Short notes on:

CONTRACTS & THE PASSING OF RISK:

Introduction
It is often the case that when parties conclude a contract of sale, that the time manner and place of delivery can vary. It is therefore important to regulate which of the parties will bear the risk prior to delivery and under what circumstances. One such tool for this regulation is a distribution agreement.

The most common type of risk is typically damage to or the destruction of goods being sold or delivered. For example, if goods are stolen while in transit, or lost, such as where a ship sinks along with its cargo. Finally, certain goods may by way of their nature be more prone to risk or damage, such as where goods are perishable.

General rule
As a general rule the passing of risk in South Africa is regulated by Roman Dutch law. With regards to contracts of sale, the general rule is that the purchaser shall bear the risk, once the contract has been concluded or become perfecta. This implies the following requirements:

- Any and all conditions suspending the operation of the contract have been fulfilled;
- The object of the sale is ascertainable and there is consensus on it;
- The purchase price of the sale is certain and there is consensus on it;

Various scenarios can exist, as set out below:

Prior to delivery after contracts conclusion
In this case, the risk will be borne by the purchaser, as he is the one deriving the benefit of the item. The seller is similarly protected in the case of Vis Maior or so-called acts of God. In this case the seller will not be liable for the risk as it could not have been foreseen, or despite the seller foreseeing the risk, it was not within his control to prevent. However, if the loss is imputable to the seller, it may constitute a breach of contract for which the purchaser may have recourse.
**Lateness by the purchaser or seller**

It may often happen that the seller is late to deliver the goods as he has undertaken to do. In this case the seller is late or in *Mora*, and his responsibility will increase to the point that he is responsible for all damage to the goods, other than that which would have occurred had he performed timeously.

Where the purchaser of goods is late in taking delivery, the seller will be liable only to the extent where he is grossly negligent or intentionally fails to look after the goods being sold.

**Exceptions to the general rule:**

Parties can of course vary the default rule of the risk being borne by the seller by consensus and would be well advised to regulate the risk by creating a clause to this effect.

Similarly, where, a suspensive condition has not been fulfilled the risk will remain with the seller until such time the condition has been fulfilled as the contract would not be complete or perfecta.

**Conclusion**

It is important for parties to regulate the risk in respect of corporeal goods, especially where such goods are fragile or perishable. The best way to do this is to incorporate it into a distribution agreement.

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