



Transfer of Property in the Goods Sold while being Transported in the High Seas Leg

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Abstract: This paper examines the time the ownership shall transfer from the seller to the purchaser regarding the goods sold in transit. In particular, while the goods are transported via the high seas leg. The significance of this study lies in the fact that the rule of transferring property in goods transported in the high sea has not yet been regulated by international relevant instruments or national legislation. In addition to the fact that even the regulation of the transfer of property –in general- has been overlooked in international instruments to be addressed by national laws which adopt various rules in this regard. Therefore, this paper will suggest recommendations to bridge the gap when deciding the applicable law governing a property transfer in the goods sold. At the same time, they are on the high seas.

Keywords- transfer of property, high seas, English law, applicable law, sale of goods.

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1. Introduction

Transfer of property is one of the critical implications arising from the conclusion of the international sale of goods contract. Therefore, some jurisdictions have mainly linked the conclusions of the contract of sale of goods to the time of transferring the property from the seller to the purchaser. This can be inferred from Article 1583 of the French Civil Code. Section 18 of the UK Sale of Goods Act linked the time of transfer of property to the time of concluding the contract, provided that the contracting parties have not agreed otherwise (Al-Daboubi, 2021) as it is expressly enshrined in section 18 of the UK Sale of Goods Act 1979, which declares:

“Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer. Rule 1.-Where there is an unconditional contract for the sale of specific goods in a deliverable state the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed”.

The importance of the transfer of property lies in the fact that the ownership of the sold goods is deemed to be the main interest of the buyer, i.e., the intention of the buyer to contract is mainly based on the aim of acquiring the property of the goods in exchange for the price they have paid to the seller as a consideration (Al-Daboubi, 2021). Transfer of property shall entitle the buyer to enjoy the disposition right through which they can resell the goods while they are being transported. Hence, the ambiguity of the applicable rules on the time of passing property to the buyer would lead to a controversy regarding the exact time at which the buyer is entitled to resell the goods, and such vagueness might make them liable against the sub-buyer if they have contracted on goods have not yet been owned by them. Therefore, international attempts have been dedicated to adopting international rules whereby applicable rules can be adopted to decide the time of passage of property. This has resulted in the application of the Situs Rules, which have been widely

adopted in various jurisdictions (Davis, 2011). According to situs rules, the relevant matters of the goods' property shall be regulated by the law of where the goods existed when the purchaser attained the title of the sold goods (Ostendorf, 2014). Despite the importance of these rules in determining the applicable rules on the passing of property, some aspects of un-clarity are observed when these rules come into application. Such ambiguity gave rise to contradictive views as to the time at which the property is deemed to be passed to the buyer, in particular when they are sold during the time of transporting the goods on the high seas, contrary to the case when the goods are sold while they are in the territorial water, the case in which the applicable rules will be designated on a jurisdictional basis linked to the place of the goods. This paper will highlight the ambiguous area of these rules and perspectives adopted in this regard and conclude this discussion with suggestions to overcome such ambiguity. Therefore, a qualitative approach will be applied to conduct an argumentative, authoritative and critical analysis of the relevant international rules, different jurisdictions, and case law rules.

2. Sale of goods on the high seas

It is well known that the buyer can sell the goods through an international contract of sale while they are in transit. This is inferred from the provisions of the international regulation and international trade usage embodied in the United Nations Convention for International Sales of Goods (CISG) 1980 and the Incoterms Rules, which is expressed in Article 68 of the CISG and point 9 (string sales) of the introduction of the Incoterms 2020 Rules (Al-Daboubi, 2019). Those sales have been innovated to facilitate concluding the contracts of international sale of goods, notwithstanding that the goods are being transported from the seller to the buyer. Concluding a contract of sale in transit gave rise to various controversies regarding the obligations and implications arising from this kind of sale. Therefore, international instruments have formulated particular rules that can govern commitments and the impact of these sales. For example, the CISG applies rules of passage of risk in the goods sold in transit, which are different from that applicable under the general sales because the CISG has based a transfer of risk -in the sales concluded in transit- based on the conclusion time of string sales, or on the time when the goods are handed over to the carrier who undertake the carriage operation, provided that particular circumstances are existing. This can be derived from Article 68 of the CISG:

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

Contrary to the general basis of the same rules, which have adopted the norm of handing the goods to determine the time of risk passage. Article 67(1) declares that:

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

Even under the Incoterms Rules 2010, the International Chamber of Commerce has adopted the basis of 'procuring the goods so delivered' regarding the passage of risk in string sales. In contrast, the delivery obligation has been considered to determine the time of risk transfer in international contracts of sale. Therefore, Article A4 of CIF, CFR and FOB terms should be the basis for Articles A5 and B5, as the norm of the delivery of goods, stipulated in both Articles. According to Article A4:

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

Although international rules have been formulated to regulate the passage of risk in the sales concluded in transit, those rules need to be interpreted (Al-Daboubi, 2018). Controversy regarding the provisions of international rules is not only confined to the rules of the transfer of risk in string sales; instead, the transfer of property rules under the CISG and Incoterms Rules 2010 is also ambiguous, as both have disregarded the regulation of the passage of property in contracts of international sale (Lorenzon and Baatz, 2017).

The complexity of determining the time of passage of property in contracts of international sale can be identified in the sales concluded while the goods are on the high seas. This complexity is imputable to the difficulty of ascertaining the applicable law on the transfer of property on the goods sold while on the high seas, as no state has jurisdiction on such carriage stage. Namely, the rules of conflict of law cannot ascertain the applicable law on a particular transaction or incident that occurs while the goods are transported on the high seas (Debattista, 1995).

3. Applicable rules on the transfer of property in the goods sold while on the high seas

The principle of the *Situs Rules* is the most applicable principle on which the rules governing the relevant property issues are decided. According to this principle, property should be regulated by the law of where the goods are located when the title of goods is acquired (Ostendorf, 2014). Property transfer is one of the critical issues of the property subject to the principle of *situs rules* (Koppenol-Laforce et al. 1996).

It is admitted that the seller is the only person who enjoys the right to the goods, where the buyer cannot obtain the property in the sold goods except after the seller makes a lawful performance. Therefore, one can infer that the liability must rest with the seller once they fail to take the necessary action to render the property in the goods to transfer to the buyer (Schwenzer and Hachem, 2016; Bridge, 2013). However, it is well established that the property is disregarded in international regulations, and this omission will result in having recourse to the rules of the conflict of law. In other words, it shall resort to the designated national legislation to determine the time the property transfers to the buyer in the contracts of international sale of goods (Schwenzer and Hachem, 2016). This application will give rise to a discrepancy in determining the time of passing the property in the goods sold via this kind of contract, as national legal systems adopt different bases to determine the time of passing of property between contracting parties to international contracts of sale (Koppenol-Laforce et al., 1996). This contradicts the principle of harmonisation and unification of international commercial rules. For instance, the transfer of property is based on the time of the conclusion of the contract of sale in Article 1583 of the French Civil Code, while Section 18 of the UK Sale of Goods Act decides the time of this transfer on the intention of the contracting parties. In contrast, Section 929 of the German Civil Code provides that a separate agreement must be made to ascertain the time of transfer of property, contrary to Section 2-401(2) of the United States Uniform Commercial Code-Sales (UCC), which links a passage of property to the time at which of the obligation of delivery of goods is discharged, as it can be understood from Article 18 SGA, Article 1583 of the French Civil Code, § 2-401(2) of the United States Uniform Commercial Code-Sales (UCC) and Section 929 of the German Civil Code (Schwenzer and Hachem, 2016; Plegat, 2011; Thorn, 2011).

The dissimilarity between these jurisdictions is also noted in the context of the movability concept, as the jurisdictions adopting common law system have not distinguished between movable and immovable property, where they have only drawn such a distinction under the rules of private international law, as opposed to the legislations adopting the civil law legal system, which have adopted the distinction in terms of the principle of movability, but with various approaches, see s 30(1) of the UK's Civil Jurisdiction and Judgements Act 1982, Section 7 of New Zealand Property (Relationships) Act 1976 (Koppenol-Laforce et al., 1996).

It is worth mentioning that the principle of *Situs Rules* has been widely criticised (Koppenol-Laforce et al., 1996). It has been argued that *Situs* needs to be more specific, which leads to uncertainty regarding the

applicable law, whether the law of the shipment or where the goods are placed when the contract has been concluded (Debattista, 1995). Therefore, it can be agreed with its suggestion that the law of the place where the goods are located at the time of the conclusions of the international contract of sale shall be applied, instead of the law of the place of shipment, as a passage of property is deemed to be an implication of the contract of sale, not of the carriage of goods contract. Therefore, it cannot be agreed with the view of Koppenol-Laforce, who argued that the law of the place where the relevant documents have been issued should regulate all of the property's issues, and if these documents are not exist, applicability should be granted to the law of the place where the carriage of goods has commenced; however, she added that usually the law of the destination place used to be applied in this regard (Koppenol-Laforce et al., 1996).

It is essential to point out that a jurisdiction like Switzerland did not adopt the principle of *situs rules*, where the determination of the applicable rules on the property of the sold good has been hinged on the decision of the contracting parties to have the same law regulate such issues. This is noted in Article 104(e) of Switzerland's Federal Code on Private International Law 178 (CPIL). In contrast, France, Germany, the United Kingdom, and many other jurisdictions have deprived the contracting parties of the right to choose the applicable law governing the property of goods (Koppenol-Laforce et al., 1996). See Article 43 of the German Introductory Act to the Civil Law, Article 3(2) of the French Civil Code and s 30(1) UK's Civil Jurisdiction and Judgements Act 1982.

However, a controversial scenario would be encountered when the time of passage of property is decided in terms of the goods sold while being transported on the high seas, as this would also give rise to a competition with the law of the vessel's flag (Koppenol-Laforce et al., 1996).

Therefore, the applicable law on the transfer of property in the goods sold while existing on the high seas might be the law of shipping place, destination place or state of the ship's flag. It could be suggested that the *Situs Rules* can be applied in this scenario. Still, the recourse can be made to the conflict of law rules to determine the place of the goods that should be considered to determine the rules governing a transfer of property in the goods sold while existing in the high sea. It can be inferred that the law of the state's flag must govern the passing of property in the goods sold in this way. This is because the transactions carried out on board the ship must be governed by the law of the state's law, as provided in the conflict of law rules.

4. Necessity of determining the time of passing of property while the goods are on the high seas

Ascertaining the time of property transfer is one of the decisive concerns of both contracting parties to the international contract of sale. By obtaining ownership of the sold goods, the buyer will take title to them, whereby the buyer can resell or gift the goods. However, in some jurisdictions, property transfer plays a significant role, as the passage of risk time is linked to the time of property transfer (Gillette and Walt, 2016; Al-Daboubi, 2019). This has been adopted in Articles 1138 and 1583 of the French Civil Code and Section 20(1) of the UK Sale of Goods Act 1979. This means that not only would contracting parties be affected by the implications of the international contract of sale, but the goods' insurer will also be influenced because the time of risk transfer is determined by the time at which the buyer acquires ownership of the sold goods.

The importance of identifying the time of passing of property can also be observed when the goods are sold in transit, whereby such a contract is deemed to be concluded once the bill of lading has been endorsed by the consignee to the sub-buyer. Hence, the inaccuracy of ascertaining the time of property transfer will adversely affect the right of a third party to obtain the property due to the sale concluded in transit. In other words, if the consignee, who has not yet acquired the property in the goods embodied in the bill of lading, has sold the goods-in subject and endorsed the bill of lading to a sub-buyer, the latter cannot take ownership in these goods as the requirements of attaining such ownership have not been met yet. Therefore, the ambiguity in determining the applicable law on the passing of property in the goods sold in transit will lead to uncertainty regarding the right of the endorsee to take title to the goods sold in transit. Selling the goods while the goods are transported on the high seas is one aspect of the sales concluded in transit. However, the difficulty in determining the applicable law on the property transfer is a more

controversial issue under sales concluded. At the same time, the goods are carried on the high seas, as the goods are not in territorial water, which will give rise to difficulty in applying the Situs Rules principle.

5. Conclusion

It can be concluded from this discussion that the *Situs Rules* play a conclusive role in determining the applicable law on the transfer of property. However, the application of Situs Rules on the goods sold while transported on the high seas encounters an obstacle in terms of the designated law that should govern the passing of property because the goods are not placed on the land of a specific state or in territorial water. Therefore, this paper recommends that the law of the vessel's flag decide when the property transfer shall occur -in the goods sold while on the high seas. This suggestion is based on the rules of conflict of law that entitle the law of the flag of carriage's mean to govern a dispute related to a subject matter on board the carriage's mean. However, this entails that the arbitration clause attached to the sale contract does not deprive the application of the state's flag, provided that the law applicable to the contract of sale allows contracting parties to agree on a particular law governing the passing of property, i.e., the law that does not comply with the *Situs Rules*.

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