I. **Basic Principle:** The UCC provides rules to determine which party to a transaction is responsible if goods are damaged or destroyed between the time the parties enter into the contract and the time the buyer receives possession of the goods.

A. **Dramatis Personae**
   1. Typical case = Buyer and Seller
   2. Bailee case = Buyer, Seller, and third-party “Bailee” (warehouse operator, common carrier, etc.)

B. **“Unclean Hands” Rule:** A buyer or seller who causes the damage or destruction of the goods at issue is liable for their damage or loss, notwithstanding the various “default” rules for risk allocation to follow.

C. **Freedom of Contract:** The buyer and seller can agree *a priori* who will bear the risk for various kinds of losses, and thus “trump” the various “default” rules for risk allocation to follow. § 2-509(4).

D. **Insurance:** The buyer or seller may have insurance to cover some or all of the risk of a particular type of loss. Nonetheless, UCC risk of loss rules still apply.

II. **Shipment Contract:** The seller delivers or tenders goods to the buyer at the seller’s *place of business* or residence or at some other location designated by the seller (*i.e.*, the buyer pays to have the goods delivered by a third-party carrier).

A. **§ 2-319(1)(a):** Unless otherwise agreed, the seller is liable for any damage to or destruction of the goods until the carrier takes possession.

B. **§ 2-504:** In order to pass the risk of loss to the buyer, the seller must
   1. make a “reasonable” contract with a third-party carrier;
   2. give possession of the goods to the carrier;
   3. provide the buyer with any documents necessary for the buyer to take possession of the goods from the carrier; and
4. **promptly notify** the buyer that the goods have been shipped.

- The seller’s failure to make a reasonable contract or to properly notify the buyer will justify the buyer’s rejection “only if material delay or loss ensues.”

C. **§ 2-509(1)(a):** Once the seller satisfies the requirements of § 2-504, the buyer becomes liable for any damage to or destruction of the goods in transit.

D. **Burning Issue:** What is the meaning of “ensues” in the final sentence of § 2-504? Must the seller’s failure to make a reasonable contract or promptly notify the buyer **cause** the material delay or loss, or must it only **precede** the material delay or loss?

- **UCC §§ 2-504 & 2-509(1)(a) (2003)** neither answer this burning question nor substantively change the rules regarding risk of loss in a shipment contract.

III. **Destination Contract:** The seller delivers or tenders goods to the buyer at the buyer’s **place of business** or residence or at some other location designated by the buyer (i.e., the seller delivers or pays a third-party carrier to deliver the goods to the buyer)

A. **§ 2-319(1)(b):** Unless otherwise agreed, the seller is liable for any damage to or destruction of the goods until the goods are tendered to the buyer at the stated destination.

B. **§ 2-503(1)-(3):** In order to pass the risk of loss to the buyer, the seller must

   1. put and hold the goods at the buyer’s **disposition**
      
      a. at a **reasonable hour**, and
      
      b. for the **time necessary** for the buyer to take possession;

   2. give the buyer **notice** of the tender; and

   3. provide the buyer with any **documents** necessary for the buyer to take delivery of the goods.

C. **§ 2-509(1)(b):** The buyer becomes liable for any damage to or destruction of the goods following a proper tender.

- **UCC §§ 2-503(1)-(3) & 2-509(1)(b) (2003)** do not substantively change the rules regarding risk of loss in a destination contract.
IV. Other Contracts

A. Contract to Transfer Title to Goods in the Possession of a Bailee

1. Constructive delivery: The seller delivers or tenders goods already in possession of a third-party bailee to the buyer, who will take title to the goods while keeping them in the possession of the same third-party bailee (i.e., the bailee makes a bookkeeping notation).

2. § 2-503(4): In order to pass the risk of loss to the buyer, the seller must either tender to the buyer a negotiable document of title or get the bailee to acknowledge that the buyer is entitled to take possession of the goods.

3. § 2-509(2): The seller remains liable for any damage to or destruction of the goods until

   (1) the buyer receives a document of title covering the goods, or

   (2) the bailee acknowledges the buyer’s right to possess the goods, or

   ♦ Current § 2-509(2) does not clarify to whom the bailee must acknowledge the buyer’s right to take possession, and it has been the subject of litigation. UCC §§ 2-503(4)(a) & 2-509(2)(b) (2003) clarify that the bailee must acknowledge to the buyer the buyer’s right to take possession.

   (3) the buyer receives a direction to the bailee to deliver, at which time risk of loss passes to the buyer.

B. Contract Not Specifying Place of Tender or Delivery

1. What do we do when the contract is not a Shipment, Destination, or Bailee contract (including cases where the Buyer is to pick the goods up from the Seller’s place of business)?

2. § 2-509(3) provides:

   a. If the seller is a merchant, the risk of loss passes to the buyer when the buyer receives the goods; but

   b. If the seller is not a merchant, the risk of loss passes to the buyer when the seller tenders delivery to the buyer.

   ♦ UCC §§ 2-509(3) (2003) dispenses with the distinction between merchant and non-merchant sellers, so that the risk of loss in all “other” contracts passes to the buyer only when the buyer receives the goods.
V. **Effect of Buyer’s or Seller’s Breach on Risk of Loss:** All of the foregoing discussion covers risk of loss in cases where neither party has breached its contractual obligations (distinguish b/w breach and cause of loss). What happens to the default risk of loss rules if one of the parties has breached?

A. **§ 2-510(1):** If the seller’s tender or delivery of goods “so fails to conform to the contract as to give a right of rejection” by the buyer, “the risk of their loss remains on the seller until cure or acceptance.”

B. **§ 2-510(2):** If the buyer rightfully revokes acceptance (after first having received and accepted the goods), any loss in excess of the buyer’s insurance coverage rests on the seller.

C. **§ 2-510(3):** As to conforming goods, if the buyer repudiates or otherwise breaches (while the seller is still in possession of the goods), any loss in excess of the seller’s insurance rests on the buyer.

D. **Key Considerations:**

1. Which party has **control** of the goods?

2. **§ 2-510 does not** affect the subrogation rights of the aggrieved party’s insurer.

VI. **Risk of Loss Under Article 2A:** Tracks the provisions of Article 2, compare §§ 2A-219 & -220 with §§ 2-509 & -510, with default rule that risk of loss never passes from the lessor to the lessee, except in cases of finance leases. **§ 2A-219(1).**

VII. **Risk of Loss Under the CISG**

A. **Shipment Contract:** When the contract does not specify a place of delivery, the risk of loss to identified goods passes to the buyer when the seller hands over the goods to the first carrier. **Art. 67(1) & (2).**

B. **Destination Contract:** When the contract does specify a place of delivery, the risk of loss to identified goods passes to the buyer when the seller hands over the goods at the place of delivery. **Art. 67(1) & (2).**

C. **Goods Sold in Transit**

1. **General Rule:** The risk of loss to identified goods sold in transit passes to the buyer at the conclusion of the contract. **Art. 68.**

2. **Assumed Risk:** If the circumstances so indicate, the buyer assumes the risk of loss to identified goods when the seller handed them over to the carrier. **Id.**
3. **Undisclosed Loss:** If the seller knew that the goods had been lost or damaged at the conclusion of the contract, and did not disclose that fact to the buyer, the seller is responsible for the damage or loss.

D. **Contract Not Specifying Place of Tender or Delivery:** If the contract does not fall within the scope of Article 67 or 68,

1. **General Rule:** the risk of loss passes to the buyer when the buyer takes possession of the goods or, if the buyer fails to timely take possession, when the seller or carrier places the goods at the buyer’s disposal and the buyer breaches the contract by failing to take delivery, Art. 69(1).

2. **Exception:** However, if the buyer is obliged to take possession at some place other than the seller’s place of business, the risk of loss passes to the buyer when delivery is due and the buyer is aware that the goods are at the buyer’s disposal at the designated locale.