones brevi* and *longa manus* or the *costitutum possessorium* or, again, the clauses of *tradition feinte*, and their widespread diffusion in France, in the *pays de droit écrit*, and in Italy after feudalism). Contrary to the general interpretation of delivery as an objective and factual act of performance which, excluding any legal abstractions, should be more suitable for the buyer's protection, the lack of a generally adopted basic construction may entail a certain margin of insecurity and indistinctness.[9] Against this conclusion, the supranational provisions distinctly prove that the delivery criterion is suitable to develop itself in a number of different rules fit for

6 *Eg* no rule provides the passing of risk in multiple sales of goods during transit: see S.S. Grewal, 'Risk of Loss in Goods Sold during Transit: a Comparative Study of the U.N. Convention on Contracts for the International Sale of Goods, the U.C.C., and the British Sale of Goods Act' (1991) *Loyola of Los Angeles International and Comparative Law Review* 94.

7 A. Rosset, *Improving the Uniform Commercial Code* (1997) 2; Oliva Blásquez, n 3 above, 188.

8 J. Domat, *Le Lois civiles dans leur ordre naturel* (1745) liv I, tit II, sec II, 270.

9 Upon the ‚endless difficulties … caused by the different meanings given to the term delivery: see G. Lagergren, *Delivery of the Goods and Transfer of Property and Risk in the Law on Sale* (Stockholm: Norstedt, 1954) 45 *et seq* and 61.

the purpose of regulating every specific situation which emerges from the reality of trade and commerce in the most efficient way.

Furthermore, our criterion is suitable to pursue additional aims. Sometimes it works in order to incentivize one of the parties to act in good faith or to prevent them from acting in bad faith or to punish him, with the burden of bearing the hazard, for having done so (Article 144.1 CESL;[10] Articles IV.A.-5:201(2) DCFR and 145.2 CESL;[11] Articles 146 CESL, 68 CISG and IV.A.-5:203 DFRC[12]).

Nor the positive evaluation of delivery, as an objective criterion, in comparison with the formal and abstract ones based on the title or on the completion of the contract, can be denied on the basis of its exceptions. We can consider this, *e.g*. the rule which does not allocate the risk on the basis of the physical control and accessibility of the goods, but takes into account the time when the goods are handed over to the first carrier for transmission to the vendee, in accordance with the contract (Article 145.2 CESL). This latter criterion, according to which delivery under the contract coincides with the transition to the carrier, may be justified by reference to the opportunity of not dividing the risks during the transport;[13] and, in addition, on the basis that, by handing the things over to the carrier, the control over the goods is lost by the vendor and is acquired by the carrier, who is considered as an extension of the vendee.[14] Moreover, the goods are usually covered by a transport insurance policy endorsed in favour of the transferee. Actually, because of the buyer's opportunity to examine the goods on arrival (Articles 38.1 CISG, IV.A.-4:301 DCFR and 121.1 CESL), they are in the better position to claim against the insurance company for the thing being damaged or lost.

In conclusion, from a supranational perspective, our analyses prove: (a) that the rule which governs the passing of risk may work independently from the principles identifying the transference of the property, (b) that the delivery criterion as for the allocation of risk seems to be the most advisable from an empirical, a teleological and a functional viewpoint, and (c) that with regard to risk, the Consumer Rights Directive largely mirrors the provisions of the Convention on the International Sale of Goods which apply to commercial transactions

10 With the exemption which takes place when the buyer has the right to withhold performance, according with art 113 CESL: Oliva Blásquez, n 3 above, 194.

11 *Eg* when the market has declined and the buyer wants to back out from a bargain which has become bad: see P.M. Roth, 'The Passing of Risk' (1979) *American Journal of Comparative Law* 296; Oliva Blásquez, n 3 above, 198.

12 Oliva Blásquez, n 3 above, 200.

13 P. Schlechtriem, *Uniform Sales Law: The UN-Convention on Contracts for the International Sale of Goods* (Vienna: Manz, 1986) 87; Oliva Blásquez, n 3 above, 198.

14 Oliva Blásquez, n 3 above, 198.

but not to consumer sales that are excluded from its range of application (Article 2 a) CISG).

(a) Whatever interest between the two in conflict (the purchaser's protection or the improved function of trade and commerce) would be deemed to be worthy of a stronger defence, the supranational draftsmen's aim can be pursued without treating the risk as an attribute of property.

The rule which places the risk upon the party who has the ownership of the goods does not fit the requirements of modern trade and commerce due to the several solutions that are followed not only in governing the transference of ownership, but also in defining the meaning given to the term 'property' itself.[15] Apart from certain ideas, which link the right of ownership to an extra-legal origin based on natural law, there could not be any doubt that the exact content of that right is ultimately determined by current legal regulations,[16] which, however, are very different to one another. But, as we will see later, in addition to the difficulties caused by that lack of uniformity (because, ultimately, each legal system settles the various issues with reference to its own conceptualization on the right of property), there is a truly intrinsic inadequacy in treating the contractual rights of the vendor and the vendee as being tied up with the passing of property.[17]

Thus, due to both the formal ground of the objective difficulties in reaching unanimity on the passing of property and to the substantial reason of the intrinsic deficiency of the proprietary perspective in dealing with the relation between the seller and the buyer,[18] what about the allocation of the risk in sales contracts if '*le transfer de propriété est essentiellement destiné à justifier le déplacement des risques*'?[19] Indeed, it does not seem correct to approach, even the issue of risk, from a proprietary logic by deductively ruling it from the concept of ownership and the transference of the right.

15 E. Rabel, 'A Draft of an International Law of Sales' (1938) *University of Chicago Law Review* 551; P. Thieffry, 'Sale of Goods between French and U.S. Merchants: Choice of Law considerations under the U.N. Convention on Contracts for the International Sale of Goods' (1988) *International Lawyer* 1024; B. von Hoffmann, 'Passing of Risk in International Sales of Goods', in P. Sarcevic and P. Volken (eds), *International Sale of Goods: Dubrovnik Lecturers* (New York *et al*: Oceana, 1986) 286; C. Angelici, 'La disciplina del passaggio dei rischi', in C. Angelici *et al* (eds), *La vendita internazionale* (Milano: Giuffré, 1981) 222.

16 Lagergren, n 10 above, 63.

17 K. Llewellyn, *Cases and materials on the law of sales* (Chicago: Callaghan and Co, 1930) 569.

18 '*Le transfert de propriété es-il, après tout, autre chose qu'une interprétation doctrinale des faits juridiques, destinée à expliquer et à justifier certaines solutions de pratique*': G. Hamel, 'Les efforts pour l'unification du droit privé en matière de vente. Méthode et résultats', in *Etudes de droit civil à la mémoire de Henri Capitant* (Paris: Dalloz, 1939) 308.

19 Hamel, n 19 above, 308.

On the contrary, both the relation between the transferor and the purchaser and the problem of risk should be dealt with on an obligational plane, in terms of the performance of the contractual obligations. This option is related to the risk as being governed independently from the transfer of property and we will analytically examine it further. By now we can say that, both from a supranational outlook and from a perspective of full harmonization, this alternative allows the different legal system to '*se mettre d'accord sur ce déplacement des risques sans passer par le transfert de propriété*' with the advantage that '*ils se dispenseraient d'avoir à prendre parti sur la plus épineuse des difficultés doctrinales nées du contrat de vente*'.[20]

(b) From an (i) empirical viewpoint, the analyses on the supranational legislations reveal that the rule connecting the passing of risk with the transference of the physical control of it through delivery, seems to be the most reasonable one. Actually, it does not imply normative concepts, but only the empirical fact of possession. It is easy to determine when it happens, regardless of the structure of the legal systems which belong to each part, and it is equitable as it is assumed that who has the possession of the thing is in the better position to prevent the risk of loss or damage.

Following a (ii) teleological perspective, the delivery criterion is the most efficient criterion in order to protect the buyer's interest, which is deemed to deserve a stronger protection.

With regard to a (iii) functional outlook, our analyses show the adequacy of the delivery criterion with respect to the purposes of the Consumer Rights Directive, of the Convention on International Sale of Goods and the CESL.

The Convention on International Sale of Goods aims to remove legal barriers in order to promote the development of international trade on the basis of equality and mutual benefit. The CESL aims to make available a self-standing uniform set of contract law rules in order to offer an optional instrument and to improve the establishment and the functioning of the internal market. The Consumer Rights Directive aspires to maximize consumption and increase the competitiveness of the enterprises in order to strengthen the internal market (Whereas 4 and 7 CRD).

(c) Finally, then, the correspondence of the risk rules in all the international instruments here examined cannot be underestimated. Furthermore, the provisions of the Consumer Rights Directive, as well as the ones of the Consumer Sales Directive n 99/44/EU, seem to be generally fair not only for the sale of consumer goods but also for all other type of contracts.[21] This seems to pave the way towards

20 Hamel, n 19 above, 308.

21 For the Consumer Sales Directive, regarding to the concept of conformity and to the remedies provided, see R. Zimmermann, *The New German Law of Obligations* (Oxford: Oxford University Press, 2005) 119.

the development of a general criterion to allocate the risk in sales contract based on delivery. Such a parameter is suitable to the dynamic reality of modern trade and commerce, which forces one to manage the type of sales where the whole transaction is made of a complex sequence of stages and actions; the static perspective based on the title does not fit to govern them. The adequacy of the delivery criterion emerges even in the comparison with the one based on the conclusion of the contract, which entails several problems.[22] Actually, it is not easy to determine the exact time in which the contract between parties located in different places is completed. Furthermore, it cannot be applied to B-to-B and B-to-C sales when, as usually happens, they involve bulk goods, which have not been manufactured or specified. In such a case the risk does not pass to the vendee until the time of identification, regardless of the moment of the conclusion of the contract.[23]

III Comparative perspective

1 The criteria in modern Law

a) England and Scotland

Prima facie English law attaches the risk to the ownership, so that their transference is contemporaneous, whether delivery has been made or not.[24] Furthermore, when delivery has been delayed through the fault of either buyer or seller, the goods are at the risk of the party at fault, as regards any loss which might not have occurred but for such fault. This rule, established under s 20 Sale of Goods Act 1979,[25] reproduces the general principle of the s 20 Sale of Goods Act 1893.

22 B. Nicholas, *An Introduction to Roman Law* (Oxford: Clarendon Press, 1962) 101; A. Seymour, 'The Passing of Risk in Contracts for Sale in Roman Law and Australian Law: A Comparative Perspective' (2008) 1 *Queensland Law Student Review* 1; B. Audit, *La vente internationale de marchandises, Convention des Nations-Unies du 11 avril 1980* (Paris: LDGJ, 1990) 87.

23 F. Enderlein and D. Maskow, *International Sales Law. United Nations Convention on Contracts for the International Sale of Goods-Convention on the Limitation Period in the International Sale of Goods. Commentary* (New York: Oceana, 1992) 225.

24 See the marginal note to s 20 substituted (31 March 2003) by SI 2002/3045, reg 4(1).

25 The Sale of Goods Act 1979 was ammended by the Sale of Goods (Amendment) Act 1994; the Sale and Supply of Goods Act 1994; the Sale of Goods (Amendment) Act 1995 and the Sale and Supply of Goods to Consumers Regulations 2002, SI 2002/3045, which implements Council Directive (EC) 1999/44 on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees [1999] *OJEC* L 171/12.

By virtue of an amendment inserted in 2003, according to s 20(4),[26] the above mentioned rules on risk do not apply in a case where the buyer deals as consumer or, in Scotland, where there is a consumer contract in which the buyer is a consumer. In such cases, the goods remain at the seller's risk until they are delivered to the consumer.

(i) With regard to the relationship between transfer of property and tradition, actually, in a sale of specific or ascertained goods, property passes at such a time as the parties to the contract intend it to pass (s 17(1) SGA). Nothing, not the delivery of the goods or the control over them, nor the payment of the price operates to transfer property except the intention of the parties.[27]

In the case of an unconditional contract for the sale of a specific good in a deliverable state, unless otherwise agreed, the property is transferred by the vendor to the vendee by the mere force of the contract, irrespective of delivery (s 18, r 1 SGA).[28] This happens because actual sale is an executed contract of sale which presents a dual nature: it is both a contract and an act of conveyance. Each of them produces peculiar effects. As a contract, it gives rise to obligations and creates rights *in personam*, such as the obligation which binds the vendor to deliver in payment of the price and the one which binds the vendee to pay the price. As a conveyance, it transfers a right *in re* and, according to the above mentioned general rule, the risk with it.[29]

However, under the contract of sale the vendor has the duty to transfer the property in the thing (s 2 SGA) and to deliver it to the vendee (s 27 SGA). The buyer, on his side, has to accept the goods and pay the purchase price (s 27 SGA). The language of s 27 SGA implies quite distinctly that the obligations to transfer ownership and to pay the price are correlative; the performance of the former being undertaken for a money consideration, called the price. This means that, if the purchaser fails to get a good title as owner, he may claim the return of the price on the basis of a total failure of consideration. This is true whether the vendee has the possession of the thing or not.[30]

26 S 20(4) inserted (31 March 2003) by SI 2002/3045, reg 4(2).

27 See E. McKendrik, 'Sale of Goods', in A. Burrows (ed), *English Private Law* (Oxford: Oxford University Press, 2013) 672.

28 Sale of Goods Act 1979, s 2. The presumption related to the transfer of property has much less force today than in former time; being needed now very little to give rise to the inference that the property in specific goods is to pass only on delivery or payment: see *RV Ward Ltd* v *Bignall* [1947] 1 QB 534, 545, CA; McKendrik, n 28 above, 672.

29 M. Mark, *Chalmers' Sale of Goods Act 1979* (London: Butterworth, 1981) 86.

30 Sealy, n 4 above, 226.

Furthermore, s 50 and 51 SGA, providing actions for damages due to their non-performance, also show a mutual link between the obligation to deliver and the one to accept the goods.

(ii) As for the relationship between transfer of property and transfer of risk, because the parties are left at the liberty to allocate risk however they agree,[31] risk and ownership are not really inseparable and, in the end, risk is a matter of intention.[32] Therefore, if, by a special clause in the contract, the risk, or any part of it, should be laid on the seller, the *lex contractus* represents the rule.[33] Furthermore, if the terms of the contract are not distinct, the Courts have to arrive, adopting certain rules of construction, at the presumed intention both as to the property and the risk, which is treated as an incident of it.

Thus the vendor may reserve property in the goods until the vendee pays the price, even if in such a case, the risk often passes to the purchaser at an earlier stage.[34]

b) Germany

The German law of obligations provides that the creditor's right to the performance ceases due to its impossibility (§ 275 I). As a consequence of this the debtor is freed from his obligation[35] but he loses the right to the counter-performance as well (§ 326 I[36]). In such a case, the creditor may terminate the contract without giving the debtor the notice provided by § 323 I.

As for the allocation of the risk in the sales contract, according to § 446 I 1 BGB, the German Law follows the *Übergabeprinzip*, which passes the risk to the purchaser when the seller hands him over the possession of the thing sold or

31 Thus the seller may agree to take the risk for a definite period irrespective of the passing of the property or the buyer may take the risk of specific goods before they are weighed and the property in which has not yet passed to him: see *Martineau* v *Kitching* (1872) LR 7 QB 454; *Castle* v *Playford* (1872) LR 7 Exch 98; *Inglis* v *Stock* (1885) 10 App Cas 263.

32 See Lord Blackburn in *Martineau* v *Kitching*, n 32 above.

33 The passage of risk and property are often decoupled in international sales contracts: McKendrik, n 28 above, 678.

34 Similarly, the risk may pass to the buyer before the transfer of ownership in the contracts for sale of goods from a bulk, if there is evidence (*eg* the transmission to the purchaser of a delivery warrant) which allows the Court to infer that this rule on risk is the one the parties had wanted: McKendrik, n 28 above, 678.

35 The debtor is held liable for the impossibility of performance due by *vis major* where he is in *mora* (§ 287), unless the same damage would have occurred in case of timely delivery (§ 287 II).

36 According to the *Schuldrechtsmodernisierungsgesetz*, 26 November 2001 (BGBl I 3138).

when the seller delivers the goods to the carrier (or other person for the purpose of transmission to the buyer) under contracts of carriage. Henceforward, the vendee may claim any fruits and is burdened by expenses. This provision is non-mandatory, leaving the parties at liberty to prepone or postpone the passing of risk by contractual agreement or making it subject to a condition.

2 Evaluation of the different criteria from the axiological perspective. Which is the interest which deserves the stronger protection?

From an axiological perspective, we have to admit that in an era before the law on insurance had been developed, such as in the former Roman time, placing the risk on the buyer as soon as the contract of sale was complete, regardless of property and delivery, could encourage overseas commerce. In such a way, under the Roman Law, the vendor was assured of payment whatever the risks of delivery might be.[37] By contrast, in modern conditions, it is the transferor who, until delivery, knows much better than the vendee the conditions in which the goods are kept and is therefore in a better position to effect insurance.[38]

Nor could there be any doubt that an approach to risk based on the physical control of the goods, because of its objectivity, is more conducive to certainty of law than the formal and legal one which builds on the transfer of ownership. This criterion offers a better protection to the vendee, by preventing them from bearing the risk while, not already being the possessor, they don't have any actual possibility to protect the goods. In this way, it is not only the more equitable mode to allocate the risk, but it also helps to encourage the commerce. Through this path, the delivery rule is at the same time more in line with the requirements of trade.

If those are the results of our analyses so far, now we will find out the way to reconcile them with the analytical structure of the contract of sale, under a legal system, like the Italian one, in which the risk rule, based on the *res perit domino* rule, encroaches the consent's real effect, as it relates to the transfer of ownership.

37 R. Jhering, 'Beiträge zur Lehre von der Gefahr zum Kaufcontract. Teil 2' (1861) 4 *Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts* 366.

38 H. de Page, *Traité élémentaire de Droit Civil Belge, vol VI* (Bruxelles: Bruylant, 1952) 85; Scottish Law Commission, *Memorandum n 25, Corporeal Moveables: Passing of Risk and of Ownership*, 31 August 1976, 4.

IV How the rule for risk based on delivery works within Italian Contract Law in terms of coherence.

The question here is, whether the introduction of a different rule for the transfer of risk (in the context of consumer contracts) undermines the unity of a legal system which both follows the *res perit domino* rule and recognises the consent's real effects or if such a system could allow the coexistence of different risk rules (ownership and delivery).

The Italian Law of Contracts can be used as a paradigmatic case for this analysis. On one hand, the Consumer Rights Directive leaves it to national law to determine the conditions for the transfer of ownership in the goods and the moment at which such transfer takes place (Preamble paragraph 51). And, as it is well known, according to the Italian Civil Code, the moment at which the transfer of property takes place is when the parties reach an agreement (Article 1376 it cc), which is sufficient for the conclusion of the contract. On the other hand, this moment is relevant also in order to determine the transfer of risk (Article 1465, 1, it cc), because in Italy the sale of a specific good transfers both the ownership and the burden of risk to the vendee at the time of the conclusion of the contract, so that the *res perit domino* maxim is followed as a general rule.

1 The supervening impossibility of the performance (Article 1463 it cc) and the impossibility to fulfil the seller's obligation to deliver the goods in sale contracts (Article 1465 it cc): res perit creditor and res perit domino rules

Now we need to move on from the provisions of sale contained in the Italian Civil Code, in order to identify and explain two different rules.

When the obligation is unilateral, the problem of risk concerns the effect that the impossibility to fulfil it produces upon the debtor. Are they bound to give the equivalent of the performance which has become impossible or are they freed from the duty of carrying it out? According to Article 1256 it cc, the obligation is extinguished when its performance becomes impossible for cause not imputable to the debtor.

In case of a mutual connection between the obligations, the risk rule, assuming that the debtor is freed due to the impossibility of performing their obligation (and thus, treating the solution given for the unilateral obligation as a prerequisite) pertains to the way to treat the counter-performance. Is the counterpart

bound to fulfil his own duty or not? Article 1463 it cc provides that, due to this link, the supervening impossibility to fulfil one's obligation leads to the termination of the contract. This means that the impossibility not only excuses the party from performing, being their own obligation extinguished according to Article 1256 it cc, but also frees the counterpart from their own debt.

Both of the two cases follow the rule *casum sentit creditor*.

However, this rule does not govern the non-delivery due to accidental loss of the thing sold because the nexus of synallagma in the sale contract does not include delivery. This means that what happens to the obligation of delivery does not affect the obligation under which the vendee is debtor and the vendor is creditor for the purchase price. And the impossibility to fulfil the transferor's obligation to deliver the goods does not free the buyer from their duty to pay the price (Article 1465, 1, it cc).

This happens because of the idea that the contract of sale, due to its real effects, implies only an improper obligation of *dare* (which is considered by the doctrine as a prerequisite to solve the problem of risk according to the law of obligations). The transfer of ownership occurring by virtue of consent, the remaining duty is the one to transfer the physical possession of the goods. In other words, the patrimonial attribution which justifies the impoverishment of the creditor (the buyer) is only the transfer of ownership and it has already been taken place by virtue of consent. This means that the creditor has had their own counter-performance and has the duty to pay the price in consideration for this, even though the thing is not under their actual power.

Delivery is the subject only of an improper obligation of *dare*[39] because the subject of the duty to transfer is the right of property (since the property has been transferred, the contract is accomplished on the side of the vendor). It is not the *res*; if the thing perishes, the legal consequences do not concern the loss of the thing itself but the extinction of the right. But the right is no more the subject of an obligation to be accomplished because the obligation was already fulfilled by the consent. This means that the legal consequences of the loss of the thing may

39 G. Gorla, *Del rischio e pericolo nelle obbligazioni* (Padova: Cedam, 1934) 56; see also L. Cabella Pisu, *Dell'impossibilità sopravvenuta (Art. 1463–1466)* (Bologna: Zanichelli and Roma: Del Foro Italiano, 2002 – Commentario del codice civile Scialoja-Branca) sub art 1465, 164; A.G. Rescio, *La traslazione del rischio contrattuale nel leasing* (Milano: Giuffré, 1989) 39; C.M. Bianca, 'Il principio del consenso traslativo', in *Diritto Privato, I, Il trasferimento della proprietà* (Padova: Cedam, 1995) 18; R. Sacco, *Trattato di diritto civile – Il contratto, vol II* (Torino: Utet, 2004) 692; G. De Cristofaro, 'Vendita VIII) Vendita di beni di consumo', in *Enciclopedia giuridica* (2004) 10; E. Moscati, in P. Agostinelli *et al* (eds), *Commentario alla disciplina della vendita dei beni di consumo* (Padova: Cedam, 2003) 296.

not be governed by the law of obligations and the matter of the risk has to find its solution elsewhere. Where? In the law of transference. This is the motive for the conclusion that the risk belongs to the one who is the owner of the thing (Article 1465, 1, it cc).

According to this legal and logical framework, delivery is not a due act in itself, and thus hailing directly from the contract of sale, but it necessarily follows the transfer of ownership and is nothing but a material means to realize this transfer.[40] Delivery is an obligation that derives from the fact of holding a thing that, according to the (real) effects of the contract, has passed in ownership to others. Furthermore, it is detached from the legal concept of consideration, becoming merely a material means to implement the consideration itself. Finally, delivery is a consequence of the lack of justification for the thing sold remaining in the assets of the seller, who is no longer the owner of it.

As for the link of mutual dependence, it works only between property and payment; property being the real exchange for the purchase price. Once property is transferred to the buyer by virtue of consent, the buyers are themselves committed by the fulfillment of the duty to pay the price. Nor could they be freed from their debt for the lack of delivery owing to the impossibility of performance because there is not any interdependence between delivery and payment. It is the structure of the synallagma nexus in sale contracts, which is a consequence of the consent's real effects, that leads to the rule on the transfer of risk. It requires buyers to carry out their duty, irrespective of whether the goods were lost or destroyed by accident.

The origins of a nexus between property and price are very interesting.

Under ancient Roman Law, *mancipatio* was an act whereby the property passed from the seller to the buyer without an implied duty to deliver the goods nor any connection with the buyer's duty to pay the price. However, there was a natural and intrinsic relationship between the payment of the price (payed in bronze) and the transfer of property in the *per aes et libram* sale scheme. This link, due to the empirical features of that sale whose real effects were achieved with the exchange of the property and the price, had not been rejected with the spread of the *aes signatum* and when coined money, with its fixed value stamped on it by public authority as a common measure for estimating everything else, came into use. On the contrary, it was recognized by law, due to the necessity of some statutory protection for the seller in order to prevent the Quiritary ownership

40 The same for the French law: see C. Crome, *Teorie fondamentali delle obbligazioni nel diritto francese* (translated by Ascoli and Cammeo, Milano: Società Editirce Libraria, 1908) 125.

passing by virtue of mancipation, even if the buyer might not have yet paid the price.

It was actually prescribed (*Inst* II, 1, 41 referred the rule to the XII Tables[41] and evoked natural law as its basis) that *mancipatio*[42] did not pass the property in things sold unless the price was paid or secured (when the vendor had received personal or real security by guarantee or pledge) or credit given (which occurred when the transferor had relied on the buyer's credit with the former's '*fidem emptoris sequi*' declaration).[43] The satisfaction of the seller's interest in payment in one of these three ways[44] was considered to be an implied condition precedent to the transfer of property to the purchaser, even if the vendor had already handed over the goods. In such a case, the seller had a sort of lien over the goods themselves against both the vendee and third parties, like the buyers' creditors or the purchasers from them.[45]

This rule, by making transfer of ownership dependent upon payment of the price, distinctly shows the intimate and mutual connection among the two obligations which is still maintained in the contract of sale under the Italian Civil Code. The need for this connection, which in Italy is revealed in the structure of the sale's synallagma nexus, is due (as it was, according to the Roman law) to the nature of the contract of sale as an executed one. This is exactly the rationale which stands behind the Roman rule; it is coherent with the Roman cash sale principle, according to which sale necessarily meant executed contract. In order to maintain the balance of *do ut des* inherent in it, the payment of the price and transfer of the object sold should have coincided or, at least (when, as the time went on, the price could be credited), been made in exchange for one another.[46]

41 F. Pringsheim, *The Greek Law of Sale* (Weimar: Böhlau, 1950) 179 *et seq*; F. Pringsheim, *Der Kauf mit fremdem Geld* (Leipzig: Veit, 1916) 50 *et seq* excludes the XII Tables could have contained such a provision.

42 See G. Pugliese, 'Compravendita in diritto romano', in L. Vacca (ed), *Vendita e trasferimento della proprietà nella prospettiva storico-comparatistica*, I (Milano: Giuffré, 1991) 31, n 14; J. Mackintosch, *The Roman Law of Sale* (1907) 43.

43 Pugliese, n 43 above, 29. This rule has been followed in the *ius commune*: see *eg* A. Vinnius, *In Quatuor Libros Institutionum Imperialium Commentarius* (Lugduni, 1761) Lib II, Tit I, 41; Pothier, n 49 above, § 323.

44 See Mackintosch, n 43 above, 43.

45 In case of lack of delivery, instead, the seller had the right of retention over the good sold in security of the unpaid price, see Mackintosch, n 43 above, 42.

46 See R. Zimmermann, *The Law of Obligations, Roman Foundations of the Civilian Tradition* (Capetown: Juta, 1990) 275, where the Author remarks that this rationale was bound to fade once sale had become a fully executory contract; V. Arangio-Ruiz, *La compravendita in diritto romano* (Napoli: Jovene, 1954) 44, and E.J. Bekker, 'Über die «leges locationis» bei «Cato de re rustica»' (1864) 3 *Zeitschrift für Rechtsgeschichte* 442.

2 Transfer of ownership by virtue of the parties' agreement

Given that the *res perit domino* principle is incompatible with the new one introduced by the Consumer Rights Directive, we would like to compare the results obtained so far with the analysis of the relationships between two different pairs of principles. The first one is the relationship between *translatio dominii* and the principle which links it with the agreement. The second one is the relationship between the transfer of ownership and the transfer of risk.

Actually, we need to frame these relations in terms of necessary consequence instead of mere contingency.

As for the first point, the consent does not produce real effects (Article 1376 it cc) in those sales in which *translatio dominii* is deferred: sale of a future good (Article 1472 it cc), sale subject to the condition precedent (Article 1465, 4, it cc)[47] and sale with retention of ownership (Article 1523 it cc).

Nor does the consent transfer the property in the executory sales: sale of an unascertained good (Article 1378 it cc),[48] sale of goods belongings to others (Article 1478, 2, it cc) and preliminary purchase contract.

Those cases negate the essential quality of the link between the transfer of ownership and the moment at which the parties reach their agreement. Moreover, in those cases, sometimes the risk is transferred when the contract is concluded (Article 1523 it cc), sometimes it is transferred together with the ownership (Articles 1472, 2 and 1465, 4, it cc).

3 The hypothesis: the obligation to deliver enters the Consumer Sales' synallagma nexus

We want to consider here, in an analytical perspective, the scope of the Italian Consumer Code's Reform and to analyze the impact of the EU Law on the Italian legal system starting from the European Consumer Sales Directive on the sale of

47 In the sale in which the accomplishment depends on a condition, if the thing sold perishes before the event of the condition, the loss should be the seller's, although the condition should come to pass afterwards. This happens because the seller is the owner of the thing: see Domat, n 9 above, liv I, tit II, sec VII, 343.

48 If the things are sold by number, weight or measure, all the diminutions and the losses which happen before the things are numbered, weighted or measured fall upon the seller, for until then there is no sale: see Domat, n 9 above, liv I, tit II, sec VII, 399. Actually, until such time, *nondum apparet quid venierit*: it does not yet appear what will be the object of the sale, since it can only be the one that is to be numbered, weighted or measured: see R.G. Pothier, *Traité du contrat de vente* (Paris: Letellier, 1762) § 309.

consumer goods. The Consumer Sales Directive, by introducing the unified notion of conformity of the goods with the contract, reshapes the content of the translational obligation of the seller as it was originally provided by the Italian Civil Code.

Here our hypothesis is that: as the Consumer Sales Directive brings under breach of contract the cases of non-conformity of the goods with the contract, in the same way, the Consumer Rights Directive seems to further push the boundaries of the same area of non-fulfilment, including therein the cases of non-delivery of the goods sold.

As has been stated above, according to the Civil Code's Law of Sale, the transferor of a specific thing is under an obligation to transfer the property in it. That duty being complied with by the consent, the seller is deemed to have met his obligation. This means that neither when the thing turns out to be defective, nor non-delivery due to an act of God are cases of non-performance.[49]

The Consumer Sales Directive, providing the seller's duty to deliver an object of average kind or quality or fit for the use envisaged by the parties or for ordinary use implies the vendor is liable for non-performance not only whenever he delivers defective (or accidentally damaged or deteriorated) goods but also, implicitly, in case of non-delivery (due to accidental loss).[50] If the vendor is under an obligation to deliver an object free from defects, *a fortiori* he is deemed to be under an obligation to deliver. Actually, the lack of delivery (which, in the traditional conceptualization on sale, does not compromise the balance between the parties' mutual obligations, due to the fulfillment of the main duty of seller,

49 The vendor is bound to warrant that the thing sold is free from defects that render it unfit for the use for which it was intended or which appreciably diminish its value (art 1490). In such a case the transferee is entitled to claim for the termination of the contract or for the reduction of the price (art 1492). When the thing sold lacks the qualities promised or those essential for the use for which it was intended, the buyer is entitled to obtain the termination of the contract according to the general provisions on dissolution for non-performance (art 1497). The parties may extend the vendor's warranty to any defect or deficiency in quality not envisaged by artt 1490 and 1497, giving the buyer the right to resort to remedies other than those provided under artt 1492 and 1497 (*eg* replacement of the goods). Similarly, the contractors may exclude or limit the vendor's liability, but the agreement is ineffective where the transferor has in bad faith failed to reveal defects to the vendee (art 1490, 2) and, where, in contracts made by standard terms, the clause is not signed specifically by the transferee (art 1341, 2).

50 The integrity of the thing is here relevant as a quality related to the standard of conformity of goods with the contract, according to art 129, 2, lett c) it cons c, which is protected by the remedies under art 130 it cons c. The standard concerns with a status that can be assessed only with regard to a certain moment in time, which is the buyer's acquisition of the material possession of the goods.

which is the transfer of ownership, by mere consent) becomes concurrent, next to the transfer of the title, to the payment.

This change of conceptual basis is confirmed by the Consumer Rights Directive according to which, distinctly, under expedition consumer sales contracts the lack of delivery, even due to accidental loss or destruction of the goods, means the transferor has not complied with his own contractual obligations. The consequences for this failure to deliver, in terms of remedies for breach of contract, will be dealt with shortly.

Taking it one step further, this change now provides the theoretical basis for the risk being allocated according to an obligational plane, finally putting it beyond doubt that the *res perit domino* rule is no longer suitable for modern laws on Sale of Goods.

a) State of the Art on the hypothesis

This hypothesis would drop, at least with regard to consumer sales, the main justification that is found by the doctrine for the *res perit domino* rule, within the framework of the Italian Civil Code system. As has been stated above, the buyer has to bear the risk of loss or damage to the goods, which happen after the agreement which concludes the contract but before delivery, because the seller has fulfilled their obligation (transfer of ownership to the purchaser). As a consequence, there is no reason to deny them the right to counter-performance (price).

Admittedly, also with reference to the Civil Code sales there are those who, arguing under Article 1476 it cc, recognize the obligation to deliver as a principal obligation. This thesis extends the concept of 'principal obligation' beyond the obligations which are inherent in the abstract cause of the contract (as the one to transfer the ownership in the good to the buyer, which is considered the causal and typical obligation of the seller).

As a 'principal obligation', this thesis also considers the one related to the concrete cause of the contract, because of its main importance in the economy of the contract itself, as the obligation to deliver the goods. According to this opinion, this obligation should not be considered as an accessory one in the context of the sale.

However, if the current Civil Code system remains the legal framework to these considerations, it is hard to challenge the objection based on the accessory nature of the obligation to deliver. Actually the majority of the authors and the case law does not extend the nexus of synallagma to include delivery.

b) Theoretical consequence of the hypothesis

If the spectrum of investigation widens to include International Law and EU Law, the conclusion may be different.

Here the recent rules seem to confer a new strength to any risk relating to the object of the contract. And not only to the risk linked to the non-conformity, pursuant to Article 130, 1, it cod cons, but also to the risk of fortuitous deterioration, in defiance of the rule to Article 1510, 2, it cc, on sale where the seller dispatches the goods. It is the strength of compromise in the functionality of the contract where the ownership is transferred by virtue of the agreement of the parties and, therefore, of not the enforceability of consideration.[51]

According to our hypothesis, this result seems possible only by entering the delivery within the nexus of synallagma. It seems then that the area of breach of contract, by widening it to include the non-performance of the obligation of delivery, is changed correspondingly, admitting the opportunity to consider the fulfilment of the obligation of transfer of ownership as inadequate to exclude a non-fulfilment of the contract. And, therefore, insufficient for the conservation of the contract itself.

In general terms, the remedy offered by the law depends on the type of injury suffered by the person who has an interest worthy of protection. Here, however, the analysis has to move from the remedies granted by the EU Law and, therefore, from the technique chosen to protect the consumer's rights. It is the change of that protection which leads to revisit the nature of the rights of the buyer and, consequently, the nature of the obligations of the seller which shall enter into the synallagma nexus and which have to be fulfilled in order to prevent the buyer from claiming the contract be terminated.

4 The reasons against the reform which lead to abolishing the *res perit domino rule*

Each rule regarding transfer of property is affected by a peculiar construction with reference to the nature of the sale contract and its own effects. And this, in turn, has implications for the remedies to which the parties are entitled. Above all, each

51 On the relationship between art 130 it cod cons, see: C.M. Bianca, *La vendita dei beni di consumo* (Padova: Cedam, 2006 – Le nuove Leggi civili commentate) 443; A. Luminoso, 'Armonizzazione del diritto europeo e disarmonie del diritto italiano: il caso dei contratti di alienazione e dei contratti d'opera', (2008) *Europa e diritto privato* 476; G. Amadio, in S. Patti (ed), *Commentario sulla vendita dei beni di consumo* (Milano: Giuffré, 2004) 202.

legislator has to guarantee the internal coherence of its own legal system. Thus, while we are searching for a route toward the harmonization among the Sales Laws, we cannot forget that, while balancing expediency, in the end every legislator is free to follow such a way which more suitably protects those interests which are deemed to be worthy of protection.

As has been stated above, the main reason to exclude the reform of the Article 1465, 1 it cc is related to the structure of the sale contract and its nexus of synallagma.

Here are the other attempts to justify the *res perit domino* rule, but they do not seem so persuasive.(i) As ownership is transferred by consent, even before delivery the vendee has given the disposal of the goods. Furthermore, as he has the right to the accessions, fruits and profits of the thing bought, he has to bear the risk of the loss or deterioration of it. In addition to what we have already observed with regard to this argument, it may not be amiss to recognize here that, if this idea may justify the risk rule for the purchaser who has a speculative interest, it cannot be applied for one who buys because they are interested in the possession of the thing. Nor when no change takes place in the goods' market value.

(ii) When delivery is postponed to a later date due to the purchaser's interest, or negligence, and the thing perishes *casu* before tradition, the risk shall be the buyer's by virtue of the *imputet sibi* rule.[52] This argument being correct, we should infer that the risk must be the seller's whenever delivery has been delayed due to the interest of the vendor, which is a consequence that the law does not provide.[53]

5 The reasons for a reform of the Italian Civil Code sale contracts system in a perspective of full harmonization

If modern commercial sales have unascertained goods as their object, this has to be reflected in the modern provisions on sales. European Law, dealing with consumer protection, establishes solutions which would pave the way towards the foundation of a new approach in governing the Laws on Sale if only the national legal systems make an effort in order to enhance the potential for generalization which is inherent in it.[54]

52 A. Natucci, 'Considerazioni sul principio res perit domino (art. 1465 c.c.)' (2010) II *Rivista diritto civile* 41.

53 S. Pagliantini, 'Sul principio res perit domino' (2010) *Obb e Contr* 11.

54 Zimmermann, n 22 above, 118.

The passing of the risk is a material consequence due to the physical control of the thing and not a formal link deriving from the abstract connection between the *res* and they, who have a title in it.[55]

But, apart from this and generally speaking, the contract of sale concerns things. What in particular with regard to the things? Well, we dare say the property[56] in it as well as the physical control and use of it.

This is the reason why it seems so natural to look at the sale contract from a propriety perspective and, in determining the feature of the sale, to reason in terms of property. It also seems that many of the most important questions should be posed as if they turn on the requirements for the transfer of property, the moment when such a transfer occurs and the consequences of it.[57]

According to this perspective, we shall, from a static viewpoint, consider three elements: the real right of property, the possession of the good, and the risk of its loss or deterioration. These elements represent corresponding interests. Firstly, the right of disposal of the title and, consequently, of the thing, as well as the right to defend them *vis-à-vis* third parties, the matter of fact linked to the physical use and the enjoyment of the thing itself, and, finally, the interest connected to the legal and economic consequences of the loss of the thing, the risk here being an attribute of the real right as well as the fruits and the improvements of the good.

When they are involved in a contractual scheme, as happens in the contract of sale, it is also true that these elements are the subjects of the obligations created by the contract itself. As a consequence of this, we shall change our outlook into a dynamic one and treat these elements as stages of a transaction, which consist of: transfer of property, delivery of possession and passing of risk. From this perspective, the transaction begins when the three interests are vested in the vendor and is not completed until all three of them have passed irrevocably to the vendee.[58] First of all, which rules shall be applied? Secondly, there is a factor of complexity. These stages may not be contemporary. This means that we must consider the consequences due to the respective transfers taking place in a sequence.

55 V. Polacco, *Le obbligazioni nel diritto civile italiano* (Roma: Athenaeum, 1915) 347.

56 It is indeed a generalization, valid only with reference to the national legal systems here considered. Actually, the legal consequences of a sale would be entirely different whether or not the applicable provisions are based upon 'the recognition of the one-worded legal preconception property': see Lagergren, n 10 above, 67.

57 Lagergren, n 10 above, 60.

58 Sealy, n 4 above, 225.

The key words of the following pages are two: element and stages. When we consider property, possession and risk as element of a fixed situation, we may apply the rules connected with property. On the contrary, when we consider them as stages of a transaction (and as subjects of a legal duty), we should search for different provisions; those of the law of obligations.[59]

It is true that the law of alienation is a part of the law of property and concerns the dynamic perspective of the vendor who divests and the vendee who vests the title as owner. But the law of alientation directly governs the right of property. In the contract of sale, property is nothing but the indirect subject of the matter to be governed. In the contract of sale, risk does not concern the loss of the property but the loss of the performance, because the subject ceases to exist. As a consequence of this, risk is the hazard of the extinction of the obligation when this obligation has a mutual link with another one between the same parties in which vest inverse roles.[60] The creditor of the ceased obligation is the debtor for its consideration.

If the frame is the *iuris vinculum* due to the obligation, the issue is how to allocate the risk, whether upon the creditor or upon the debtor of the obligation whose subject perishes *casu*, regardless of the role of the one who is the owner. There is no place for the *dominus*[61] and no conceptualization based on the title fits in approaching that issue. Or rather, it only fits in the case where, as in cash purchases, the whole transaction can be accomplished at the same time, transferring possession along with title. But the most relevant types of sale (*eg* contract for sale on credit, the shifting of goods to market via a factor, the delivery or shipment on approval), involve a series of different and complex actions. And, above all, 'they involve a period, during which matters are in temporary suspension or are in active flux between the parties; over a considerable period of time there is no such title in either party as the static picture of title suggests'.[62]

Roman Law disconnected the risk from the ownership, as now does the Italian Consumer Code. How is this disconnection possible? It is possible if we treat the risk not as an attribute of property, which shall be passed together with ownership, but as a derivative concept which expresses the negative consequences on the parties' duties and rights and the remedies legally due when something befalls the thing sold. Such consequences derive from a rule whereby either or both the primary obligations of one party shall be enforceable. Likewise, those of his counterpart shall be deemed to have been carried out, even though

59 Oliva Blásquez, n 3 above, 186.
60 Sealy, n 4 above, 225.
61 Gorla, n 40 above, 7.
62 Llewellyn, n 6 above, 167.

the normally prerequisite conditions have not been satisfied. This rule encroaches upon the vendor's right to demand the price and the vendee's right to refuse payment or to claim its return, as well as the right to sue the counterpart for damages, for non-delivery or non-acceptance, or the right to resist such a claim.[63]

The result will not be that one of the parties is burdened with the obligation to compensate the damage to the other, but simply will concern the allocation of such a loss which is the loss of a determined patrimonial entity. In the economic structure of the deal we are referring to, this entity can be represented by that sum of money that corresponds to the value of the thing that has perished, namely by its price. We can apply the following mechanism: the sum of money which represents the thing lost is regarded as the stake. Where the perishing took place it will be given in the negative sense (as a loss) to the party which is indicated according to the special rule regarding the risk. Where the thing did not perish, it will be given in a positive way (as a result) to the other party (that is, it shall reach or remain in his assets).[64]

Nor is the termination of the contract a non-equitable remedy, which implies the vendor has to lose both the thing *and* the price, whilst nothing is going to bear on the purchaser due to the accidental destruction of the thing he has bought. In order to exclude this construction, it suffices to think of the settlement of interest that the parties have established through the contract. Both of them want to change the composition of their economic sphere and one party, the vendor, aims to earn the purchase price, while the vendee wants to obtain the thing. This is what the sale contract is suited to; realizing the exchange of the thing in consideration for price. From this perspective, being the purchaser who is entitled to terminate the contract for non-delivery due to the loss of the thing sold and having that remedy's retrospective effects, the consequence is the restoration of the *status quo ante*. Due to the impossibility for the purchaser to be irrevocably vested in the transfer of property, *together* with the delivery of possession *and* the passing of risk, which only corresponds to the contractual settlement of interests, all those three interests return to the part that originally had them, the seller. At the same time, not even the buyer's economic sphere has to be changed from its original amount.[65]

63 Sealy, n 4 above, 226.

64 C.A. Cannata, 'Responsabilità contrattuale nel diritto romano medievale', in *Digesto: sotto gli auspici dell'Académie Internationale de Droit Comparé e dell'Associatione Italiana di Diritto Comparato 1:* Digesto delle discipline privatistiche – *Sezione civile XVII* (4th ed, Torino: Utet, 1998) 66 *et seq*.

65 Sealy, n 4 above, 226.

This does not mean that the vendee shall not bear any consequence due to the loss of the thing, given that he does not obtain exactly what they have aimed to with one stipulation; the thing itself. As the vendee is not vested in the thing, the vendor is not allowed to claim payment. But, at the same time, because the title as owner is now the seller's and is no longer involved in the dynamic concept of transaction, its implication upon the law is that it be governed with reference to law of obligations, the rule to be applied pertains once again to the law of property.[66] And, according to the propriety perspective, risk is treated as an attribute of the ownership and the property's «*caractéristique le plus importante*».[67] Thus it is the one who has the title as owner who is bound to bear it.

The last question: how is it possible that the vendee is entitled to terminate the contract for non-delivery as with a total failure of consideration, if the property has passed to him? The answer is that the transferor continues to bear the risk, as if the title is held to have passed only defeasibly, so that in the event of loss the property is revested in the seller with retrospective effects.[68]

6 A rule proposal

The above analysis allows the formulation of the following rule for the Article 1465, 1 it cc:

> '*In contracts which transfer ownership of a specific thing or constitute or transfer real rights, destruction of the thing by a cause not imputable to the transferor releases the transferee from the obligation of performance, when the thing was not delivered to him*'.

In conclusion, it is true that the subjection of the sale of generic and unascertained goods (which has emerged, economically, as the most important form of sale) to a set of rules tailored for an act which allocates a specific object to the vendee has caused doctrinal tensions in many fields, and regarding the question of risk among the other parties.[69] Nor could there be any doubt that what is appropriate for the sale of a specific good does not represent the ideal solution for commercial sales in the industrial era.[70] But that subjection we are dealing with

66 Sealy, n 4 above, 225.
67 M. and P. Chaveau, *Traité théorique et pratique des ventes commerciales*, II (Paris: Juris-Classeurs, 1938) n 346.
68 Sealy, n 4 above, 239.
69 Zimmermann, n 22 above, 86.
70 Zimmermann, n 22 above, 118.

may also represent an opportunity to get rid of rules which can be justified more as a tradition belonging to legal history than as some logical derivation of our legal system. Such a tradition is based upon a misleading interpretation of a law, as the Roman one, where the connection between property and risk, when it took place (as in the archaic form of executed sale), had not the meaning it was gradually given at a later stage, by means of interpretation and in order to prevent in any case the risk being allocated to the seller. This means that our solution can be deemed as nothing but the most rational way to achieve the greatest outcome: the one which provides harmonization among the European National Laws of Sale of Goods.

V Summary and conclusions

1. As it is well known, the law of sale 'is in one phase part of the law of contract, in other phases part of the law of property'.[71] That is the reason why it is so hard to understand how the risk may be allocated between the parties to the contract ofsale. They are actually at the same time contractors, reciprocally bound to fulfil mutual obligations, and in such a position with regards to the thing sold as the ownership in it will pass from one to another at the end of and due to the whole transaction. As a consequence of this, it is possible in principle to approach the problem of risk by choosing the logical plane to be followed in solving it, whether a (I) proprietary or an (II) obligational one. What is strikingly unsatisfactory is the overlapping of the two planes forcing, by means of interpretation, the rules which govern each of them and emptying with artificial expedients the substantial content of property as a *ius in re* (as did the attempts the *ius commune* followed in order to explain the passing of the risk to the buyer not yet owner of the non-delivered things).
   (I) From a national legal system's perspective, both the comparative analysis (made in the second part of the Article) and the one focused on the Italian Law (in its third part) reveal a sort of neutrality of the risk rule itself in determining any consequence on the purchaser's protection. Because of the draftsmen's choice in following a propriety logical plane and in establishing that risk attaches to property, the concrete result upon risk, and consequently upon the parties' mutual rights and duties, is due to the rule adopted to govern the transfer of ownership.

71 Llewellyn, n 6 above, 159.

(II) Applying the rules established in the law of obligations means that the risk does not concern the loss of the real right, but the loss of the personal right that entitled the creditor to obtain a specific performance. What is relevant here is not the thing by itself, as the subject of the real right of property. On the contrary, what is relevant is the right of property as the subject of the performance, besides delivery, due to the creditor. As a consequence of this, being the thing lost, it is not the real right of property but the personal right connected with the performance (and thus the obligation itself) of delivery which is ceased due to extinction of its subject.

Among the rules of the law of obligations, the allocation of the risk concerns the ones which govern the ways in which the obligations are assumed by law to be extinguished and the ones which are related to the relationship between the obligation of delivery and the obligation to pay the purchase price.

2. From a supranational perspective, the analysis made in the first part of the Article proves that the rule which governs the passing of risk may work independently from the principles underlying the transference of the property.
3. The comparative perspective based on the positive legal systems considered here confirms the same two options.
   (I) There is an interference between the proprietary logical plane and the passing of risk in Italy, England and Scotland. This means that the processing of the rule which is assumed to find a balance in the interests in conflict finally passes through the principles concerning the transfer of ownership. From this path, the functionality is highlighted, with regard to the *res perit domino* maxim, both of the consent's real effect and the construction of the synallagma of sale contract irrespective of the obligation of delivery.

   If we try to follow a different perspective, which starts from the result to obtain, as it could be the allocation of the risk upon the buyer (because between the interests in conflict, the seller's is deemed to deserve more protection), and proceed toward the elaboration of the most efficient *regula iuris*, there is no difference between the Roman *casum sentit creditor* and the *res perit domino* based on natural law. This means that in approaching our problem, we must also consider the axiological perspective. Which is now the interest which deserves the stronger protection?

   (II) The risk is allocated according with the law of obligations in Germany. If there is similarity between the BGB provisions and the Roman Law, in some aspects the former is different. This is true because of the inclusion

of the duty to transfer the property among the ones which burden the vendor and the construction of a link of mutual interdependence between the transferor and the transferee's duties. Because the passing of risk is connected to the transfer of possession, irrespective of any passing of the property, the principle is *casum sentit debitor*.

4. As specifically for Italy, the two methods, (I) and (II), lead to congruent results.
   (I) From a proprietary perspective,
   (a) according to the law of alienation, risk attaches to the property, which is in principle transferred by the mere consent, but can also be deferred (Articles 1472, 1465, 4, 1378, 1478, 2 it cc);
   (b) the risk is treated as an attribute of the real right of property.
   (II) Following the law of obligations,
   (a) the obligation is extinguished when its performance becomes impossible for cause not imputable to the debtor (Article 1256 it cc);
   (b) there is a mutual connection between the obligations under the sale contract due to the specific structure of it. In principle, this link entails that the supervening impossibility of the performance leads to the termination of the contract. This means that the impossibility not only excuses the party from performing, his own obligation being extinguished according to (a), but also frees the counterpart from his own debt (Article 1463 it cc). Nevertheless, this rule does not govern the non-delivery due to accidental loss of the thing sold because the nexus of synallagma in the sale contract does not include delivery. The impossibility to fulfil the transferor's obligation to deliver the goods does not free the buyer from his duty to pay the price (Article 1465, 1 it cc).
5. In Italy, *res perit domino* means a rule which applies a proprietary criterion to solve a problem linked with the law of obligations, whose logical frame is entered by the rules on the law of transference. The result of the influence of the latter upon the former is the lack of any place for the delivery into the synallagma nexus which is related to the contract of sale.
6. The new criterion that the EU Law has introduced into the Italian Consumer Code introduces a disconnection between the title as owner and the burden of the risk. The concrete results upon the purchaser's protection are evident. Postponing the passing of the risk to delivery is sufficicient for the purpose of incrementing the protection of the vendee regardless of the logical proprietary plane. Combining Article 63 it cod cons and Article 1376 it cc, the purchaser is freed from the duty to pay the price although he has already become owner. On the other side, how can the risk lie upon the vendor if they are no longer the owner of the thing sold? It is possible if we approach the problem

of risk following an obligational plane, based on the mutual interdependence between transfer of ownership and delivery, on the side of the vendor, and payment of the price, on the side of the vendee.Hence, in Italy, due to the Consumer Rights Directive, in consumer sales:

(a) The risk does not pass to the buyer of the goods to be dispatched by the vendor, until he acquires the physical control of the goods, through delivery.
(b) The vendee is entitled to terminate the contract for non-delivery due to the accidental loss of the thing sold.
(c) This means that the synallagma now makes the transfer of property and delivery concurrent to the payment.
(d) This construction must be combined with the role of consent regarding the transfer of ownership.

7. This scheme may be extended to the Civil Code's sales.
   (a) If the obligation of delivery enters the synallagma, it is possible to modify Article 1465, 1 it cc, in accordance with the rule under Article 1463 it cc.
   (b) This does not imply the reform of the mode in which the property is transferred, as 'risk and ownership are two different institutions'.[72] Thus, there is no necessity to abandon the consent's real effect for a rule which links the transfer of ownership to delivery. This idea would confirm the propriety logical plane which we want to reject; that the risk should attach to property. Furthermore, this idea would lead backwards compared to the process of emphasis onthe delivery, which represents a great benefit to the requirements of commerce.
   (c) Generalizing the approach on risk from a perspective which belongs to the law of obligations could represent a sort of return to Roman Law. We can say that the DCR is for the Italian Civil Code's sale what the *ius gentium* was for the archaic sale of the Roman *ius civile*. The requirements due to the evolution of trade implied the passage from the archaic and simple executed cash purchase (in which the whole transaction was accomplished at one time), to the executory *emptio-venditio*, (which divided the contractual scheme into stages, the transference of: property, possession and risk). The same logical solution, which is followed for the Italian consumer sale, can be extended to the Italian code's civil sales. Its evolution is due to the requirements of trade and commerce.

72 E. Rabel, *Das Recht des Warenkaufs* (Berlin: de Gruyter, 1958) 296.

(d) The law of obligations' perspective leads to the delivery criterion for the allocation of the risk. This is the most advisable from an (i) empirical, a (ii) teleological and a (iii) functional viewpoint.

(i) See the results of the analysis on the supranational acts of law. It avoids the difficulties due to the different rules on governing the transfer of property.

(ii) It is the most efficient criterion in order to protect the buyer's interest, which is deemed to deserve a stronger defence and whose protection at the same time encourages the dealings with benefit for the market. Furthermore, it is unquestionable that the aim of the parties of a contract to sell goods is the buyer's ultimate acquisition of the physical possession of the thing sold. The purchaser buys the things for no other end but to have them in their own power and to possess them.[73] That means that the seller's duty of transferring such a possession, delivering the good to the buyer, is not merely important but 'a most vital one'.[74]

(iii) It is suitable to the dynamic reality of modern trade and commerce which develops types of sales where the whole transaction is made of a complex sequence of stages and actions; the static concept linked with title does not fit in governing them.

Acknowledgement: To Sofia, with all my love.

73 Domat, n 9 above, liv I, tit II, sec II, 266.

74 Lagergren, n 10 above, 17.