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## **Passing of Property in Goods in Contracts of International Sale of Goods**

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The existing international legal instruments that deal with contracts of sale do not cater for the transfer of ownership in goods sold, yet transfer of ownership is core to the contract of sale. This incapacity is mainly due to divergence in different countries' legal systems as far as transfer of ownership is concerned, leaving parties to an international contract with no option other than expressly agreeing on the law applicable to the transfer of ownership. However, for various reasons parties may forget or be unable to determine the applicable law. This article attempts to highlight different options that can be resorted to in order to cope with the problem of transfer of ownership in contracts that deal with international sale of goods.

Keywords: transfer of ownership, contract of international sale

## Introduction

A contract of sale of goods is one of various legal transactions people enter into in their daily lives. A contract of sale entails necessarily the transfer of title to (property in) goods sold.<sup>1</sup> A contract of sale between parties whose places of business are located in different states is an international one.<sup>2</sup> In such a case different legal systems and backgrounds are involved and it is necessary to find the common ground between contracting parties. Several international instruments dealing with different core issues related to rights and duties of parties have been elaborated to guide international actors. One example is the United Nations Convention on Contracts for the International Sale of Goods (CISG). However, transfer of property in sold goods<sup>3</sup> is not covered by most instruments in use,<sup>4</sup> even though it is central to the contract of sale. Given this situation, one may rightly argue that contracting parties must envisage in their sale contract clauses related to the transfer of ownership in sold goods. Surprisingly, this issue is often overlooked by parties when entering into commercial contracts.<sup>5</sup>

In such an absence of any relevant provision dealing with the transfer of ownership in the core international sets of rules related to contracts of international sale of goods, the crucial question that arises is, When and how does transfer – from the seller to the buyer – of property in goods occur in the contract, since property transfer may produce some important effects?<sup>6</sup> In addition, and more important, is the problem of the law applicable to the transfer of property. This article intends, therefore, to bring to the attention of international actors in the sale of goods the existence of these loopholes as well as to draw up proposals on how to cope with them.

This article focuses on the transfer of ownership in international contracts of sale in view of relevant different international sets of rules. In the first place, the article explains summarily different main principles of passing of property in goods under different legal systems, since international sale contracts may involve any of them. Secondly, details on passing of property in goods in international sale contracts are dealt with.

### 1. Principles of Passing of Property in Contracts for Sale of Goods

When a contract of sale is concluded, one of its main effects is the transfer of ownership in goods sold from the seller to the buyer.<sup>7</sup> The passing of property in the sale contract is an issue which is dealt with in various ways in legal systems of different states, and in an international sale contract parties from at least two countries

are involved. Without pretending to be exhaustive, this section provides a summarized overview of major general principles governing the transfer of ownership in some countries from both civil and common law systems.

In many civil law system states, passing of property takes place either at the time explicitly agreed upon by parties to the contract or, in the case of silence, at the time the parties exchange their consents to the sale, and this irrespective of whether the goods have been delivered or the price thereof has been paid.<sup>8</sup> In this system, as in common law countries, property in generic goods passes only when they are identified;<sup>9</sup> when they are sold by weight, number or measure, property passes when the goods have been weighed, counted or measured.<sup>10</sup> Moreover, property in future goods passes when they are manufactured, grown or come into existence and the buyer can take delivery of them; in conditional sales, property passes upon fulfillment of the condition.<sup>11</sup>

In common law system countries, as under English and American law, the principle is that in the case of a sale contract dealing with specific or ascertained goods, property passes to the buyer at the time parties intend it to be transferred.<sup>12</sup> However, the default principle under English law envisages the same solution as in civil law systems, pursuant to which when there is unconditional contract of sale of specific or ascertained goods, property in them passes to the buyer at the time the contract is made, irrespective of whether the time of payment or delivery or both is postponed.<sup>13</sup> In the case of unascertained goods, property in the goods is transferred to the buyer when they are ascertained.<sup>14</sup> It is noteworthy that there are several cases where specific rules apply,<sup>15</sup> including the title retention clause, which serves to separate the passing of property and risk of loss and which provides that until payment is received title remains with the seller,<sup>16</sup> as well as other conditions that may be imposed by a party to contract.<sup>17</sup>

In some countries, for example the Netherlands, Germany and China, the default rule is that physical delivery is needed in order for transfer of ownership to take effect.<sup>18</sup> This is also the case under Swiss law, where delivery of possession is necessary for the transfer of ownership in movable goods<sup>19</sup> in addition to a cause underlying this transfer. All the above systems recognize, however, the transfer of possession by way of *constitutum possessorium*<sup>20</sup> (the seller transfers ownership but retains temporary control over the thing). In addition, if the sale is a cash sale there must be payment of the price in addition to delivery of the goods for transfer of ownership to take effect,<sup>21</sup> except in the case where there is a credit agreement.<sup>22</sup>

The principles of ownership transfer so far analyzed apply within territorial jurisdictions of a given country when a sale contract does not contain any foreign

element. Questions rightly arise in the case of an international contract of sale, since at least two different state legal systems are involved.

## **2. Law Applicable to the Passing of Property in International Sale Contracts**

**P**arties to an international contract of sale are in different countries, and such a contract is governed either by a particular national law or by merchant law (*lex mercatoria*).<sup>23</sup> The latter is defined in various ways,<sup>24</sup> though in most cases it is agreed to include, among others, rules laid down by merchants and general principles which are codified by different institutions.<sup>25</sup> In this section the focus will be on analysis of the *United Nations Convention on Contracts for the International Sale of Goods* (the CISG) and Incoterms (International Commercial Terms adopted by the International Chamber of Commerce for use in international and domestic contracts for the sale of goods) as the most internationally used rules governing contracts for international sale of goods. Nevertheless, other international and regional conventions also shall be resorted to in order to have a more comprehensive view. The analysis will, of course, be limited to the passing of property in international sale contracts. Finally, other rules and principles that govern the passing of property in an international contract of sale, be they the result of the choice of parties to the contract or not, shall also be scrutinized.

### *2.1 Passing of Property under the CISG*

The CISG, adopted on 11 April 1980 to enter into force on 1 January 1986, has certainly been a worldwide success<sup>26</sup> and is increasingly applicable to world trade as more and more states accept it and make its rules part of their law.<sup>27</sup> The task of the CISG is to provide uniform rules for the international sale of goods.<sup>28</sup> The CISG applies when parties to the sale contract have their places of business in different states which are contracting states or when the rules of private international law lead to the application of the law of a contracting state.<sup>29</sup> Furthermore, parties are entitled to choose the CISG as the law governing their contract even if they are located in states which are not member states to the convention.<sup>30</sup> In this case the CISG shall apply as *lex mercatoria*.

Article 30 of the CISG states that the seller must, among other obligations, transfer the property in the goods as required by the contract and the CISG. However, it is explicitly stated in article 4 (b) of the CISG that it is not concerned with the effect which the contract may have on the property in the goods sold. From the two provisions, it is clear that the transfer of ownership is a matter to be regulated by the contract stipulations in a case where the parties decide that the contract is governed by

the CISG. Thus a thorny question arises when parties have not said anything about ownership transfer.

The transfer of property is not dealt with by the CISG because legal systems disagree on this question. Countries have never managed to reach agreement (as seen *supra*, the mode and time of transfer of ownership differ in different legal systems), and they do not agree on various consequences attached to the transfer of ownership, such as the questions of validity and effects of the reservation-of-ownership clause, mainly in case of bankruptcy.<sup>31</sup>

To sum up, in cases where the transfer of ownership is effected by the delivery of goods sold, the CISG may play a vital role in the transfer of ownership since it regulates the delivery of goods in international sale.<sup>32</sup> However, in this case the role of CISG in as far as transfer of ownership is concerned comes as a subsequent application of the domestic law which eventually provides for transfer of property by delivery.

## *2.2 Passing of Property under UNIDROIT Principles for International Commercial Contracts*

According to the Principles for International Commercial Contracts adopted by the International Institute for the Unification of Private Law (UNIDROIT), the very principles “may apply when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like. They may be applied when the parties have not chosen any law to govern their contract”.<sup>33</sup> In my opinion, they may also apply when there is an aspect of the contract which is not regulated by the law governing the contract. However, if parties to the contract have not managed to contemplate transfer of ownership in their contract, the principles will be helpless, since they neither regulate the transfer of ownership of the goods to be sold nor contain provisions concerning delivery of the goods.<sup>34</sup>

## *2.3 Passing of Property under Incoterms*

The analysis in this article is confined to FOS, FOB, CIF, EX-SHIP and arrival terms in general, since either they are the most used,<sup>35</sup> or at least each selected term represents a group.<sup>36</sup>

Incoterms do not deal with the transfer of ownership in goods, which remains a matter subject to the sale contract and/or the applicable law; rather, Incoterms deal with responsibilities of parties for delivery of goods under sales contracts.<sup>37</sup> As for the CISG, the underlying cause is that the law on transfer of property rights differs from country to country.<sup>38</sup> The time and manner of transfer of ownership is determined by

the applicable national law. The determination of the law applicable to the contract is therefore a relevant issue.

However, according to some authors and some case law the moment of passing of property in the case of some Incoterms can be traced and has been considered. As argued by L. S. Sealy and R. J. A. Hooley, in a FAS (free alongside ship) contract, property in goods sold normally passes to the buyer on delivery, i.e., when the goods are placed alongside the ship, just at the same time as risks.<sup>39</sup> In a FOB (free on board) contract, property as well as risk and possession pass when goods cross the ship's rail, save in a case where the seller has reserved the right of disposal (by retaining the bill of lading), when goods are unascertained or when the contract provides otherwise.<sup>40</sup> In a CIF (cost, insurance and freight) contract, property and possession pass to the buyer when documents are handed over, but the risk passes retroactively as of shipment.<sup>41</sup> In ex-ship or arrival contracts, property and risk pass with delivery of possession.<sup>42</sup>

From what is said above, one may ask whether this amounts to affirming that Incoterms deal with the transfer of ownership. In my view, it cannot be asserted that transfer of ownership flows directly from Incoterms, since in the above arguments authors use expressions which rather carry a supposition and/or an uncertain idea, for example, "...property normally passes...", "property might pass...", etc. Furthermore, in many other cases authors quote cases decided by English courts. Thus, it can be clearly said that courts were trying to find a solution to the question of the passing of ownership under Incoterms. This is true in the sense that the report of the United Nations Conference on Trade and Development (UNCTAD) confirms that to know the moment of transfer of ownership one must first determine the national applicable law. In most cases the moment at which property passes is a matter of intention to be gathered from the terms of the contract, the conduct of the parties and the circumstances of the case.<sup>43</sup> Therefore, this is an orientation taken by courts. Since Incoterms regulate the delivery and, in some legal systems, as seen *supra*, property in goods sold passes upon delivery, Incoterms shall play an important role in the passing of property. Nonetheless, they do not play this role by themselves, but rather subsequently to the application of the domestic law governing the transfer of ownership.

In a case where the transfer of ownership is not regulated under international rules under scrutiny, one may resort to the contract between parties, which may help to show a way out of this puzzle.

#### ***2.4 Choice of Applicable Law by the Parties***

As underscored by the United Nations Commission on International Trade Law (UNCITRAL) Secretariat in its explanatory note on the CISG,

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The basic principle of contractual freedom in the international sale of goods is recognized by the provision that permits the parties to exclude the application of CISG or derogate from or vary the effect of any of its provisions. This exclusion would most often result from the choice by the parties of the law of a non-contracting State or of the domestic law of a contracting State to be the law applicable to the contract.<sup>44</sup>

The relevant provision in this regard is article 6 of the CISG. Strictly speaking, this provision is not applicable to the transfer of property in goods sold since it entails the idea that parties may vary or derogate from the already regulated matter, while the transfer of property in goods sold is not governed by the CISG.<sup>45</sup> But at least it consecrates the principle of contractual freedom in the international sale of goods, especially its recognition by the CISG. This widely recognized freedom of choice of rules in private international law as well as international conventions stipulates that parties are free to choose the law governing the contract,<sup>46</sup> which can be the domestic law of the country designated by the contracting parties in an express clause or can unambiguously result from the provisions of the contract.<sup>47</sup> Furthermore, it can be the law of the country of one party, the law of a neutral country<sup>48</sup> or not connected to the law of any country but rather the principles recognized by international traders known as the *lex mercatoria*.<sup>49</sup>

However, there are mandatory rules which cannot be derogated from by parties no matter how international their contract may be.<sup>50</sup> One may rightly wonder whether the law chosen by the parties as the law governing the contract governs also the transfer of property in goods sold.

In principle, the law applicable to the contract does not necessarily govern the transfer of ownership.<sup>51</sup> This can be illustrated by the example of a case where parties have chosen the *lex mercatoria* as the law governing their contract. Yet the *lex mercatoria* does not govern the transfer of ownership.<sup>52</sup> Moreover, parties may choose the domestic law of either country as governing the contract, while in the other's domestic law, transfer of ownership must be necessarily be governed by the latter.<sup>53</sup> The choice of law clause must explicitly state that the law chosen will also govern the transfer of ownership.<sup>54</sup>

Parties are allowed to subject different elements of the contract to different laws<sup>55</sup> under what is commonly known as *depeçage*.<sup>56</sup> Under English law, it has been held several times that the law governing the contract does not apply to the transfer of ownership. In fact the trend is that the *lex situs* governs the transfer of ownership.<sup>57</sup> Parties should, thus, choose the law governing the contract as also the law governing transfer of ownership to avoid eventual contradictions between the law governing the contract and the law governing transfer of ownership.<sup>58</sup>

It can therefore be concluded that the transfer of ownership will depend on the law chosen by parties governing the contract. Moreover, as seen in section 1 of this article, even though only some exemplary domestic law cases were discussed, the manner and timing of transfer of property in goods sold will vary according to the domestic law chosen by the contracting parties.

The choice of applicable law may be implied.<sup>59</sup> Some authors equate and analyze the implied choice as the absence of choice of law;<sup>60</sup> however, in this article the implied choice of applicable law shall be discussed under this subsection. Indeed, in this case the proper law is determined by reference to the subjective element (the implied intention of parties).

The implied choice of applicable law can be deduced from the arbitration or jurisdiction clause in the contract.<sup>61</sup> This is justified by the principle *qui eligit judicem eligit jus* which entails that a stipulation as to the appropriate tribunal simultaneously provides an appropriate basis for the determination of the law to be applied.<sup>62</sup> Furthermore, the choice of applicable law may be implied from the parties' use of a standard form known to be governed by the law of a particular country, from an express choice in previous or related transactions between the countries or from references in the contract to particular provisions of the law of a particular country.<sup>63</sup>

In as far as transfer of property is concerned, some authors argue that a choice of law governing the contract (express or implied) might be implied only when the contract was made by a layperson or an inexperienced business man. In fact, the latter would probably not be aware of the mentioned problem, while a lawyer should know the distinction.<sup>64</sup> In my view, when the absence of choice of applicable law is not due to failure to reach a mutual agreement as to the law governing the transfer of ownership, the law governing the contract should apply. If parties have chosen the law governing the whole contract, I do not see any grounds for isolating one element from the whole and trying to look for another governing law when the parties did not manifest any intention of subjecting that element to a different law.

However, one may rightly ask what happens when the contract contains no clause about the law governing transfer of ownership and there is no room for implied choice.

### ***2.5. Absence of Choice of Applicable Law by Parties***

Contracting parties may fail to contemplate the applicable law for various reasons, for example ignorance, negligence or inability to come to a mutual agreement.<sup>65</sup> In the absence of any choice of law the court shall decide the proper law applicable to the contract based on conflict of law rules<sup>66</sup> which vary from country to country.<sup>67</sup>

In a case where parties have not chosen the law applicable to the contract, it shall be governed by the law of the country with which it is most closely connected.<sup>68</sup> Under article 4 (2) of Rome Convention, it is presumed that a contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or central administration in the case of a body corporate or unincorporate.<sup>69</sup>

Under article 8 (1) of the Convention on the Law Applicable to Contracts for the International Sale of Goods of 1986 (but which has not yet entered into force), the contract is governed by the law of the state where the seller has his place of business at the time of conclusion of the contract. Article 8 (2) of the same convention provides some cases when the law of the state of the buyer can govern the contract. Nonetheless, this provision cannot be of great help since article 5 (c) of the convention excludes the transfer of ownership from its scope of application. However, this convention can show the underlying spirit, since it goes along the same lines as the 1980 Rome Convention on the Law Applicable to Contractual Obligations. In fact, the Giuliano-Lagarde Report of 1980 on the convention highlights that the characteristic performance is usually performance for which payment is due, such as the delivery of goods, etc.<sup>70</sup>

In this same perspective, article 117 (3) (a) of Swiss Private International Law, which goes into some detail, states that the characteristic performance is deemed to be, in particular, performance of the transfer, or in the case of contracts the transfer of a thing or a right. There is no doubt that under a contract for sale of goods the characteristic performer is the seller.<sup>71</sup> Therefore, the law governing transfer of ownership should be the law of the state of the seller. Indeed, it would be unfair if the law of the country of the seller cannot govern ownership transfer while his/her performance is said to be characteristic of the contract. Once this law is determined, the next step is to see what it states about the transfer of ownership. In many cases the *lex situs* shall apply.<sup>72</sup> However, a crucial problem may arise: What happens if it is not possible to determine where the goods were located at the time of conclusion of the contract?

Obviously in such cases the *lex situs* principle cannot apply.<sup>73</sup> Under Swiss law, the law of the place of destination shall apply.<sup>74</sup> In other cases, the law governing property in transit is deemed to be the law of the state of origin<sup>75</sup> or the law governing the contract.<sup>76</sup>

## **Conclusion**

Passing of property in goods sold from the seller to the buyer is a vital element in any contract of sale. In different legal systems, passing of property in goods sold is regulated in various different ways. The manner in which and the time when passing of property takes place differ, therefore, from one country to another. Passing of property may take place, in principle, immediately and automatically at the moment the contract of sale is concluded, especially in civil law tradition countries. On the contrary, in common law tradition countries the principle is that the intention of parties prevails as to when and how passing of property is effected.

In some other countries the passing of property in goods sold is accomplished with the physical delivery. In this case, it is worth noting that some countries require either the payment of the price or a valid underlying cause besides the delivery of goods.

When dealing with a sale confined within the limits of one state, the passing of property in goods sold does not cause any problem, as it is governed by the same law as the contract. In contracts of international sale of goods, the passing of property deserves particular consideration. The various sets of rules, principles and conventions of international trade do not regulate the moment and the manner of passing of property, allegedly because different countries have failed to reach a consensus. Consequently, the issue of passing of property in goods sold is a matter left to contractual stipulations. The parties may expressly or by implication choose a national law that shall govern the passing of property which may differ from the law governing the entire contract. However, in some instances parties do not include in the contract clauses governing the passing of property for various reasons, including but not limited to oversight, ignorance and failure to reach a mutual agreement. In such a case, the law applicable to the passing of property shall be determined by the court, based on various objective criteria. Since the passing of property is a delicate issue, parties are advised to make a choice as to which law will govern the passing of property, as in the absence of such a choice the court may decide on a law which was not intended by parties.

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