Abhandlungen zum
Recht der Internationalen Wirtschaft

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Property in Goods and the CISG

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by

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Preface

This study, accepted by the Faculty of Law of the University of Basel as a PhD thesis in the spring of 2022, has been updated with the available literature and case law as of June 2024.

I would like to express my deep gratitude to my doctoral advisor Professor Ulrich G. Schroeter. The academic freedom I enjoyed while working for him allowed me to explore research topics independently, challenge prevailing opinions, and develop my scholarly perspectives in an encouraging and supportive environment. I thank Professor Corinne Widmer Lüchinger and Pascal Hachem for their helpful comments and contributions to my dissertation committee.

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Most importantly, I thank my family, and my wife Sita, whose unwavering support, patience, and encouragement have been the bedrock of this endeavor.

Freiburg, June 2024 Till Rau (born Maier-Lohmann)

Overview

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Abbreviations

AC	Law Reports, Appeal Cases (English law report)
AcP	Archiv für die civilistische Praxis (German journal)
AJP	Aktuelle Juristische Praxis (Swiss journal)
All ER	All England Law Reports (English law report)
All ER (Comm)	All England Reports (Commercial Cases) (English law report)
Alta S. C.	Alberta Supreme Court (Canada)
Art.	Article
Arts.	Articles
BBl	Bundesblatt (Swiss governmental publication)
BGE	Amtliche Sammlung von Entscheiden des Schweizerischen Bundesgericht (Swiss law report)
Burr	Burrow's King's Bench Reports (English law report)
Bus LR	Business Law Reports (English law report)
CA	Court of Appeal(s)
Carth	Carthew's King's Bench Reports (English law report)
CB (NS)	Common Bench Reports, New Series (English law report)
C. C. A.	Circuit Court of Appeal
CH	Law Reports, Chancery Division (English law report)
CIETAC	Chine International Economic and Trade Arbitration Commission
Circ.	Circuit
CISG	United Nations Convention on Contracts for the International Sale of Goods
CISG AC	CISG Advisory Council
CLR	Commonwealth Law Reports (Australian law report)
Co.	Company
Con LR	Construction Law Reports (English law report)
CR	Computer und Recht (German journal)
D.	Recueil Dalloz de doctrine, de jurisprudence et de législation (French journal)
DCFR	Draft Common Frame of Reference
DLR	Dominion Law Reports (Canadian law report)
Ed(s)	Editor(s)
ER	English Reports (English law report)
EWCA Civ	Court of Appeal (England and Wales), Civil Division
EWiR	Entscheidungen zum Wirtschaftsrecht
Ex	Exchequer Reports (English law report)
F.	Federal Reporter (US law report)
F.Supp.2d	Federal Supplement (Second Series) (US law report)
GmbH	Gesellschaft mit beschränkter Haftung (limited company in Germany)
HCA	High Court of Australia

HL	House of Lords
ICC	International Chamber of Commerce
IP	Intellectual Property
IPRax	Praxis des Internationalen Privat- und Verfahrensrechts (German journal)
IHR	Internationales Handelsrecht (German journal)
Inc.	Incorporated
IWRZ	Zeitschrift für Internationales Wirtschaftsrecht (German journal)
JR	Juristische Rundschau (German journal)
JZ	JustizenZeitung (German journal)
KB	Law Reports, King's Bench (English law report)
Keb	Keble's King's Bench Reports (English law report)
Lloyd's Rep	Lloyd's Law Reports (English law report)
Lloyd's Rep Plus	Lloyd's Law Reports Plus (English law report)
Ltd	Limited Company
M & W	Meeson and Welsby
MKAC	Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry
MMR	MMR Zeitschrift für IT-Recht und Recht der Digitalisierung (German Journal)
N. E.2d	North Eastern Reporter (Second Series) (US law report)
NJW	Neue Juristische Wochenzeitung (German Journal)
OHADA	Organisation pour l'Harmonisation en Afrique du Droit des Affaires
PECL	Principles of European Contract Law
QB	Law Reports, Queen's Bench Division (English law report)
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht, The Rabel Journal of Comparative and International Private Law (German journal)
RGZ	Entscheidungen des Reichsgerichts in Zivilsachen (German law report)
RIW	Recht der Internationalen Wirtschaft (German journal)
S.	Sentence
S. d.N.	Société des Nations
SchiedsVZ	Zeitschrift für Schiedsverfahren (German journal)
Sect.	Section(s)
SGA	Sale of Goods Act
SJZ	Schweizerische Juristen-Zeitung (Swiss journal)
TR	Term Reports (English law report)
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UCC	Uniform Commercial Code (USA)
UK	United Kingdom
UKHL	United Kingdom House of Lords

UKSC	Supreme Court of the United Kingdom
ULIS	Convention relating to a Uniform Law on the International Sale of Goods
UNSW Law Journal	University of New South Wales Law Journal (Australian journal)
UNCITRAL	United Nations Commission on International Trade Law
Unidroit	Institut Internationale pour l'unification du droit privé/International Institute for the Unification of Private Law
UPICC	Unidroit Principles of International Commercial Contracts 2016
U. S.	United States Reports (US law report)
US	United States
VJ	The Vindobona Journal of International Commercial Law and Arbitration
WL	Westlaw
WLR	Weekly Law Reports (English & Welsh law report)
WWR	Western Weekly Reports (Canadian law report)
ZEuP	Zeitschrift für Europäisches Privatrecht (German journal)
ZRG GA	Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Germanistische Abteilung (German journal)
ZRG RA	Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung (German journal)
ZVglRWiss	Zeitschrift für Vergleichende Rechtswissenschaft (German journal)

§ 1: Introduction

Drafters of unified contract laws often deliberately exclude questions of property, ownership, or title from the scope of application. Article 8 of the Uniform Law on International Sales (ULIS) and Article 4, sentence 2(b) of the United Nations Convention on Contracts for the International Sale of Goods (CISG) exemplify this exclusion. This should not, however, be mistaken to mean that a smooth delimitation of property law and unified sales law has thereby been established. The law governing the property in goods has seen no notable acts of international harmonization.[1] There are thus myriad notions of rights, liabilities, terms, and concepts from various legal systems that need to be considered when analyzing the interplay between unified sales contract law like the CISG with property in goods. **1**

Rabel discovered a remaining relevance of property in the realm of uniform sales law in his ground-breaking work "*Das Recht des Warenkaufs*" nearly a century ago. He found the concept of property to be partly overestimated and partly underestimated regarding unified sales law, and set out to analyze the practically important facets at the end of the work.[2] Accordingly, the table of contents of Volume 1 contains an announcement for a "*VIII. Teil. Sicherungen des Verkäufers*"[3] in Volume 2.[4] Volume 2 does not deliver on this promise. In the preface to volume 2, *Dölle* explained this to be due to the rudimentary state in which the manuscript of this part was when *Rabel* died before the publication of the second volume.[5] *Honnold* also was aware **2**

1 But see for the developments under European law between 1989 and 2016, *Walczak*, pp. 15–41.

2 *Rabel*, Recht des Warenkaufs I, pp. 31–32.

3 My translation: Part 8: Securities of the seller.

4 *Rabel*, Recht des Warenkaufs I, p. XXIV.

5 *Rabel*, Recht des Warenkaufs II, pp. III–IV. Despite considerable efforts, I was not able to find this unpublished and maybe lost manuscript. It is neither in the Max Planck Institute for Comparative and International Private Law in Hamburg, nor (as part of the so-called *Rabel Koffer*) in the archives of the Max Planck Society in Berlin. In 1969 *Landfermann* entered the Max Planck Institute for Comparative and International Private Law in Hamburg and *Zweigert* tasked him with researching this area of the law in a comparative manner. During the time of his research, the manuscript was still in Hamburg and was at his disposal. Yet, it was already then partially outdated, and judging from the book that resulted from the research (*Landfermann*, Sicherungen des vorleistenden Verkäufers), the manuscript was concerned with the protection of the seller after the goods have been dispatched and received by the buyer. The (limited) scope of the manuscript can be explained against the background of other assumptions and ideas *Rabel* had when drafting "*Das Recht des Warenkaufs*". As will be discussed in more detail below (para. 75), *Rabel* considered it preferable to avoid national law concepts such as property in uniform sales law. As a result, the first draft of a uniform sales law in 1935 only contained a single reference to property, which excluded any effect of the unified sales law on the property

of the problem with regard to the "*complex, conclusionary legal idiom of 'property'*" in uniform sales law and detected the potential for confusion therein, which "*at crucial parts need*[ed] *reexamination.*"[6]

3 Nevertheless, the interplay and tensions between property in goods and the CISG have not yet been comprehensively analyzed. This study endeavors to fill that void.

I. Outline of the problem

1. Unharmonized domestic sales law and property law

4 Property in goods and sales contract law are considered intertwined in many national legal systems. Although the categorization as two different fields of law is broadly accepted and research has accordingly become more specialized,[7] there remain many connections between sales contract and property law. The importance and number of these connections differs widely between different legal systems, but for example in England, they are so significant as to prompt *Bridge* to refer to a "*title-fundamentalism*" in the law of sale,[8] and *Goode* to state that *"*[t]*he impact of the location of the property is all-pervasive*".[9] *Llewellyn*, who came upon a similar legal situation in the USA when drafting the Uniform Commercial Code (UCC), commented in prosaic fashion that *"*[n]*obody ever saw a chattel's Title.*"[10] In this spirit of legal realism, the UCC aims at avoiding the use of property or other single concepts to decide factually unconnected questions.[11]

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in the goods. It, thus, did not contain an obligation of the seller to transfer the property in the goods. Since there was no such obligation, the characterization of a sales contract was not necessarily connected to "property", and the scope of application therefore not connected to this notion. Moreover, the claim for the purchase price was regulated in a very different manner compared to today's Art. 62 CISG in combination with Art. 28 CISG. Hence, although the loss is unfortunate, *Rabel*'s manuscript would probably not have provided much insight into the current interplay between the CISG and national property law.

6 *Honnold*, 30 Law and Contemporary Problems (Spring 1965), 326, 350.

7 *Forray*, 2 European Property Law Journal (2013), 220, 221; *Michaels*, Sachzuordnung durch Kaufvertrag, p. 50.

8 *Bridge*, Singapore Journal of Legal Studies (2017), 345, 348.

9 *Goode/McKendrick*, para. 8.27.

10 *Llewellyn*, XV NYU Law Quarterly Review (1938), 159, 165.

11 See for example, the first sentence of sect. 2-401 UCC "*Each provision of this Article with regard to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies irrespective of title to the goods except where the provision refers to such title.*"

5 While under many national laws the number of connections between property and sales law have been reduced, the remaining connections can be categorized depending on the concerned parties: Property law can have relevance between the seller and the buyer, and it can simultaneously be of significance vis-à-vis third parties. Between the seller and the buyer, property and its transfer might influence the very characterization of whether the contract at hand is in fact a sales contract, whether the seller has fulfilled his or her obligation to transfer the property as far as such an obligation exists, and whether the seller can claim the purchase price. Moreover, the passing of the risk of loss under some national sales laws is linked to the transfer of property.[12] The sales contract may also be relevant for questions linked to property, since the (re-)transfer of property might be dependent on a mere avoidance of contract,[13] or a vindication claim based on property might only be substantiated if there is no sales contract conferring a right to possession anymore. Vis-à-vis third parties, property might have decisive relevance, e. g., for creditors in cases of bankruptcy, liability in conversion, taxation, criminal law, insurable interest, and more.[14]

6 It is important to keep these (depending on the respective national law, diverging) consequences of property and sales law in mind when discussing differences and perspectives for unification or harmonization. Since national law makers mostly write laws with cases in mind to which the respective legal system would apply to in its entirety, solutions to existing problems can be provided through contract law or property law. National property law, sales law and other areas of these national legal systems can, thereby, counterbalance each other's weaknesses and specifics.

2. CISG and national property law

7 The same cannot be said of the CISG and the respective national property laws. Since Article 7(1) of the CISG requires the interpretation of the Convention to take into account its international character and the need to promote uniformity in its application, the interpretation of the CISG cannot, at first sight, cater to specifics of the applicable property law. On the other hand, the national property law cannot be interpreted only to be compatible with the CISG. It must also maintain compatibility with national contract law.

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12 For example, sect. 20(1) SGA 1979 in the UK; Art. 1196(3), s. 1, French Civil Code in France.

13 *Schlechtriem/Cl. Witz*, para. 434; but see *Cl. Witz*, para. 114.81.

14 *Bridge*, Sale of Goods, para. 3.01.

8 If it is correct that sales law is "*in one phase part of the law of contract, in another phase part of the law of property*",[15] it is notable that the CISG has unified only one part of the equation. In contrast, when national sales laws were codified without simultaneously codifying all aspects of property law, these codifications nevertheless often contained rules on property and its transfer.[16] Also, when commercial law in parts of Africa was unified by the *Acte uniforme relatif au droit commercial général* of 1997 (OHADA Uniform Commercial Law 1997) the interplay with property was explicitly regulated in Articles 283–284.[17]

9 While, as mentioned above, the interplay between contract and property law under national law has been the subject of detailed research and monographies, with regard to international cases and diverging contract and property laws there is little on the topic.[18] *Stadler*'s work "*Gestaltungsfreiheit und Verkehrsschutz durch Abstraktion*" is an exception and contains a full chapter on collisions between diverging laws in this regard.[19] With regard to unified (sales) contract law such as the Convention relating to a Uniform Law on the International Sale of Goods (ULIS) or the CISG, there is even less on the topic. It is not possible to transplant solutions proposed with regard to national laws: *Stadler*, for example, has suggested that the law applicable to questions of property could follow the applicable contract law to avoid tensions.[20] However, since the CISG does not contain rules on the transfer of property and there are no unified property laws that could go hand in hand with the CISG, this would not be a viable option to regulate the interplay and avoid any tensions between the CISG and national property law.

10 This study is, therefore, aimed at revealing the interplay and assessing whether tensions exist between the CISG and national property law. What influence does property and its transfer have on the CISG and contractual questions and what influence does the CISG have on national property law?

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15 *Llewellyn*, XV NYU Law Quarterly Review (1938), 159.

16 For example, in Switzerland with the Swiss Code of Obligations of 1881 (Arts. 199–209 Swiss Code of Obligations 1881) and the Sale of Goods Act 1893 in the UK (sect. 17–25 SGA 1893), see *Bridge*, Sale of Goods, para. 5.46 stating that "*it is by no means obvious that the Sale of Goods Act was and is the proper place to deal with title disputes involving third parties: there is much to be said for a separate and comprehensive statute dealing with title transfer.*"

17 In the revised version from 2010, these Arts. have been moved to Arts. 275–276 Acte uniforme révisé portant sur le droit commercial général from 2010 (OHADA Uniform Commercial Law 2010). Cf. *Chianale*, Singapore Journal of Legal Studies (2016), 26, 40.

18 But see for example, Fawcett/Harris/Bridge/*Bridge*, para. 18.02; *Torsello*, International Business Law Journal (2000), 939.

19 *Stadler*, Verkehrsschutz durch Abstraktion, pp. 651–697.

20 *Stadler*, Verkehrsschutz durch Abstraktion, p. 680.

Therefore, the research is limited to cases within the scope of the CISG, which most notably excludes sales of immovables. Many other comparative studies have been absorbed by the isolated question of when and how property is transferred under national law, which is why this question is not addressed in much depth in this study.[21] Moreover, whether property as a "lump" concept should be maintained or given up[22] is not a question to be answered in this work. The focus is how the current interplay and tensions can be accurately described and how current laws, i. e. the CISG and national property laws, can be interpreted to find coherent results.

II. Outline of the study

11 The **second chapter** provides the necessary groundwork for the following chapters, including remarks on the terminology (property, ownership, and title), the relevance of the legal history of unified sales law, the use of comparative law pre- and post-unification, and the conflict of law rules on property in the goods in litigation and arbitration. Moreover, different notions of property under national laws are illustrated: Is property a relative or absolute notion under national law, and are there national laws that do not contain any concept or one lump concept of ownership at all?

12 Turning to the CISG, one could be inclined to start with the exclusion of the effect the contract has on the property in the goods from the scope of the Convention under Article 4, sentence 2(b) of the CISG. Yet, to better understand the exclusion and what "property" under the CISG refers to, this work starts with the only other section of the CISG that mentions "property in the goods". Article 30 obliges the seller to transfer the property in the goods. This obligation forms the basis of the **third chapter**: The seller's obligation to transfer the property and the respective notion of "property" under certain national laws (Switzerland, France, England, Germany) are analyzed historically and comparatively to explain the later development of said obligation within unified sales law. A crucial question in this context is whether "property" under the CISG can and should be interpreted as an autonomous con-

21 See also *Sacco*, 39 The American Journal of Comparative Law (1991), 343, 383 et seq. who emphasizes that the (abstract) question of the transfer of property is not a worthwhile question since answers will exaggerate differences and conceal the uniformity of solutions.

22 See for example, the discussions in the context of the DCFR, *von Bar/Clive*, pp. 4250 et seq.; *Stadler*, JZ 2010, 380, 382. Cf. *Michaels*, Sachzuordnung durch Kaufvertrag, p. 40: "*Während die Meinung, man müsse sich für ein Prinzip entscheiden, nicht alle sinnvollen Differenzierungsmöglichkeiten ausnutzt, geht die pragmatische Gegenansicht in ihrem gänzlichen Verzicht auf eine Systematisierung daher zu weit.*" On the term "lump concept", see *Lagergren*, p. 61.

cept. It is suggested that "property" under Article 30 of the CISG is indeed an autonomous term. Moreover, the third chapter illustrates the effects of the proposed definition of property under the CISG on the seller's obligations. It concludes by highlighting the differences between the CISG and the current harmonization of European law with regard to the seller's obligation to transfer the property.

13 Since Article 30 of the CISG and the obligation to transfer the property in the goods are often taken to form part of the definition of a sales contract, the **fourth chapter** addresses the relevance of "property" in characterizing a sales contract under Article 1(1) of the CISG.

14 The **fifth chapter** concerns the surprisingly divergent understanding of the seller's claim for the purchase price in civil and common law jurisdictions. Since this claim is almost inextricably interwoven with the transfer of property in many common law jurisdictions (for example, in the UK, section 49(1) of the Sale of Goods Act 1979), this historical connection is reviewed. The CISG has not copied this connection directly, and Article 62 of the CISG contains a broadly worded remedy of the buyer to claim the purchase price. However, it has been subject to debate whether the restrictions of the action for the purchase price and the relevance of the transfer of property resurface due to Article 28 of the CISG. The latter provision allows courts to refuse specific performance if they would do so under their respective national law.

15 While chapters three to five address the impact of property and its transfer on the CISG, chapters six to eight examine the converse: What impact does the CISG have on the property in the goods? The **sixth chapter** addresses the exclusion of the transfer of property under Article 4, sentence 2(b) of the CISG. This sequence of chapters allows an assessment of whether the proposed definition of "property" under Article 30 of the CISG developed in the third chapter can also be applied under Article 4. Moreover, this sequence allows assessing whether the decision not to regulate the effects of the CISG on property was sensible against the background of the remaining relevance of property under the CISG discovered in the foregoing chapters.

16 The relationship between claims or remedies based on property under national law and the CISG is discussed in the **seventh chapter**. It is important to note that national laws approach such claims based on property differently. Some allow parties to sue for possession of the very goods in question (vindication), while others generally allow the debtor to compensate the creditor in damages. It is questionable whether the CISG preempts such claims based on national law.

17 Finally, the **eighth chapter** is concerned with property in the goods and insolvency of one of the contractual parties. Generally, property is highly

relevant in insolvency, because goods owned by a contractual partner are not typically part of the assets available for distribution to other creditors of the insolvent party. It has been questioned in this regard whether the CISG supersedes national insolvency law due to its status as an international Convention. Furthermore, under some national laws, the avoidance of a contract can also protect a seller in case of the buyer's insolvency. This is because with avoidance of contract, the legal basis for the transfer of property lapses and the seller is, consequently, considered to never have parted with the property in the goods. This work concludes by assessing whether avoidance under the CISG can have this effect, too.

III. Remarks on methodology

18 In assessing the interplay and tensions between the CISG and national property law, this work frequently relies on the generally accepted principles of interpretation of the CISG under Article 7(1) of the CISG and its interpretation methods.[23] Yet, the use of the history of unified sales law and comparative law in this work necessitate a few words of explanation. To establish a foundation for discussing the usefulness of the history of unified sales law in interpreting the CISG, the relevant history and available documents will be presented first.

1. History of unified sales law, the accessible material, and its usefulness in interpreting the CISG

19 A helpful introduction to the *travaux préparatoires* is the Secretariat's Commentary of 1978, but it must be kept in mind that this Commentary is not an official commentary. It was prepared by the UNCITRAL secretariat and contains comments on the provisions as they stood in 1978, thus, two years before the conference. Moreover, the material from the conference has been published in the Official Records, and the UNCITRAL Yearbooks Volumes I–IX from 1968–1978 are accessible on the UNCITRAL website.[24]

20 Yet, the relevant material cannot be limited to the twelve years during which the unification project was finalized at UNCITRAL.[25]

23 See for the distinction between principles and methods, *Schroeter*, 81 RabelsZ (2017), 32, 48; *Gruber*, Methoden des Einheitsrechts, pp. 104 et seq.; Staudinger/*Magnus*, Art. 7 para. 30; MüKoHGB/*Ferrari*, Art. 7 para. 6; *Köhler*, p. 35.

24 For a broad collection of relevant material, see *Honnold*, Documentary History of the Uniform Law for International Sales, *passim*.

25 *Farnsworth*, 18 International Lawyer (1984), 17, 17–18; *Hellner*, FS Riesenfeld, pp. 71, 77; *Schlechtriem*, Bemerkungen zur Geschichte des Einheitskaufrechts, pp. 27 et seq.

a) Unidroit: 1928–1951

21 Rather, the discussions and the resulting Convention have been built on a treasure trove of preparatory work that originated from *Rabel's* initiative. In 1928, he proposed to *Scialoja*, the then-president of the newly founded International Institute for the Unification of Private Law (Unidroit) in Rome, to strive for a unification of the law on the sale of goods.[26] As early as 1929, *Rabel* presented a first preliminary report in French.[27] A committee was formed in 1930 and, in addition to *Rabel*, consisted of *Hurst* and *Gutteridge* from England, *Capitant* and *Hamel* from France, *Bagge* and *Fehr* from Sweden, and *Ficker* as secretary.[28] Based on the preliminary report, the committee with the collaboration of other internationally renowned experts[29] and the staff of the Institute for Comparative and International Private Law in Berlin,[30] of which *Rabel* was the first director, started discussing the prospects and contents of a uniform law on the sale of goods.

22 Two important drafts, one from 1935 (the first draft of a uniform law on the sale of goods), and the other from 1939 (the so-called "Rome draft")[31] originated from this period, and are frequently cited in scholarly work due to their accessibility.[32] Just before finalization of the draft in 1935, the committee decided to deal with rules on contract conclusion separately.[33] These drafts were only merged when the preparatory work for the CISG at UNCITRAL began more than thirty years later. It is, however, important to note that these drafts were not created in a vacuum. The comparative law foundations underlying the drafts were published in "*Das Recht des Warenkaufs*"[34].[35] The Unidroit committee additionally produced 97 documents between 1929 and 1950 as part of "*Etude IV – Vente*" that contain the dis-

26 *Rabel*, 9 RabelsZ (1935), 1; Staudinger/*Magnus*, Einleitung zum CISG para. 20; *Rösler*, 70 RabelsZ (2006), 793, 797.

27 Printed in *Leser*, Gesammelte Aufsätze Rabel, pp. 381–476. It is also recently available as "S. d.N. – U. D.P. 1929 – Etudes IV – Vente – Doc. 2" on Unidroit's website.

28 *Rabel*, 9 RabelsZ (1935), 1, 3.

29 The names of the experts and the areas they have contributed to can be found in *Rabel*, 9 RabelsZ (1935), 1, 4.

30 Today this is the Max Planck Institute for Comparative and International Private Law in Hamburg.

31 Diplomatic Conference on the Unification of Law Governing the International Sale of Goods, The Hague, 2–25 April 1964, Vol. I – Records, p. 8.

32 The first draft of 1935 is printed in *Rabel*, Recht des Warenkaufs II, pp. 374 et seq. (French original text); *Rabel*, 9 RabelsZ (1935), 1, 8-44 (including a German translation). The Rome draft of 1939 is printed in *Rabel*, Recht des Warenkaufs II, pp. 395 et seq. (French original text); Unidroit, Draft of a uniform law on international sales of goods (corporeal movables) and Report, *passim* (English translation).

33 Staudinger/*Magnus*, Einleitung zum CISG para. 20.

34 *Rabel*, Recht des Warenkaufs I, *passim; Rabel*, Recht des Warenkaufs II, *passim*.

35 Cf. *Rabel*, 9 RabelsZ (1935), 1, 5.

cussions and background of the drafts.[36] Fortunately, while these documents were difficult to access for a long time, Unidroit has recently made all these documents of the international sales project available on its website.

b) Conference in The Hague in 1951 and the Special Commission

23 World War II halted the work on the unification, and efforts only resumed in 1951 when Unidroit suggested that the Dutch government invite States to participate in a diplomatic conference in The Hague. Delegates of 20 States met from 1–10 November 1951 and discussed the project based on the Rome draft of 1939. The delegates decided to form a Special Commission consisting of *Angeloni*, *Bagge*, *De Castro y Bravo*, *Frédérico*, *Gutzwiller*, *Hamel*, *Meijers*, *Pilotti*, *Rabel*,[37] *Riese*, *Ussing*, and *Wortley* to further develop the draft.[38] This Special Commission produced the draft of 1956 after only six meetings,[39] which was forwarded to the Dutch Government and, subsequently, to other States. The opinions of the States, the ICC and other interested parties were considered during two meetings of the Special Commission and led to the draft of 1963.[40] The further drafting of rules on contract conclusion was concurrently but separately advanced by Unidroit.[41]

24 Apart from the widely available drafts of 1956 and 1963, the eight meetings and further material of the Special Commission have been documented and published. The minutes of the eight meetings and a "rapport" by *Gutzwiller* have been digitalized and published on the CISG-online.org website in the section "*Travaux préparatoires*".[42]

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36 Documents 98–105 are dated between 1952 and 1969.

37 *Rabel* was a member until his death in 1955.

38 Unidroit, Actes de la Conférence convoquée par le Gouvernement Royal des Pay-Bas sur un Projet de Convention Relatif à une Loi Uniforme sur la Vente d'Objets Mobiliers Corporels, 1952, p. 278.

39 Printed in *Rabel*, Recht des Warenkaufs II, pp. 416 et seq. and Diplomatic Conference on the Unification of Law Governing the International Sale of Goods, The Hague, 2–25 April 1964, Vol. II – Documents, pp. 7–78.

40 Diplomatic Conference on the Unification of Law Governing the International Sale of Goods, The Hague, 2–25 April 1964, Vol. I – Records, p. 5. The draft is printed in Diplomatic Conference on the Unification of Law Governing the International Sale of Goods, The Hague, 2–25 April 1964, Vol. II – Documents, pp. 213–231.

41 Diplomatic Conference on the Unification of Law Governing the International Sale of Goods, The Hague, 2–25 April 1964, Vol. I – Records, p. 5.

42 They can be also found in some libraries (for example in Freiburg, Germany) referred to as "Procès-verbaux/Commission Spéciale nommée par la Conférence de La Haye sur la Vente".

c) ULIS and ULF

25 Based on the preparatory work, another conference in The Hague was convened in 1964, which led to the creation of both the Convention relating to a Uniform Law on the International Sale of Goods (ULIS) and the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF). These Conventions were ultimately unsuccessful on a global scale,[43] which motivated the work at UNCITRAL starting in 1966 and, hence, the creation of the CISG. The relevant material from the conference of 1964 was published in two volumes.[44]

d) Usefulness of historical records

26 The relevance of the historical background for the interpretation is twofold. First, it aids in assessing the intention and purpose behind the provisions found in the CISG. It is undisputed that the CISG is built on this development and some provisions originated directly from the ULIS and the ULF.[45] Therefore, it is helpful to consider the historical background of these conventions, too, when interpreting the CISG.[46] *Schlechtriem* has emphasized the general relevance of the early material with the caveat that specific research has to evaluate whether the propositions by *Rabel* survived the protracted development over fifty years.[47] This broad understanding of the *travaux préparatoires* is especially important, since some aspects of the CISG originated from work and discussions at Unidroit, and were no longer even discussed at UNCITRAL.[48] It is therefore appropriate to explore the relevant material beyond the conventions, including material prepared by *Rabel*, the Committee at Unidroit, the Special Commission initiated at the conference in the Hague in 1951, and the drafts that have led to the ULIS and the ULF.

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43 For a discussion of the reasons behind the lack of success, see Staudinger/*Magnus*, Einleitung zum CISG para. 23; *Schroeter*, 81 RabelsZ (2017), 26, 37.

44 Diplomatic Conference on the Unification of Law Governing the International Sale of Goods, The Hague, 2–25 April 1964, Vol. I – Records, and Diplomatic Conference on the Unification of Law Governing the International Sale of Goods, The Hague, 2–25 April 1964, Vol. II – Documents.

45 *Schlechtriem*, Bemerkungen zur Geschichte des Einheitskaufrechts, pp. 27, 35; Schlechtriem/Schwenzer/Schroeter/*Ferrari*, 7th German edn, Art. 7 para. 36; *Prašalo*, pp. 12–13.

46 Kröll/Mistelis/Perales Viscasillas/*Perales Viscasillas*, Art. 7 para. 41.

47 *Schlechtriem*, Bemerkungen zur Geschichte des Einheitskaufrechts, pp. 27, 35; similarly, *Köhler*, p. 46.

48 Similarly, *Köhler*, p. 46. An example is the obligation to transfer property in Art. 30 CISG, see below paras. 74 et seq.

Second, examining the material beyond the UNCITRAL Yearbooks, the Secretariat's Commentary and the Official Records of 1980 is a preemptive force against the so-called "homeward-trend".[49] *Honnold* has convincingly argued that *"*[o]*ne who examines the evolution of uniform law will be disabused of the view that the statutory language is simply an awkward attempt to state one's familiar domestic law.*"[50] To this end, the statement that historic interpretation becomes less persuasive the longer the Convention is in force,[51] should not be interpreted as a rejection of the idea that the historical records remain highly relevant as a basis for an interpretation that has regard to the need to promote uniformity of application of the CISG. Instead, it should be taken to merely mean that the historical interpretation should not block the consideration of trends in international sales law which have occurred after the negotiations or a general further development of the CISG. In a nutshell, "*a page of history*" can be "*worth a volume of logic.*"[52] **27**

2. Comparative law pre- and post-unification

Comparative law was of paramount importance in laying the foundations for drafting and negotiating the CISG.[53] *Magnus* considers the CISG even to be coagulated comparative law.[54] Thus, the relevance of pre-unification comparative law cannot be overstated. **28**

In contrast, the usefulness of comparative law in the context of interpreting the CISG post-unification is frequently mentioned, but evaluated divergently (sometimes referred to as a "disputed question").[55] It is unclear whether the expressed opinions would lead to different results or if they merely reflect a discussion about the precise line between methods and principles of interpretation on one hand, and varying notions of what comparative law entails on the other. Moving away from technical distinction and breaking the question down into separate aspects may alleviate some of this uncertainty. **29**

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49 See on the "homeward-trend", *Ferrari*, IHR 2009, 8, 12.

50 *Honnold*, Documentary History of the Uniform Law for International Sales, p. 2.

51 For example, Schlechtriem/Schwenzer/Schroeter/*Hachem*, 5th edn, Art. 7 para. 22.

52 Formulation inspired by Judge *Holmes* in *New York Trust Co. v. Eisner*, 256 U. S. 345 (1921), 349: "*Upon this point a page of history is worth a volume of logic.*"

53 *Zeller*, p. 1; *Salger*, IWRZ 2018, 99, 100 et seq.; Staudinger/*Magnus*, Art. 7 para. 37.

54 Staudinger/*Magnus*, Art. 7 para. 37 ("*Es ist zu Normen geronnene Rechtsvergleichung*").

55 Positively, *Burkart*, pp. 144 et seq.; Schlechtriem/Schwenzer/Schroeter/*Hachem*, 5th edn, Art. 7 para. 24; Brunner/Gottlieb/*Wagner*, Art. 7 para. 6; more cautiously, MüKoHGB/*Ferrari*, Art. 7 para. 38; *Herber/Czerwenka*, Art. 7 para. 9; *Magnus*, Tracing Methodology, pp. 33, 57; rejecting comparative law as a method of interpretation, *Schlechtriem/Schroeter*, para. 110; *Schroeter*, Internationales UN-Kaufrecht, para. 146; *Janssen*, pp. 299, 323.

30 "Principles of interpretation" or "aims" are understood to refer to the three building-blocks of Article 7(1) of the CISG: the relevance of the CISG's international character, the need to promote uniformity in its application, and the observance of good faith in international trade.[56] Since the CISG does not explicitly explain how to achieve results in line with these principles, scholars have introduced the umbrella-term "methods of interpretation" to refer to methods to interpret provisions of the CISG (the wording, the systematic position, the *travaux préparatoires*, and teleological interpretation).[57] This categorization can be helpful, but should not serve as an end in itself. Even scholars who refuse to accept comparative law as an interpretation method under the CISG readily accept that in order to have sufficient regard to the need of uniformity in the application of the CISG, jurists should interpret the CISG autonomously.[58] To achieve this goal, it is first necessary to be aware that one's own national unharmonized law might be different from other laws, including the CISG. To this day, jurists are mainly educated in their respective national sales law (frequently the CISG does not form part of the standard curriculum) and, thus, the risk of interpreting the CISG as identical to one's own national sales law is already inherent in the system. Applying the CISG with expertise only in one national sales law is like reading a text drafted in a foreign language translated by poorly programmed software. This translation software translates the text word by word, but is incapable of conveying the full and sufficiently nuanced meaning. As a reader, one might be familiar with certain words, and be inclined to supply them with the legal concepts or terms that one is familiar with. Awareness of one's own biases requires "comparing" one's own law to other laws to assess whether following an initial instinct would result in a concealed application of one's national law under the cloak of the CISG. Whether comparing national laws to form a foundation to substantiate a truly uniform application of the CISG is only considered to be necessary in the context of the "principles" of interpretation (need for uniformity) or also accepted as a "method" of interpretation, produces no diverging results and appears to be a discussion of mere terminology.

31 It is unclear whether "comparative law" is understood by some scholars in this discussion who argue against its usefulness to refer to a form of functional comparative method.[59] This might be in line with *Zweigert's* statement

56 *Schroeter*, 81 RabelsZ (2017), 32, 48; *Gruber*, Methoden des Einheitsrechts, pp. 104 et seq.; *Köhler*, p. 35; Staudinger/*Magnus*, Art. 7 para. 30; MüKoHGB/*Ferrari*, Art. 7 para. 6; Brunner/Gottlieb/*Wagner*, Art. 7 paras. 3–5.

57 Brunner/Gottlieb/*Wagner*, Art. 7 paras. 3–5 stating that these methods are widely accepted in doctrine.

58 *Schlechtriem/Schroeter*, para. 91; Schlechtriem/Schwenzer/Schroeter/*Ferrari*, 8th German edn, Art. 7 para. 9.

59 For example, *Janssen*, p. 299, 323. Regarding the ambiguous term "*functional method*" the enlightening piece by *Michaels*, Functional Method, pp. 345–389.

that "*the basic methodological principle of all comparative law is that of functionality.*"[60] Functionalist comparatists generally agree that their method does not focus on dogmatics and rules, but rather results and facts.[61] If the term "comparative law" is understood to be this limited, its use might indeed be slim. It is not completely obvious whether a less technical understanding of comparative law is employed by the authors in favor of comparative law as a method of interpretation. They might look at various doctrinal and practical solutions under national law to help avoid interpreting the CISG from a biased perspective. This is because even these proponents of using "comparative law" caution not to transplant the results reached under national law into the CISG.[62] Additionally, they emphasize its usefulness in avoiding the homeward trend and consider the latter to be a symptom for the lack of comparative studies.[63]

Hence, when interpreting the CISG, using comparative law to avoid national bias should be welcomed. It is unclear whether scholars would still disagree if misunderstandings about whether comparative law is a "method" or a means to achieve an "aim of interpretation", as well as the definition of "comparative law", were resolved. **32**

3. Summary

In summation, besides the general tools for interpreting the CISG, one needs to understand the (national and historical) rules in order to apply uniform law in a truly uniform manner. This not only concerns the results reached under national law, i. e., functional comparative law in a technical sense, but extends to the general approach and the underlying principles of national legal doctrines. Courts and tribunals often lack the resources to conduct such extensive research. Therefore, the academic world must contribute to this end. Discovering divergent solutions can help reduce the risk of preconceived interpretations of the CISG that disregard its international character. Both the historical background of uniform law and comparative studies can foster international understanding, while neither a (non-)categorization as "methods", "principles", or "comparative law" should be taken to pose abstract obstacles in this regard. **33**

60 *Zweigert/Kötz*, p. 34.
61 *Michaels*, Functional Method, pp. 345, 347.
62 For example, Schlechtriem/Schwenzer/Schroeter/*Hachem*, 5th edn, Art. 7 para. 24; Brunner/Gottlieb/*Wagner*, Art. 7 para. 6.
63 Schlechtriem/Schwenzer/Schroeter/*Hachem*, 5th edn, Art. 7 para. 24; Brunner/Gottlieb/*Wagner*, Art. 7 para. 6.

§ 2: Groundwork

I. Terminology

The first task of this study is to establish a terminology with which the relevant legal questions can be analyzed. This section aims to allow for a clearer discussion in the following parts. It does not set out to answer the question of whether the implementation of a unitary, lump concept of property, which describes the most complete bundle of rights in a movable good, is a convincing solution to the problems posed. **34**

Having chosen English as the language for this study, there is a natural link to the common law. This can, however, prove to be somewhat problematic when describing civil law concepts in property law in the English language.[64] In particular, the English language has not one but three potential terms to describe somebody's interest in goods: Some authors use "title", while others prefer "ownership", "property", or combinations of these terms.[65] Thus, from an outsider's perspective, English law might appear to use these terms interchangeably.[66] Yet, the English lawyer knows that under English law there are indeed discussions on the exact delineations. While it was long claimed that ownership was not a term of art, "ownership" is now used in the Consumer Rights Act 2015,[67] and there is a notable dogmatic discussion on the use of "title" and "property" under the UK Sale of Goods Act 1979.[68] Moreover, due to the dichotomy of common law in a narrow sense and equity law, rights, such as property or ownership, are split into a "bare legal title" and an "equitable title" that comes into existence with the creation of a "trust".[69] To further complicate matters, the English legal system lacks a coherent concept of property altogether. The law of property rather forms a mosaic of different statutes addressing property *en passant* and judge-made rules.[70] Under Canadian law, "property" and "title" are both **35**

64 *van Erp/Akkermans*, pp. 46 et seq., while *Graziadei*, pp. 71, 75 offers a more optimistic perspective.

65 *Schwenzer/Hachem/Kee*, para. 39.03 (title); S*chwenzer/Muñoz*, para. 39.03 (title); *Del Corral*, European Property Law Journal 2014, 34 et seq. (ownership); *Dalhuisen*, pp. 1 et seq. (ownership and property), *van Erp/Akkermans*, p. 55 (ownership and title); *Zogg*, p. 10 ("*title, interest, property* […] *are equally used in this book*").

66 *van Erp/Akkermans*, p. 348.

67 Sect. 4(1) Consumer Rights Act 2015 defines "*ownership of goods*" as the "*general property in goods, not merely a special property*" in conformity with the definition of "property" in sect. 61(1) SGA 1979.

68 *Battersby/Preston*, 35 The Modern Law Review (1972), 268; *Ho*, Cambridge Law Journal 1997, 571; *Battersby*, Journal of Business Law (2001), 1.

69 *Häcker*, p. 38.

70 *Pollock/Wright*, p. 3 ("*exceedingly difficult to obtain a consistent doctrine, and almost impossible to preserve a consistent terminology*"); *van Erp/Akkermans*, p. 36.

used in sales law, but held to be "*entirely different things*".[71] *Honnold* assessed the "*use of the complex, conclusionary legal idiom of 'property'* [to have] *led to confusion*" in common law jurisdictions.[72] Hence, in the English language, there is not one specific and appropriate term to describe what for example a German jurist would call property (*Eigentum*).[73]

36 Additionally, in uniform law, these terms are again used differently. The CISG uses the term "property" in Article 4, sentence 2(b) and Article 30. This could be understood to refer to a person's rights over the goods.[74] In contrast, "property" in Articles 7:110, 9:306 and 9:308 of the Principles of European Contract Law (PECL) is understood to refer to a thing, and not to a person's rights over the thing. Article 7:110(1) of the PECL, for example, states: "*A party who is left in possession of tangible property other than money because of the other party's failure to accept or retake the property must take reasonable steps to protect and preserve the property.*" When addressing a person's rights over a thing in the realm of sales law and property law, other projects on the European level use "ownership", as exemplified by the Draft Common Frame of Reference (DCFR).[75] Notably, and to exhaust all possible terms used in international unification projects, there is a *Convention du 15 avril 1958 sur la loi applicable au transfert de la propriété en cas de vente à caractère international d'objets mobiliers corporels* by the Hague Conference on Private International Law. This Convention never entered into force and was drawn up in French. Yet, in the English translation of the convention, "*propriété*" is translated as "title".

37 Against this background, it is not surprising that there is no prevailing terminology for the kind of research at hand. Since this study focuses on the interplay between national property law on the one hand and the CISG on the other, a terminological differentiation might have helped to highlight that the terms and concepts do not always fully overlap in their scope. Yet, this differentiation could not be used coherently for the full study: For example, the CISG refers to "property" in Articles 4 and 30. English law and the action for the purchase price under section 49(1) of the Sale of Goods

71 *Hendrickson v Mid-City Motors Ltd* [1951] 3 DLR 276, 1 WWR (N.S.) 609 (Alta S.C.), para. 24; *Schmitz v Van Der Loos*, 2015 BCPC 0077 (British Columbia Provincial Court), para. 41(a); *Fridman*, p. 95.

72 *Honnold*, 30 Law and Contemporary Problems (Spring 1965), 326, 350.

73 Translations to other languages also pose serious problems, cf. the helpful tables of common terminology in French, Italian, Portuguese, Romanian, Spanish, Danish, Dutch, Estonian, German, and Swedish by *Gretton*, 71 RabelsZ (2007), 802, 850.

74 Whether the exact meaning of "property" under the CISG has to be derived from the CISG itself or from national law is discussed in detail below paras. 168 et seq.

75 For example, Art. VIII.-1:202 DCFR defines "ownership" by using "property" as a term referring to the thing in contrast to the right over a thing. See also Jansen/Zimmermann/*Martens*, p. 1985 fn. 1.

Act 1979, which will be discussed in detail below,[76] also references "property" instead of "ownership" or "title". To change the terminology when discussing this provision and English law in general would confuse rather than clarify. Therefore, distinguishing between "property" under the CISG and "ownership" or "title" under national law lacks persuasive clarity. Instead, this study will generally use "property" when addressing aspects that concern all notions of property (irrespective of whether under the CISG or national law). Property is thus understood in a broad manner to refer to a legal interest any party can have in the goods. In turn, the terminology employed in the work at hand does not match the European projects, such as the PECL and the DCFR, which refer to property as the thing itself. If a specific manifestation of property is referred to then this will either be obvious or the text will clarify what concept is meant, for example, property under Swiss law, or property under the CISG, or relative property. The person who has property in the goods is referred to as the owner.

II. Notions of property

Property as a term is frequently used both in legal and non-legal discussions. Article VIII.-1:202 of the DCFR defines it as "*the most comprehensive right a person, the 'owner', can have over property,*[77] *including the exclusive right, so far as consistent with applicable laws or rights granted by the owner, to use, enjoy, modify, destroy, dispose of and recover the property.*" While the DCFR utilizes the term "ownership" to describe the most comprehensive right over a thing, this work refers to this right as property.[78] Notably, other areas of national law can provide important limitations to the comprehensiveness of the rights that follow from property. These can, for example, stem from a constitutional or even international level like the European Convention on Human Rights, or from public law that might, for example, limit certain uses or rules concerning specific cultural objects.[79] The following refers to property in private law, and is not concerned with the protection and understanding in public law.[80] **38**

76 See below paras. 344 et seq.
77 In this provision, property refers to the thing in contrast to the legal rights in the thing, cf. for the use of property and ownership in projects on the European level above para. 36.
78 See above para. 37.
79 Cf. *von Bar/Clive*, p. 4250.
80 For this differentiation, cf. for example, *Dreier*, pp. 116, 123–125.

1. Absolute notion of property on the European continent

39 The definition of property under the DCFR will be familiar to most jurists who have been educated on the European continent. Under the continental European understanding, property is a right *in rem*.[81] Due to this nature, property is interpreted to be effective vis-à-vis all third parties and must consequently be respected by everybody.[82] Since the owner can generally rely on his or her rights toward everybody and not just certain parties, this conception of property is commonly referred to as "absolute property" or having an *erga omnes*[83] effect. There are many other commonalities in the understanding of property (such as elasticity, the idea of a bundle of rights, etc.) which other scholars have analyzed and are not relevant for the work at hand.[84]

40 This notion of property, for example, underlies German law: Section 903, sentence 1 of the German Civil Code states: "*Der Eigentümer einer Sache kann, soweit nicht das Gesetz oder Rechte Dritter entgegenstehen, mit der Sache nach Belieben verfahren und andere von jeder Einwirkung ausschließen.*"[85] This provision does not define what property is, but presupposes its existence.[86] Property is understood to be an absolute right and to be effective vis-à-vis everybody.[87] It is possible for multiple persons to share property in goods (co-ownership, *Miteigentum*), but it is not possible for multiple persons to each individually have undivided property in the same goods. It is not possible to speak of person A having a better title or stronger property than person B. Therefore, the notion of property is not relative, but absolute, because from the point of view of substantive law, the question of who has property in the goods is assessed comprehensively and independently from the litigants. The result of legal proceedings could thus be that none of the parties to the dispute has property in the goods.

41 It is sometimes stated that these continental European national laws follow "*Roman law in matters of property law*".[88] This statement requires further qualification to avoid the impression that property as a legal notion has always existed in this "absolute" form.

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81 *von Bar/Clive*, p. 4250.
82 *von Bar/Clive*, p. 4251; *Sauer*, 118 ZVglRWiss (2019), 81, 84.
83 Literally translated: "toward everybody".
84 Cf. the general comments in *von Bar/Clive*, pp. 4250 et seq.
85 My translation: The owner of a thing may deal with the thing at his or her discretion and exclude others from every influence to the extent that neither a statute nor third party rights are not in conflict with this freedom.
86 BeckOK/*Fritzsche*, § 903 BGB para. 1.
87 MüKoBGB/*Brückner*, § 903 BGB para. 2.
88 *von Bar/Clive*, p. 4248.

2. Relative, absolute, and otherwise different notions of property under Roman law

It would be inaccurate to broadly state that Roman law always had an absolute notion of property that is comparable to, for example, the continental European understanding that was called *dominium*. At least when the *mancipatio*,[89] the oldest known form of a sale under Roman law, surfaced in the early republic or even earlier,[90] Roman law had not yet developed a uniform and singular notion of property: On the one hand, the scope and content of property in early Roman law was not clearly differentiated from possession and it also encompassed limited property rights.[91] On the other hand, the procedural environment (*legis actio sacramento in rem*) entailed that both parties had to claim and substantiate their respective property in the goods and the judge would find which party has the better right in the goods.[92] The action could not be dismissed with the argument that neither of the litigants had (absolute) property in the goods.[93] *Kaser* refers to it as "relative" property.[94] Hence, in the early stages of Roman law, there was neither an absolute notion of property, nor a uniform notion of property in the goods.[95] **42**

With the advent of a more absolute notion of property, plaintiffs under the *rei vindicatio* had to substantiate their property claim with a legal basis that provided them with a legal position that was to be respected by everyone.[96] The gap left by the restriction in the understanding of property was filled by the new *actio publiciana*, which provided protection against the possessor with the weaker right, and supplanted the idea of the protection of relative prop- **43**

89 A *mancipatio* is a "*pretended sale in presence of five citizens as witnesses and a libripens holding a pair of copper scales. The transferee, with one hand on the thing being transferred, and using certain words of style, declared it his by purchase with an as (which he held in his other hand) and the scales (hoc aere aeneaque libra); and simultaneously he struck the scales with the coin, which he then handed to the transferrer as figurative of the price*", *Muirhead/Goudy/Grant*, p. 53.

90 *Kaser*, Eigentum und Besitz, p. 107; *Kaser/Knütel/Lohsse*, § 17 para. 3.

91 *Kaser*, Eigentum und Besitz, pp. 3, 6; *Kaser/Knütel/Lohsse*, § 32 para. 2.

92 *Kaser*, 102 ZRG RA (1985), 1, 15; *Wubbe*, 28 Tijdschrift voor Rechtsgeschiedenis/ Legal History Review (1960), 13, 35.

93 *Kaser*, 102 ZRG RA (1985), 1, 15.

94 *Kaser*, Eigentum und Besitz, p. 8; support by *Wubbe*, 28 Tijdschrift voor Rechtsgeschiedenis/ Legal History Review (1960), 13, 35. For evidence of such relative property under demotic and graeco-egyptian law, see *Rabel*, Mangels im Rechte, p. 48.

95 *Wubbe*, 28 Tijdschrift voor Rechtsgeschiedenis/Legal History Review (1960), 13, 36: "*Denn wenn die causa vindicandi entscheidend ist für das bessere Recht zweier Prätendenten, gibt es nicht nur kein absolutes Eigentum, es gibt auch keinen einheitlichen Eigentumsbegriff.*"

96 *Kaser/Knütel/Lohsse*, § 32 para. 7.

erty.[97] Nevertheless, different notions of property continued to exist under classical Roman law. The *dominium ex iure Quiritium* (Quiritiary property) was only available to Roman citizens and only for certain movables and Italian land.[98] It could only be transferred by *mancipatio* or *in iure cessio*, while the mere *traditio* was not sufficient.[99] The Praetor provided the buyer, who had merely been delivered the goods for which a *mancipatio* or *in iure cessio* would have been necessary to acquire Quiritiary property, with a defense against the *rei vindicatio* by the seller.[100] Following Gaius, who considered the buyer to have the goods "*in bonis*", this legal position is called Bonitary property.[101] Parcels of land in Roman provinces were not a possible subject of Roman private property law.[102] Thus, while there was a more absolute notion of property under classical Roman law, different notions of property remained, depending on the object and the subjects of the sale.

44 After a relapse to a more blurred term of property in post-classical law, Justinian abolished the differences between Quiritiary and Bonitary property.[103] He established a uniform concept of property.[104] Tracing the origins of an absolute notion of property back to this stage is correct, but it hides the fact that Roman law (and specifically Roman sales law) had to work with different notions of property, which is comparable to today's situation under the CISG.

3. Relative notion of property

45 Less familiar, and diverging from the notion of property under the DCFR, is the "relative notion" of property often found in common law jurisdictions. It appears that the relativity of property in England was not influenced by the understanding of relativity of property under Roman law.[105] A more pragmatic approach was chosen and the distinction between possession and property was not strictly drawn.[106] The law of property in chattels was "*long*

97 See the detailed discussion of the development of Roman law in this regard by *Kaser*, Eigentum und Besitz, pp. 277–312; *Kaser/Knütel/Lohsse*, § 37 para. 24.
98 *De Zulueta*, p. 37; *Kaser/Knütel/Lohsse*, § 32 para. 8.
99 *Muirhead/Goudy/Grant*, p. 244; *Kaser/Knütel/Lohsse*, § 32 para. 9.
100 *Muirhead/Goudy/Grant*, p. 38; *Kaser/Knütel/Lohsse*, § 32 para. 9.
101 *Morey*, p. 283; *De Zulueta*, p. 37; *Kaser/Knütel/Lohsse*, § 32 para. 9.
102 *Kaser/Knütel/Lohsse*, § 32 para. 10.
103 *Muirhead/Goudy/Grant*, p. 379; *Kaser/Knütel/Lohsse*, § 32 para. 12.
104 *Kaser/Knütel/Lohsse*, § 32 para. 12.
105 *Pollock/Maitland*, pp. 77–78; *Merryman*, 48 Tulane Law Review (1974), 916, 919; *von Bar/Clive*, p. 4257 para. 23 state that the procedural devices for the recovery of property were influenced by Roman law in contrast to the concept. But see *Giglio*, 86 RabelsZ (2022), 91, 93 et seq.
106 *D. Fox*, 65 Cambridge Law Journal (2006), 330, 338; *Graziadel*, pp. 71, 92.

neglected and mainly developed only as a part of the commercial law, more particularly in connection with sales of goods and the transfer of property in them."[107]

In the realm of sales law, for example, section 61(1) of the Sale of Goods 1979 defines "property" as referring to general property in goods, and not merely a special property. Section 4 of the Consumer Rights Act 2015 defines "ownership" in the same manner. Special property is a limited (possessory) right in the goods, such as the right which a bailee holds.[108] This distinction only highlights whether a person holds a derivative right and does not indicate whether this right can be claimed against everybody, and thus, be considered "absolute" or "relative".[109] It seems, however, generally accepted that all notions of "property", "ownership" or "title" are best described as being only relative in nature.[110] Thus, instead of asking who (of all people in the world) is the true and only "owner" of the goods, an English jurist would ask whether person A or person B has a "better title" to the goods. **46**

Another emanation of the concept of "relative" property was the long-held perception that litigants should not be able to plead that a third person had a superior title in the goods to defend themselves from the opposing litigant's claims of having a better title (sometimes referred to as *jus tertii*). While this is still the case in some common law jurisdictions, like Singapore,[111] section 8(1) of the Torts (Interference with Goods) Act 1977 abolished this rule in England.[112] Although this could be taken to signify a slight shift toward an absolute notion of property under English law, it is not considered to have had a direct effect on the Sale of Goods Act 1979, since the rules on prop- **47**

107 *Dalhuisen*, p. 36. *Birks*, 11 King's College Law Journal (2000), 1 considers the "*law of personal property* [to be] *in a bad state*"; skeptically, *Bridge/Gullifer/Low/McMeel*, paras. 1-015, 1-066.

108 *Pollock/Wright*, p. 5: "[W]*hen distinction became necessary in modern times, the clumsy term 'special property' was employed to denote the rights of a possessor not being owner*"; *Bridge*, Sale of Goods, para. 2.50.

109 It should be noted that the words "absolute" and "relative" are sometimes also used to describe this aspect of derivativeness, but this terminology is not employed in this work, cf. below fn. 120.

110 *Gordley*, p. 3; *Battersby/Preston*, 35 The Modern Law Review (1972), 268, 269; *Bridge/Gullifer/Low/McMeel*, para. 18-006; *Philbrick*, 24 Iowa Law Review (1938–1939), 268, 277–278. This understanding also extends into equity and equitable titles, *D. Fox*, 65 Cambridge Law Journal (2006), 330, 351 et seq.

111 *Bridge*, Singapore Journal of Legal Studies (2017), 345, 350.

112 Sect. 8(1) Torts (Interference with Goods) Act 1977: "*The defendant in an action for wrongful interference shall be entitled to show, in accordance with rules of court, that a third party has a better right than the plaintiff as respects all or any part of the interest claimed by the plaintiff, or in right of which he sues, and any rule of law (sometimes called jus tertii) to the contrary is abolished.*"

erty therein were already codified in 1893,[113] and the abolition of *jus tertii* was meant to protect the defendant from double-liability and not introduce a concept of absolute property.[114] Moreover, allowing a defendant to name the person with the best title to the goods and have him or her joined to the proceedings should not be overestimated in terms of a shift, as was illustrated by the case *Costello v Chief Constable of Derbyshire Constabulary*.[115] The police seized a stolen car from *Costello*, but neither prosecuted him nor found the person the car had been stolen from. The police nevertheless refused to give the car back to *Costello*, who in turn sued the police for conversion. Conversion is a tort claim that concerns "*taking with the intent of exercising over the chattel an ownership inconsistent with the real owner's right of possession*".[116] The Court of Appeal found for *Costello*, since his title to the goods was better than that of the police, and the person with a better title was not named. In other words, for the purposes of this litigation, *Costello* had the property in the car. Hence, section 8(1) of the Torts (Interference with Goods) Act 1977 did not help the police as much as a concept of absolute property might have.[117]

48 From a continental European perspective, one might be inclined to at least equate the "best title" (a term that can be used under English law) with absolute property. Yet, as *David Fox* explains, these terms should not be put on equal footing: Even if somebody has the best title to a good, somebody else might get possession of it and, thereby, establish a relative title to the goods that is good against everybody but the person with the best title.[118] Hence, because possession and property are mingled, even the acceptance of a "best title" does not approximate the concept of absolute property. Absoluteness or relativeness do not determine whether a third party can be considered to establish a new legal position, which would also be possible under a concept of absolute property, for example in the case of a *bona fide* acquisition. It is rather a question of whether there can be only one owner of the goods (whose legal position might nevertheless be extinguished) or whether multiple persons can have competing titles to the same proprietary interest.

113 *Bridge*, Sale of Goods, para. 2.52.
114 *Bridge/Gullifer/Low/McMeel*, para. 19-004.
115 [2001] 1 WLR 1437.
116 *Fouldes v Willoughby* (1841) 81 M & W 540, 550 (at that time this definition was expressed in connection with the action "trover", which has been replaced by "conversion" under modern English law).
117 Approving comments on the result reached by *D. Fox*, 61 Cambridge Law Journal (2002), 27, 29 and *Battersby*, 65 The Modern Law Review (2002), 603, 610.
118 *D. Fox*, 65 Cambridge Law Journal (2006), 330, 336.

As far as the text in the following refers to "relative" property, it is to be understood as it is described here, although in other texts this expression can refer to different aspects.[119] **49**

4. Reduced significance of a "lump" concept of property

In some legal systems the exact notion of property has lost its appeal as a subject in the realm of sales law, because the idea that one "lump" concept could answer many different questions is considered a shaky premise. **50**

a) Nordic countries

Nordic countries (Finland, Sweden, Denmark, Norway, Iceland) have a long tradition of looking at the respective conflicts of different parties with regard to the goods instead of using property as a central pillar to decide these conflicts. These laws have only minimally been influenced by the common law and Roman law.[120] For historical and political reasons, co-operation between the Nordic countries led to far-reaching unifications of commercial law and even property law.[121] At the end of the 19th century, the Danish law professor *Torp* was among scholars that started to criticize the Roman notion of property and the related idea that all rights to the goods are transferred at one single point in time.[122] This idea has since been developed further,[123] and is considered a major difference between the approaches of legal systems with regard to those questions of property that were heavily discussed in projects of unification.[124] This is not to say that jurists in Nordic countries would not be aware of the term property or even refrain from using it in legal debate. They distinguish static property rights, where no transfer of the legal position is in question and the concept of property can be used, from **51**

119 Sometimes it is used to refer to the difference between general property (absolute) and special property (relative), *Zogg*, p. 11. At other times, it is used to refer to the relative effect of a transaction, i. e., that the acquisition from the rightful owner cannot be relied upon vis-à-vis certain other parties, for example, under Art. 717 Swiss Civil Code, BSK ZGB II/*Wolf/Wiegand*, Art. 641 ZGB para. 22.

120 *von Bar/Clive*, p. 4259 para. 31.

121 *von Bar/Clive*, pp. 4259 et seq. paras. 32–34.

122 *Torp*, p. 324; cf. *Håstad*, 17 European Review Private Law (2009), 725, 727; cf. *von Bar/Clive*, p. 4260 paras. 34–35.

123 *Martinson*, pp. 69, 70 for example claims that the last "*shakes in the emancipation procedure could be said to have ended as late as the 1970-ies.*" Cf. also *von Bar/Clive*, pp. 4260 et seq. paras. 35–36.

124 Cf. for example, *Håstad*, 17 European Review Private Law (2009), 725 with regard to the DCFR; *Martinson*, pp. 69, 72 fn. 7 with regard to the Study Group on a European Civil Code; *Lilja*, European Property Law Journal 2014, 52, 53; *Gottheiner*, 18 RabelsZ (1953), 356, 357.

dynamic property rights, where legal positions have to be allocated during a transaction.[125]

52 Those adopting the latter approach, labeled as a "functional approach",[126] do not consider it worthwhile to find a theoretical and comprehensive explanation of what property is.[127] The point of origin in the debate is the respective conflict, not the dogmatics of property.[128] The notion that a single concept and one relevant point in time can determine many different outcomes in various contexts fails to persuade jurists from Nordic countries. Rather, the transfer of property occurs gradually.[129] Hence, this approach does not fall under the categories of relative or absolute notions of property, but should rather be understood as part of a different category that puts less relevance on the notion as such.[130]

53 There is no general written law on movable property in the Nordic countries, but rather fragments can be found in different acts to specific questions.[131] For example, there are rules containing conditions for the protection of a buyer from a seller's creditors if the buyer leaves the seller in possession of the goods,[132] or for the protection of the seller from the buyer's creditors if the buyer does not pay the price.[133] Nevertheless, these rules do not mention "property" in providing rules for the respective conflict. Rules that do in fact mention property make it clear which single aspect and which single conflict are being referred to.[134]

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125 *Håstad*, Property Rights regarding Movables, sub. 17.1.

126 *Faber*, European Property Law Journal 2013, 22, 27–28; *von Bar/Clive*, p. 4259 para. 31.

127 *Martinson*, pp. 69, 93: "*the question of 'ownership' is simply an irrelevant question*"; *Pelzer*, p. 26.

128 *Lagergren*, p. 62.

129 *Håstad*, Property Rights regarding Movables, sub. 17.2.1. Cf. also *Kruse*, 7 American Journal of Comparative Law (1958), 500, who analyzes English, French, German, and United States' law in this fashion with regard to different point in times and different concerned parties.

130 *Gottheiner*, 18 RabelsZ (1953), 356, 360–362.

131 Providing ample illustrative material for Sweden as an example, *Håstad*, Property Rights regarding Movables, *passim*.

132 Lag (1845:50 s. 1) om handel med lösören, som köparen låter i säljarens vård kvarbliva (Act (1845:50 s. 1) on trade in movables that the buyer leaves in the seller's custody).

133 Sect. 54(4) Finish Sale of Goods Act 1987; sect. 54(4) Norwegian Sale of Goods Act 1988, sect. 54(4) Swedish Sale of Goods Act 1990; *Martinson*, pp. 69, 81 et seq.

134 *Håstad*, 17 European Review Private Law (2009), 725, 727 fn. 4.

b) USA and its UCC

The legal situation under the Uniform Commercial Code (UCC) in the USA exhibits certain commonalities with Nordic laws and legal realist thought.[135] Although the UCC has not completely abandoned the notion of property as understood in this work (the UCC refers to it as title and uses property to refer to the thing itself), it has severely limited its impact as a concept. Section 2-401 of the UCC opens by stating that **54**

> "[e]*ach provision of this Article with regard to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies irrespective of title to the goods except where the provision refers to such title. Insofar as situations are not covered by the other provisions of this Article and matters concerning title become material the following rules apply:* […]."

This general stance of the UCC can be traced back to strong opinions held by one of the main drafters of the UCC, *Llewellyn*. His famous article "*Through Title to Contract and a Bit Beyond*" from 1938 reveals his hostile opinion on "title" as a lump concept.[136] His "narrow-issue approach" became a fundamental principle of the UCC and consists in addressing the respective narrowly defined situations instead of referring to one general principle.[137] The fact that the transfer of property became mostly irrelevant for the question of remedies between the parties was not met with applause everywhere.[138] To this day, some scholars attempt to expose that the proprietary structures still exist under the UCC, and that the courts have not always abandoned the old title-structures.[139] As far as a concept of title is used, the idea of it as a bundle of sticks, of which individual (but not all) sticks can be transferred at the same time, while the holder of the title retains some, convinces many jurists.[140] This emphasis on the respective sticks of the bundle stands in contrast to the continental European notion that emphasizes the **55**

135 Highlighting the similarities, *Håstad*, 17 European Review Private Law (2009), 725, 727; *Pelzer*, p. 20; highlighting the differences, *Lilja*, European Property Law Journal 2014, 52, 60.

136 *Llewellyn*, XV NYU Law Quarterly Review (1938), 159, 165. Similarly skeptical toward "property" and "title", *Cohen*, XXXV Columbia Law Review (1935), 809, 820.

137 See for example, the risk of loss in sect. 2-509 et seq. UCC; the buyer's right to the goods in the seller's insolvency in sect. 2-502 UCC; the decision whether buyer or seller can sue a third party for damages to the goods in sect. 2-722 UCC; cf. also *Lilja*, European Property Law Journal 2014, 52, 57.

138 *Williston*, 63 Harvard Law Review (1950), 561, 568: "*unsatisfactory and can result only in confusion*".

139 Cf. for example, *Rusch*, 54 SMU Law Review (2001), 947; *Dolan*, 59 Boston University Law Review (1979), 811, 847.

140 *Stoebuck/Whitman*, p. 6; *Graziadei*, pp. 71, 83; *Barron*, 82 University of Cincinnati Law Review (2014), 57. Skeptically, *Penner*, 43 UCLA Law Review (1996), 711, 714.

bundle over the respective sticks.[141] It is, nevertheless, difficult to ascertain whether title or property are relative or absolute notions in the terminology employed above.[142]

5. Summary

56 The plural use of "notions" (of property) in this section's heading is deliberate and significant. Property is, by no means, a singular concept in private law as reflected by its many different definitions and uses around the world. While the differences in the transfer of property are frequently emphasized and compared, the different understandings of how property in goods as a concept in different legal systems is remains less explored. For purely functional comparative law, this might be appropriate, however, the highlighted differences in national concepts become relevant when considering how preconceived national understandings influence the understanding of the CISG.

III. Differences in the transfer of property with regard to sales transactions

57 As far as a unitary notion of property (in contrast to a functional notion under Nordic laws described above)[143] is used, there are additional differences in when and how property is transferred under national law. The following provides a broad overview of the general diverging approaches on this topic. Two dividing lines along the necessity of a handing over and the relevance of the sales contract can be drawn.[144] This section offers a bird's-eye view rather than a comprehensive and detailed comparative account of the rules on the transfer of property, and lays the minimum groundwork for the following chapters.

1. Transfer of property due to mere consent or additional requirement of handing over of the goods

58 The first dichotomy between national laws on the transfer of property is between legal systems that consider the property to be transferred merely

141 *Stoebuck/Whitman*, pp. 6–7.

142 Cf. *Gabriel*, 17 Brooklyn Journal of Corporate, Financial & Commercial Law (2022), 39, 47 who argues that title in a sales transaction can be a conclusion not a requirement.

143 See above paras. 39 et seq. regarding the unitary and absolute notion of property, and paras. 51 et seq. regarding the Nordic approach to property in goods.

144 *van Vliet*, pp. 150, 151.

due to the sales contract (*solo consensu*) and others that additionally require handing over of the goods (*traditio*).

French law exemplifies a large group of legal systems following the *solo consensu* approach: Article 1583 of the French Civil Code states that the property is acquired by the buyer with the conclusion of the sales contract without regard to whether the goods have been delivered or the price has been paid.[145] This general principle can also be found in Belgium[146] and Italy[147] without surprising anyone, but is followed in many other parts of the world, too: In Middle Eastern and Arabic countries such as, for example, Egypt;[148] in Asian and Eastern European countries;[149] and in some Middle and South American countries.[150] In addition, countries following the approach of the English Sale of Goods Act provide for the transfer of property by mere consent in the sales contract and provide rules for ascertaining the parties' intention with regard to the transfer of property. These countries include England, Ireland, Wales, Scotland, Kenya, Tanzania, parts of Australia, parts of Canada and Hong Kong.[151] **59**

Under these laws, however, it is not always the case that property passes with the conclusion of the sales contract. Indeed, there are many exceptions to the general rule, most notably that property in unascertained goods can generally not be transferred without ascertaining the respective goods **60**

145 Art. 1583 French Civil Code: "*Elle est parfaite entre les parties, et la propriété est acquise de droit à l'acheteur à l'égard du vendeur, dès qu'on est convenu de la chose et du prix, quoique la chose n'ait pas encore été livrée ni le prix payé.*" The reform of the French Civil law in 2016 has not changed the stance of French law with regard to the transfer solo consensu, *Porchy-Simon*, para. 448; *Babusiaux/Cl. Witz*, JZ 2017, 496, 504.

146 Art. 1583 Belgian Civil Code; *von Bar/Clive*, p. 4448 para. 20.

147 Art. 1376 Italian Civil Code; *Gallo*, 2 The Italian Law Journal (2016), 313, 319; *von Bar/Clive*, p. 4448 para. 21.

148 *Debs*, p. 132.

149 Art. 458 Thai Civil Code; Arts. 528, 133 Cambodian Civil Code; Art. 1674 Romanian Civil Code; Art. 164 Albanian Civil Code; Art. 24(1) Bulgarian Law of Obligations and Contracts.

150 For example, Art. 2014 Mexican Civil Code; Arts. 110, 584 Bolivian Civil Code; see for further references, *Muñoz*, pp. 366–367.

151 For the UK, sect. 17 et seq. SGA 1979; *Bridge*, Sale of Goods, para. 3.02; for Kenya, sect. 18 et seq. Kenyan Sale of Goods Act; for Tanzania, sect. 18 et seq. Tanzanian Sale of Goods Act; for Australia, for example, sect. 21 et seq. Australian Capital Territory Sale of Goods Act 1954; sect. 21 et seq. New South Wales Sale of Goods Act 1923; for Canada, for example, sect. 21 et seq. British Columbia Sale of Goods Act; sect. 17 et seq. Ontario Sale of Goods Act 1990; for Hong Kong, sect. 18 et seq. Hong Kong Sale of Goods Ordinance.

first.[152] Property in future goods can be transferred only after the goods come into existence.[153]

61 In contrast to the *solo consensu* approach, the *traditio* approach requires the handing over of goods to transfer property.[154] Swiss law provides an example: Article 714(1) of the Swiss Civil Code generally requires the transfer of possession ("*Übergang des Besitzes*") among other prerequisites[155] for property to transfer to the buyer. This approach can also be found in the neighboring Austria and Germany, as well as in the Netherlands, Turkey, in some Asian legal systems, such as China, Korea, the Philippines, Vietnam.[156] Notably, it is also in place in the USA in divergence from other common law countries, and in some South American countries.[157]

62 There are exceptions to the rule requiring physical transfer of goods, as some laws permit parties to agree that the seller retains possession of the goods on behalf of the buyer, allowing property to be transferred according to this agreement.[158] Moreover, it is possible that either the buyer or nobody at all could already be in possession of the goods, and in both scenarios national laws are not as rigid as to require the seller to first (re-)take possession only to hand the goods over again and thereby transfer property onto the buyer.[159]

63 In summation, although both approaches allow for exceptions that move them closer together in terms of results, the diverging starting points – mere consent or handing over – are noteworthy.

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152 For example, Art. 1585 French Civil Code; cf. French Supreme Court, 19 February 2002, 99-12585. See the general remarks on identification by *von Bar/Clive*, pp. 4452–4459 paras. 31–50; *Schwenzer/Hachem/Kee*, para. 39.53; *Schwenzer/Muñoz*, paras. 39.39 et seq.

153 *Porchy-Simon*, para. 449; *van Vliet*, pp. 150, 156.

154 It is common to refer to this requirement as "delivery", cf. *von Bar/Clive*, p. 4437 para. 1. To avoid terminological overlap with "delivery" under Art. 30 CISG, "handing over" is used here.

155 BSK ZGB II/S*chwandler*, Art. 714 ZGB paras. 1–2.

156 For Austria, sect. 425 Austrian Civil Code; for Germany, sect. 929 German Civil Code; for the Netherlands, Art. 3:84(1) Dutch Civil Code; for Turkey, Art. 763 Turkish Civil Code; for China, Art. 208 s. 2 Chinese Civil Code; for Korea, Art. 188 Korean Civil Act; for the Philippines, Art. 1477 Civil Code of the Philippines; for Vietnam, Art. 168(2) Vietnamese Civil Code; *Schwenzer/Hachem/Kee*, para. 39.59 fn. 111 with further references.

157 Under sect. 2-401(2) UCC property passes when "*the seller completes his performance with reference to the physical delivery of the goods*", but allows for an explicit agreement by the parties diverging from the general rule; Art. 237 Brazilian Civil Code; Art. 675 Chilean Civil Code; see *Muñoz*, p. 369 with further references.

158 For example, sect. 930 German Civil Code.

159 For example, sect. 931 German Civil Code; cf. *Schwenzer/Hachem/Kee*, paras. 39.61–39.63 and *Schwenzer/Muñoz*, paras. 39.62–39.64 with further references.

2. Causal or abstract relationship between transfer of property and the sales contract

For legal systems that require handing over of the goods to transfer property under a sales transaction, a further distinction between the relationship of the sales contract and transfer has to be drawn. In many legal systems, there is a "causal" relationship between the sales contract and the transfer of property.[160] Consequently, if the sales contract is not valid, property is not considered to have been transferred. In contrast, German law maintains that the transfer of property is "abstract" from the underlying sales contract. To transfer the property under such a system, the sales contract is not relevant, but a separate, "real" agreement with regard to the transfer of property is necessary. **64**

The distinction between causal and abstract systems for property transfer does not equally apply across all legal systems when it comes to determining whether a separate, additional agreement beyond the sales contract is necessary for transferring property. Even legal systems like Austria, which generally follows a causal approach, requires a "real" agreement for the transfer of property to take place.[161] **65**

IV. Law applicable to questions of property

As a final background section, the law that applies to questions of property must be addressed. The main approach found under the majority of today's legal systems is to apply the law of the country where the goods are located (so-called *lex rei sitae*).[162] Hence, if a Turkmen buyer contracts with an Uzbek seller regarding goods located in Tajikistan, Tajik law will answer the questions when and how property in the goods can be transferred onto the buyer. If the goods are transported across a border, the applicable law will **66**

160 French and Italian law are examples. The approach, however, is widespread, cf. the detailed description by *von Bar/Clive*, pp. 4439–4443 paras. 8–16. The question whether the English system is causal or abstract is not posed explicitly under English law, but it appears to be causal, *van Vliet*, pp. 150, 157.

161 *von Bar/Clive*, p. 4440 para. 9.

162 Staudinger/*Mansel*, Art. 43 EGBGB para. 12; *Kieninger*, p. 16; *Stadler*, Verkehrsschutz durch Abstraktion, p. 654; *Karrer*, p. 52; *d'Avout*, p. 417; MüKoBGB/*Wendehorst*, Art. 43 EGBGB para. 3; *Briggs*, The Conflict of Laws, p. 284; *Fawcett/Carruthers*, p. 1209 who, however, highlight many exceptions under English law; *Kuhn*, pp. 233–236. See furthermore the detailed account of national provisions Staudinger/*Stoll*, Internationales Sachenrecht, paras. 5–103. Notably, French law might be an exception and mandate that the law applicable to the contract also governs questions of property, cf. *Iran v. USA*, 10 March 2020, Award no. 604-A15(II:A)/A26(IV)/B43-FT, p. 81 para. 162.

change accordingly. This has not always been the case. In the seventeenth and eighteenth century, goods were considered to either have no situs of their own or follow the situs of their owner.[163]

67 The reason behind the general applicability of the *lex rei sitae* lies with the protection of third parties: Since property can have effect vis-à-vis third parties, it should not be up to the contractual parties to manipulate the transaction to the detriment of third parties.[164] The rules at the place where the goods are situated are considered to provide the necessary legal certainty.[165] The general decisiveness of the *lex rei sitae* is subject to a few, mostly accepted, exceptions, such as its non-applicability in the case of *res in transitu*, i. e., goods that are in transit at the point in time they are being sold.[166] Regarding the details of the law applicable to property in goods, litigation and arbitration must be analyzed separately.

1. Law applicable to questions of property before State courts

68 In addition to the CISG and other unification projects in substantive sales law, unified conflict of law rules also eschew issues of property and its transfer. For example, while the EU has regulations on the applicable law and jurisdiction, it has left out rules to determine the law applicable to questions of property thus far.[167] Notably, the European Group for Private International Law is working on a draft of private international law rules with regard to property rights.[168] There have been a few international conventions, but they are either very restricted in scope,[169] or have not been successful.[170] As a consequence, the principal applicability of the *lex rei sitae* is due to national

163 *Kuhn*, pp. 233–236; Staudinger/*Mansel*, Art. 43 EGBGB para. 39.

164 *Basedow*, 18 Yearbook of Private International Law (2016/17), 1, 2.

165 Cf. *Iran v. USA*, 10 March 2020, Award no. 604-A15(II:A)/A26(IV)/B43-FT, p. 79 paras. 160–161.

166 *Stadler*, Verkehrsschutz durch Abstraktion, p. 656.

167 *Akkermans*, 7 European Property Law Journal (2018), 246, 248; *Briggs*, para. 8.01 highlighting that there are exceptions with regard to property rights in the context of marriage and death.

168 A draft is published on the group's website with the title "The law applicable to rights in rem in tangible assets – Provisional draft, 31.10.2020".

169 For example, the 2001 Cape Town Convention on International Interest in Mobile Equipment, thereon Fawcett/Harris/Bridge/*Bridge*, para. 18.126, the 2006 Hague Convention on the Law Applicable to Certain Rights in Respect of Securities, and the 2016 UNCITRAL Model Law on Secured Transactions.

170 For example, the *Convention du 15 avril 1958 sur la loi applicable au transfert de la propriété en cas de vente à caractère international d'objets mobiliers corporels* by the Hague Conference on Private International Law, which was only ratified by Italy and never entered into force. On this Convention, Fawcett/Harris/Bridge/*Bridge*, para. 18.72.

private international laws. An example among many is Article 43(1) of the Introductory Law to the German Civil Code.[171]

Alternatives in the form of allowing a choice of law by the parties[172] or applying the law applicable to the sales contract[173] have been unsuccessfully proposed on multiple occasions. The former proposition has led to a limited choice of law, for example, under Article 104 of the Swiss Federal Act on Private International Law. This provision, however, is not effective against third parties and, and consequently, its meaningfulness is in doubt.[174] Applying the law applicable to the sales contract to questions of property has the seldom discussed disadvantage that it cannot smooth the relationship between the laws applicable to the contract and property as far as unified law, such as the CISG is applicable. A widely accepted exception to the applicability of the *lex rei sitae* concerns the situation in which goods are being transported (*res in transitu*), where the respective location of the goods might be haphazard and unconnected to the transaction, but there has been no consensus on which law should be applied in such cases.[175] **69**

Notably, differences arise with regard to the applicable law before State courts not due to divergences regarding the general applicability of the *lex rei sitae*, but instead due to different approaches to pleading and proving foreign law:[176] While some jurisdictions, such as Germany[177] and Switzerland,[178] consider the application of foreign law to be a question of law, they generally consequently instruct judges to determine the content of the ap- **70**

171 "*Rechte an einer Sache unterliegen dem Recht des Staates, in dem sich die Sache befindet.*" My translation: Proprietary rights in a thing are subject to the law of the State, in which the thing is situated.

172 *Inter alia* Staudinger/*Stoll*, Internationales Sachenrecht, paras. 292–294; *Basedow*, 18 Yearbook of Private International Law (2016/17), 1, 11; *Khairallah*, pp. 181 et seq. Limited to the parties' relationship, *Mazzoni*, pp. 245, 277–279; *Ritterhoff*, pp. 292 et seq.; *Chesterman*, 22 International and Comparative Law Quarterly (1973), 213. Cf. also Art. 37 of the Law of the People's Republic of China on Application of Law to Foreign-Related Civil Relations that allows parties to choose the law applicable to *in rem* rights, *Basedow*, 18 Yearbook of Private International Law (2016/17), 1, 16.

173 See for example, *Fawcett/Carruthers*, p. 1211; *Stadler*, Verkehrsschutz durch Abstraktion, p. 680.

174 Cf., for example, the discussion by BSK IPRG/*Fisch/Fisch*, Art. 104 IPRG paras. 25–28.

175 Cf. *Basedow*, 18 Yearbook of Private International Law (2016/17), 1, 4–6. For example, Art. 101 Swiss Federal Act on Private International Law.

176 See the very instructive article by *Hartley*, 45 The International and Comparative Law Quarterly (1996), 271–292.

177 MüKoBGB/*v. Hein*, Einleitung zum Internationalen Privatrecht para. 321.

178 Art. 16 Swiss Federal Act on Private International Law. Cf. also *Wagner*, ZEuP 1999, 6, 11; ZK IPRG/*Girsberger/Furrer*, Art. 16 IPRG, paras. 12 et seq.; cf. for the law in this regard before codification under the Swiss Federal Act on Private International

plicable law by themselves (*ex officio*). On the other end of the spectrum, for example, English law deems the application of foreign law to be a question of fact, and the court will generally find no reason to apply it unless a party pleads it and proves the substance of the foreign law.[179] In case no party provides the court with such pleading and proof, the court will apply English law as the *lex fori*.[180] A similar approach can also be found under section 10(1), sentence 2(2) of the Chinese Law on Application of Law to Foreign-Related Civil Relations.[181] This practical limitation of the relevance of the *lex rei sitae* has to be kept in mind.

2. Law applicable to questions of property before arbitral tribunals

71 The general applicability of the *lex rei sitae* with regard to property is also omnipresent in arbitration. Three recent cases, Nos. A15(II:A), A26(IV), and B43, decided by the Iran-United States Claims Tribunal discuss at length the law applicable to matters of property in arbitration.[182] They conclude that the *lex rei sitae* is a universal principle of private international law regarding property in goods and that the law applicable to the transfer of property must be ascertained under this principle.[183]

72 However, the applicable law in arbitration is often assessed on different legal grounds than the applicable law before State courts. For example, section 1051(1), sentence 1 of the German Code of Civil Procedure requires arbitral tribunals seated in Germany to apply the law that the parties have chosen. This is the only provision on the applicable law on the subject matter of the arbitration. Thus, in contrast to rules of private international law for State courts, there is no further differentiation between the law applica-

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Law, *v. Overbeck*, FS Frank Vischer, pp. 257 et seq. There are notable exceptions to this rule in Art. 16(1) sentence 2, 3 Swiss Federal Act on Private International Law.

179 *Hartley*, 45 The International and Comparative Law Quarterly (1996), 271, 282; *Wagner*, ZEuP 1999, 6, 10.

180 *Hartley*, 45 The International and Comparative Law Quarterly (1996), 271, 283.

181 *Basedow*, 18 Yearbook of Private International Law (2016/17), 1, 16.

182 *Iran v. USA*, 10 March 2020, Award no. 604-A15(II:A)/A26(IV)/B43-FT, pp. 67–82. Specifically, p. 72 para. 144 contains a comparative overview of the approaches around the world.

183 *Iran v. USA*, 10 March 2020, Award no. 604-A15(II:A)/A26(IV)/B43-FT, p. 82 para. 164; similarly, *Berger*, 19 Uniform Law Review (2014), 519, 530 ("*lex rei sitae rule as a generally accepted conflict rule for international property law issues*"); but see Separate Opinion of Judge *Mir-Hossein Abedian Kalkhoran* in *Iran v. USA*, 10 March 2020, Award no. 604-A15(II:A)/A26(IV)/B43-FT, para. 154 advocating the *lex contractus* at least for property matters *inter partes*.

ble to, for example, contracts, torts, or property.[184] The principle to apply the *lex rei sitae* to questions of property in goods, as for example under Article 43 of the Introductory Law to the German Civil Code is, thus, not found in section 1051(1), sentence 1 of the German Code of Civil Procedure. Yet, whether the latter provision is to be interpreted to allow the parties to choose the law applicable on questions for property in goods is not clear either.[185]

V. Conclusion

Property in goods is a field of law that has not been subject to unification, and national laws differ widely. There are different notions of property. In some legal systems, property is an absolute notion, while in other legal systems, property refers to a relative notion. Under such a notion, multiple persons can have property in the same goods. Other legal systems try to avoid relying on property as an abstract concept, and rather aim at finding solutions to the respective question at hand. Moreover, the transfer of property differs under national laws. Generally, the *lex rei sitae* is applied to decide which notion of property and which kind of mechanism for the transfer of property applies. **73**

184 This is similar in France and has prompted similar discussions on how far the parties' choice of law should trump the *lex rei sitae*, *d'Avout*, pp. 436–440.

185 See the overview of opinions under German law by *McGuire*, SchiedsVZ 2011, 257, 260–262. Most scholars appear to allow a broad party autonomy with regard to the law applicable in arbitration, which could include the law applicable to property matters, see for example, Musielak/Voit/*Voit*, § 1051 ZPO para. 3. But there are critical voices that favor the application of the *lex rei sitae*, too, *Wagner*, FS Schumann, pp. 535, 557; MüKoZPO/*Münch*, § 1051 ZPO paras. 19–20; *Handorn*, pp. 169–170.

§ 3: Obligation to transfer the property and third party rights or claims

Under the CISG, Article 30 obliges the seller to transfer the property in the goods, and Article 41, sentence 1, stipulates that the goods delivered must be "*free from any right or claim of a third party, unless the buyer agreed to take the goods subject to that right or claim.*" The obligation to transfer the property is oftentimes considered a central pillar of sales law.[186] While the sixth chapter below will outline the difficulties of unification with regard to the transfer of property, a question to be distinguished therefrom concerns the seller's obligation to transfer the property and the liability for third-party rights. **74**

It is only partially true that the drafters of uniform law simply intended to exclude the effect the contract has on the property in the goods, and not the obligation to transfer property. Rather, the drafters intended to avoid national traditional concepts and terms, such as "property", in order to increase the odds that the resulting uniform sales law would be applied in a truly uniform manner. Consequently, *Rabel* and the committee members at Unidroit in the 1930s drafted the entire sales law without ever touching on matters that could be connected to national (property) law: **75**

> *"Die Verpflichtungen des Verkäufers, das Eigentum und den Besitz zu übertragen, sowie die Gewährleistung wegen Rechtsmangels bleiben außerhalb der Vereinheitlichung. Der Entwurf kennt daher nur eine einzige Hauptverpflichtung des Verkäufers, die zur '**Lieferung**'. Dieser Begriff aber bildet die Grundlage der ganzen Ordnung.* […] *Wir brauchten jedenfalls einen Begriff, der vollkommen unabhängig von dem ganzen juristischen System der Mobiliarübertragung bleibt; dank ihm kann der Entwurf die Hauptverpflichtung des Verkäufers näher regeln, ohne alle die Fragen irgend zu berühren, die sich um Wesen und Terminologie des Eigentumsübertrags und der Besitzübertragung drehen."*[187]

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186 For example, the statement by Great Britain in 1962, "*le trait essentiel* [du contrat de vente] *est le transfert de propriété*", U. D.P. – Etudes: IV Vente – Doc. 102, p. 23.

187 *Rabel*, 9 RabelsZ (1935), 1, 56. My translation: The seller's obligation to transfer the property and possession as well as the liability for legal defects remain beyond the scope of unification. Therefore, the draft only stipulates one main obligation of the seller: the obligation to deliver. The notion of 'delivery' serves as the basis for the entire regulation. […] We needed a concept that would remain completely independent of the entire legal system of the transfer of [property in] movables. With this concept [delivery], the draft can regulate the main obligation of the seller in more detail without touching on all the questions that revolve around the nature and terminology of the transfer of property and possession.

76 Consequently, the first draft of a uniform sales law of 1935 contained neither an expression obliging the seller to transfer the property nor one providing for the seller's liability when the buyer faces third-party rights or claims.[188] The exclusion of questions related to property was, thus, originally more far-reaching than merely the effect the contract has on the property in the goods. Given today's Articles 30 and 41 of the CISG, it is obvious that the process of drafting uniform rules has continued to evolve. This chapter analyzes the scope of the obligation to transfer the property under Article 30 and the liability for third party rights and claims under Article 41. To this end, an understanding of "property" under the CISG is necessary.

77 This chapter will first explain *Rabel*'s distinction between different kinds of obligations to transfer the property. This differentiation was and remains necessary because jurists from different countries refer to different kinds of obligations when they refer to "the" obligation to transfer the property. Thereafter, a brief overview of the position under Roman law and the obligation's development tracing it to current national laws is necessary to understand certain arguments on the interpretation and the development of the CISG rooted in these national laws. Against this backdrop, the current interpretations of Articles 30 and 41 of the CISG will be explored, and a novel approach offered. The chapter concludes with a short outlook on the future of unification of these obligations, specifically under European law.

I. Distinguishing different obligations to transfer the property

78 In the statement just cited,[189] *Rabel* differentiates between the seller's obligation to transfer the property and the seller's liability for legal defects. This distinction goes back to his seminal work, "*Das Recht des Warenkaufs*". In the section covering the seller's main obligations, *Rabel* writes that there are multiple concurrent obligations of the seller. With regard to property, he cites two kinds of possible obligations:[190] On the one hand, there can be an

188 The first draft can be found in *Rabel*, Recht des Warenkaufs II, pp. 374 et seq. Norway supported the laguna with regard to the obligation to transfer the property and the seller's liability for third party rights, and even proposed to go further and change Art. 5 of the draft to explicitly state that the liability for eviction was not governed by the uniform sales law, S. D.N.-U. D.P. 1936 – Etude IV – Vente – Doc. 82, p. 53. Skeptical by contrast, Poland, S. D.N.-U. D.P. 1936 – Etude IV – Vente – Doc. 82, p. 87.

189 See above para. 75.

190 *Rabel*, Recht des Warenkaufs II, p. 313: "*Es bestehen nebeneinander die Verpflichtungen* […] *2. den Akt vorzunehmen, der zur Übertragung des Eigentums sachenrechtlich vorgeschrieben ist, 3. a) das Eigentum an der Sache zu verschaffen, oder b) nur das geschützte Haben zu garantieren.*"

obligation to make the buyer the owner of the goods, i. e., that no third party has rights in the goods; on the other hand, there can be an obligation of the seller to fulfill the necessary acts to transfer property under the law applicable to property.

1. Obligation to transfer unencumbered property

Rabel first addresses the obligation to make the buyer the owner of the goods. This obligation is breached if a third party has rights (for example, property under German or Swiss law) in the goods after the latter have been transferred to the buyer. It is not relevant whether third parties assert their right for there to be a breach of contract. One might refer to this kind of obligation as an obligation to transfer "perfect property/title", an "obligation regarding third party rights", or an "obligation to transfer unencumbered property" where "unencumbered" would signify the freedom from third party rights and claims. This work will use the last expression ("obligation to transfer unencumbered property") following *Rabel*.[191] This obligation differs from the obligation to merely guarantee undisturbed possession, since the latter is only breached if the buyer's possession is disturbed. Yet, possession is not disturbed in case of the mere existence of a third party right, but rather when a third party claims to be entitled to the goods in any way. **79**

2. Obligation to fulfill the necessary acts for the transfer of property

The obligation to transfer unencumbered property must be differentiated (but seldom was and is)[192] from the obligation to fulfill the necessary acts for the transfer of property under property law. In the context of the latter obligation, it is not relevant whether third parties have rights in the goods or whether the seller had the authority to sell them. The obligation focuses on what the seller has to do in terms of formal acts to transfer property in contrast to whether the result of the buyer becoming the owner of the goods also vis-à-vis third parties is actually achieved. Using French terminology (which was employed during the drafting of the ULIS) this could be referred **80**

191 See heading "*2. Pflicht, freies Eigentum zu verschaffen*", *Rabel*, Recht des Warenkaufs II, p. 314.

192 Cf. also *Rabel's* remark: "*Man kann sagen, daß diese Verpflichtung selbstverständlich ist, obwohl sie oft verkannt, nämlich entweder übersehen oder fälschlich als Eigentumsverschaffungspflicht* [im Sinne einer Pflicht, freies Eigentum zu verschaffen] *angesehen wurde*", *Rabel*, Recht des Warenkaufs II, p. 315.

to as an "*obligation de moyen*", in contrast to an "*obligation de résultat*".[193] It is reasonable to refer to this obligation to transfer the property, but this label would not unambiguously denote which obligation is meant. *Rabel* called this obligation the obligation of formal transfer.[194] Amplifying the contrast, the obligation will be referred to as the "obligation to fulfill the necessary acts for the transfer of property".

81 A perfect illustration of how to differentiate these obligations can be found in the second draft of 1939 (the first draft containing a provision on both obligations) which bears the imprint of *Rabel's* influence:

> "*Article 52. Le vendeur est obligé d'accomplir les actes qui sont nécessaires pour transférer à l'acheteur la propriété et la possession de la chose au sens de la loi nationale compétente.*
>
> *Lorsque, par suite d'un vice affectant le droit du vendeur, ces actes ne peuvent pas procurer à l'acheteur la chose libre de tous droits appartenant à des tiers, l'acheteur, s'il ignorait ces droits en concluant le contrat, peut déclarer la résolution et demander, à raison de cette résolution, les dommages-intérêts prévus aux articles 87 à 91.* […]"[195]

82 The first sentence contains the obligation to fulfill the necessary acts for the transfer of property, while the second lays out the obligation to transfer unencumbered property and the respective remedies. This clear division was blurred in later drafts,[196] but remains an important foundation for discussing and analyzing the obligations under the CISG. This is because the current opinions on how to interpret the CISG discussed below can be traced back to this differentiation.

II. Historical roots and comparative law

83 The following part provides an overview of the development of the obligation to transfer the property, beginning with Roman law. Based on the insights gained, fundamental differences regarding the theoretical and procedural approaches to the obligation to transfer the property under French, Swiss, English, and German law are discussed. These differences may have led the Commission at Unidroit to believe that a unification should not be

193 Cf. *Tunc's* statements during the negotiations, Diplomatic Conference on the Unification of Law Governing the International Sale of Goods, The Hague, 2–25 April 1964, Vol. I – Records, p. 97.

194 See heading "*3. Pflicht zur formellen Übereignung*", *Rabel*, Recht des Warenkaufs II, p. 314.

195 *Rabel*, Recht des Warenkaufs II, p. 404.

196 See more on the historic development of the provisions below paras. 255 et seq.

undertaken and can help to avoid misunderstandings with regard to Articles 30 and 41 of the CISG in the subsequent sections.

1. Roman law

Sales law and the notion(s) of property have not followed a linear development under the (broad) umbrella term Roman law. A complete timeline including all the associated controversies is beyond the scope of this work.[197] This section rather highlights selected aspects that demonstrate the roots upon which many legal systems have later developed their respective solutions. Examining these roots allows for a better understanding of current national laws, general discussions on the seller's obligation to transfer property, and thus, ultimately an enhanced understanding of the CISG. **84**

a) *Actio auctoritatis*, *stipulatio duplae*, *stipulatio habere licere*, and obligation to transfer property

Based upon the distinction between different obligations to transfer the property above,[198] any statement claiming that no obligation to transfer property existed under Roman law would need to specify which form of this obligation is being referred to. With respect to the obligation to fulfill the necessary acts for the transfer of property, Roman law might indeed have had a similar obligation to mancipate (convey).[199] The obligation was, however, not understood to mean that the seller had to make the buyer owner of the goods.[200] There was, thus, no obligation to transfer unencumbered property.[201] **85**

Rather, the liability of a seller who was not the owner of the goods sold underwent different steps of evolution, and never reached the form of an obligation to transfer unencumbered property.[202] Under the oldest form **86**

197 See generally, *De Zulueta*, The Roman Law of Sale, *passim*; *Kaser*, Eigentum und Besitz, *passim*; *Rabel*, Mangels im Rechte, *passim*. Cf. regarding the difficulties to depict the complex Roman law in this regard, *Nörr*, 121 ZRG RA (2004), 153 et seq.

198 See above paras. 78 et seq.

199 Gaius Book 4 131a; Paul. Sent. 1. 13a. 4; *Rabel*, Recht des Warenkaufs II, p. 314; *Peters*, 96 ZRG RA (1979), 173, 178–182; *Zimmermann,* p. 278; *De Zulueta*, p. 36 (with an English translation of the respective section in Gaius, and an English translation of Paul's sentences on p. 71); undecided, *Brägger*, p. 44.

200 *De Zulueta*, p. 36; *Powell*, pp. 78, 86; *Windscheid/Kipp*, p. 652; *Brägger*, p. 119; *Peters*, 96 ZRG RA (1979), 173, 181.

201 *Zimmermann,* p. 278. It is not a contradiction to this statement that the seller who knew that he sells goods belonging to a third party incurred liability, cf. *Powell*, pp. 78, 87; *Peters*, 96 ZRG RA (1979), 173, 197, 199.

202 *Peters*, 96 ZRG RA (1979), 173, 174. Notably, *Ernst*, Rechtsmängelhaftung, *passim*

(*mancipatio*), the seller's liability took the form of a duty to defend (*obligatio auctoritas*).[203] If a third party sued the buyer, the buyer had to inform the seller (*denuntiatio*), and the latter had to defend against the claim.[204] If the seller did not defend or the defense was unsuccessful, the seller had to pay double the price to the buyer under the *actio auctoritatis*.[205] It is not entirely clear whether this was dependent on an explicit statement of the seller to create *auctoritas* or whether this liability already existed due to the *mancipatio*.[206] Moreover, the exact position of the seller in the proceedings appears unclear.[207] Notably, this kind of liability of the seller may have to be viewed in the context of implications of theft connected with the possession of the goods: If goods were found in the possession of a person that the owner had not given them to, the owner may have pursued this person under suspicion of theft, and the latter may have been charged with theft or receiving stolen property.[208] The inclusion of the seller into the process to relieve the buyer of the liability may have been important to maintain order and avoid retributions.[209] In addition, it was not sufficient for the buyer to negate the claim of the person alleging to be the owner, but rather the buyer had to substantiate his or her own right. Furthermore, it is not entirely clear whether the proof of the seller's acquisition of the goods could potentially only be furnished by the seller.[210] Against this background, it is reasonable

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does not consider the obligation to transfer unencumbered property to be a further step in the development, but rather a completely different approach.

203 See comprehensively on the auctoritas, *Brägger*, *passim* with references to the (few) adverse opinions on pp. 228 et seq.; *Zimmermann,* pp. 294–295. It should be noted that this was not a contractual liability. The latter type of liability did not even exist at the time, yet, see references by *Brägger*, pp. 163–168 who concludes that no clear classification is possible.

204 *Muirhead/Goudy/Grant*, p. 126; *De Zulueta*, p. 43; *Brägger*, pp. 66 et seq., 81 et seq.

205 *De Zulueta*, p. 43; *Brägger*, p. 40; *Zimmermann,* p. 294.

206 In favor of the former interpretation, *Eck*, pp. 3–7. Contra and in favor of the latter interpretation, *Rabel*, Mangels im Rechte, p. 2; also, *Peters*, 96 ZRG RA (1979), 173, 200; *Kaser*, Eigentum und Besitz, p. 116; also, recently *Brägger*, pp. 47–52.

207 *Rabel*, Mangels im Rechte, pp. 7, 14–20 (regarding the details of what was expected of the seller: merely supporting or replacing the buyer in this process against the third party), 20–23 (regarding the possibility to sue or pressure the seller to render the required action); *Powell*, pp. 78, 83; *Brägger*, pp. 120 et seq.

208 *Kaser*, 102 ZRG RA (1985), 1, 11; *Powell*, pp. 78, 84; see also *Muirhead/Goudy/Grant*, pp. 134–135.

209 *Powell*, pp. 78, 84; *Kaser*, Eigentum und Besitz, p. 134; this aspect might have faded with the pure tracing of the goods with the *rei vindicatio*, *Kaser*, 102 ZRG RA (1985), 1, 14. Notably, *Brägger*, Actio auctoritatis, seems not to draw such conclusions and does not mention this potential background at all.

210 Cf. *Rabel*, Mangels im Rechte, pp. 11 fn. 1, 20.

to assume that the core of the obligation was the actual defense by the seller, and that it was not a mere basis for the buyer to claim the double price.[211]

Since the *obligatio auctoritas* was limited to the *mancipatio*[212] and did not apply to other sales transactions,[213] a parallel liability to the *actio auctoritatis* was developed by recognizing the seller's ability to give a *stipulatio*[214] to this effect.[215] This was a basis for a contractual liability, but still not yet based on a contract of sale, which was only developed much later.[216] Under the *stipulatio duplae*, the double price was to be paid to the buyer if the goods were evicted from the buyer by *actio in rem* and the buyer had called on the seller to defend the suit.[217] It has to be differentiated from the *stipulatio habere licere* that made the seller liable for the damage suffered by the buyer that had to be assessed by the *iudex*.[218] Under both liability regimes, however, the obligation of actual defense and the criminal implications and procedural environment took a back seat while the liability for eviction became more important.[219] The *stipulationes* became customary, and later even compulsory: The *actio empti* allowed the buyer to compel the seller to give a *stipulatio* to this effect, and even later, the seller was generally treated as having given it.[220] This eviction-based system is understood to represent the last evolving state of the obligation to defend the buyer, and does not hide its origin.[221] While most notably *Eck* and *Rabel* interpreted Roman law **87**

211 *Rabel*, Mangels im Rechte, pp. 20–21; *Brägger*, p. 119 ("*Diese Beistandsleistung ist der zentrale Inhalt der auctoritas-Pflicht des Manzipanten*"). Nevertheless, it appears unclear whether the obligation of the seller was directly enforceable, *Brägger*, pp. 134–135 with further references.

212 *Brägger*, pp. 45–46; *Zimmermann,* p. 295.

213 Examples for other sales transactions are transactions under which the sold goods were *res nec mancipi*, i. e., certain goods of everyday life that did not require the formalities brought by the *manispacio*, or the transaction involving a peregrin (*peregrinus*), *Kaser*, Eigentum und Besitz, p. 124.

214 A *stipulatio* was a formal contract concluded orally subject to requirements that changed over the course of Roman law and are disputed in the details, cf. *Zimmermann*, pp. 68 et seq.

215 *Kaser/Knütel/Lohsse*, § 52 para. 29; *De Zulueta*, p. 43.

216 *De Zulueta*, p. 43.

217 *Zimmermann,* p. 296; *Kaser*, Eigentum und Besitz, pp. 203 et seq.; *Kaser/Knütel/Lohsse*, § 52 para. 29.

218 *De Zulueta*, p. 44.

219 *Rabel*, Mangels im Rechte, p. 28 ("*Dagegen wird mit Recht aus den erhaltenen Formularen abgenommen, daß von solcher* [Defensionsp]*flicht in den Stipulationen, die wir als stip. habere licere und duplae kennen, nicht mehr die Rede war.*"); *Brägger*, pp. 16, 132 summarizes that the *auctoritas*-liability and the obligation to defend became practically irrelevant after the classical period.

220 *E. Huber*, Vol. IV, pp. 853–854; *Kaser/Knütel/Lohsse*, § 52 para. 32; *De Zulueta*, p. 44, *Watson*, 2 Law and History Review (1984), 1, 10.

221 *Rabel*, Mangels im Rechte, p. 101.

as already having initiated a progression toward the obligation to make the buyer the owner of the goods, this interpretation is not undisputed and this opinion can be partially seen in the light of the development of then-current German law.[222]

88 In essence, Roman law may have contained an obligation to fulfill the necessary acts for the transfer of property, but did not contain an obligation to transfer unencumbered property free of third party rights and claims. If the buyer did not receive absolute property in the goods, sellers were not liable unless they either knew of their lack of property or the buyer was sued by the owner and the goods were evicted. Roman law remained an eviction-based liability system at its core.

b) Explanatory approaches

89 Apart from *Eck* and *Rabel*'s reasoning that the progression toward a more fully evolved obligation was initiated but not completed,[223] different approaches have been proposed to explain the buyer's position under Roman law and the rejection of an obligation to transfer unencumbered property. Two approaches, while perhaps speculative, are worth discussing because they nevertheless may provide insights when interpreting the CISG.

90 First, it is notable that during most of the evolution of the seller's liability, no singular, absolute and unified notion of property existed.[224] The limited role of property with regard to the seller's liability could arguably stand in direct connection with this fact, as for example, otherwise a peregrinus (one who could not have Quiritiary property) would have been excluded from such transactions.[225] As far as the counter-argument is raised that Roman law in fact had all the relevant notions (among them property) developed,[226] this can only be meant to refer to the late legal status after the unification by Justinian.[227] Prior to that time, the absence of a uniform concept might have contributed to the failure to develop an obligation to transfer unencumbered property.

91 Second, a different line of thought is that Roman law deliberately rejected an obligation to transfer the unencumbered property, given the existing notions of property, transfer and obligation, and the fact that parties under a barter were obliged to transfer the property free of third party rights.[228]

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222 Further discussion below paras. 144 et seq.
223 See below paras. 144 et seq.
224 See above paras. 42 et seq.
225 *Repgen*, pp. 203, 209.
226 *Peters*, 96 ZRG RA (1979), 173, 174.
227 See above para. 44.
228 *Peters*, 96 ZRG RA (1979), 173, 175.

This might be due to the fear that the buyer may remain in possession and simultaneously liquidate the goods' value or that the behavior and interest of the buyer in the process against the third party could only be in line with the seller's interest if no proceeding between the buyer and seller had taken place beforehand.[229] In light of these concerns, it may have been sensible to consider the buyer not to have any rights against the seller with regard to the third party right until the third party sued.[230]

Moreover, although no *bona fide* acquisition of property was possible under Roman law,[231] a buyer of movables could obtain absolute property within one year of possession (*usucapio*).[232] This may have drastically reduced the buyer's need for further protection against the future possibility of a third party successfully suing the buyer. Yet, this may not always have been very helpful to the buyer of goods from a non-owner since the *usucapio* was not possible with regard to furtive movables, and the notion of furtum included both theft and the sale of a movable that was owned by somebody else.[233] **92**

2. National laws

Examination of a sample of current national laws further reveals the roots underlying the discussion of the respective obligations under Articles 30 and 41 of the CISG. In turn, the Roman roots of some of the legal systems depicted regarding the seller's obligation to transfer the property will become obvious. **93**

a) French law

The French Civil Code does not contain an explicit obligation of the seller to transfer the property with regard to sales contracts. While scholars claim that this obligation is at least represented in the definition of a sales con- **94**

229 *Peters*, 96 ZRG RA (1979), 173, 198; similarly, *Zimmermann,* p. 280 emphasizing that both the seller and the buyer may be honest and not have known about the rights of the third party, which necessitates striking a difficult balance between two innocent parties.

230 *Peters*, 96 ZRG RA (1979), 173, 199.

231 *Zimmermann,* p. 293.

232 *Kaser/Knütel/Lohsse*, § 35 paras. 7 et seq.

233 *Kaser*, Eigentum und Besitz, pp. 293–302; *Kaser/Knütel/Lohsse*, § 35 para. 8.

tract,[234] Article 1582(1) of the French Code Civil merely mentions delivery and payment as the constituting obligations under a sales contract.[235]

aa) *Garantie d'éviction* and Articles 1626 et seq. of the French Civil Code

95 French sales law generally equips buyers with the sellers' *garantie d'éviction* under Articles 1626 et seq. of the French Civil Code. In line with the Roman legal tradition, the seller's liability is generally triggered by a third party suing the buyer and the goods being awarded to the former, or in circumstances considered equivalent by the law.[236] This is referred to as the "*garantie du fait des tiers*" which is, however, only half of the obligation. The "*garantie du fait personnel*", in contrast, obliges the sellers not to trouble the buyers with factual actions that might hinder the buyers' enjoyment of the goods or by legal actions as far as the sellers try to vindicate the goods or the like.[237] Yet, this does not hinder sellers from either relying on nullity of contract or making use of contractual remedies, it merely prohibits sellers from claiming the sold goods if the respective contract has not yet been annulled.[238] In line with Roman law, this regime of liability does generally not apply before the buyer is subject to a lawsuit. Yet, in contrast to Roman law, there is no independent obligation of sellers to defend their respective buyer in legal proceedings (*obligatio auctoritas*).

bb) Nullity of the sale of goods that belong to a third party under Article 1599 of the French Civil Code

96 In a divergence from Roman law, Article 1599 of the French Civil Code might surprise jurists educated outside the French legal system:[239] "*La*

234 *Malaurie/Aynès/Gautier*, p. 55 para. 54: "*Malgré son évolution tourmentée et sa diversification, l'élément constant de la vente est sa définition. Elle est le contrat par lequel la propriété d'une chose est transférée à un acquéreur, en contrepartie d'une somme d'argent.*"

235 Art. 1582(1) French Civil Code: "*La vente est une convention par laquelle l'un s'oblige à livrer une chose, et l'autre à la payer.*"

236 See for details *Malaurie/Aynès/Gautier*, pp. 236 et seq., paras. 281 et seq. Also highlighting the visible Roman roots, Jansen/Zimmermann/*Rüfner*, p. 2018 para. 6.

237 *Malaurie/Aynès/Gautier*, p. 235 paras. 277–278.

238 *Malaurie/Aynès/Gautier*, p. 235 para. 280.

239 In contrast, *Malaurie/Aynès/Gautier*, p. 145 claim that such a provision corresponds to common sense. The underlying idea is also followed by Québec, Art. 1713 Civil Code Québec: "*The sale of property by a person other than the owner or other than a person charged with its sale or authorized to sell it may be declared null. The sale may not be declared null, however, if the seller becomes the owner of the property.*" Notably, property is used in this provision to refer to the goods, while owner refers to the person that has as property in the goods according to the terminology used in this work.

vente de la chose d'autrui est nulle…". The provision can only be explained against the natural law (philosophical) background of this aspect of French law:[240] According to *Wolff*, a seller should be considered obliged not only to hand over the goods but furthermore to transfer the property.[241] Consistent with natural law thought, the transfer of property can be effected by mere consent of both parties and is independent from the handing over or payment of the price.[242] This idea is echoed by Article 1583 of the French Civil Code:

> "*Elle est parfaite entre les parties, et la propriété est acquise de droit à l'acheteur à l'égard du vendeur, dès qu'on est convenu de la chose et du prix, quoique la chose n'ait pas encore été livrée ni le prix payé.*"

From this point of origin, French law – in line with *Wolff* but in contrast to *Pothier*[243] – considers a contract under which this is not possible due to a third party having property in the goods to be null under Article 1599 of the French Civil Code. This provision and the idea of a direct proprietary effect of the sales contract are, hence, profoundly interwoven. **97**

Two prerequisites for the application of Article 1599 of the French Civil Code are, first, that the seller is not the owner of the goods, and second, that the contract calls for an immediate transfer of property in specific, identified goods.[244] The scope of the provision's application is therefore limited, since for example, the first requirement is not fulfilled if the seller has apparent authority to sell the goods.[245] The case of unidentified goods is a further example of an excluded scenario, due to the second requirement.[246] **98**

Apart from the limitations with regard to the scope of application, the legal consequences are on one hand more limited and on the other hand more **99**

240 *Malaurie/Aynès/Gautier*, p. 184 para. 222.

241 *Wolff*, Institutiones, p. 324 § 587; *Bergmann*, RabelsZ 2010, 45.

242 *Wolff*, Jus naturae, p. 7 § 13; *Malaurie/Aynès/Gautier*, p. 184, para. 222; *Rabel*, Mangels im Rechte, p. 272. But see *Cl. Witz*, FS Jahr, pp. 533, 536 who emphasizes a fiction of a handing over rather than the full discard of the requirement of handing over the goods, and on pp. 536–538 he explains that there are important exceptions to the principle of transfer *solo consensu* (for example, in the case of the sale of unidentified goods and sales under retention-of-title-clauses) that might even supersede the general principle.

243 Cf. *Bergmann*, 74 RabelsZ (2010), 25, 45–47.

244 *Malaurie/Aynès/Gautier*, pp. 145–148.

245 *Malaurie/Aynès/Gautier*, p. 147 para. 172. This might even prevent the second buyer in a case of double sales to rely on Art. 1599 French Civil Code if he or she acquired possession first under Art. 1198 French Civil Code even though the goods were already owned by the first buyer at that point in time, *Malaurie/Aynès/Gautier*, p. 145 para. 167.

246 *Malaurie/Aynès/Gautier*, p. 146 paras. 169 et seq.

extensive than the wording ("*nulle*") might suggest. French case law has always attributed only the consequence of relative nullity to the provision.[247] Only the buyer can rely on the nullity by refusing to pay the price or by claiming repayment of the paid price, while the seller and the owner of the goods are without remedies against the buyer in this regard.[248] Moreover, the nullity can only be invoked for a period of five years.[249] In these regards, the consequences are more limited and are not consistent with common notions of nullity. On the other hand, while the wording allows for damages to be awarded to the buyer, even lost profits have in some instances been considered to be compensable under Article 1599 of the French Civil Code.[250] This is more extensive than the legal consequences of nullity, since a null contract is generally considered not to be a sufficient basis for the buyer to claim damages to fully compensate for the seller's lack of performance.[251] Invoking Article of the 1599 French Civil Code at least consumes the basis for the *garantie d'éviction* under Article 1626 et seq. of the French Civil Code discussed above. Hence, relying on nullity prevents the buyer from relying on the (partly advantageous) rules of Articles 1626 et seq. of the French Civil Code.[252]

cc) Summary

100 Considered holistically, French law does not have an explicit obligation to fulfill the necessary acts for the transfer of property. It only has an obligation to transfer unencumbered property with regard to sales of specific goods due to Article 1599 of the French Civil Code. No such protection is afforded if unascertained goods are being sold, because Article 1599 of the French Civil Code does not apply and Articles 1626 et seq. of the French Civil Code protect the buyer only upon eviction of the goods or similar circumstances. Apart from this exception, French law is firmly rooted in the Roman tradition with its eviction-based liability system.

247 For example, French Supreme Court, 15 October 2013, 12-19.756.
248 *Malaurie/Aynès/Gautier*, pp. 149 para. 175.
249 *Malaurie/Aynès/Gautier*, p. 150 para. 176.
250 Court of Appeal Orléans, 26 October 1967, D. 1968 Jur. 210; *Hornung*, p. 65.
251 *Hornung*, p. 65 (*positives Interesse*).
252 *Malaurie/Aynès/Gautier*, p. 150 para. 176 No. 2.

b) Swiss law

The Swiss Code of Obligations appears to contain contradictory provisions which are difficult to reconcile with a clear approach regarding the obligation to transfer the property in the goods under sales contracts.[253] **101**

aa) Articles 184 and 192 et seq. of the Swiss Code of Obligations

On the one hand, Article 184(1) of the Swiss Code of Obligations states: **102**

> "*Durch den Kaufvertrag verpflichten sich der Verkäufer, dem Käufer den Kaufgegenstand zu übergeben und ihm das Eigentum daran zu verschaffen* […]."[254]

On the other hand, Articles 192 et seq. of the Swiss Code of Obligations are seemingly based on liability for eviction.[255] Article 192(1), for example, states: **103**

> "*Der Verkäufer hat dafür Gewähr zu leisten, dass nicht ein Dritter aus Rechtsgründen, die schon zur Zeit des Vertragsabschlusses bestanden haben, den Kaufgegenstand dem Käufer ganz oder teilweise entziehe.*"

The unofficial English translation reads: "*The seller is obliged to transfer the purchased goods to the buyer free from any rights enforceable by third parties against the buyer that already exist at the time the contract is concluded.*"[256] It allows for an interpretation of the provision that hinges on the question whether the buyer has received the goods free from rights of third parties. The English wording is, however, inaccurate or at least misleading, which is already apparent in comparison to the German text, but even more so compared to the French text that explicitly references "*éviction*" as the source of the seller's liability: **104**

> "*Le vendeur est tenu de garantir l'acheteur de l'éviction qu'il souffre, dans la totalité ou dans une partie de la chose vendue, en raison*

253 BSK OR I/*Honsell*, Art. 192 OR para. 1; *Bader*, SJZ 1923/24, 306; *Fargnoli*, pp. 11, 16 para. 41; see already *Rabel*, Mangels im Rechte, p. 285 fn. 2 regarding the version of 1881 of the Swiss Code of Obligations.

254 "*A contract of sale is a contract whereby the seller undertakes to deliver the item sold and transfer property of it to the buyer* […]." This is the non-binding English translation of the Code of Obligations provided by the State administration in Switzerland, which is available on the Swiss government's website.

255 For example, *Brägger*, p. 15.

256 This is the non-binding English translation of the Code of Obligations provided by the State administration in Switzerland, which is available on the Swiss government's website.

d'un droit qui appartenait à un tiers déjà lors de la conclusion du contrat."

105 Hence, there is tension between the wording of Articles 184(1) and 192 et seq. and it is therefore not clear whether Swiss Code of Obligations contains an obligation to transfer unencumbered property.[257] It is, however, undisputed that until the goods have been delivered, the buyer can rely on Articles 97 et seq. of the Swiss Code of Obligations, which deal with the consequences of non-performance under general contract law. Yet, at this stage (pre-delivery), the parties cannot rely on remedies provided by sales law under the Articles 184 et seq. of the Swiss Code of Obligations.[258] At first sight, one might conclude that the failure to transfer property is the non-performance of the seller for purposes of Articles 97 et seq. of the Swiss Code of Obligations. Consequently, one could reason that Article 184(1) of the Swiss Code of Obligations requires the buyer to become the absolute owner of the goods. This reasoning is flawed as it fails to take into account that at this stage, there is no delivery of the goods, which is undisputedly a non-performance under Articles 97 et seq. of the Swiss Code of Obligations. Therefore, it remains unclear whether a breach of the obligation to transfer the property is even considered to be relevant in this regard. Thus, a more detailed assessment is required to reconcile the seemingly contradictory wording of Articles 184 and 192 et seq. of the Swiss Code of Obligations.

bb) Opinions by the Swiss courts and scholars

106 The uncertainties within the Swiss Code of Obligations cannot be pinpointed to just one provision and must be analyzed holistically. Current Swiss literature and case law offer three different approaches to the interpretation of the seller's obligation to transfer the property.

107 The first approach considers Swiss law to be carrying on in the tradition of Roman law. According thereto the Swiss Code of Obligations does not contain a relevant obligation to transfer the property in Article 184, or alternatively this obligation is congruent with the obligation under Articles 192 et seq.[259] The contract cannot be rescinded due to an error under Article 24 of the Swiss Code of Obligations regarding the property status of the goods, nor are the general remedies for non-performance under Articles 97 et seq.

257 Rightfully critical on the apparent tension in the wording, *Rabel*, Mangels im Rechte, p. 285 fn. 2 and also *Bader*, SJZ 1923/24, 306. For the obligation to transfer unencumbered property, see above para. 79.

258 KuKoOR/*Kikinis*, Art. 184 OR para. 30; *Atamer/Eggen*, Zeitschrift des Bernischen Juristenvereins 2017, 731, 777.

259 BSK OR I/*Schwenzer/Fountoulakis*, vor Art. 23–31 OR para. 12; *Schwenzer/Fountoulakis*, OR AT, para. 39.42; *Bucher*, recht 1996, 178, 185; *von Büren*, pp. 15–16; *Marti*, pp. 63, 74 para. 216.

of the Swiss Code of Obligations applicable.[260] The source of the seller's liability is still the eviction and equivalent circumstances, while the mere possibility of eviction is not in itself a breach of contract.[261] If the buyer does not receive unencumbered property and no *bona fide* acquisition is possible, this approach leaves the buyer high and dry until the owner evicts the goods.

108 A second approach is taken by Swiss case law and *inter alia Alfred Koller* and *Honsell*. Like the first approach, the seller's contractual liability is considered to be dependent on the eviction or equivalent circumstances and the mere possibility of eviction is not sufficient.[262] Yet, the Swiss Supreme Court recognizes the difficult situation this creates for the buyer. The buyer would have to wait to learn whether the actual owner claims the goods. Therefore, the Swiss Supreme Court allows the buyer to rescind the contract due to a fundamental error in respect to the necessary basis for the contract (*Grundlagenirrtum*) under Article 24(1) No. 4 of the Swiss Code of Obligations.[263] The buyer's error relates to the seller's inability to provide the buyer with the (unencumbered) property in the goods.[264] If the buyer rescinds the contract, he or she is left with no remedies under Articles 195, 196 of the Swiss Code of Obligations, since the contract ceases to exist *ex tunc* due to the rescission, and the consequences are subject to rules of unjust enrichment instead of rules of contract law.[265] Thus, although buyers cannot claim damages based on the contract, they can free themselves of the contract, and generally reclaim the price paid.

109 While both this work and *Alfred Koller* speak of an "obligation to transfer unencumbered property", two different concepts are envisaged.[266] The concepts differ, because he reaches the conclusion that the obligation to transfer the property is a mere auxiliary obligation, and not a sufficient basis for a performance claim. Moreover, the buyer has no remedies under the Swiss

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260 BSK OR I/*Schwenzer/Fountoulakis*, vor Art. 23–31 OR para. 12; *Bucher*, recht 1996, 178, 185.

261 *von Büren*, p. 16; *Müller-Chen/Girsberger/Droese*, p. 43 para. 38.

262 *A. Koller*, § 4 para. 118; *Honsell*, OR BT, p. 82; District Court Affoltern a. A., 6 July 1972, SJZ 1972, 358 et seq.; indirectly, Swiss Supreme Court, 25 October 1983, BGE 109 II 319, 322.

263 Swiss Supreme Court, 25 October 1983, BGE 109 II 319, 322: *"*[Parallele Anwendung der Anfechtung und Gewährleistung*] drängt sich diesfalls sogar auf, da der Käufer die Entwehrung durch den rechtmässigen Eigentümer abwarten, folglich die damit verbundenen Nachteile während unbestimmter Zeit auf sich nehmen müsste, wenn er sich trotz eines Willensmangels nur auf rechtlich mangelhafte Erfüllung berufen könnte.*"; *A. Koller*, § 4 para. 118.

264 Swiss Supreme Court, 25 October 1983, BGE 109 II 319, 325–326.

265 Swiss Supreme Court, 25 October 1983, BGE 109 II 319, 327; *Honsell*, OR BT, p. 77.

266 For the understanding of an obligation to transfer unencumbered property employed in this work, see above para. 79.

Code of Obligations other than contract rescission under Article 24(1) No. 4 if Articles 192 et seq. apply.[267] Therefore, if buyers were not to become the owners of the goods, they could not rely on Article 97 of the Swiss Code of Obligations. However, the buyer's mere lack of property would have to be a sufficient breach of contract if an obligation to transfer unencumbered property in the employed terminology were to exist under Swiss law.

110 The third approach supports an obligation to transfer unencumbered property in Article 184 of the Swiss Code of Obligations in combination with Articles 97 et seq.[268] This approach highlights the wording of Article 184 and deduces an obligation for the seller to provide the buyer with unencumbered property in the goods.[269] Supporters argue that Articles 97 et seq. can be applied with regard to this obligation.[270] Consequently, the buyer can insist on performance, avoid the contract,[271] and claim damages for non-performance based on the failure to transfer property.[272] Articles 192 et seq. of the Swiss Code of Obligations merely provide the buyer with an even more advantageous position if the goods are evicted or equivalent circumstances materialize.[273] A conflict of the rules in Articles 97 et seq. with Articles 192 et seq. (and potential preemption of the former by the latter) is only considered to exist from the time of eviction[274] or is denied completely even after eviction.[275] This approach provides the buyer with an arsenal of remedies even before a third party claims the goods and introduces an obligation to transfer unencumbered property.[276] This approach is often referred to as the

267 *A. Koller*, paras. 75 ("*blosse Nebenpflicht ohne Forderungscharakter*"), 120.

268 *Huguenin*, OR AT/BT, paras. 2433, 2567; BK/*Giger*, Art. 184 OR para. 90, Art. 192 OR paras. 7, 8; *Keller/Siehr*, p. 53; BSK ZGB II/*Huwiler*, Art. 562 ZGB para. 16; ZK/*Schönle/Higi*, Art. 192 OR paras. 8–14; potentially, *Bader*, SJZ 1923/24, 306, 307.

269 BSK ZGB II/*Huwiler*, Art. 562 ZGB para. 16 ("*eindeutige*[r] *Gesetzeswortlaut*").

270 ZK/*Schönle/Higi*, Art. 192 OR paras. 8, 9.

271 It is disputed whether this can be based on Art. 97 Swiss Code of Obligations or only on Art. 107(2) Swiss Code of Obligations, cf. with further references, ZK/*Schönle/Higi*, Art. 192 OR para. 9.

272 ZK/*Schönle/Higi*, Art. 192 OR para. 9.

273 BK/*Giger*, Art. 192 OR para. 7; ZK/*Schönle/Higi*, Art. 192 OR para. 11 even allow for a parallel application of Arts. 97 et seq. Swiss Code of Obligations if the goods have been evicted.

274 ZK/*Schönle/Higi*, Art. 192 OR para. 10.

275 BK/*Giger*, Art. 192, para. 9 and *Keller/Siehr*, p. 70 claiming that even after eviction, buyers can decide on the remedy they would like to pursue, since buyers are allowed not to rely on the privileges provided by Arts. 192 et seq. over Arts. 97 et seq. Swiss Code of Obligations.

276 For a definition of this obligation, see above para. 79.

prevailing academic opinion, and the Swiss Supreme Court is cited to support this opinion in light of its judgment BGE 110 II 239.[277]

cc) Position of the Swiss Supreme Court

111 As indicated, supporters of two different approaches claim to have the Swiss Supreme Court on their side. While the Supreme Court undisputedly allowed for rescission under Article 24(1) No. 4 of the Swiss Code of Obligations in 1983,[278] a judgment rendered only one year later is quoted to indicate the Supreme Court's approval of the application of Articles 97 et seq. of the Swiss Code of Obligations regarding the breach of the obligation to transfer the property.[279] In my opinion, the latter interpretation is inaccurate. First of all, the judgment concerns the sale of an invalid patent, for which the Swiss Code of Obligations does not provide explicit rules. This compelled the Swiss Supreme Court to find an adequate solution by applying Article 192 of the Swiss Code of Obligations by analogy instead of declaring the sales contract void.[280] Although the application of Articles 97 et seq. of the Swiss Code of Obligations was listed by the Supreme Court among the existing opinions on how to treat null patents, it endorsed the application only in case of an explicit or implicit guarantee of the existence of the patent.[281] Without such a guarantee, the seller is only liable if third parties claim to have rights regarding the same patent (Article 192 of the Swiss Code of Obligations by analogy).[282] In other words, the mere fact that the buyer might not become the owner of the patent is not a breach of contract.

112 While it is obvious that the parties can agree on the liability of the seller in case the buyer does not become the owner of the goods, in the typical sales transaction such an explicit or implicit guarantee is absent. It might be dogmatically possible to find a respective guarantee for the seller's property based on Article 184 of the Swiss Code of Obligations,[283] but this is not indicated by the Court. Moreover, the reasoning of the Court is specific to patents because, with regard to property in the goods, no gaps in the Swiss Code of Obligations were ascertained by the Court. Nothing in the ruling suggests that it may be applied analogously to cases concerning sales of goods in which a third party retains property. Lastly, the Supreme Court

277 For example, *Huguenin*, OR BT, para. 251 cites the Swiss Supreme Court in this fashion.
278 Swiss Supreme Court, 25 October 1983, BGE 109 II 319, 322.
279 Swiss Supreme Court, 21 February 1984, BGE 110 II 239; for example, cited by *Huguenin*, OR BT, para. 251.
280 Swiss Supreme Court, 21 February 1984, BGE 110 II 239, 242.
281 Swiss Supreme Court, 21 February 1984, BGE 110 II 239, 243.
282 Swiss Supreme Court, 21 February 1984, BGE 110 II 239, 243.
283 ZK/*Schönle/Higi*, Art. 192 OR para. 9.

decided to allow the buyer to rescind the contract due to an error based on Article 24(1) No. 4 of the Swiss Code of Obligations.[284] This decision, made only one year before the judgment concerning the sold but nonexistent patent, explicitly reasoned that the parallel application of Articles 192 et seq. and Articles 23 et seq. of the Swiss Code of Obligations was necessary. This approach was taken to protect the buyer, who would otherwise have to await eviction by the owner before being entitled to remedies against the seller.[285] This statement would not appear to be correct if buyers could rely on Articles 97 et seq. of the Swiss Code of Obligations: If these remedies were available to them, they would not be in the precarious situation to have to wait for the owner to act. The judgment does not indicate that the Court wanted to overrule its case law from the year before. Hence, the Swiss Supreme Court did not endorse the third approach that introduces an obligation to transfer unencumbered property, but rather merely acknowledged a right to rescission under Article 24(1) No. 4 of the Swiss Code of Obligations.

dd) Discussion

113 The arguments in support of each of the three approaches must be assessed. Both the Swiss Supreme Court as well as scholars seem most concerned with the buyer's weak position as long as the owner of the goods has not (yet) approached the buyer.[286]

(1) Protection of the buyer before eviction

114 While it is true that buyers would find themselves without remedy if Articles 23 and Articles 97 et seq. of the Swiss Code of Obligations were not applicable, the buyers' position is not as weak as it might appear at first sight, and especially not for an indefinite amount of time.

115 Article 934(1), sentence 1 of the Swiss Civil Code provides that even if the buyer could not acquire property in good faith, the owner can only claim the goods for five years after the day they were stolen or lost.[287] The prevailing

284 Swiss Supreme Court, 25 October 1983, BGE 109 II 319, 322.

285 Swiss Supreme Court, 25 October 1983, BGE 109 II 319, 322: "[Parallele Anwendung Anfechtung/Gewährleistung] *drängt sich diesfalls sogar auf, da der Käufer die Entwehrung durch den rechtmässigen Eigentümer abwarten, folglich die damit verbundenen Nachteile während unbestimmter Zeit auf sich nehmen müsste, wenn er sich trotz eines Willensmangels nur auf rechtlich mangelhafte Erfüllung berufen könnte.*"

286 Swiss Supreme Court, 25 October 1983, BGE 109 II 319, 322; BK/*Giger*, Art. 192 OR para. 8.

287 Art. 934(1), s. 1 Swiss Civil Code "*Der Besitzer, dem eine bewegliche Sache gestohlen wird oder verloren geht oder sonst wider seinen Willen abhanden kommt, kann sie während fünf Jahren jedem Empfänger abfordern.*"

opinion among scholars is that this provision simultaneously implies that the buyer becomes the owner of the goods after five years in combination with Article 714(2) of the Swiss Civil Code.[288] However, scholars have different opinions as to whether buyers must (still) be in good faith when the owner loses his or her claim under Article 934(1) of the Swiss Civil Code, or whether they only have to be in good faith when taking over the goods.[289] In my view, better arguments militate for the handing over of the goods as the only relevant point in time to evaluate good faith with regard to the *bona fide* acquisition by the buyer. Article 714(2) of the Swiss Civil Code requires that the buyer be in good faith when the goods are transferred and additionally that the third party does not have any right under Articles 933 et seq. of the Swiss Civil Code (anymore). Article 934(1) of the Swiss Civil Code does not differentiate whether the possessor is in good faith, and it protects the possessor after five years have passed from the time the owner has lost possession. Article 936 of the Swiss Civil Code allows an owner to indefinitely claim for possession of the goods if the possessor was in good faith when taking over the goods. Taken together, these two rules provide that the (prior) owner does not have a claim under rules on possession if five years have elapsed and the possessor was in good faith when taking over the goods. Consequently, even if buyers learn about a prior theft of the goods, they become the owners of them if they were in good faith when receiving them and five years have elapsed since the owner lost possession.

116 If the owner claims the goods from the buyer, Article 934(2) of the Swiss Civil Code allows the buyer who was unaware of the third party right to condition the handing over of the goods to the owner on the payment of the price the buyer has paid if the goods were publicly auctioned or bought from a trading merchant such goods at any stage in the contractual chain.[290]

117 The buyer is, thus, not without protection under the Swiss Civil Code, due to the time-limit of five years under Article 934(1) and the retention right under Article 934(2). The fact that the Swiss Civil Code, including Article 934,

288 BSK ZGB II/*Ernst/Zogg*, Art. 934 ZGB para. 15; BK/*Stark/Lindenmann*, Art. 934 ZGB para. 29; contra, *Sutter-Somm*, SPR V/1, para. 64. The Swiss Supreme Court did not have to address the discussion but acknowledged its existence in Swiss Supreme Court, 13 December 1968, BGE 94 II 297, sub. E.6., but see Swiss Supreme Court, 26 March 1981, SJ 1981, 449, 453 sub. E. 4a.

289 Arguing that good faith must be present when the five years under Art. 934(1) Swiss Civil Code elapse ZK/*Haab/Simonius/Scherrer/Zobl*, Art. 714 ZGB para. 68, while KuKoZGB/*Baumann Lorant*, Art. 714 ZGB paras. 5, 6 highlights the moment when the person takes possession to determine whether good faith was present.

290 Art. 934(2) Swiss Civil Code: "*Ist die Sache öffentlich versteigert oder auf dem Markt oder durch einen Kaufmann, der mit Waren der gleichen Art handelt, übertragen worden, so kann sie dem ersten und jedem spätern gutgläubigen Empfänger nur gegen Vergütung des von ihm bezahlten Preises abgefordert werden.*"

only came into existence in 1907 (in force 1912) provides no basis to argue that it cannot be relied upon when interpreting provisions that already existed verbatim in the Swiss Code of Obligations from 1881. This is because, perhaps surprisingly for a law on obligations, the draft of the Swiss Code of Obligations from 1864[291] and the final text of 1881[292] already contained provisions mirroring today's Article 934(1), (2) of the Swiss Civil Code. The Supreme Court acknowledges Article 934 of the Swiss Civil Code, but nevertheless, maintains that the goods remain tainted (for example, by theft).[293] Thus, similar to Roman law that provided for a usucapion after one year, Swiss law provides for a similar protection after five years. Consequently, the buyer does not hang in limbo indefinitely, and Articles 192 et seq. of the Swiss Code of Obligations might suffice as was considered appropriate under Roman law.[294]

118 Furthermore, allowing rescission due to a fundamental error under Article 24(1) No. 4 of the Swiss Code of Obligations provides the buyer with a protection that goes further than the protection of his or her permanent possession of the goods. Since Article 31 of the Swiss Code of Obligations only provides for a relative cut-off period of one year, there is no absolute cut-off period with regard to the rescission,[295] and only the limitation period of ten years under Article 67(1) of the Swiss Code of Obligations would apply to the claim for repayment of the price.[296] The buyer might even rescind the contract five years after the theft despite having become the owner of the goods by that time. This conclusion regarding the possibility of rescission even after the buyer has become the owner only convinces if the buyer had further negative repercussions to fear, but as already stated, apart from

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291 *Wiegand*, Sachenrecht im Obligationenrecht, pp. 107, 123. The draft of 1871, in contrast, did not contain an equivalent provision.

292 Art. 206 Swiss Code of Obligations 1881: "*Gestohlene oder verlorene Sachen können binnen fünf Jahren, vom Tage des Abhandenkommens an gerechnet, jedem Inhaber abverlangt werden. Ist eine solche Sache an öffentlicher Steigerung, auf einem Markte oder von einem Kaufmanne, welcher mit derartigen Waaren handelt, gutgläubig erworben worden, so muss sie nur gegen Vergütung des dafür bezahlten Preises herausgegeben werden.*"; *Wiegand*, Sachenrecht im Obligationenrecht, pp. 107, 125.

293 Swiss Supreme Court, 25 October 1983, BGE 109 II 319, 326.

294 In a similar vein, HKK/*Ernst*, §§ 434, 435 para. 29 mentions the approach underlying Art. 934(1) Swiss Civil Code to render less relevant *inter alia* the far-reaching remedies for breaches of an obligation to transfer the property.

295 Swiss Supreme Court, 7 June 1988, BGE 114 II 131.

296 It is disputed when the ten-year period starts to run: The Swiss Supreme Court, 7 June 1988, BGE 114 II 131, 142, has decided that it should start when the payment is effected, since the rescission erases the contract and with it the cause for the payment *ex tunc*. In contrast, the majority of scholars argue that the relevant point in time is when the buyer declares the rescission, see BSK OR I/*Huwiler*, Art. 67 OR para. 5 with further references.

moral implications, the remaining negative legal consequences for a buyer who intends to keep the goods are yet to be named.[297]

(2) Systematic arguments

From a systematic point of view, the first approach has the most merits. **119**
This is because the special (sales) rules governing the situation in which a third party has a right in or to the goods prompt the conclusion that under the Swiss Code of Obligations remedies of general contract law (Articles 97 et seq.) and mistake (Article 24(1) No. 4) should not apply to undermine the prerequisites and consequences from the ones envisaged by Articles 192 et seq.[298] It is true that the Swiss Supreme Court allows for concurrent application of the rules on liability for non-conforming goods under Articles 197 et seq. and the general non-performance remedies under Articles 97 et seq. However, to avoid diverging results, restrictive requirements, such as the duty to notify the seller of non-conformities, are applied by analogy to Articles 97 et seq. of the Swiss Code of Obligations.[299] Yet, no argument regarding the concurrent application of Articles 97 et seq. and Articles 192 et seq. of the Swiss Code of Obligations can be formed from this: Articles 192 et seq. focus on whether the goods have been evicted or similar circumstances are present, while supporters of the concurrent application of Articles 97 et seq. thereby try to extend the buyer's protection in case the requirements of Articles 192 et seq. are not fulfilled. The concurrent application of Articles 97 et seq. is exactly aimed at bridging the gulf between contract conclusion and eviction. Thus, they strengthen the perceived weak position of buyers if Articles 192 et seq. do not yet apply by providing the latter with remedies. From a systematic point of view, the special rules on sales contracts (Articles 184 et seq. of the Swiss Code of Obligations) should not be undermined by applying other remedies for non-performance that deviate from the result reached by sales law. Therefore, the first approach is more convincing than approaches two and three.

Additionally, the headings within the Articles 184 et seq. of the Swiss Code **120**
of Obligations provide insight: Article 188 is prefaced by the heading "*B. Verpflichtungen des Verkäufers*" (B. Obligations of the seller). Within this section on the obligations of the seller, there is no reference to an obliga-

297 A reasonable restriction of the buyer's option to rescind the contract could be found in Art. 25 Swiss Code of Obligations if one argues that the advantages of the buyer bear no proportion to the disadvantages the seller might face, especially if the latter did not receive the goods in good faith. The owner of the goods could in this case claim the goods indefinitely due to Art. 936 Swiss Civil Code from the seller.

298 BSK OR I/*Wiegand*, Einleitung zu Art. 97–109 OR para. 16; *Schwenzer/Fountoulakis*, OR AT, para. 39.42.

299 See *Huguenin*, OR AT/BT, para. 2696 with further references.

tion to transfer the property but merely to eviction in Articles 192 et seq. Article 184 of the Swiss Code of Obligations could, thus, be understood merely to illustrate the aim of a sales contract for purposes of contract characterization. This interpretation is supported by the fact that the other facets of a sales contract referenced in Article 184(1) are laid out explicitly in the sections on the obligations of the seller and the buyer respectively (handing over in Articles 188 et seq., payment in Articles 211 et seq. of the Swiss Code of Obligations).

121 Furthermore, a systematic argument can be raised against the possibility of rescission under Article 24(1) No. 4 of the Swiss Code of Obligations. Article 195(1) No. 1 of the Swiss Code of Obligations reduces the claim for the purchase price of the buyer against the seller after the goods have been evicted by the amount of benefits the buyer derived from the goods. Yet, by contrast, if the buyer rescinds the contract due to an error under Article 24(1) No. 1 of the Swiss Code of Obligations, the buyer does not have to account for the benefits it received towards the seller.[300] This can produce notable practical differences especially if the goods are used for an extended period of time before the buyer rescinds the contract. This conflicts with the rules on sales law and there is no obvious reason why the buyer should in effect receive the use of the goods for free until he or she decides to rescind the contract.

122 The system of the Swiss Code of Obligations could, hence, be interpreted to favor a liability system based on eviction without a relevant obligation to transfer property and respective remedies.

(3) Revealing the respective historical background of the Swiss Code of Obligations

123 The remaining arguments are premised on assertions that are not sufficiently supported by the historical records of Swiss law. *Huwiler* claims that the wording of Article 184 Swiss Code of Obligations is unequivocal and that the wording was changed in 1905 with a clear intention of the lawmakers to include an obligation to transfer unencumbered property.[301] *Schönle* and *Higi* support this idea under the Swiss Code of Obligations and claim *inter alia* that if Articles 97 et seq. were not applicable, the buyer would be deprived of the protection offered under Article 107(2)[302] – an argument based on the premise that this provision is applicable. On the other hand, *Bucher* claims that Article 192 et seq. of the Swiss Code of Obligations

300 ZK/*Schönle/Higi*, Art. 195 OR paras. 14–15.

301 BSK ZGB II/*Huwiler*, Art. 562 ZGB para. 16. Highlighting the clear change in wording, also *Bader*, SJZ 1923/24, 306.

302 ZK/*Schönle/Higi*, Art. 192 OR para. 12.

should be considered exclusively applicable to avoid a circumvention of eviction-based liability[303] – an argument based on the premise that the Code structures the seller's liability solely around the idea of eviction.

124 These arguments are premised on conclusions that expose the dearth of attention that has thus far been afforded to the *travaux préparatoires*. Before the Swiss Code of Obligations entered into force, the law of obligations was regulated on a cantonal level. There were different groups of cantons following the legal traditions of different legal systems: The south-western cantons stood in the tradition of French law and the then relatively recent French Civil Code of 1804. The centrally located cantons (Aargau, Bern, Luzern, and Solothurn) were influenced by the Austrian Civil Code of 1811.[304] *Bluntschli*[305] crafted a Civil Code (*Privatrechtliches Gesetzbuch*) for Zurich[306] that influenced the law in cantons like Schaffhausen, Thurgau, and Zug. This Zurich Civil Code is (among others) considered a direct model for the Swiss Code of Obligations.[307] The Code produced by *Bluntschli* is especially remarkable with regard to the matter under discussion here:

> Section 1383: "*Durch den Kaufvertrag verpflichtet sich der Eine (der Verkäufer), das Eigenthum an einer Sache oder ein anderes Vermögensrecht, z. B. eine Forderung, auf den Anderen (den Käufer) zu übertragen, und dieser hinwieder, jenem einen Preis in Geld dafür zu zahlen.*"[308]
>
> Section 1398: "*Der Verkäufer ist verbunden, die verkaufte Sache sammt deren Zubehör und Zuwachs in das Eigenthum und den Besitz des Käufers zu übertragen oder, wenn andere Rechte verkauft sind, ihm diese zu vollem Recht und Genuß zu übergeben.*"[309]
>
> Section 1404: "*Der Verkäufer ist verpflichtet, dem Käufer sowohl dafür Gewähr zu leisten, daß dieser das vertragsmäßig veräußerte*

303 *Bucher*, recht 1996, 178, 186.

304 Regarding the influence on the Civil Code in Bern, *Wolf*, FS Eccher, pp. 1299, 1308–1309; regarding the influence on other cantons Aargau, Luzern, Solothurn, p. 1312.

305 Notwithstanding his progressive thinking in private law, *Bluntschli's* oeuvre especially in public law is stained by at least ambiguous and partly disconcerting statements with regard to races, Jews, and women, see *Seen*, 110 ZRG GA (1993), 372 et seq.

306 *Bluntschli*, Privatrechtliches Gesetzbuch für den Kanton Zürich: mit Erläuterungen: Das zürcherische Obligationenrecht, *passim*.

307 BSK OR I/*Zellweger-Gutknecht*, Einl. vor Art. 1 ff OR para. 13. The potentially underestimated influence of the French Civil Code is emphasized by *Bucher*, Code Civil, pp. 139 et seq.

308 *Bluntschli*, p. 361.

309 *Bluntschli*, p. 374.

Recht wirklich erlangt habe, als dafür, daß er im ungestörten Besitz der veräußerten Sache bleiben könne."[310]

125 Regarding the last provision, *Bluntschli's* comments highlight that a prior draft version referred to "*Eigenthum*" (property), which was struck due to obviousness: property was considered to clearly be encompassed by the legal position the buyer was to receive.[311] *Bluntschli* himself considered these rules to be a break with the Roman law structured around a liability for eviction: "*Die neuere Rechtsbildung unterscheidet sich darin von dem römischen Recht, daß sie den Verkäufer nicht bloß verpflichtet, die Sache dem Käufer zu überliefern und den ruhigen Besitz derselben zu gewährleisten, sondern unmittelbar auch auf Eigenthumsübertragung gerichtet ist.*"[312]

126 *Munzinger*, who received the task to draft a uniform Swiss Code of Obligations in 1868 from the Schweizer Juristenverein, explicitly praised the Zurich Civil Code, and even considered following large parts of it.[313] In *Munzinger's* draft of 1863, he stood by his word and copied the provisions on the obligation to transfer property and the liability for legal defects under sections 1398 and 1404 of the Zurich Civil Code verbatim in sections 205 and 210.[314] Yet, the next draft of 1869 implemented the results of discussions that had taken place since 1863, and formulated the respective provisions very differently. It had no provision containing an obligation to transfer the property in the section on the obligations of the seller, and it reverted to eviction as the central element of liability for legal defects.[315] The exact motives for this change remain unclear, but *Meili* plausibly opines that this could have been a compromise found with regard to the cantons that were

310 *Bluntschli*, p. 380.

311 *Bluntschli*, p. 380.

312 *Bluntschli*, p. 374. My translation: The modern legislation differs from Roman law in that it does not only oblige the seller to deliver the thing to the buyer and to ensure the quiet possession of it, but is also directly geared to the transfer of property.

313 *Munzinger*, p. 57, printed in *Fasel*, pp. 17, 52.

314 *"§ 205: Der Verkäufer ist verbunden, die verkaufte Sache sammt deren Zubehörde und Zuwachs in das Eigenthum und den Besitz des Käufers zu übertragen oder, wenn andere Rechte verkauft sind, ihm diese zu vollem Recht und Genuss zu übergeben.* […] *§ 210: Der Verkäufer ist verpflichtet, dem Käufer sowohl dafür Gewähr zu leisten, dass dieser das vertragsmässig veräusserte Recht wirklich erlangt habe, als dafür, dass er im ungestörten Besitz der veräusserten Sache bleiben könne*", printed in *Fasel*, pp. 129–130.

315 Cf. sect. 223 of the 1869 draft: "*Der Verkäufer hat dafür Gewähr zu leisten, dass nicht ein Dritter wegen rechtlicher Mängel, die schon zur Zeit des Verkaufes bestanden haben, das veräusserte Recht dem Käufer entziehen und schmälern könne*", printed in *Fasel*, p. 543. This fact is overlooked by *Giger* who argues that Art. 235 Swiss Code of Obligations 1881 (of which sect. 223 of the 1869 draft was a predecessor) is a continuation of sect. 1404 Zürich Civil Code, BK/*Giger*, Art. 192 OR para. 13.

closer to French law.[316] At the time of drafting, the seller's liability was still based on eviction in other parts of Switzerland.[317] Given that laws of other Swiss cantons at the time did not contain comparable provisions to sections 1383, 1398 and 1404 of the Zurich Civil Code and were partly based on French and Austrian legal thought that had not followed Zurich law, it appears more likely that the compromise found worked to the detriment of the obligation to transfer unencumbered property. *Carrard* emphasized that Zurich law could not be understood to form a basis for Swiss law, as it contained many particularities of Zurich legal thought.[318] Yet, the wording of today's Article 184 of the Swiss Code of Obligations may well go back to section 1383 of the Zurich Civil Code (but not section 1398), as the explicit reference to property in the first provision of sales law was neither in cantonal law following French law, nor in cantonal law following Austrian law. Explaining the change in wording by highlighting the possibility of a compromise is supported by the fact that such compromises can also be found in other areas of Swiss sales law: While the transfer of property was first regulated based on French law and the south-west cantons of Switzerland (transfer with contract conclusion),[319] the requirement of a handing-over was later introduced in line with the legal concept in German-speaking cantons.[320] As a compromise, however, the risk of loss was detached from the transfer of property, and in line with the French approach, was reattached to the contract conclusion (today's Article 185 of the Swiss Code of Obligations).[321]

Moreover, the headings and the structure that evolved under the aegis of *Munzinger* and later *Fick* can also be interpreted to signify a departure from the Zurich Civil Code and its obligation to transfer the property. **127**

316 *Meili*, p. 82 para. 228 fn. 61.

317 *E. Huber*, Vol. III, p. 703 with regard to immovable property.

318 *Carrard*, p. 15 ("*a conservé avec soin les particularités du droit zurichois*"). Supporting the idea that this obligation to transfer the property was part of Zürich legal thought, *Bader*, SJZ 1923/24, 306.

319 See the draft of the Swiss Code of Obligations of 1871, Art. 212: "*Ein Rechtsgeschäft, das auf die Übertragung von Eigentum an bestimmten beweglichen Sachen gerichtet ist, übertragt das Eigentum sofort, ohne dass die Übergabe der Sache oder die Zahlung des Preises erforderlich ist.*"

320 Regarding this compromise *Bucher*, Code Civil, pp. 139, 145–146.

321 *Wiegand*, Sachenrecht im Obligationenrecht, pp. 107, 119.

Zurich Civil Code 1854/1856	Swiss Code of Obligations 1881 (today's numbering of Articles in brackets)
Section 1383: Siebenter Abschnitt. Vom Kauf und Verkauf. Erstes Kapitel. Abschließung des Kaufvertrags	Article 229 (184): I. Allgemeine Bestimmungen
Section 1398: Zweites Kapitel. Wirkungen des Kaufvertrags. A. Verpflichtungen des Verkäufers [i. e., obligations of the seller, this section contained a specific obligation of the seller to transfer property]	Article 232 (188): Verpflichtungen des Verkäufers [i. e., obligations of the seller, this section contains specifics of the obligations to hand over the goods but does not mention an obligation to transfer property]
Section 1404: 1. Gewährleistung des veräußerten Rechtes und Besitzes	Article 235 (192): II. Gewährleistung des veräusserten Rechtes

128 Section 1398 of the Zurich Civil Code contained a provision laying out the seller's obligation to transfer the property under the heading "*Verpflichtungen des Verkäufers*" (obligations of the seller). However, no parallel section can be found in the Articles 232 et seq. of the Swiss Code of Obligations 1881 (today's Articles 188 et seq.). Only the general rule found in section 1383 of the Zurich Civil Code which may have only served as a definition of what a sales contract is, was acceptable enough to find its way into Article 229 of the Swiss Code of Obligation 1881 (today's Article 184). Also, the difference with regard to warranties under section 1404 of the Zurich Civil Code in contrast to Article 235 of the Swiss Code of Obligations 1881 is striking, as far as the latter speaks of eviction while section 1404 of the Zurich Civil Code specifies that the buyer has to actually receive the sold right.[322] Hence, within the section on the obligations of the seller, there is no reference to an obligation to transfer the property, but merely reference to eviction in Articles 235 et seq. of the Swiss Code of Obligations 1881. The comparison of the Swiss Code of Obligations against the background of existing cantonal laws at the time of drafting, thus, militates in favor of interpreting the Swiss Code of Obligations to structure the seller's liability around eviction, and against finding an obligation to transfer unencumbered property.

129 *Huwiler* emphasizes the change in the German wording in 1905 to argue that the Article 184 of the Swiss Code of Obligations contains an obligation to transfer unencumbered property.[323] The German wording was changed from "*Durch den Kaufvertrag verpflichtet sich der Verkäufer, dem Käufer*

322 Contra, BK/*Giger*, Art. 192 OR para. 13 arguing that Art. 235 Swiss Code of Obligations 1881 is a continuation of sect. 1404 Zürich Civil Code.

323 BSK ZGB II/*Huwiler*, Art. 562 ZGB para. 16.

den Kaufgegenstand zu vollem Rechte und Genusse zu übergeben […]"[324] to read: "*Durch den Kaufvertrag verpflichten sich der Verkäufer, dem Käufer den Kaufgegenstand zu übergeben und ihm das Eigentum daran zu verschaffen* […]".[325] However, no change in the seller's obligation was intended, as this change was only meant to bring the German wording in line with the French wording, which already referred to "*propriété*" (property) in the version of 1881.[326] The change in wording would, thus, only carry weight if the French wording from 1881 represented an obligation to transfer unencumbered property. Yet, the French wording did not contain such an obligation, since the arguments laid out are equally applicable.

Consequently, the arguments under the Swiss Code of Obligations that a preemption of Articles 97 et seq. by Articles 192 et seq. would deprive the buyer of the protection provided by the former provisions[327] is based on the wrong premise that the latter provision is even applicable in cases of a lack of property on the seller's part. In contrast, the historical background strengthens the premise that the starting point of the Swiss Code of Obligations is an eviction-based liability system. The argument against the second and third approach that the results of the eviction-based liability are circumvented,[328] thus, becomes more persuasive. Some of the remaining uncertainty for the buyer is alleviated by the five-year period under Article 934(1), (2) of the Swiss Civil Code. The time limitation restricts the buyer's uncertainty. **130**

ee) Summary regarding the obligation to transfer the property

Swiss law does not contain an obligation to transfer unencumbered property, but is rooted in an eviction-based liability system. Seen from a practical point of view, the Swiss Supreme Court nevertheless allows the buyer to rescind the contract in case the seller cannot provide him or her with unencumbered property under Article 24(1) No. 4 of the Swiss Code of Obligations. Comparable to French law, Swiss sales law and the remedies for non-performance are an expression of an eviction-based liability system, **131**

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324 My translation: A contract of sale is a contract whereby the seller undertakes to deliver the item sold including the full rights and benefits […].

325 "*A contract of sale is a contract whereby the seller undertakes to deliver the item sold and transfer ownership of it to the buyer* […]." This is the non-binding English translation of the Code of Obligations provided by the State administration in Switzerland, which is available on the Swiss government's website.

326 Botschaft des Bundesrates an die Bundesversammlung zu einem Gesetzesentwurf betreffend die Ergänzung des Entwurfes eines schweizerischen Zivilgesetzbuches durch Anfügung des Obligationenrechtes und der Einführungsbestimmungen. (Vom 3. März 1905.), BBl 1905, Vol. II(1), p. 23.

327 ZK/*Schönle/Higi*, Art. 192 OR para. 12.

328 *Bucher*, recht 1996, 178, 186.

and Article 184(1) of the Swiss Code of Obligations cannot be understood to contain an obligation to transfer unencumbered property. However, factoring in the option to rescind the contract, the buyer in effect enjoys a similar protection compared to buyers that can rely on an obligation to transfer unencumbered property. This protection is not identical, since on the one hand the buyer may even be able to rescind the contract even though he or she is protected under Article 934(1) of the Swiss Civil Code; and on the other hand, the seller may be able to rely on Article 64 of the Swiss Code of Obligations to argue that he or she is "no longer enriched".

ff) Nullity due to impossibility and Article 20 of the Swiss Code of Obligations

132 Comparable to Article 1599 of the French Civil Code, Swiss law provides that some contracts which are impossible to perform will be deemed null. Yet, this is less relevant regarding the obligation to transfer the property than under French law. Article 20(1) of the Swiss Code of Obligations reads: "*Ein Vertrag, der einen unmöglichen* […] *Inhalt hat* […]*, ist nichtig.*" This is based on the idea *impossibilium nulla obligatio*. With respect to sales contracts, several constellations are considered under this provision. In the case of initial, objective impossibility (*anfängliche, objektive Unmöglichkeit*), i. e., if the obligation cannot be performed by anybody at the time the contract is concluded, the contract is null *ex tunc*.[329] An example is a sales contract concerning a (at the time of contract conclusion) non-existing or no longer existing good.[330] This stands in contrast to a subjective impossibility (*subjektive Unmöglichkeit*), where there is at least one person that could fulfill the contract (but may be unwilling to do so).[331] Such a contract is not null under Article 20(1) of the Swiss Code of Obligations, which is why the contractual remedies apply.[332] Likewise, a subsequent, objective impossibility (i. e., after contract conclusion) does not render the contract null, and is governed by Article 119 of the Swiss Code of Obligations.[333]

329 KuKoOR/*Herzog*, Art. 20 OR para. 4. The original German Civil Code was structured similarly to Swiss law (sect. 306 German Civil Code old version), but was changed as the solution was considered outdated, *Drobnig*, 40 American Journal of Comparative Law (1992), 635, 641 (written before German law was amended, but already referencing the idea and reason).

330 *Gauch/Schluep/Schmid*, OR AT I, para. 632; KuKoOR/*Herzog*, Art. 20 OR para. 4.

331 *Gauch/Schluep/Emmenegger*, OR AT II, para. 2567; ZK/*Schönle/Higi*, Art. 192 OR para. 7.

332 *Gauch/Schluep/Emmenegger*, OR AT II, paras. 2573 (subsequent subjective impossibility), 2574 (initial subjective impossibility), with further references regarding the disputed details regarding the available remedies; ZK/*Schönle/Higi*, Art. 192 OR para. 7.

333 BSK OR I/*Meise/Huguenin*, Art. 20 OR para. 46.

The existence or non-existence of an obligation to transfer unencumbered property has little practical implications under Article 20 of the Swiss Code of Obligations: In case of initial, objective impossibility, the goods cannot be delivered or handed over. Therefore, the legal consequence of nullity cannot be solely attributed to the impossibility of transferring of property, but could also be attributable to the impossibility of delivering the goods. The only conceivable consequence could follow in cases of initial subjective impossibility in which the seller cannot transfer the property but has delivered the goods. Yet, under such circumstances, the application of Article 119 of the Swiss Code of Obligations and Articles 97 et seq. of the Swiss Code of Obligations would raise the same concerns that have led to the above conclusion that they are preempted in cases of a mere lack of property without eviction.[334] In other words, the application of Article 119 and Articles 97 et seq. would require the impossibility of performing the contractual obligation. This obligation could only be an obligation to transfer unencumbered property which does not exist under Swiss law. **133**

c) English law

Common law jurisdictions have not always considered it necessary for the seller to guarantee the transfer of best title in the goods since sales mostly took place at markets.[335] Under the (now repealed) doctrine of market overt a buyer could obtain good title in the goods despite a prior theft if the goods were sold in specific markets between sunrise and sunset.[336] This protected the buyer sufficiently against prior owners of the goods.[337] Hence, no warranty as to the quality of the title of the goods was considered to exist and the seller would generally only transfer the title he or she had. **134**

When sales occurred more frequently outside the market overt, the protection of the buyer was gradually expanded.[338] Courts found a seller to be liable toward the buyer if the former had knowingly misrepresented that he or she was selling goods belonging to a third party.[339] This claim was based on fraud and was not a contractual claim,[340] however, the alternative ground of a contractual claim was also recognized: *Lord Holt* in *Medina v Houghton* **135**

334 See above paras. 113 et seq.
335 *Bridge*, Sale of Goods, para. 5.45; *Franzi*, Western Australian Law Review (1980), 208, 209.
336 See on the doctrine of market overt generally, *Davenport/Ross*, pp. 337 et seq.
337 Parke B in *Morley v Attenborough* (1849) 3 Ex 500, 511; *Bridge*, Sale of Goods, para. 5.45; *Franzi*, Western Australian Law Review (1980), 208, 209; *Ulph*, para. 5-118.
338 *Franzi*, Western Australian Law Review (1980), 208, 209.
339 *Powell*, pp. 78, 88. This liability was sometimes also granted if the seller merely alleged that the goods belonged to him, *Crosse v Gardner* (1689) Carth 90, 90 ER 656.
340 *Meadows*, 65 Fordham Law Review (1997) 2419, 2422–2423.

held that the mere possession of the goods, "*the bare affirming it to be his own, amounts to a warrant.*"[341]

136 *Parke B* in *Morley v Attenborough* analyzed the prior case law and scholarly work in detail to find that there was evidence for an implied warranty for the best title in the goods.[342] However, this case concerned the sale by a pawnbroker where such an implied warranty could not be assumed to exist. In *Eichholz v Bannister*, the judges appear to have interpreted *Morley v Attenborough* as a rather untypical case, noting that "*there can seldom be a sale of goods where one of these circumstances* [yielding an implied warranty for title] *is not present.*"[343] Thereby, the rule that the seller does not warrant the title of the goods was reversed, unless specific circumstances require a finding to the contrary.[344] Nevertheless, it remained the object of resistance.[345]

aa) Section 12(1) of the Sale of Goods Act 1893 and 1979

137 While *Eichholz v Bannister* still contained limitations, and sales contracts to other effects were "seldom" conceivable, section 12 of the Sale of Goods Act 1893 clarified that unless there is intention to the contrary, there is an "*implied condition on the part of the seller that in the case of a sale he has a right to sell the goods, and that in the case of an agreement to sell he will have a right to sell the goods at the time when the property is to pass.*" A condition is such an important term of the contract that its breach allows the aggrieved party to treat the contract as repudiated.[346] This stands in contrast to a mere warranty, which only gives rise to a claim for damages.[347]

138 Notably, the wording of section 12(1) of the Sale of Goods Act is silent regarding "title", "ownership", or "property" and instead speaks of the "right to sell". Moreover, it does not require the seller to fulfill the necessary acts to transfer property under the applicable law, nor does it regulate when the seller has to transfer the property.[348] It cannot be characterized as an obligation to fulfill the necessary acts for the transfer of property. However, considering its function, section 12(1) of the Sale of Goods Act 1979 might fulfill the purposes of an obligation to transfer unencumbered property and might even go further than such an obligation. This is because it is not entirely clear under the Sale of Goods Act 1979 whether section 12(1) can also

341 (1700) 1 Salk 210.
342 (1849) 3 Ex 500.
343 *Byles J* in *Eichholz v Bannister* (1864) 17 CB (NS) 708, 724.
344 *Meadows*, 65 Fordham L. Rev. (1997) 2419, 2424.
345 *Bridge*, Sale of Goods, para. 5.07; *Franzi*, Western Australian Law Review (1980), 208, 211.
346 Bridge, Sale of Goods, para. 10.01.
347 Cf. sect. 11(3) SGA 1979.
348 *Bridge*, Sale of Goods, para. 5.04.

be considered breached if the buyer receives a title that overrides the owner's title.[349] *Goode* and *Bridge* find a breach of section 12(1) of the Sale of Goods Act 1979, since the provision speaks of the "right to sell" and not the "power to sell", and the buyer might face trouble in reselling the goods.[350] If this is correct,[351] this obligation would even surpass the protection provided by an obligation to transfer unencumbered property. This might appear astonishing considering the origins of section 12 of the Sale of Goods Act 1979 in *Morley v Attenborough*. In the reasoning of this case, *Parke B* also relied on comparative law to argue that *inter alia* under Roman and French law "*there is always an implied contract that the vendor has the right to dispose of the subject which he sells.*"[352] Roman and French law are structured more around the idea of eviction than the buyer's actual legal position after the transaction. Roman law did not even provide for the protection of the buyer by way of an obligation to transfer unencumbered property. It is unclear whether this line of reasoning supports an interpretation that takes the leap toward an obligation to transfer unencumbered property and protects buyers even further by allowing them to rescind the contract even though they have the best title in the goods after performance of the contract.

bb) Failure of consideration

139 The seller's undertaking with regard to the quality of the title is even considered to transcend a contractual condition, because the handing over of goods, within which a third party has a better title, simultaneously leads to a total failure of consideration.[353] In *Rowland v Divall*,[354] a stolen car was sold and subsequently resold to a sub-buyer. The police seized the car due to a prior theft of the car, and the buyer reimbursed the sub-buyer. The buyer claimed repayment of the price from the seller, who had no knowledge of the theft. *Atkin LJ* argued:

> "*It seems to me that in this case there has been a total failure of consideration, that is to say that the buyer has not got any part of that for which he paid the purchase money. He paid the money in order that he might get the property, and he has not got it. It is true that the seller delivered to him the de facto possession, but the seller had not*

349 *Bridge*, Sale of Goods, paras. 5.29–5.30.

350 *Goode*, Commercial Law, 1st edn, p. 240; *Bridge*, Sale of Goods, para. 5.30.

351 Potentially contra, *Atkin* L. J., who reasoned in *Niblett v Confectioners' Materials Co.* [1921] 3 KB 387, 401–402 that "*if the seller is able to pass to the purchaser a right to sell notwithstanding his own inability*" there would be no breach of sect. 12(1) SGA 1893.

352 (1849) 3 Ex 500, 510.

353 *Bridge*, Sale of Goods, para. 5.08.

354 [1923] 2 KB 500.

> *got the right to possession and consequently could not give it to the buyer.* […] *There can be no sale at all of goods which the seller has no right to sell. The whole object of a sale is to transfer property from one person to another* […] *can it make any difference that the buyer had used the car before he found out that there was a breach of the condition? To my mind it makes no difference at all. The buyer accepted the car in the representation of the seller that he had a right to sell it, and in as much as the seller had no such right he is not entitled to say that the buyer has enjoyed a benefit under the contract. In fact the buyer has not received any part of that which he contracted to receive, namely the property and right to possession – and that being so there has been a total failure of consideration.*"[355]

141 The failure of consideration results in a full (restitutionary) action for repayment of the purchase price, while the buyer does not have to account for any benefits that he or she (or their sub-buyers) may have received from the possession of the goods.[356] This result is criticized as attributing too much (dogmatic) importance to the concept of property and paying insufficient attention to the fact that the buyer purchases goods to use them: The mere lack of good title does not prevent use of the goods (at least temporarily).[357] Nevertheless, the case illustrates the current law since respective reforms were not yet successful.[358] Hence, English law (and the legal systems that follow English law in this regard)[359] endows the buyer with the possibility to plead failure of consideration if property could not be transferred by the seller.

cc) Summary

141 English law does not contain an explicit obligation to fulfill the necessary acts for the transfer of property, but through section 12(1) of the Sale of Goods Act 1979 and the notion of a total failure of consideration in the case of a sale of goods belonging to a third party, a functional equivalent to an obligation to transfer unencumbered property exists under English law.

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355 *Rowland v Divall* [1923] 2 KB 500.

356 *Bridge*, Singapore Journal of Legal Studies (2017), 345, 348; *Ulph*, para. 5-119.

357 *Bridge*, Sale of Goods, para. 5.09; *Bridge*, Singapore Journal of Legal Studies (2017), 345, 349 et seq.; *Goode/McKendrick*, para. 8.26; *Burrows*, The Law of Restitution, pp. 324–325; finding arguments for and against the judgment, *Ulph*, para. 5-119; different, however, *Wilmot-Smith*, 72 Cambridge Law Journal (2013), 414, 420 who finds the judgment consistent with a possible interpretation of English law.

358 *Bridge*, Sale of Goods, para, 5.15.

359 For example, Canada: *Fridman*, pp. 97–99. Not so under US law, where the concept of "failure of consideration" is no longer used, *Kull*, 51 Osgood Hall Law Journal 2014, 783, 784.

3. The breakthrough of German law?

German law is often singled out with regard to the obligation to transfer the property. This is less so because of the wording of section 433(1), sentence 1 of the German Civil Code ("*der Verkäufer einer Sache* [wird] *verpflichtet, dem Käufer … das Eigentum an der Sache zu verschaffen*"), which can also be found elsewhere,[360] but rather due to the actual interpretation and the respective remedies available to the buyer. **142**

a) Germanic and Franconian law

Germanic and Franconian[361] law have not always followed the approach found in today's section 433(1) of the German Civil Code. Pre-unification of Germany, the different German territories had differing approaches, although they were mostly rooted in Roman law with liability based on eviction.[362] Germanic and Franconian law did not contain an obligation to transfer property free of rights and claims of third parties.[363] As far as scholars have argued that an obligation to transfer the property existed, *Rabel* maintained that this can only be considered true in light of a "relative" notion of property.[364] If such a definition of property were assumed, one could consider Germanic and Franconian law to have contained an obligation to transfer the property. This obligation differs, however, from what *Rabel* and this work refers to as an obligation to transfer unencumbered property. Notwithstanding, under Germanic law it was considered self-evident that a transaction led to the transfer of the seller's legal position to the buyer.[365] The obligation to fulfil the necessary acts to transfer property existed under Germanic law.[366] The acts necessary were, however, sometimes very difficult to fulfill if the seller had no property in the goods, which is why *Rabel* considers the obligation to be *de facto* more far reaching than a mere obligation to fulfill the necessary acts for the transfer of property.[367] **143**

360 For example, Art. 184 Swiss Code of Obligations, see above para. 102.
361 Franconian law is not to be confused with French law. Rather, it refers to the codified popular and customary rights in the Franconian Empire between the fifth and the ninth century, cf. *Schumann*, col. 1671–1672.
362 *Rabel*, Mangels im Rechte, p. 282.
363 *Rabel*, Mangels im Rechte, p. 194.
364 *Rabel*, Mangels im Rechte, p. 194 with references to other opinions.
365 *Rabel*, Mangels im Rechte, pp. 197, 199–200.
366 *Rabel*, Mangels im Rechte, p. 197.
367 *Rabel*, Mangels im Rechte, p. 197.

b) The German Civil Code of 1900

144 The wording of Article 422 of the Dresden Draft 1866 (equivalent to today's section 433 of the German Civil Code) was still slightly ambiguous and did not explicitly refer to an obligation to transfer the property:

> "*Durch den Kaufvertrag wird der Verkäufer verpflichtet, dem Käufer* […] *den Kaufgegenstand als eigen zu überlassen und, wenn dieser eine Sache ist, dem Käufer zu übergeben.*"[368]

145 Yet, the discussion whether a sales contract contained an obligation of the seller to transfer property was a central element in the genesis of the provision.[369] The majority of drafters believed the future law should break with the Roman law tradition and its reliance on eviction.[370] With this break, the point of departure in cases of legal defects changed: It was no longer decisive whether a third party actually claimed to be owner or have rights in the goods or whether any of the limited exceptions to this requirement were fulfilled. Instead, the mere existence of a third party right or a third party being the owner of the goods without the possibility of the buyer to acquire property *bona fide* was considered to lead to a breach of contract.

146 Eight years later in 1874, *Eck* published a highly influential piece on the obligation of the seller to transfer the property under Roman law.[371] In it, he argued that even under Roman law, there was a tendency towards recognizing the seller's obligation to transfer unencumbered property, but concluded that the Romans were not able to bring this evolution to the final form.[372] Irrespective of whether one agrees with this interpretation of Roman law,[373] German law during that time was dominated by Pandectistic thought. The linkage of potentially new ideas to Roman law may have been necessary to establish the rule as a serious possibility for the legal discussion.[374]

147 The ideas to either break with Roman law or, alternatively, that it would be in the spirit of Roman law to complete the obligation and constitute an obligation to transfer unencumbered property, gained widespread support and led to section 433(1), sentence 1 of the German Civil Code in 1900.[375] With

368 *Francke*, p. 86. My translation: The sales contract obligates the seller to transfer to the buyer […] the object of purchase as the buyer's own and, if it is an object, to hand it over to the buyer.
369 Cf. *Jakobs/Schubert*, pp. 2–3; *Meili*, p. 79 para. 218.
370 *Jakobs/Schubert*, p. 3.
371 *Eck*, Die Verpflichtung des Verkäufers zur Gewährung des Eigenthums nach Römischen und gemeinem Deutschen Recht, 1874, *passim*.
372 *Eck*, p. 42.
373 Notably, *Ernst*, Rechtsmängelhaftung, pp. 8 et seq. has undertaken to disprove the interpretation favored by *Eck* and *Rabel*.
374 HKK/*Ernst*, §§ 434, 435 para. 30.
375 HKK/*Ernst*, §§ 434, 435 para. 30.

its introduction, the Roman notion that the seller is obliged to defend the buyer in the legal proceedings against a third party was also abandoned.[376]

148 Yet, section 440(2) of the German Civil Code 1900 provided: "*Ist eine bewegliche Sache verkauft und dem Käufer zum Zwecke der Eigentumsübertragung übergeben worden, so kann der Käufer wegen des Rechtes eines Dritten, das zum Besitze der Sache berechtigt, Schadensersatz wegen Nichterfüllung nur verlangen, wenn er die Sache dem Dritten mit Rücksicht auf dessen Recht herausgegeben hat oder sie dem Verkäufer zurückgewährt oder wenn die Sache untergegangen ist.*" Damages for non-performance were only available if the buyer had acknowledged a third party's right and given him or her the goods, or if the goods were destroyed. The mere existence of a third party right was insufficient to claim damages for non-performance. Therefore, it was disputed whether the provision kept an eviction-liability system alive.[377] This discussion lost its relevance when the reform of the German Civil Code in 2002 silently removed the limitation to damages claims.

149 The 2002 reform additionally unified the remedies available for breaches of contract. Thereby, it became less relevant what kind of a breach of contract had taken place. It has since then, however, been disputed under the German Civil Code whether the seller has breached section 433 or section 435 when a third party has property in the goods and the buyer cannot become owner by the rules of *bona fide* acquisition under sections 932 et seq. The opening provision on sales contracts, section 433 of the German Civil Code, contains the seller's obligation to transfer the property. Section 435, sentence 1 of the German Civil Code provides that a legal defect exists if a third party has rights regarding the goods that were not provided for in the contract. If the buyer does not receive unencumbered property because the seller is not the owner of the goods, it is disputed whether section 433 or section 435, sentence 1 of the German Civil Code is breached.[378] As will be seen below, this dispute has structural similarities to the dispute under the CISG on the relationship between Articles 30 and 41. Under the German Civil Code, the dispute yields very little differences in practical results, since the remedies for both kinds of breaches are generally the same. The only practical dif-

376 *Bunde*, p. 42.

377 Cf. for example, *Bergmann*, 74 RabelsZ (2010), 25, 28.

378 Dannemann/Schulze/*Schaub*, § 435 BGB para. 7. In favor of applying sect. 433 German Civil Code, Erman/*Grunewald*, § 435 BGB para. 3; Staudinger/*Matusche-Beckmann*, § 435 paras. 17–18; MüKoBGB/*Westermann*, § 435 BGB para. 1. Contra, and in favor of applying sect. 435 German Civil Code, *Canaris* JZ 2003, 831, 832; *Scheuren-Bandes*, ZGS 2005, 295, 296; Jauernig/*Berger*, § 435 BGB para. 5; *Meier*, JR 2003, 353, 355.

ference concerns the applicable limitation periods.[379] It might regain more relevance, if the approach of the Court of Appeal Düsseldorf finds more approval: The court applies the duty to notify the seller of defects under section 377 of the German Commercial Code in analogy to legal defects, but the duty is only extended to legal defects under section 435 and not to the obligation to transfer the property under section 433(1) of the German Civil Code.[380] If a seller who does not transfer property were to only breach section 435 of the German Civil Code, section 377 of the German Commercial Code might prevent the buyer who has not notified the seller of the defect from relying on it. In contrast, if section 433(1) of the German Civil Code were also considered to be breached, the duty to notify would not apply.

c) Breakthrough of German law by introducing the obligation to transfer the property?

150 At first sight, the introduction of the obligation to transfer the property under section 433(1), sentence 1 of the German Civil Code could be celebrated as a breakthrough.[381] Yet, the comparative perspective shows that other legal systems had already before 1900 protected the buyer through remedies outside of sales law in case of existing third party rights even if they have not been asserted against him or her. Even more remarkably, the Civil Code (*Privatrechtliches Gesetzbuch*) for Zurich of 1854/56 already contained the obligation to transfer property implemented in Germany just short of fifty years later.[382] Yet, the breakthrough was the introduction of contractual remedies that applied to the failure to transfer property, regardless of whether a third party actually raised his or her right. The German law, therefore, remains an important stepping-stone toward the solution found under the CISG.

4. Summary

151 The seller's obligation to transfer the property in the goods and the liability for third party rights are intertwined in national laws. The general statement that the obligation to transfer the property is central in sales law requires further differentiation, already introduced by *Rabel* in "*Das Recht des Warenkaufs*" (obligation to fulfill the necessary acts for the transfer of property and obligation to transfer unencumbered property). The relationship varies, and national laws differ on whether a buyer can rely on not having become

379 *Rener*, p. 55.
380 Cf. Court of Appeal Düsseldorf, 4 December 2012 – 23 U 47/12, BeckRS 2013, 06665, sub. I.1.a.aa.
381 HKK/*Ernst*, §§ 434, 435 para. 32.
382 See above para. 124.

the (absolute) owner of the goods. French law allows for a (relative) nullity in such a case, while under English law a total failure of consideration exists. The Swiss Code of Obligations, in contrast, contains an eviction-based liability system but the Swiss Supreme Court allows for a rescission under these circumstances. German law solves the problems comprehensively in sales law while having abandoned eviction as a central pillar of liability.

III. Current interpretations of Articles 30 and 41 of the CISG

Turning to the CISG, the obligation to transfer the property under Article 30 has received attention, specifically with regard to the interplay of this obligation with Article 41. Article 30 obliges the seller to "*transfer the property in the goods, as required by the contract and this Convention*", while Article 41 requires the seller to "*deliver goods which are free from any right or claim of a third party, unless the buyer agreed to take the goods subject to that right or claim.*" **152**

Under Article 43(1) of the CISG, the buyer has to notify the seller of any breach of Article 41 of the CISG. If buyers do not comply with this duty, they generally lose the right to rely on breaches of Articles 41 or 42 of the CISG. The wording of Article 43 of the CISG does not indicate a similar duty with regard to a potential breach of Article 30 of the CISG.[383] This requires clarification of the relationship between both provisions: Is Article 30 of the CISG limited to providing an overview of all of the seller's obligations or does it entail a substantive obligation independent of Article 41 of the CISG? If the latter is true, what does this obligation entail? **153**

1. Approach 1: Buyer has to become owner of the goods under Article 30 of the CISG

The first approach takes the wording of Article 30 of the CISG literally and deduces from the obligation to transfer the property in the goods to the buyer that the buyer actually has to become owner of the goods and no third party can remain the owner of the goods. If, for any reason, the buyer does not become the owner of the goods, Article 30 of the CISG is breached. Since the wording of Article 43(1) of the CISG requires notification only with re- **154**

383 It should be noted that *Bach*, IPRax 2009, 299, 303 proposes that practical differences might be leveled by applying Art. 43 CISG in analogy to such breaches of Art. 30 CISG in line with the opinions under German law.

gard to Articles 41 and 42 of the CISG, buyers would not lose their right to rely on Article 30 of the CISG if they failed to notify the seller in time.

155 The Court of Appeal Dresden, the Court of Appeal Munich, and the District Court Freiburg have adopted this approach.[384] All three cases concerned the sale of stolen cars. Thus, under the respective applicable national laws the victims of the theft retained property in the cars. The courts considered it irrelevant whether the buyers had notified the sellers within a reasonable time under Article of the 43(1) CISG. Even though the buyers had not in all cases notified the seller in time, the sellers had also breached Article 30 of the CISG by not transferring property. The Court of Appeal Munich explicitly stated that Article 30 of the CISG required the seller to make the buyer the owner of the goods.[385] It has to be noted at this stage that this understanding cannot be generalized as an approach by the German courts, since the German Supreme Court has considered Article 43(1) of the CISG to be applicable in a similar constellation of a different case, and did not even mention Article 30 of the CISG.[386] Yet, the decisions of the Court of Appeal Dresden and the Court of Appeal Munich were handed down after the Supreme Court's judgment. Therefore, these lower courts were not deterred in their approach by the Supreme Court's decision.

156 *Bridge* states that where the seller is not the owner of the goods and English law would apply section 12 of the Sale of Goods Act 1979 should be assessed under Article 41 of the CISG "*as well as under Article 30, which requires the seller to transfer the property in the goods.*"[387] In the accompanying footnote, he cites the decision by the Court of Appeal Dresden just mentioned.[388]

157 Most criticism of this approach (directly or indirectly) points out that this interpretation would circumvent the buyer's duty to notify the seller of the legal defect under Article 43 of the CISG.[389] A stronger argument against this approach can be derived from Article 7(1) of the CISG and its mandate to

384 Court of Appeal Dresden, 21 March 2007, CISG-online 1626; Court of Appeal Munich, 5 March 2008, CISG-online 1686; District Court Freiburg, 22 August 2002, CISG-online 711. Court of Appeal Karlsruhe, 15 February 2016, CISG-online 2740, para. 21 can be interpreted to confirm this approach in German case law. However, in this case the seller did not deliver the goods at all. Therefore, the practical differences with regard to Art. 39(1) CISG do not arise.

385 Court of Appeal Munich, 5 March 2008, CISG-online 1686 sub. II.2.a.aa: "*Der Beklagte war aufgrund des Kaufvertrags gem. Art. 30 CISG verpflichtet, der Klägerin Eigentum an der verkauften Ware zu verschaffen.*"

386 German Supreme Court, 11 January 2006, CISG-online 1200.

387 *Bridge*, International Sale of Goods, para. 11.41, less clear in para. 10.29.

388 *Bridge*, International Sale of Goods, para. 11.41 fn. 292.

389 *Kiene*, IHR 2006, 93, 96; Kröll/Mistelis/Perales Viscasillas/*Kröll*, Art. 41 para. 11; BeckOGK/*Hachem*, 01.03.2021, Art. 41 CISG para. 7.

interpret the Convention in a manner that promotes uniformity in its application. The German courts had to decide cases in which the law applicable to property contained an absolute notion of property[390] to find that Article 30 of the CISG had been breached. In contrast, if one were to assume a relative notion of property,[391] the seller could be considered to have transferred the property to the buyer even in cases in which the goods had been stolen. Consequently, Article 30 of the CISG would not be breached. This potential divergence due to different national, unharmonized understandings of "property" under Article 30 of the CISG would lead to far-reaching differences in results, due to Article 43 of the CISG only blocking the buyer's remedies comprehensively under a relative notion of property, while leaving the buyer with such remedies if an absolute notion of property were employed. Proponents of this first approach may counter that they apply the CISG in a uniform manner but that the differences in results stem from differences in national property law. Yet, the seller's liability for third parties' rights is governed by the CISG, and uniformity cannot be achieved if the relevant understanding of property in Article 30 of the CISG is left to national law. Article 7(1) of the CISG not only requires uniformity by requiring the transfer of property under Article 30 of the CISG, but its effect extends to the question what property is. Otherwise, for example, the question of whether Article 30 of the CISG is breached when a third party remains the owner of the goods would be answered divergently depending on the respective national law's understanding of property.

2. Approach 2: Article 30 of the CISG obliges the seller to fulfill the necessary acts under national law to effect a transfer of property

158 A second approach advanced by many scholars interprets Article 30 of the CISG to contain the seller's obligation to comply with all acts necessary under the law applicable to the transfer of property without regard to whether the buyer eventually becomes the owner of the goods.[392] The respective

390 On the notion of absolute property, see above paras. 39 et seq.

391 On the notion of relative property, see above paras. 45 et seq.

392 Schlechtriem/Schwenzer/Schroeter/*Widmer Lüchinger*, 8th German edn, Art. 30 para. 9: "*Diese Pflicht ergibt sich unmittelbar aus Art. 30*"; *Widmer Lüchinger,* pp. 167, 169; Kröll/Mistelis/Perales Viscasillas/*Piltz*, Art. 30 para. 14: "*Therefore, Art. 30 only contains an abstract obligation of the seller to take all necessary actions and measures in order to transfer property*"; *Piltz*, MAH Internationales Wirtschaftsrecht, § 7 para. 161; BeckOK/*Saenger*, Art. 30 CISG para. 4: "*Art. 30 verpflichtet den Verkäufer, alle Handlungen vorzunehmen, die danach zur Eigentumsübertragung erforderlich sind, wie zB eine gesonderte Einigung über den Eigentumsübergang oder die Übergabe der Ware*"; Brunner/Gottlieb/*Brunner/Dimsey*, Art. 30 para. 13; probably,

requirements are to be determined under the (national) law applicable to the transfer of property, and may include: handing over of the goods, a distinct agreement that property should pass, no further acts being necessary due to the causal nature of the transfer of property.[393]

159 Compared to the first approach, this approach renders the obligation to transfer the property under Article 30 of the CISG for most practical cases less relevant, since the cases in which the seller does not comply with the necessary acts under national law to transfer property will mostly coincide with non-delivery of the goods. For cases in which a third party remains the owner of the goods, Article 43(1) of the CISG requires the buyer to notify the seller within a reasonable period of time, and Article 30 of the CISG will generally not be breached to afford the buyer an alternative breach of contract to rely on despite the lack of notification to the seller.

160 Yet, the wording of Article 30 of the CISG makes no reference to the acts necessary to transfer the property. The seller has to "transfer the property", and the proponents of this approach limit the breaches of this obligation to the situation in which the lack of transfer of property is due to the seller not agreeing to transfer the property or not handing over the goods. In contrast, situations in which the transfer of property fails due to the seller not acquiring the necessary legal position to transfer the property would be considered a breach of Article 41 of the CISG. However, in both situations, the seller has ultimately not transferred the property, which puts this differentiation in conflict with the wording of Article 30 of the CISG.

161 Counterarguments against this interpretation of the wording can also be found in the historical records. The differentiation between an *obligation de moyen* and an *obligation de résultat* was discussed during the drafting of the provision that would become Article 30 of the CISG. An *obligation de moyen* is breached if the debtor does not perform the required acts or fails to comply with the means to reach a result, but it is irrelevant whether the result is achieved. In contrast, an *obligation de résultat* is breached if the result is not achieved. The second draft of a uniform sales law of 1939 was the first draft that contained a provision on the obligation to transfer the property. Article 52(1) of the (Rome) draft read: "*Le vendeur est obligé d'accomplir les actes qui sont nécessaires pour transférer à l'acheteur la propriété*

BeckOGK/*Hachem*, 01.03.2020, Art. 41 CISG para. 15; *Bucher*, recht 1996, 178, 181 ("*Die Sachlogik fordert, dass die Eigentumsverschaffungspflicht des Verkäufers als eine obligation de faire, nicht aber als eine obligation du résultat verstanden wird: Geschuldet ist die Eigentumsübertragungshandlung selber, nicht aber deren Erfolg (sc. Eigentumserlangung durch den Käufer).*"); Staudinger/*Magnus*, Art. 30 para. 10; *Karollus*, p. 113; *Schmitt*, CR 2001, 145, 148.

393 Cf. for the differences in national laws regarding the transfer of property above paras. 57 et seq.

et la possession de la chose au sens de la loi nationale compétente."[394] In 1953 during the third meeting of the Special Commission in Nice, the Commission changed the wording to "[l]*e vendeur s'oblige à transférer à l'acheteur la propriété de la chose au sens de la loi nationale compétente*", which was accepted without further discussion.[395] At the conference at the Hague in 1964 when the final text of the ULIS was negotiated, *Gutzwiller* (who was a member of the Special Commission[396]) explained that in Nice it had been decided to leave out the phrase "*actes nécessaires pour transférer la propriété*". "*This was in order to simplify the law and to specify more clearly the seller's obligation. In this way the concept of possession had been set aside because Swedish legislation, for instance, did not include the concept of property in the goods, in the sense in which this was understood in continental European countries*."[397] *Eula* (the then president of Unidroit) explicitly favored the Rome draft over the new wording.[398] *Tunc* responded that it was a deliberate change in wording that went hand in hand with a change from an *obligation de moyen* to an *obligation de résultat*.[399]

162 Due to proposals by Great Britain and Norway, it was decided at a late stage of the drafting to carve out the obligation to transfer the property from the provision that became Article 52 of the ULIS and create a new provision outlining the seller's obligations (Article 18 of the ULIS) that included the obligation to transfer the property.[400] It is not entirely clear whether this was meant to have any impact on the interpretation of the ULIS or was merely a question of drafting and structure guided by the existence of such a provision summarizing the buyer's obligations (Article 56 of the ULIS).[401] This is because, in contrast to Article 41 of the CISG, Article 52 of the ULIS was titled "transfer of property" and, thus, Article 18 of the ULIS might have just referenced this obligation. On the other hand, *Tunc*'s commentary on

394 Unidroit, L'Unification du Droit – Aperçu général des travaux pour l'unificiation du droit privé (Projets et Conventions), Vol. I, Rome, 1948, p. 124; see the draft also at *Rabel*, Recht des Warenkaufs II, pp. 395 et seq. (French original text); Unidroit, Draft of a uniform law on international sales of goods (corporeal movables) and Report, *passim* (English translation). This wording was based on a draft by *Rabel* from 1937, see S. d.N. – U. D.P. 1937 – Etudes: IV Vente – Doc. 87(1), p. 44.

395 Special Commission, Doc. 98, p. 34.

396 For details on the Special Commission, see above paras. 23–24.

397 Diplomatic Conference on the Unification of Law Governing the International Sale of Goods, The Hague, 2–25 April 1964, Vol. I – Records, pp. 98–99.

398 Diplomatic Conference on the Unification of Law Governing the International Sale of Goods, The Hague, 2–25 April 1964, Vol. I – Records, p. 97.

399 Diplomatic Conference on the Unification of Law Governing the International Sale of Goods, The Hague, 2–25 April 1964, Vol. I – Records, p. 97.

400 *Riese*, 29 RabelsZ (1965), 31. A prior attempt by Great Britain to achieve the same result in 1962 had been unsuccessful, see U. D.P. – Etudes: IV Vente – Doc. 102, p. 23.

401 For the latter, *Riese*, 29 RabelsZ (1965), 31 ("*übertriebenen Symmetriebestreben*").

Article 52 of the ULIS states that this provision is not a mere repetition of Article 18 of the ULIS but has a more extensive scope.[402] None of these changes, however, cast doubt on the decision to consider the fragment that ended up in Article 18 of the ULIS to be an *obligation de résultat*. No further changes in the wording in this regard were undertaken by UNCITRAL at the conference in Vienna, and this wording was accepted for Article 30 of the CISG. Hence, the *travaux préparatoires* of the CISG, including the prior work at Unidroit and by the Special Commission,[403] militate against the second approach, which interprets Article 30 of the CISG as containing an obligation of the seller to comply with the necessary acts to transfer property under national law.

3. Approach 3: Article 30 of the CISG is merely an overview elaborated by Article 41 of the CISG and contains no independent obligation

163 The third approach considers Article 41 of the CISG to specify Article 30, which is why the latter provision is not considered to contain an independent or stand-alone obligation to transfer the property.[404] If the buyer does not become owner of the goods, only Article 41 of the CISG is breached and the duty to notify under Article 43 of the CISG, thus, applies comprehensively to such cases. *Tebel* argues that this approach is justified with regard to the wording of Article 30 of the CISG which requires the transfer of property "*as required by* […] *this Convention.*"[405] Moreover, considering Article 30 of the CISG as the opening provision of "Chapter II. Obligations of the Seller", one may interpret the provision to only provide an overview of the obligations that follow in Articles 31 to 44.[406] This interpretation would correspond to the common understanding of Article 53 of the CISG, according

402 Diplomatic Conference on the Unification of Law Governing the International Sale of Goods, The Hague, 2–25 April 1964, Vol. I – Records, p. 378.

403 For details on the historical background and its usefulness in the interpretation of the CISG, see above paras. 19 et seq.

404 Brunner/Gottlieb/*Tebel*, Art. 41 para. 6; *Achilles*, Art. 41 para. 1; Staudinger/*Magnus*, Art. 41 para. 8; *Zhang*, p. 73; probably, Court of Appeal Canton Zug, 23 February 2023, CISG-online 6313 paras. 51 et seq.; potentially, *Kiene*, IHR 2006, 93, 96, who, however, addresses a more restricted question of the sale of goods owned by a third party; potentially, also *Schlechtriem*, Pflichten des Verkäufers, pp. 103, 104 stating that the obligations of the seller can be found in Arts. 31 et seq.

405 Brunner/Gottlieb/*Tebel*, Art. 41 para. 6.

406 *Kiene*, IHR 2006, 93, 96; Staudinger/*Magnus*, Art. 30 para. 1.

to which the latter provision also provides an overview of the buyer's obligations, while Articles 54 to 60 specify said obligations.[407]

164 Yet, Article 30 of the CISG refers to the obligations to deliver the goods, hand over the documents, and transfer the property. The obligations to deliver the goods and hand over documents have clear provisions addressing these obligations with consistent wording (delivery, Articles 31 to 33, handing over the documents, Article 34). In contrast, Article 41 of the CISG – as highlighted – does not refer to "transfer of the property" at any point. This also differs from Article 53 of the CISG, where the following provisions correspond in wording to the former provision. The key to this puzzle might, however, be discovered in Article 52 of the ULIS, the predecessor of Article 41 of the CISG, which was titled "Section III. Transfer of Property". Although the title was (rightfully) dropped during the drafting of the CISG due to ambiguousness given that the actual transfer of property was not envisaged to be unified, this historical fact may prompt one to interpret "transfer the property" in Article 18 of the ULIS or Article 30 of the CISG to refer to Article 52 of the ULIS or Article 41 of the CISG. However, Article 18 of the ULIS was already considered to contain its own obligation to transfer the property, and to be differentiated from Article 52 of the ULIS as explicitly stated by *Tunc* in the commentary on the ULIS.[408] *Tunc*'s understanding of Article 52 as containing a different obligation than Article 18 is supported by the reasoning why references to the transfer of property were dropped in Article 52: The reference was dropped to avoid repetition of an obligation that was already contained in Article 18.[409] Therefore, the title of Article 52 of the ULIS as the predecessor of Article 41 of the CISG is no persuasive argument to favor the third approach.

165 Furthermore, if Article 30 of the CISG were to be understood as providing an overview also extending to Article 41, there would be no obvious systematic reason why Article 30 is silent with regard to Article 35 (non-conformity of the goods). While one might counter that the obligation to "*deliver the goods* […] *as required by* […] *this Convention*" can be construed to encompass Article 35 of the CISG, because the latter provision is part of the Convention and requires goods to be delivered in accordance with the contract and its requirements, the same argument could be raised regarding Article 41. Hence, it is not convincing to interpret the reference to the obli-

407 Cf. the understanding of Art. 53 CISG, Schlechtriem/Schwenzer/Schroeter/*Mohs*, 8th German edn, Art. 53 para. 1; MüKoBGB/*P. Huber*, Art. 53 para. 1.

408 Diplomatic Conference on the Unification of Law Governing the International Sale of Goods, The Hague, 2–25 April 1964, Vol. I – Records, p. 378.

409 Diplomatic Conference on the Unification of Law Governing the International Sale of Goods, The Hague, 2–25 April 1964, Vol. II – Documents, p. 410, Conf/V/Amend/153 and 170.

gation to transfer the property in Article 30 of the CISG to merely provide the overview of the seller's obligation under Article 41 of the CISG, since Article 30 of the CISG would in this case have to refer to the obligation to deliver conforming goods, too.

166 Lastly, the interpretation is not in line with the wording of Article 41 of the CISG. If Article 41 truly absorbed Article 30, Article 41 would also have to be applied if the seller retained rights in the goods. The seller would, consequently, have to be considered a "third person" under Article 41. This obvious conflict with the wording is commonly shrugged off.[410] Some scholars justify this result with an analogy of Article 41 of the CISG with regard to rights of the seller.[411] The provisions of the CISG only name three different private parties: the buyer, the seller, and third parties. Therefore, it appears to be more than a stretch to apply Article 41 of the CISG directly to rights of the seller. Moreover, depriving Article 30 of the CISG its scope of application with regard to the seller's obligation to transfer the property only to apply Article 41 of the CISG in analogy to fill this self-inflicted gap is superfluous.

IV. A novel approach: Defining "property" under Article 30 of the CISG and applying Article 41 of the CISG with regard to third parties only

167 The three existing interpretations of the obligation to transfer the property and the delineation of Articles 30 and 41 of the CISG create discord with the wording, the systematics, and the historical background of the Convention. What they additionally have in common is that none of the interpretations have asked whether "property" under Article 30 is an autonomous term within the CISG or merely references the respective notion under the applicable property law. This, however, is a fundamental question that could

410 Schlechtriem/Schwenzer/Schroeter/*Schwenzer*, 7th German edn, Art. 41 para. 14 for example, writes "*Gleichwohl dürfte kein Zweifel daran bestehen, dass Art. 41 S. 1 auch* [auf eigene Rechte des Verkäufers] *Anwendung findet*" (maintained by the new author in Schlechtriem/Schwenzer/Schroeter/*Schwenzer/Lutzi*, 8th German edn, Art. 41 para. 14); W. Witz/Salger/M. Lorenz/*Salger*, Art. 41 para. 8 ("*Dritter i. S. v. Art. 41 kann auch der Verkäufer selbst sein*"); *Rener*, p. 74; Soergel/*Willems*, Art. 41 para. 4 ("*über den Wortlaut des Art. 41 hinaus*"); but see *Piltz*, Internationales Kaufrecht, para. 5-119. Unclear, MüKoHGB/*Benicke*, Art. 41 para. 6 who differentiates between a retention of property which he considers not to be a breach of Art. 41 CISG due to the limitation to third parties, and the seller claiming to have rights in the goods which he considers to be a breach of Art. 41 CISG.

411 Brunner/Gottlieb/*Tebel*, Art. 41 para. 17; MüKoBGB/*Gruber*, Art. 41 para. 11.

have far-reaching consequences for the understanding and delineation of Articles 30 and 41.

1. Defining "property" under Article 30 of the CISG

In fact, defining "property" under Article 30 of the CISG as an autonomous term should not be treated as a mere alternative to other interpretations, as the general rule under Article 7(1) of the CISG to ensure uniformity in the application mandates that terms of the Convention are generally to be interpreted autonomously, i. e., without regard to national law. A fallback to national law with regard to "property" could, hence, only be permissible as an exception to the general rule. **168**

a) Deriving the meaning of "property" from existing concepts

As stated above with regard to the general terminology, "property" is sometimes understood to refer to the thing itself. A common use would, for example, be "damage to property", which is concerned with the physical damage to the goods and not directly with the rights to the goods. Yet, "property" under the CISG should not be understood accordingly, since the CISG provides that the word "goods" is to refer to the things being sold themselves.[412] Property, consequently, refers to a person's legal position regarding the goods. **169**

Yet, as explained above, there are at least three different solutions under national law: an absolute or relative notion of property, and no comprehensive notion of property.[413] It is erroneous to assume that the notion of (relative) property under English law is to equal the term "property" under the CISG, since all six languages of the CISG are relevant in its interpretation.[414] For example, the French wording (*propriété*) would signify an (absolute) notion of property. Some scholars and courts treat the English wording with more interpretive relevance, because the negotiations of the CISG in Vienna were conducted in English,[415] this is unhelpful when answering the question at hand. With regard to the obligation to transfer the property, Article 30 of the CISG has a direct predecessor in Article 18 of the ULIS, which was negotiated and drafted from 1929 to 1964 in French. **170**

412 Cf. a similar argument with regard to "property" and "goods" under the SGA 1893 by *Battersby/Preston*, 35 The Modern Law Review (1972), 268, 271.

413 See above paras. 38 et seq.

414 *Schroeter*, Internationales UN-Kaufrecht, para. 140.

415 *Schroeter*, FS Kritzer, pp. 425, 429; Staudinger/*Magnus*, Unterzeichnungsklausel para. 1. Cf. Swiss Supreme Court, 13 November 2003, CISG-online 840 para. 22 which, however, also highlights the relevance of the French wording. More cautiously, W. Witz/Salger/M. Lorenz/*W. Witz*, Art. 7 para. 20.

171 Therefore, it is not convincing to derive the meaning of "property" under the CISG from one existing concept among the many that exist under national laws.

b) Proposed definition of property under Article 30 of the CISG

172 Property under Article of the 30 CISG should be understood to refer to the legal interest the seller has in the goods without regard to the quality of this interest. Legal interest in the goods must be understood broadly and encompass the legal relationship of the seller to the goods, i. e., every legal position the seller has with regard to the goods. This broad definition aims at staying true to the spirit of the CISG and its preference for neutral terminology that is not burdened with preconceptions under national law.[416] If one were to use "rights" instead of "legal interest", national preconceptions with regard to a limited interpretation of what rights are, could be unduly transferred to the CISG. For example, Swiss and German law provide the owner with many rights flowing from having property in the goods in the sense of Swiss and German law. But it is unclear whether the broad concept of property under these national laws can be split up completely into specific rights, or sticks within the bundle, or whether there is something to property that is more than the sum of the rights associated.[417] While this may appear metaphysical to a commercial lawyer, the risk of interpolating such discussions into the CISG should be avoided by using "legal interest" instead of "rights". If property under national law refers to more than the rights it provides to the owner, "legal interest" encompasses this legal position too. "Legal interest" nevertheless is an autonomous term and specifically does not exclude "equitable interests" under, for example, English law.

173 This definition of "property" under Article 30 of the CISG also includes limited property rights, such as liens and similar interests. The proposed definition levels the playing field for countries that employ an absolute notion of property, a relative notion of property, or no comprehensive notion of property.[418] It does so by not referring to a specific form of a right (ownership, title, or property rights), but rather to the persons directly involved in the sales contract and their legal positions. Under the CISG, property, in the sense of national law, should be considered just another right and should not be given special status.

174 Some examples may serve to illustrate the practical consequences of this definition. If the seller is the absolute owner of the goods, for example, un-

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416 For this spirit of uniform sales law, see *Rabel*, 9 RabelsZ (1935), 1, 56 especially regarding (the transfer of) property.

417 Cf. BSK ZGB II/*Wolf/Wiegand*, Art. 641 ZGB para. 12.

418 See on different notions of property above paras. 38 et seq.

der Swiss or German law, he or she has to transfer full property under Swiss or German law and cannot retain any other rights in the goods. If the seller has a kind of possessory right, which might nevertheless amount to relative property under English law, he or she has to transfer it to the buyer, irrespective of whether this right would be good against anybody in the world. Also, under German or Swiss law, possession is a right that generally allows the possessor to reclaim the goods from anybody who illegally interferes with his or her possession. Thus, such a right of the seller would also have to be transferred to the buyer. Moreover, if the seller has a security right in the goods, for example a lien, he or she has to transfer this lien. Thus, the definition also accommodates, for example, the feature of the UCC that considers the retention of property to merely have the effect of a security interest under section 2-401(1), sentence 2 of the UCC. In such a case, the seller would still not have transferred the property under Article 30 of the CISG, since the security interest is as much a legal interest of the seller as is property.

175 If the seller has no legal interest in the goods at all, there is no breach of the obligation to transfer the property under Article 30 of the CISG. Sellers only have to transfer the legal interest they have in the goods. In most cases, the seller will not be able to deliver the goods to the buyer without having a legal interest in them. In these cases, there will be a breach of the obligation to deliver the goods under Article 30, and the buyer will need no further protection.

176 The most common case in which the seller is able to deliver without having a legal interest in the goods, concerns a seller who is only an intermediary in a chain of sales contracts and the first seller in the chain is obliged to deliver the goods and transfer the property in them directly to the last buyer.[419] Problems may arise if the first seller in the chain of contracts delivers the goods to the last buyer, but retains the property in the goods until he or she has been paid, even though this reservation of property was not agreed to by at least one buyer in the chain. A different, exceptional case involves a seller who leads the third party to (erroneously) believe that the seller has concluded the contract with the buyer for the third party's benefit and account. Depending on the applicable property law, the buyer might not become the absolute owner and/or the third party might retain rights in the goods. Even

419 An example can be found in the facts of the following: Court of Appeal Munich, 2 March 1994, CISG-online 108, see below para. 320. These contracts must be differentiated from the first sales contract in such a chain of contracts under which the parties amend the seller's obligation to transfer the property to the buyer under Art. 6 CISG: They agree that the seller should transfer the property, i. e., the legal interest in the goods, to a third party directly. Therefore, the fact that the buyer never receives the seller's legal interest does not lead to a breach of Art. 30 CISG under such circumstances.

if the third party does not retain rights in the goods, this party might approach the buyer as soon the mistake is recognized.

177 However, the underlying problem in both cases is the third party's legal interest in the goods: Either the legal interest of first seller in the chain of contracts, who is a third party for purposes of later contracts in the chain, or a completely uninvolved third party. The buyer is protected in both cases from third party rights or claims by considering the latter to be breaches of Article 41 of the CISG, as discussed below.[420] Consequently, Article 30 of the CISG can be interpreted to require sellers to transfer their legal interest and if they have no interest in the goods, this obligation is not breached.

178 This definition limits the relevance of the obligation to transfer the property under Article 30 of the CISG to the allocation of the goods between the seller and the buyer. If third party rights are involved, Article 41 of the CISG protects the buyer.

c) "Transfer" of property

179 Under the CISG's obligation to "transfer" the property under Article 30, it is not relevant whether the applicable property law considers the transfer to be a transfer in a strict sense, or whether the buyer receives the interest by means of legal acquisition (for example, if goods are installed or combined with other goods and national law considers the owner of the absorbing goods to become the owner by law).[421] What is important is that the seller loses his or her interest in the goods and the buyer receives (at least)[422] an interest of comparable strength.

d) Intellectual property rights

180 Given the proposed broad understanding of "property", the question arises whether sellers are also obliged to transfer their intellectual property in the goods to the buyer under Article 30 of the CISG. Apart from the detailed discussions of Article 42 of the CISG, there is little research on intellectual property and the CISG. Nevertheless, lawyers from outside continental Europe might classify intellectual property law as part of "property law".[423]

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420 See below paras. 220 et seq.

421 For example, under sect. 947(2) German Civil Code and Art. 727(2) Swiss Civil Code.

422 In cases of *bona fide* acquisitions, the buyer may even receive a greater interest than the seller has had.

423 For example, *Trakman/Walters/Zeller*, 6 European Data Protection Law Review (2020), 243, 254–255 argue that data sales could be sales under the CISG since data was intellectual property and, therefore, a form of property that is being sold existed. Cf. *Dreier*, pp. 116, 123.

Intellectual property rights include patents, trademarks, service marks, commercial names and designations, appellation of origin and copyrights.[424] If such rights are sold and transferred on their own, such contracts might be considered sales contracts but would not concern a sale of goods, and, consequently fall outside the scope of the CISG.[425] In the case of a sale of goods, sellers under the CISG are not required to also transfer their intellectual property rights in the goods if they have such rights.[426] The intellectual property right is an independent legal position that exists without regard to specific goods.[427] The intellectual property is itself the *res* or thing, but a different thing than the goods.[428] Thus, sellers do not retain rights in the goods if they do not transfer their intellectual property rights concurrently with the property in the goods. Intellectual property, hence, does not form part of "property" under Article 30 of the CISG as interpreted here, since it is not a legal interest in the goods, but an independent legal interest. **181**

A different question in this regard is to what extent sellers are allowed to rely on their intellectual property rights toward the buyer and potential sub-buyers. It is obvious from Article 42 of the CISG that goods that are subject to intellectual property rights can still be sold under a CISG contract.[429] While this provision addresses intellectual property rights of third parties, it is notable that the CISG does not address the question of the seller's intellectual property rights explicitly. During the many years leading up to the CISG in 1980, this question seems not to have been raised. As with the differences in the transfer of property under national law, the regulation of national intellectual property rights differs widely. Notwithstanding international conventions like the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), central questions that are relevant in this regard have not been regulated therein. For example, under the doctrine of exhaustion, a party may not rely on an intellectual property right with regard to specific goods as soon as they have (rightfully) entered circulation in a specific market.[430] Alternatively, one may consider certain simple licenses to be concluded between parties to a sales contract that also prevent sellers from relying on their rights (at least to the agreed upon extent). **182**

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424 Kröll/Mistelis/Perales Viscasillas/*Kröll*, Art. 42 para. 12; *Achilles*, FS Schwenzer, p. 1.
425 *Schmitt*, CR 2001, 145, 152.
426 *Neumann*, 21 VJ (2017), 109, 116; *Muñoz*, 24 Uniform Law Review (2019), 281, 286.
427 *Hayward*, 44 UNSW Law Journal (2021), 878, 904 fn. 194. *Bridge/Gullifer/Low/McMeel*, para. 9-003; *Green*, pp. 78, 85; cf. the legal separation between property in things and the IP rights exemplified by references to US, English, and German law, *Praduroux*, pp. 51, 65–66.
428 *Bridge/Gullifer/Low/McMeel*, para. 9-003; *Low/Lin*, 27 Journal of Environmental Law (2015), 377, 402; cf. *Gretton*, 71 RabelsZ (2007), 802, 846–847.
429 Staudinger/*Magnus*, Art. 1 para. 57.
430 See for example, *Torremanns*, p. 424; *MacQueen/Waelde/Laurie*, p. 821.

183 The CISG is not concerned with the specific manner in which national law regulates or arranges the protection of the buyer against the seller in this regard. Of course, parties are free to agree on specifics in their contract under Article 6 of the CISG.[431] If the parties have not explicitly regulated the matter, in line with Articles 42(1) and 7(1) of the CISG, sellers should be considered obliged not to raise their intellectual property rights against the buyer or any sub-buyers with regard to the goods sold in the State where the goods will be resold or otherwise used, if it was contemplated by the parties at the time of the conclusion of the contract that the goods would be resold or otherwise used in that State; or in any other case, under the law of the State where the buyer has their place of business.

e) Accessories to the goods

184 National property laws can differ in the delineation of a thing as a part of the goods in being subject to the same property right or having a separable property right attached to it. However, for purposes of the CISG, Article 30 and the proposed definition of "property" render this differentiation meaningless. The drafts of 1951 and 1963 explicitly mentioned the seller's obligation to deliver the goods and "*their accessories*".[432] In proposing to delete "*their accessories*" from the wording *Davies*, as a delegate of the United Kingdom, highlighted with support from *Loewe* that either the accessories were part of the goods in which case no need for referring to them existed or they were not and, accordingly, should not be governed by the uniform sales law.[433] Yet, this statement should not be interpreted to mean that national

431 MüKoBGB/*Gruber*, Art. 42 para. 9 highlights that in case of a process patent of the seller, the buyer will nevertheless be allowed to such use of the goods due to party agreement. The potentially opposing decision by the District Court Midden-Nederland, 25 March 2015, CISG-online 2591, where the court found an agreement that the buyer was not allowed to transfer the rights granted (for example by reselling the software) was invalid under Art. 4, s. 2(a) CISG in combination with Dutch law, should not be followed. Such an agreement could place the contract outside the CISG's scope, if it renders the contract a mere licensing agreement, but the parties' agreement is inappropriately clipped if the contract is characterized as a sale which in turn renders the non-resale clause invalid.

432 Art. 18 draft of 1951: "*Le vendeur s'oblige à effectuer la délivrance de la chose à l'acheteur; le vendeur doit remettre á l'acheteur, en même temps que la chose, tous les accessoires de celle-ci.*"; Art. 20 draft of 1963: "*La délivrance consiste dans la remise d'une chose conforme au contrat et de ses accessoires*"/"*Delivery consists in the handing over of goods which conform with the contract and their accessories*", Diplomatic Conference on the Unification of Law Governing the International Sale of Goods, The Hague, 2–25 April 1964, Vol. II – Documents, p. 215.

433 Diplomatic Conference on the Unification of Law Governing the International Sale of Goods, The Hague, 2–25 April 1964, Vol. I – Records, p. 42. Similarly, *Evans* shortly before the final vote was taken, Diplomatic Conference on the Unification of Law

law decides when accessories form part of the goods. As *Ulrich Huber* has correctly pointed out with regard to Article 18 of the ULIS, whether the accessories have to be delivered and property in the goods has to be transferred under Article 30 of the CISG is a question of contract interpretation: What have the parties considered to be the "goods"?[434]

2. Advantages of this approach

185 The proposed definition and interpretation of Article 30 has multiple advantages in the interpretation of the CISG. First, it is more in line with the wording of Article 41 of the CISG and the liability for third party rights under this provision. Second, the interpretation has regard to the CISG's need to promote uniformity in its application under Article 7(1). Third, it allows for an improved delineation between the obligation to transfer the property in Article 30 and the obligation to deliver goods free from third party rights and claims under Article 41 of the CISG.

a) The wording of Article 41 of the CISG and third parties

186 The proposed definition avoids considering the seller a third party under Article 41 of the CISG or applying the provision analogously.[435] Thereby, it is more in line with a literal reading of the Convention's text. Article 41 speaks only of rights and claims of third parties and does not mention the seller's rights or claims. Under the proposed definition of "property" in Article of the 30 CISG, the seller's legal interest in the goods is encompassed by the obligation to transfer the property. At the same time, this obligation also encompasses lesser interests than property, thus doing away with the need to apply Article 41 with regard to the seller. Only as far as third parties are concerned, Article 41 provides the respective obligation. Since "property" under Article 30 of the CISG is not affected if a third party has a better right in the goods than the seller, this provision is not breached by third parties' interests.

187 One may argue that this would deprive the buyer of being able to rely on a "claim" by the seller as a breach of contract, since Article 30 of the CISG

Governing the International Sale of Goods, The Hague, 2–25 April 1964, Vol. I – Records, p. 166.

434 Dölle/*U. Huber*, Art. 18 EKG paras. 23, 24.

435 As is proposed under approach 3, for example, W. Witz/Salger/M. Lorenz/*Salger*, Art. 41 para. 8 (seller can be "third party"), see above para. 166. This differentiation between Arts. 30 and 41 CISG is overlooked also in the realm of software transactions by *Primak*, 11 Computer L. J. 197 (1991), 197, 223–224; *Larson*, 5 Tulane Journal of International and Comparative Law (1997), 445, 468; *Mowbray*, 7 VJ (2003), 121, 124.

is in this regard not as broad as Article 41 of the CISG. *Hachem*, for example, argues that if the seller retains property without consent of the buyer, it would not be relevant whether this retention of property is effective, since in the case of effectiveness Article 30 would be breached; and in the case of ineffectiveness this would still amount to a "claim" of the seller under Article 41.[436] This would render the CISG similar to French law and its "*garantie du fait personnel*" under Articles 1626 et seq. of the French Civil Cod discussed above.[437] Yet, in contrast to the wording of Article 1626 of the French Civil Code, Article 41 of the CISG is limited to rights and claims of third parties. Given that the CISG refers to the buyer, the seller, and third parties, it is unconvincing to treat the seller as a third party. Furthermore, notwithstanding the obvious stretch of the wording "third party" in Article 41 of the CISG underlying this interpretation, it is not obvious why the allegation of a non-existent legal position of the seller with regard to his or her rights in the goods should be treated any differently than any other allegation by the seller. If the seller (incorrectly) claims that the parties subsequently agreed on a higher price, the legal consequences that follow between the parties should be identical. Therefore, the solution for unfounded allegations between the parties has to be found outside Article 41 of the CISG, thus rendering the extended interpretation as to the persons covered unnecessary.[438]

b) Uniformity and Article 7(1) of the CISG

188 Moreover, the proposed definition of property under Article 30 of the CISG is more in line than the existing approaches with the mandate of Article 7(1) to interpret the CISG in a way which promotes uniformity in its application. As illustrated above, national laws vary in their definitions of property, with some considering it an absolute right, others a relative right, and some not emphasizing the concept at all.[439] The seed carrying the risk of misunderstandings is already planted when interpreting "property" in Article 30 of the CISG as referring to the respective national notions: The fruits of which can be found in statements like *"*[t]*hese obligations* [under Article 30] *would include* […] *transferring the property but not the passing of title.*"[440] While this might assume a relative notion of property that differs from title, the German courts' decisions have shown that an absolute notion of property

436 BeckOGK/*Hachem*, 01.03.2021, Art. 41 CISG para. 15.1. MüKoHGB/*Benicke*, Art. 41 para. 6 also supports applying Art. 41 CISG to claims of the seller.

437 See above para. 95.

438 For example, *Bridge*, International Sale of Goods, para. 11.41 proposes a principle of non-interference under Art. 7(2) CISG.

439 See above paras. 38 et seq.

440 *A. Butler*, § 4.03.

can also be assumed,[441] leading to contradicting interpretations, and consequently different results under Article 43 of the CISG. While Roman law may have solved this problem of multiple relevant notions of property by avoiding an obligation to transfer unencumbered property,[442] the proposed definition of property under Article 30 of the CISG is a different solution that can cater to the different notions of property under national law.

189 The proposed definition of "property" also accommodates the Nordic approach to property, since it does not lead to different results depending on whether the national law even makes use of a singular concept like property. It also accommodates, for example, the feature of the UCC that considers the retention of property to merely have the effect of a security interest under section 2-401(1), sentence 2 of the UCC. For purposes of the CISG, this legal consequence on property under the UCC would only be relevant regarding Article 30 CISG, irrespective of the national concept (property under national law or security right) employed. The proposed definition also rebuts the concerns raised by a Spanish delegate in 1964 (*Olvivencia-Ruiz*). He argued that the obligation to transfer the property would produce uncertainty, since it is not foreseeable which court would hear the matter and accordingly which rules of private international law would apply.[443] Since the scope of property is no longer tied to the national concept, the obligation to transfer the property under Article 30 of the CISG is less dependent on the potentially diverging law applicable to property.

c) Improved delineation of Articles 30 and 41 of the CISG

190 Applying the proposed definition of property under Article 30 of the CISG, the delineation between the obligation to transfer the property under Article 30 and the obligation to deliver the goods free of third party rights or claims under Article 41 becomes straightforward: Who has or claims to have rights in the goods? The proposed definition of "property", thus, leads to a personal distinction in the scope of application of both provisions rather than a right-specific distinction. This distinction allows courts and parties to more accurately address the legal problems that arise under sales contracts regarding legal defects. The following sub-sections show that the definition specifically allows the relationship between Article 30 and 41 of the CISG to be interpreted with more accuracy and precision regarding the relevant

441 See above paras. 154 et seq.

442 See above para. 90.

443 Diplomatic Conference on the Unification of Law Governing the International Sale of Goods, The Hague, 2–25 April 1964, Vol. I – Records, p. 98. *Gutzwiller* in contrast argues that this uncertainty did not exist due to the majority of countries following the *lex rei sitae*-rule, Diplomatic Conference on the Unification of Law Governing the International Sale of Goods, The Hague, 2–25 April 1964, Vol. I – Records, p. 99.

points in time of the respective obligations, assessing the modifications of the CISG of both obligations under Article 6, the dispute as to whether Article 46(1) or 46(2), (3) of the CISG are applicable to legal defects, and the scope and application of the buyer's duty to notify the seller of the legal defect under Article 43 of the CISG.

aa) Relevant point(s) in time

191 The relevant point(s) in time for Articles 30 and 41 of the CISG differ, i. e., when the seller has to transfer his or her legal interest and when the goods have to be free from rights and claims of third parties.

(1) Relevant point in time under Article 30 of the CISG

192 Notably, Article 30 of the CISG does not expressly state when the seller has to fulfill the obligation to transfer the property. Nevertheless, the question of "when" cannot be left unanswered as the remedial system of the CISG requires to identify a definitive point in time at which the contract was breached. The question to be discussed here is not when property passes under national law, but when the seller is required to fulfill the respective obligation under the CISG to avoid breaching the contract.

193 *Piltz* argues that although the relevant point in time is not stipulated expressly in the CISG, the provision governing the time of the delivery (Article 33 of the CISG) could be applied accordingly.[444] This would mean that generally property would have to be transferred "within a reasonable time after conclusion of the contract" (in line with Article 33(c)). This reasoning disregards that the seller can "deliver" goods under the CISG before the buyer gets possession of the goods. This is especially true if the contract calls for carriage of the goods. Under Article 31(a) of the CISG, sellers are deemed to have delivered the goods as soon as they hand them over to the first carrier for transmission to their buyer. An interpretation that requires sellers to transfer the property concurrently with the delivery, would result in breaches of Article 30 of the CISG if the goods are located in a country of a legal system that considers the transfer of property to require a handover of the goods. The seller may have handed the goods over to the first carrier (Article 31(a) of the CISG) within a reasonable time after conclusion of the contract (Article 33(c) of the CISG), but in many cases, the handing over to the buyer might still be pending. Thus, the rule is ill-suited for determining the relevant time for the obligation to transfer the property. Based on the same reasoning, the time at which risk passes under Article 36 of the CISG is also inappropriate.

444 Kröll/Mistelis/Perales Viscasillas/*Piltz*, Art. 30 para. 15.

Yet another argument proposes building on Article 58(1), sentence 2 of the CISG to find that property has to be transferred at the latest when the buyer pays the price. Under this provision, the seller is allowed to condition the handing over of the goods on the payment of the price, which is why – *a fortiori* – the seller should be allowed to hold back the transfer of property.[445] The argument might appear circular: Article 58 is first and foremost a provision that governs when the price becomes due.[446] As far as Article 58 can be used to establish a concurrent performance of obligations, the wording references the delivery and documents controlling the disposition of the goods. The fact that two of three parts of Article 30 (delivery and documents) are referenced in Article 58(1) reveals a presumption of the *a fortiori* argument. It presupposes that the seller is allowed to deny both the handing-over of the goods and the transfer of property, while the latter is not mentioned in the wording. It might, thus, be that the seller is not left with less (i. e., only property instead of possession and property), but rather with something different (i. e., only property instead of possession and property). Yet, there is nothing in the CISG that indicates that the transfer of property has to be effected before the goods are handed over. The underlying idea of Article 58(1), sentence 2, which safeguards sellers from having to part from the goods without payment if no deviating agreements have been concluded, extends to the transfer of their legal interest in the goods. The right to withhold the handing over might otherwise be undermined if buyers or their creditors would already be in a legal position to claim possession of the goods without prior payment. Moreover, if parties have not agreed on a later payment, buyers' interest in receiving the legal interest in the goods before payment seems unworthy of protection since buyers will themselves be in breach of contract if they have not paid for goods already received. Therefore, the relevant point in time when the seller has to transfer the property under Article 30 of the CISG is, at the latest, the payment of the goods due to the underlying idea of Article 58(1), sentence 2 of the CISG. If the parties have agreed that the goods have to be handed over and that the price only has to be paid later in deviation from this provision, the contract has to be interpreted to determine whether this also untied the obligation to transfer the property from the payment.[447] **194**

445 Schlechtriem/*U. Huber*, 3rd German edn, Art. 30 para. 8; MüKoBGB/*Gruber*, Art. 31 para. 29; Schlechtriem/Schwenzer/Schroeter/*Widmer Lüchinger*, 8th German edn, Art. 30 para. 11; Kröll/Mistelis/Perales Viscasillas/*Piltz*, Art. 30 para. 17.

446 *Schlechtriem/Schroeter*, paras. 503, 527; *Schroeter*, Internationales UN-Kaufrecht, paras. 603, 635.

447 MüKoBGB/*Gruber*, Art. 31 para. 29; Schlechtriem/Schwenzer/Schroeter/*Widmer Lüchinger*, 8th German edn, Art. 30 para. 11 who generally considers the obligation for advance performance to only apply to the obligation to deliver the goods, and not

(2) Relevant point in time under Article 41 of the CISG

195 In contrast to Article 30 of the CISG, the wording of Article 41 of the CISG indicates a relevant point in time, since the seller has to "deliver" goods which are free from any right or claim of a third party. As "delivery" is a term of art under the CISG, one could argue in full accordance with the wording that the relevant point in time is the delivery of the goods under Article 31 of the CISG. This is in fact the general opinion held by most scholars.[448] A generally accepted exception exists with regard to claims under Article 41 of the CISG, which will be discussed below.[449]

196 *Tebel* has recently highlighted that under the CISG, Article 35(1) contains similar wording to Article 41 with regard to the relevant point in time, while Article 36 nevertheless ties the relevant point in time for Article 35 to the moment when the risk passes.[450] He concludes that the wording of Article(s) 41 (and 42) should not be considered to determine the relevant point in time.[451]

197 Moreover, with regard to Article 42 of the CISG he reasons extensively why Article 36 of the CISG and, thus, the transfer of risk should be applied analogously to determine the relevant point in time.[452] The practical difference between the delivery and passing of risk as the relevant point in time under the CISG exists with regard to delivery under Article 31(b) and (c): The seller has delivered the goods when he or she places the goods at the buyer's disposal, which does not necessitate that the buyer is already in factual possession of the goods.[453] By contrast, risk is only transferred under Article 69(1) of the CISG when the buyer takes over the goods. If the transfer of risk was the relevant point in time, through an analogous application of Article 36 of the CISG regarding Articles 41 and 42 of the CISG, the relevant point in time would be later than if the delivery of the goods in line with the wording of Articles 41 and 42 determined the relevant point in time.

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to extend to the transfer of property; with less emphasis on the parties' agreement in this regard Staudinger/*Magnus*, Art. 30 para. 12.

448 Kröll/Mistelis/Perales Viscasillas/*Kröll*, Art. 41 para. 29; MüKoBGB/*Gruber*, Art. 41 para. 16; *Herber/Czerwenka*, Art. 41 para. 8; contra Schweizer Botschaft BBl 1989 I, 745, 794 deeming the contract conclusion to be the relevant point in time.

449 See below paras. 224 et seq.

450 *Tebel*, para. 482.

451 *Tebel*, para. 483.

452 *Tebel*, para. 511. It is unclear whether Soergel/*Willems*, Art. 41 para. 8 follows this approach, since the author considers Art. 36 CISG to contain the relevant point in time but at the same time writes that the relevant point in time is the delivery of the goods.

453 Schlechtriem/Schwenzer/Schroeter/*Widmer Lüchinger*, 5th edn, Art. 31 paras. 47 et seq.

Tebel's main argument in favor of an analogous application of Article 36 of the CISG and, thus, the transfer of risk, is that the later point in time would be in the interest of both the buyer and the seller.[454] He argues that on the one hand, the seller thereby has more time to remove legal encumbrances without already breaching the contract. On the other hand, the seller bears no additional risk of any new encumbrances after contract conclusion, since the seller's liability is limited to those encumbrances he or she knew of or could not have been unaware of at the time of contract conclusion. **198**

Yet, this limitation of the seller's liability only applies to Article 42 of the CISG, while the seller's liability under Article 41 of the CISG is not restricted to rights or claims he or she knew of or could not have been unaware of at the time of contract conclusion. Therefore, irrespective of whether this reasoning is convincing with regard to Article 42 of the CISG, it cannot be extrapolated to Article 41 of the CISG. The parties do not share an interest, as sellers prefer an early point in time to not become liable for later arising rights and claims, and buyers prefer a later point in time to still be protected accordingly from any new rights and claims, the parties' interest does not favor one point in time over the other. **199**

Moreover, the analogous application of Article 36 of the CISG would require that the parties share a comparable interest as to the relevant point in time for the liability due to non-conformities under Article 35 and third party rights and claims under Articles 41 and 42. Yet, the seller will generally be able to prevent (physical) the development of non-conformities under Article 35 between delivery and the buyer taking over the goods due to a typically closer connection to the place at which he or she places the goods at the buyer's disposal than the buyer. The seller under the CISG, consequently, will generally accept the later relevant point in time under Article 36 for non-conformities under Article 35. By contrast, the factual control over the goods and the place where the goods are located does not enable the seller to prevent third party rights or claims from arising to a comparable degree. A third party may allege having received a right in the goods after delivery of the seller but before transfer of the risk, and this allegation is independent from which party had control over or possession of the goods. Therefore, the seller's willingness to accept a later point in time as delivery under Article 36 of the CISG, also with regard to third party rights and claims under Articles 41 and 42 of the CISG, is not comparable to the respective willingness with regard to non-conformities under Article 35 of the CISG. **200**

The overwhelming majority of scholars are thus correct in taking the wording of Article 41 of the CISG literally to determine that delivery is the generally relevant point in time. **201**

454 *Tebel*, paras. 501 (buyer's interest), 502 (seller's interest).

(3) Advantages of a distinction regarding the relevant point in time

202 Mixing third party rights and the seller's legal interest either under Article 30 of the CISG (in considering it to contain an obligation to transfer unencumbered property) or under Article 41 of the CISG (in considering Article 30 to be a mere overview of the seller's obligations) obfuscates the different considerations at play in determining the relevant point in time. Differentiating the CISG's obligations under Articles 30 and 41 by the persons concerned, in contrast, reveals and accommodates these differences.

203 Since many national laws generally require the buyer to take possession of the goods before the transfer of property can be considered to have occurred, attaching the relevant point in time for the seller's obligation to transfer the property to delivery or the passing of risk would lead to many breaches of contract.[455] In turn, attaching the obligation to deliver goods which are free from third party rights and claims to the payment of the goods in line with Article 58(1), sentence 2 of the CISG would violate the wording of the respective provisions (Articles 58 and 41 of the CISG). It would, furthermore, be to the detriment of the seller who can generally rely on the delivery to constitute the point in time after which the buyer should bear the risk of any new rights and claims.

204 Considering the obligations under Articles 30 and 41 of the CISG to be subject to different relevant point in times, moreover, safeguards the sellers' interest in being paid before having to transfer their legal interest in line with Article 58(1), sentence 2 of the CISG, while not exposing sellers to the risk that the buyer takes delivery of the goods and refuses payment based on existing third party rights having impeded him or her from receiving unencumbered property in the sense of national law. This brings Article 41 of the CISG in line with Article 35 of the CISG. Under the latter provision, most scholars do not accept a general right to suspend performance in case of a breach of contract, but instead require a fundamental breach or a similar threshold to be surpassed.[456]

(4) Summary

205 With regard to the seller's obligation to transfer the property under Article 30 of the CISG, generally the payment of the price in combination with Article 58(1), sentence 2 of the CISG is the relevant point in time. In contrast, with regard to Article 41 of the CISG and third party rights or claims,

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455 It is conceded that the practical consequences of this particular kind of breach of contract are slim to non-existent.

456 See on this general right to retention, Schlechtriem/Schwenzer/Schroeter/*Mohs*, 8th German edn, Art. 58 para. 28.

the relevant point in time is generally the delivery of the goods. The proposed definition of "property" allows differentiating the relevant point in time in this dogmatically coherent fashion.

bb) Assessing modifications of both obligations under Article 6 of the CISG

Parties can make different agreements regarding the seller's obligation to transfer the property and the liability for third party rights and claims under Article 6 of the CISG. A distinction arising from the proposed definition of 'property' regarding whether the seller or a third party has a legal interest in the goods also provides more clarity in this regard. **206**

As far as the seller and the buyer agree on warranty exclusion or caveat emptor, this should only be considered to exclude the liability of the seller for third party rights and claims under Article 41 of the CISG. Whether this exclusion is valid has to be decided in line with the applicable national law due to Article 4, sentence 1(a) of the CISG.[457] Under the proposed definition, the constellation in which the seller is not the (absolute) owner of the goods and the buyer cannot, for whatever reason, become the owner in a *bona fide* acquisition would still only constitute a breach of Article 41 of the CISG. It would, therefore, also be covered by the exclusion of liability as far as it is valid under national law. The contrasting opinion by the District Court Freiburg which held that exclusion of liability did not extend to the seller's main obligation (*Hauptpflicht*) of transferring the property[458] could stem from a fundamentally different understanding of Article 30 of the CISG. This could be avoided by adhering to the distinction made through the proposed, autonomous definition of property. **207**

As far as the seller's legal interest in the goods is concerned (i. e., property under Article 30 of the CISG), the exclusion of the obligation to transfer his or her legal interest might shift the contract out of the scope of the Convention. This is because a sales transaction is characterized by the definitive allocation of goods from the seller to the buyer.[459] The parties can, however, agree that the legal interest has to be transferred upon full payment under **208**

457 Schlechtriem/Schwenzer/Schroeter/*Schwenzer/Lutzi*, 8th German edn, Art. 41 para. 19a. Cf. for example, sect. 2-312(2) UCC, Art. 192(3) Swiss Code of Obligations, Art. 1627 et seq. French Civil Code. Notably, *Magnus* argues that the CISG provides the standard of review, which he claims does not prevent a full exclusion of liability since the CISG considers the seller not to be liable for legal defects if the buyer agrees to take the goods subject to the right or claim, Staudinger/*Magnus*, Art. 41 para. 21.

458 District Court Freiburg, 22 August 2002, CISG-online 711: "*Ein Gewährleistungsausschluss ist nach dem Inhalt des Kaufvertrags nicht vereinbart, die Hauptpflicht der Eigentumsverschaffung würde von einem solchen ohnehin nicht erfasst.*"

459 See below paras. 325 et seq.

the contract or even of prior contracts only. This should only be interpreted to amend Article 30 of the CISG and not its Article 41: The buyer still expects that no third party rights or claims exist with delivery of the goods and merely accepts that the seller retains an interest in the goods to secure the claim for the price. The personal differentiation between Articles 30 and 41 of the CISG, hence, allows for an appropriate differentiation also with regard to parties' amendments of the CISG under Article 6.

cc) Claim for performance under Article 46(1) or 46(2), (3) of the CISG

209 The proposed delineation also limits the discussion under the CISG as to whether Article 46(1) CISG or Article 46(2) and (3) contain the buyer's performance claim in case of legal defects. If the seller is the owner of the goods and merely decides not to transfer the property, Article 46(1) provides the buyer with a claim for performance. This claim can be limited under Article 28 of the CISG depending on the applicable law of the forum. If, in contrast, a third party has a right in the goods and (only) Article 41 of the CISG is consequently breached, it is disputed whether Article 46(2), (3) is applicable instead of Article 46(1),[460] and whether Article 28 of the CISG is applicable.[461] Since nobody argues that these discussions extend to the situation in which it is merely the seller who does not transfer his or her legal interest in the goods, the proposed definition of "property" allows the discussion to be limited to breaches of Article 41 of the CISG. This restriction of the discussion respects that the seller's obligation to transfer the property under Article 30 of the CISG should not be subject to the limitations of Article 46(2), (3) of the CISG as this would in effect deviate from the general (civil law) approach toward performance claims that underlies the CISG.[462]

dd) Article 43 of the CISG

210 The existing approaches have provoked questions as to whether they produce sensible results with regard to Article 43 of the CISG and its duty of notification. As mentioned, if Article 30 of the CISG is seen as a mere overview of the seller's obligations, and Article 41 of the CISG were also to cover the seller's rights in the goods (approach 3), then it seems inappropri-

460 In favor, CISG AC Opinion 21 (*Schwenzer/Beimel*), para. 3.7; contra for example, *Metzger*, 73 RabelsZ (2009), 842, 848.

461 CISG AC Opinion 21 (*Schwenzer/Beimel*), para. 3.3. Notably, with regard to Art. 28 CISG it has not been clearly established how mere "claims" are to be treated if the law of the forum does not recognize such a broad liability for legal defects.

462 See for this general stance of the CISG, Kröll/Mistelis/Perales Viscasillas/*P. Huber*, Art. 46 para. 1.

ate to burden the buyer with a duty to notify under Article 43 of the CISG, although the seller knows (or at least has to know) that he or she retained rights in the goods in breach of the contract: The purpose of the duty to notify under Article 43 of the CISG is to inform the seller of the legal defect, which is unnecessary if he or she already knows about it.[463] In contrast, if Article 30 of the CISG were considered to contain an obligation to transfer unencumbered property (approach 1), Article 43 of the CISG would not apply to a breach of Article 30 of the CISG in cases in which the seller does not retain rights, but rather third parties' rights prevent the seller from being able to transfer property in the goods.[464]

Both alleged shortcomings could, at first sight, be remedied by highlighting Article 43(2) of the CISG which discharges buyers from their duty to notify if the seller knew of the right and its nature.[465] Yet, this interpretation is once again not supported by the wording: Article 43(2) of the CISG speaks of rights or claims of a third party and does not mention the seller's rights or claims. Alternatively, one may propose applying Article 43 of the CISG analogously to Article 30 of the CISG.[466] Yet, if one accepts the proposed definition of property under Article 30, and consequently differentiates Articles 30 and 41 with regard to the person holding or claiming the right, Article 43 fits squarely with the legal opinions underlying the criticisms without the need to recur on analogies or similar legal tools: As far as third party rights are concerned, the seller has to be informed by the buyer if the former has no knowledge of them, and as far as the seller retains rights, no notification under Article 43 of the CISG is necessary, since the buyer can rely on a breach of Article 30 of the CISG without being required to notify the seller under Article 43 of the CISG. **211**

d) Summary

The proposed definition and interpretation of Article 30 brings about multiple advantages in the interpretation of the CISG. First, it is more in line with the wording of Article 41 of the CISG and the protection from third party rights under this provision. Second, the interpretation has regard to the need to promote uniformity in its application under Article 7(1). Third, the proposed definition allows for a more cohesive and accurate depiction of how Article 30 interacts with Article 41, particularly concerning the relevant points in time of the respective obligations. It also aids in assessing modifications to these obligations under Article 6, resolving disputes over **212**

463 Cf. MüKoHGB/*Benicke*, Art. 41 para. 6.
464 Cf. *Kiene*, IHR 2006, 93, 96.
465 For example, Brunner/Gottlieb/*Tebel*, Art. 41 para. 17 fn. 1513.
466 *Bach*, IPRax 2009, 299, 303.

the applicability of Article 46(1) versus 46(2) and (3) to legal defects, and clarifying the scope and application of the buyer's duty to notify the seller of legal defects under Article 43.

3. Consequences for the type of obligation found in Article 30 of the CISG

213 If one accepts the proposed interpretation of "property" in Article 30, the question remains whether the CISG contains an obligation to fulfill the necessary acts for the transfer of property and/or an obligation to transfer unencumbered property. The obligation to transfer the property under Article 30 of the CISG is shaped around a result to be achieved. It is breached if the buyer does not receive the seller's legal interest in the goods. In a strict sense, it can, thus, not be an obligation to fulfill the necessary acts for the transfer of property. The latter would be concerned with the acts necessary to transfer property without taking into account whether the result (i. e., buyer becoming the owner of the goods) was actually achieved. Yet, it cannot be denied that the situation in which the buyer does not receive the seller's legal interest in the goods will generally be due to the failure of seller to fulfil the acts necessary under national law to transfer such interests. Therefore, from a practical perspective, there is a large overlap of the obligation to transfer the property under Article 30 of the CISG and an obligation to fulfill the necessary acts for the transfer of property.

214 Since it is not relevant under Article 30 of the CISG whether a third party has any right in the goods, the obligation to transfer the property cannot be characterized as an obligation to transfer unencumbered property. The property the buyer receives does not have to be unencumbered for purposes of Article 30 of the CISG (in contrast to Article 41 of the CISG as will be discussed below).

215 If the seller under the CISG breaches the obligation to transfer the property under Article 30, the buyer can rely on the remedies provided by Article 45(1). Yet, to understand the relevance of the obligation to transfer the property fully, one last discussion has to be introduced. Under Article 49(1) of the CISG, there are two pathways for buyers to avoid the contract in case of a breach of contract: Either buyers set an additional period of time after which they can avoid the contract in case of non-delivery (Article 49(1)(b)) or there is a fundamental breach under Article 25 (Article 49(1)(a)). *Kröll* argues that a non-delivery under Article 49(1)(b) exists if the seller retains rights (for example property) in the goods and thereby breaches Article 30.[467] This discussion remains relevant under the proposed definition

467 Kröll/Mistelis/Perales Viscasillas/*Kröll*, Art. 41 paras. 21, 43 fn. 50.

of property under Article 30 of the CISG, since the case in which the seller retains rights in the goods is a type of non-transfer of property under this provision.

216 However, to equate the non-transfer of property with a non-delivery under Article 49(1)(b) is not convincing. The wording "not deliver" in the latter provision references the part of Article 30 of the CISG that speaks of "delivery" and its specification in Articles 31–33 of the CISG. One may counter that it is mostly uncontroversial that the lack of handing-over of certain documents under Article 30 of the CISG can also amount to a non-delivery under Article 49(1)(b) of the CISG.[468] Consequently, if both delivery and the handing over of documents under Article 30 of the CISG are considered relevant under Article 49(1)(b) of the CISG, there is no further differentiation in the wording to explain why only the obligation to transfer the property under Article 30 of the CISG merits a deviating interpretation.

217 Yet, not all failures to hand over documents under Article 30 of the CISG are considered to be a non-delivery. Only those cases in which the documents are necessary to receive the goods or dispose of them are considered to be relevant under Article 49(1)(b) of the CISG.[469] Hence, no comprehensive systematic argument can be made that that the failure to comply with obligations under Article 30 of the CISG apart from the obligation to deliver would lead to a non-delivery.

218 Furthermore, the purpose of the avoidance-regime of the CISG and the relaxation of the requirement of a fundamental breach in cases of non-delivery is the interest of preventing additional transport of the goods back to the seller including the associated costs and risks.[470] However, these costs and risks are present if the seller does not transfer the property in them despite having delivered: The goods will have to be transported again in case of avoidance of contract. Therefore, the additional pathway for the buyer to avoid the contract under Article 49(1)(b) of the CISG is not justified. Moreover, at several points in time during the drafting of the CISG, allowing for avoidance after an additional period of time in cases of non-transfer of property was considered, but ultimately the proposals were not successful.[471] The

468 At least as far as these documents are necessary to take delivery of the goods, MüKoBGB/*P. Huber*, Art. 49 para. 41, or if the documents are necessary to dispose of the goods, Brunner/Gottlieb/*Brunner/Leisinger*, Art. 49 para. 6; Kröll/Mistelis/Perales Viscasillas/*Bach*, Art. 49 para. 58.

469 Cf. the references in the prior footnote and *Singh/Leisinger*, 20 Pace International Law Review (2008), 161, 182.

470 MüKoBGB/*P. Huber*, Art. 49 para. 39.

471 UNCITRAL Yearbook VIII (1977), p. 121 para. 19; UNCITRAL Yearbook VIII (1977), p. 152 Art. 25 paras. 4–5.

transfer of property, hence, is not a relevant circumstance to decide whether the goods were delivered for purposes of Article 49(1)(b) of the CISG.[472]

219 Consequently, the transfer of property is irrelevant under Article 49(1)(b) of the CISG, and the breach of contract has to be assessed against the threshold of a fundamental breach under Articles 49(1)(a) and 25 of the CISG if the buyer intends to avoid the contract.

4. Obligation to transfer unencumbered property under Article 41 of the CISG

220 Although Article 30 of the CISG contains no obligation to transfer unencumbered property despite its wording, such an obligation could nevertheless be found elsewhere in the Convention. An assessment of Article 41 reveals that the provision in effect contains an obligation to transfer unencumbered property as far as it protects the buyer from third parties' rights.

221 Article 41 of the CISG stipulates that the delivered goods have to be "*free from any right or claim of a third party, unless the buyer agreed to take the goods subject to that right or claim.*" As noted above, *Rabel* rightfully considered an obligation to transfer unencumbered property to exist if the fact that the buyer does not become the owner of the goods is sufficient to be a breach of contract.[473] Yet, a few Swiss authors maintain that the mere existence of a right of a third party in the goods is insufficient to constitute a breach under Article 41.[474] In their opinion, additionally, the third party has to assert the right. They put a legal defect under Swiss unharmonized law on the same level as a legal defect under the CISG.[475] Similarly, French authors appear to interpret Article 41 to contain a protection against eviction, or at least that the mere existence of a third party right is not in and of itself a breach of contract.[476] However, taking into account the wording and

472 Same conclusion by MüKoHGB/*Benicke*, Art. 41 para. 28. Similarly, Staudinger/*Magnus*, Art. 49 para. 22.

473 See above para. 79.

474 BSK OR I/*Honsell*, vor Art. 192–196 OR, para. 9; *Bucher*, Neuerungen, pp. 27, 30; similarly, Schweizer Botschaft BBl 1989 I, 745, 794; similarly, Dölle/*U. Huber*, Art. 18 para. 16 regarding the seller's liability under the ULIS being based on eviction in principle.

475 BSK OR I/*Honsell*, vor Art. 192–196 OR, para. 9: "*Der Begriff des Rechtsmangels* [im CISG] *entspricht jenem des schweizerischen Rechts.*"

476 *Heuzé*, para. 319 refers to Art. 41 as "*la garantie d'éviction*" and only refers to examples in which the right has been raised toward the buyer. Similarly, *Schlechtriem/Cl. Witz*, para. 234 writing that Art. 41 would "*rappelle la garantie d'éviction du fait des tiers sous l'empire du Code civil (art. 1626 s.).* But see *Cl. Witz*, para. 335.21." Similarly, *Audit*, pp. 109–110 para. 113, who refers to a "*garantie contra l'éviction*" under the CISG and cites only examples in which the third party has at least raised a claim.

the additional protection from claims of third parties, the otherwise existing gap in the protection of the buyer and the historical record lead to a different conclusion: The mere existence of a third party right after delivery, such as property, is a breach of contract. It is probable that this interpretation is shared by most authors, but especially for commentators with a German legal education it might appear so obvious as to not require discussion.[477]

a) Wording and the additional protection from claims of third parties

222 The wording of Article 41 of the CISG requires nothing more than the existence of the right ("*free from rights*"). The possibility that the third party could claim a right is sufficient. This is supported by the additional protection from third party claims provided by Article 41. The following elaborations are intended to show that there is no scope for "rights" in Article 41 of the CISG other than to govern the situation in which the third party has not yet raised his or her right. Therefore, under the premise that the interpretation of claims put forward is correct, *Honsell* and *Bucher's* opinion would render "rights" under Article 41 of the CISG a legal nullity, and thus, is not convincing. The premise has two elements: First, apart from the mere existence of a third party right that has not been relied upon, there is no breach of contract by a right of a third party that is not at the same time a claim of a third party. Second, the buyer's remedies for rights of third parties are not more far-reaching than the remedies for a claim of a third party.

aa) Can there be a breach of contract by a right that is not at the same time a claim?

223 To understand whether there can be third party rights that a third party has brought forward in any way and whereby Article 41 of the CISG is breached, while not constituting a claim under the same provision, the scope of "claims" has to be analyzed. In contrast to a "right", a "claim" does not require the right to actually exist; it is sufficient that a third party claims the right to exist.[478] The historical record shows that both in the preparations of the ULIS and of the CISG, a delegate of Great Britain (*Davies*) and the Aus-

477 But see *Achilles*, Art. 41 para. 2.

478 *Honnold/Flechtner*, para. 346; Schlechtriem/Schwenzer/Schroeter/*Schwenzer/Lutzi*, 8th German edn, Art. 41 paras. 9–12; *Schlechtriem/Cl. Witz*, para. 235; Staudinger/*Magnus*, Art. 41 para. 15; MüKoBGB/*Gruber*, Art. 41 para. 6; MüKoHGB/*Benicke*, Art. 41 para. 8; BeckOGK/*Hachem*, 01.03.2021, Art. 41 CISG para. 12; Brunner/Gottlieb/*Tebel*, Art. 41 para. 11; BeckOK/*Saenger*, Art. 41 CISG para. 5; Ferrari/Kieninger/Mankowski/*Ferrari*, Art. 41 CISG para. 5; regarding the ambiguous German translation "*Ansprüche*" and the different meaning of *Ansprüche* under German national law (as defined in sect. 194 German Civil Code), see *Maier-Lohmann*, RIW 2021, 81, 83.

trian Government proposed to limit the seller's liability to existing rights, and were unsuccessful therein both times.[479] Buyers are not "*purchasing a lawsuit*"[480] and they have to be protected from having to quarrel with a third party that raises claims that buyers are not able to verify immediately.[481]

(1) Relevant point in time for the claim or the facts underlying the claim to exist

224 An additional relevance of "rights" of third parties would exist if claims under Article 41 of the CISG were required to have been raised before delivery.

225 If a claim is the mere allegation of a right, one could reason that the claim comes into existence at the point in time in which the third party first raises the claim. If one sets the relevant point in time as the delivery of the goods, in accordance with the wording ("*the seller has to deliver*"), one may follow *Enderlein* in his reasoning that such claims raised after delivery of the goods are not a breach of Article 41 of the CISG.[482] In that case, for claims raised by third parties after the relevant point in time, the buyer would have to prove the existence of a third party right to substantiate a breach of contract by the seller.

226 However, this reasoning would render "claims" nearly meaningless. It is realistic to assume that most claims will be raised vis-à-vis the buyer after the delivery and handing-over of the goods.[483] Therefore, it should rather be relevant that the facts underlying the claim by the third party precede the relevant point in time.[484] This is supported by the idea that in a typical international transaction it is reasonable for the seller to assume the risk that a third party claims to have rights in the goods.[485]

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479 Cf. the British proposal regarding Art. 52 ULIS and *Tunc*'s disapproving comments, Diplomatic Conference on the Unification of Law Governing the International Sale of Goods, The Hague, 2–25 April 1964, Vol. I – Records, p. 98, reported by *Riese*, 29 RabelsZ (1965), 1, 64 et seq.; cf. the Austrian proposal regarding the provision that became Art. 41 CISG, UNCITRAL Yearbook III (1972), p. 68 para. 73.

480 *Honnold/Flechtner*, para. 346.

481 German Supreme Court, 11 January 2006, CISG-online 1200; note by *Schroeter*, EWiR 2006, 427.

482 *Enderlein*, pp. 133, 179.

483 Schlechtriem/Schwenzer/Schroeter/*Schwenzer/Lutzi*, 8th German edn, Art. 41 para. 15; Ferrari/Kieninger/Mankowski/*Ferrari*, Art. 41 CISG para. 7.

484 MüKoHGB/*Benicke*, Art. 41 para. 13; Schlechtriem/Schwenzer/Schroeter/*Schwenzer/Lutzi*, 8th German edn, Art. 41 para. 15; Kröll/Mistelis/Perales Viscasillas/*Kröll*, Art. 41 para. 31; BeckOGK/*Hachem*, 01.03.2021, Art. 41 CISG para. 20.

485 *Schlechtriem*, Seller's Obligations, p. 6-32; BeckOK/*Saenger*, Art. 41 CISG para. 5; Schlechtriem/Schwenzer/Schroeter/*Schwenzer/Lutzi*, 8th German edn, Art. 41 para. 9; *Maier-Lohmann*, RIW 2021, 81, 82–83.

Consequently, the relevant point in time for Article 41 of the CISG leaves no additional relevance for "rights" of third parties. **227**

(2) *Bona fide* purchaser

Additionally, the rules of *bona fide* acquisition of property may create a point of relevance regarding rights not brought forward by a third party. This is because if no claim exists when the buyer has become the owner of the goods, then the buyer would have to prove that third party rights nevertheless exist. The only way to prove that might even be to prove that he or she has not become the owner of the goods under the rules of *bona fide* acquisition. **228**

Neumayer and *Ming* argue that in case the buyer has received property in the goods *bona fide*, he or she is already protected adequately by this legal status and does not require additional protection by Article 41 of the CISG.[486] This exception from the rule would, however, violate the purpose of protecting buyers of claims that they cannot easily verify or check.[487] Moreover, especially with regard to claims by third parties, the prerequisites of a *bona fide* acquisition may be subject to dispute.[488] Furthermore, there is no apparent reason why claims that were always mere allegations and claims that are based on rights that existed once but were overturned by way of *bona fide* acquisition, should be treated differently. **229**

Therefore, a *bona fide* acquisition of property does not negate the existence of a claim. Consequently, there is no additional scope of applications for "rights" of third parties under Article 41 of the CISG in this regard. **230**

(3) Threshold for existence of "claims"

Lastly, there could be an additional relevance of rights under Article 41 of the CISG if an elevated threshold was applied to "claims". This would in turn – until the third parties' behavior reaches the threshold of a claim under Article 41 of the CISG – render "rights" relevant apart from the situation in which the third party has not brought forward the claim at all. Three questions have to be distinguished: First, do frivolous or obviously unfounded claims qualify as "claims" under Article 41 of the CISG? Second, toward whom must the claim be raised? Third, are there any prerequisites for an allegation to be considered a "claim" under Article 41 of the CISG beyond a third party's mere expression of a right in the goods? **231**

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486 *Neumayer/Ming*, Art. 41 para. 4.

487 *Bridge*, International Sale of Goods, para. 11.41; BeckOGK/*Hachem*, 01.03.2021, Art. 41 CISG para. 6.

488 *Zhang*, p. 83.

(a) Frivolous or obviously unfounded claims of third parties

232 To date, there is no agreement whether frivolous or obviously unfounded claims should qualify as "claims" under Article 41 of the CISG.[489] Yet, this question does not merit deeper analysis, since this delineation is not relevant with regard to rights: If a frivolous or obviously unfounded claim is raised, this characterization already reveals that there is no right of a third party. Thus, even if such claims were not sufficient to constitute a breach under Article 41, this limitation in scope would not lead to a relevance of "rights" under this provision.

(b) Against whom must the claim be raised?

233 If there was a requirement that a claim has to be raised toward a certain party, for example the buyer, "rights" under Article 41 of the CISG would be relevant if the respective party was not directly informed by the third party. This would provide an additional scope of application of rights under Article 41 of the CISG apart from the situation in which the third party has not brought forward the claim at all.

234 Indeed, some scholars argue that a claim under Article 41 of the CISG only exists if the third party has raised the claim toward the buyer.[490] However, this interpretation is not convincing. The provision expressly states that the goods have to be free of "claims", in contrast to the buyer having to remain free from facing claims. Moreover, the wording "claim" does not necessarily require that a party claims to have a right toward a specific person. Further arguments follow from the purpose of the provision: As outlined above, the buyer is to be protected from having to quarrel with a third party that raises claims that he or she is not immediately able to verify.[491] The situation in which the third party directly approaches the buyer is, however, not the only

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489 Considering frivolous or obviously unfounded claims of third parties not to breach Art. 41 CISG, *Bridge*, The International Sale of Goods, para. 11.40; *Achilles*, FS Schwenzer, pp. 7–8; *Herber/Czerwenka*, Art. 41 para. 6; Schwimann/Kodek/*Posch/Terlitza*, Art. 41 CISG para. 4; *Schlechtriem*, Seller's Obligations, p. 6-32; contra, Staudinger/*Magnus*, Art. 41 para. 15; BeckOK/*Saenger*, Art. 41 CISG para. 5; Ferrari/Kieninger/Mankowski/*Ferrari*, Art. 41 CISG para. 5; P. Huber/Mullis/*Mullis*, p. 172; Kröll/Mistelis/Perales Viscasillas/*Kröll*, Art. 41 para. 19; MüKoBGB/*Gruber*, Art. 41 para. 8; MüKoHGB/*Benicke*, Art. 41 para. 10; Schlechtriem/Schwenzer/Schroeter/*Schwenzer/Lutzi*, 8th German edn, Art. 41 para. 10; explicitly leaving this question open, German Supreme Court, 11 January 2006, CISG-online 1200.

490 *Achilles*, FS Schwenzer, pp. 1, 6; MüKoHGB/*Benicke*, Art. 41 para. 8; *U. Huber*, 43 RabelsZ (1979), 413, 501 (the latter regarding the Art. in the New York draft (1978) that became Art. 41 CISG).

491 See above para. 223.

conceivable situation in which the buyer should not bear the risk of quarreling with the third party.

235 A case before the Court of Appeal Celle is well-suited to illustrate this argument:[492] A German company sold a vehicle to a Ukrainian buyer. When the latter transported the vehicle to the Ukraine, Polish authorities seized the car due to an alleged theft. They subsequently released the vehicle to a Hungarian company that claimed to have owned it when it was stolen. It is not apparent that the Hungarian company ever contacted the buyer. The former merely notified authorities that the vehicle had been stolen. The German seller had documents, however, that appeared to indicate that its respective German seller had already registered the vehicle in Germany before the alleged theft was said to have taken place. The Court decided that the buyer had not sufficiently proven that the Hungarian party as a third party had a "right" in the goods under Article 41 of the CISG. Unfortunately, the Court most likely misunderstood Article 41 to mean that only existing rights (and not claims) were sufficient to yield a breach of contract.[493] The case demonstrates that while the third party might not raise the claim toward the buyer, the goods might still be seized by public authorities. Under the applicable national law, this seizure might even be rightful. Nevertheless, the buyer would then be in the situation that a court might find that no "right" existed. In that case, the buyer would be forced to quarrel with the alleged owner of the goods, although this is exactly what Article 41 seeks to protect from. Thus, the purpose of Article 41 of the CISG requires an understanding of "claims" that is not dependent on whether the third party approaches the buyer.

236 Moreover, this is the only interpretation that avoids haphazard results with regard to losses other than legal costs for defending the claim: If a third party informs a potential buyer of the buyer about alleged rights he or she has in the goods, and the (sub-)buyer consequently refrains from buying the goods, the buyer has an interest in claiming damages against his or her seller for this claim by the third party. Irrespective of whether such a claim would be granted under the CISG (maybe it would not be considered foreseeable under Article 74, sentence 2 of the CISG or be dismissed for other reasons), it should not make a difference whether the third party has informed the buyer of his or her alleged rights before or after notifying the (sub-)buyer. The third party's notification has no impact on whether the buyer or the seller should bear such a risk. Accordingly, it should have no bearing on deciding whether or not a legal defect exists.

492 Court of Appeal Celle, 13 March 2019, CISG-online 5381.
493 *Maier-Lohmann*, RIW 2021, 81; BeckOK/*Saenger*, Art. 41 CISG para. 5.

237 Hence, a claim does not necessarily have to be raised toward the buyer to represent a claim under Article 41 of the CISG. Instead, it suffices that the third party claims to have a right in the goods toward any party (such as, for example, public authorities or other third parties). Therefore, with regard to the person that the claim has to be raised toward, no additional relevance for "rights" under Article 41 of the CISG exists.

(c) (No) requirements of a "claim" that surpasses a mere expression of a third party to have a right in the goods

238 If there were further requirements of a "claim", "rights" would become relevant apart from the situation in which the third party has not brought forward the right. Generally, there is agreement that a "claim" under Article 41 of the CISG does not require a suit to have been brought or any legal steps to have already been taken.[494] Moreover, there is generally agreement that no particular form of raising the claims is required.[495] Yet, one such requirement could be that the claim has to be asserted with such firmness as to impair the use of the goods or at least be coupled with the expressed intention of the third party to impair the future use.[496]

239 The wording refers to "any" claim, which could be understood to mean that no limitation exists. However, one could emphasize "claims" instead of the word "any" to argue that not every (possibly circumstantial) reference to an alleged right should be a "claim" in the sense of Article 41 of the CISG. The wording is, thus, not instructive. Yet, as is the case with regard to the discussion concerning frivolous claims,[497] it would be very hard to draw the line of sufficient firmness. Furthermore, there is no indication in the historical record that such a threshold was intended. Instead, in contrast to French national law, "*le simple cas de prétention*" was claimed to be sufficient under the (in this aspect identical) Article 52 of the ULIS.[498] It is not convincing to argue that in such a case no loss for the buyer is conceivable, since this question can be adequately addressed with the respective remedies irrespective of whether there has been a breach under Article 41 of the CISG.

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494 Secretariat Commentary, Art. 39 para. 3; *Zhang*, p. 78; Schlechtriem/Schwenzer/Schroeter/*Schwenzer/Lutzi*, 8th German edn, Art. 41 para. 11; Kröll/Mistelis/Perales Viscasillas/*Kröll*, Art. 41 para. 17; for the historical background for this interpretation and comparative remarks regarding French law, see Dölle/*Neumayer*, Art. 52 EKG para. 9.

495 *Achilles*, FS Schwenzer, pp. 1, 5; Brunner/Gottlieb/*Tebel*, Art. 41 para. 13; *Zhang*, p. 77.

496 Kröll/Mistelis/Perales Viscasillas/*Kröll*, Art. 41 para. 17; MüKoHGB/*Benicke*, Art. 41 para. 8; BeckOGK/*Hachem*, 01.03.2021, Art. 41 CISG para. 14.

497 See above on this discussion, para. 232.

498 Dölle/*Neumayer*, Art. 52 EKG para. 9.

Beside these legal arguments against the interpretation of requiring a certain degree of firmness and the impairment of use of the goods, one may even find a factual argument if one accepts the following interpretation: At least if the claim is not frivolous or obviously unfounded, the mere claim of a third party to have rights in the goods produces uncertainty for buyers in their use of the goods. Thus, the use of the goods is already impaired. As soon as buyers learn of a potential third party right, they might fear becoming liable toward the third party if they were to continue the use of the goods undeterred. Considering the rule in this light might even mean that the standard brought forward is not a higher threshold than the mere expression of a third party to have a right. Hence, it appears that a "claim" exists as soon as a third party expresses (alleged) rights with regard to the goods toward any other party which may or may not be the buyer.[499] **240**

(4) Summary

The broad protection of the buyer from "claims" of third parties under Article 41 of the CISG leaves only one case of application for "rights" under the same provision: The mere existence of the third party right without the third party having asserted (or declared) its right in anyway. Apart from the mere existence of a third party right, there is no breach of contract by a right of a third party that is not at the same time a breach due to a claim of a third party. The first element of the premise (i. e., apart from the mere existence of a third party right that has not been relied upon, there is no breach of contract by a right of a third party that is not at the same time a claim of a third part), is thus established. **241**

bb) Are there buyers' remedies for claims of third parties more limited than the remedies for rights of third parties?

The second element of the premise is that there are no additional or more extensive remedies for the buyer in case of a third party right compared to a third party claim. In other words, third party rights could still be relevant under Article 41 of the CISG apart from the situation in which the third party has not brought forward the right, if the buyer's remedies for claims of third parties were more limited than the remedies for rights of third parties. **242**

499 Similarly low standards of a "claim", Schlechtriem/Schwenzer/Schroeter/*Schwenzer/Lutzi*, 8th German edn, Art. 41 para. 11; Staudinger/*Magnus*, Art. 41 paras. 7, 17; MüKoBGB/*Gruber*, Art. 41 para. 7; Brunner/Gottlieb/*Tebel*, Art. 41 para. 13; *Zhang*, pp. 77, 78; *Heuzé*, para. 319; *Su*, IPRax 1997, 284, 285.

(1) Claim for performance under Article 46 of the CISG and reduction of price under Article 50 of the CISG

243 With regard to the claim for performance under the CISG in case of legal defects under Article 41, it is disputed whether Article 46(1) applies or whether Article 46(2), (3) contains the available remedies.[500] Similarly, it is not entirely clear whether the buyer can reduce the price under Article 50 of the CISG when facing legal defects under Article 41 of the CISG. In both cases, the wording of the remedial provisions refers to non-conformities. This wording is also found in the title of section II of the CISG where it refers to Articles 35–40. In contrast, the wording of Articles 46(2), (3), 50 do not refer to third party claims. However, "third party claims" also form part of the title of section II of the CISG where it refers to Articles 41–43. Against this background, it is disputed whether the remedies under Articles 46(2), (3), 50 are available for a breach of Article 41. Yet, the discussion revolves around the question of whether these remedies are available with regard to legal defects at all (Articles 41 and 42) without differentiating whether the legal defect is a claim or a right of a third party. Therefore, under no opinion in these discussions would the buyer's remedies for rights of third parties in the goods be more far-reaching than for claims of third parties.

(2) Avoidance of contract under Articles 49(1)(a), 25 of the CISG

244 If mere claims under Article 41 of the CISG could not amount to a fundamental breach, then the actual rights of third parties may remain relevant apart from the situation in which the third party has not brought forward the claim at all. In that case, buyers would have to prove the existence of a third party right as a basis of the fundamental breach if they intended to avoid the contract under Articles 49(1)(a), 25 of the CISG. Article 25 of the CISG defines a breach as fundamental "*if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.*" The exercise to assess the weight of a breach is, thus, primarily an exercise of contract interpretation. If the contract does not provide any insights, the general expectations under a CISG contract in this regard have to be considered.

245 As *Schlechtriem* and *Hachem* point out, the prospect of a lengthy legal proceeding without certainty of the outcome can generally be considered

500 See for details on this discussion, CISG AC Opinion 21 (*Schwenzer/Beimel*), paras. 3.5 et seq.

to deprive buyers of their reasonable expectation under the contract.[501] The claim must, however, create uncertainty regarding the outcome, which generally eliminates obviously unfounded or frivolous claims from the realm of fundamental breaches.[502] Some scholars have rejected this threshold for deciding whether a claim exists at all under Article 41 of the CISG *inter alia* due to the associated ambiguities,[503] these ambiguities have to be introduced when characterizing the breach as fundamental under Article 25 of the CISG to protect the seller from avoidances in cases in which buyers are not limited in their use of the goods and merely face a clearly unsuccessful claim by a third party. The *travaux préparatoires* supports this reasoning: The drafters of the CISG contemplated whether the buyer could avoid the contract after the fruitless elapse of an additional period of time in cases of third party rights and claims.[504] This mechanism was considered inapt *inter alia* because third party claims might be clearly unfounded and allowing an avoidance of contract in such cases seemed inappropriate.[505] The fact that only the mechanism found today in Article 49(1)(b) of the CISG was rejected, while the avoidance due to a fundamental breach was already in the draft, should be interpreted to signify that claims under Article 41 of the CISG were considered to potentially – but not always – amount to a fundamental breach.

Yet, this limitation of the remedy of contract avoidance does not lead to more extensive remedies for a right of a third party in contrast to a mere claim of a third party. This is because if the claim is obviously unfounded, there is also no right of a third party. Thus, the remedy is limited in cases in which there is no breach due to a right of a third party. Therefore, there is no more extensive remedy for third party rights in this regard. **246**

(3) Prescription

Lastly, the prescription under some national laws could lead to an additional scope of application for rights if the prescription of the buyer's claims was different depending on whether a claim or right of third parties existed. Prescription is a matter not governed by the CISG and therefore subject to **247**

501 *Schlechtriem*, Seller's Obligations, p. 6-32; BeckOGK/*Hachem*, 01.03.2021, Art. 41 CISG para. 23.
502 Brunner/Gottlieb/*Tebel*, Art. 41 para. 32.
503 See above para. 232.
504 UNCITRAL Yearbook VIII (1977), pp. 121–122 paras. 19–20; UNCITRAL Yearbook VIII (1977), p. 152 Art. 25 paras. 4–5.
505 UNCITRAL Yearbook VIII (1977), pp. 121–122 paras. 19–20.

the UN Limitation Convention[506] or to the national law applicable under the rules of private international law.[507]

248 For example, if German law applies, section 438(1) No. 1(a) of the German Civil Code provides for a prescription period of thirty years with regard to the buyer's claim against the seller in case of rights *in rem* (*dingliche Rechte*) to the goods that allow for eviction of the goods. From the property in the goods follows a vindication claim for the owner under section 985 of the German Civil Code. If a third person remains the owner of the goods, the buyer's claim against the seller is subject to section 438(1) No. 1(a) of the German Civil Code directly or in analogy according to the prevailing opinion.[508] Hence, the buyer's redress against the seller will only lose its enforceability thirty years after handing over of the goods. Yet, with regard to mere (unfounded) claims, this extended prescription period is not applicable, but instead the general rule (two years after the handing over) under section 438(1) No. 3 of the German Civil Code applies.[509] This serves as an example that due to national prescription law, the relevance of the right of the third party may resurface under CISG transactions even though a respective claim regarding the right also exists.

249 At first sight, the difference in limitation periods might discredit the second element of the premise: There could be more far-reaching remedies for rights although a claim exists. For example, if German law applied to the contract and the third party would claim to have rights in the goods more than two years after the handing over of the goods, the buyer's remedies against the seller would be time-barred under the German statute of limitation (section 438(1) No. 3 of the German Civil Code). However, if the buyer could prove that the third party claim is substantiated and, thus, a third party right exists, the remedies under the CISG with regard to the third party right would not be time-barred under the German statute of limitation (section 438(1) No. 1(a) of the German Civil Code).

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506 United Nations Convention on the Limitation Period in the International Sale of Goods. See also Spanish Supreme Court, 6 July 2020, CISG-online 5370 para. 79.

507 Austrian Supreme Court, 14 January 2002, CISG-online 643; Polish Supreme Court, 19 December 2003, CISG-online 1222; Swiss Supreme Court, 18 May 2009, CISG-online 1900 para. 44; Schlechtriem/Schwenzer/Schroeter/*Müller-Chen/Atamer*, 8th German edn, Art. 45 para. 52; MüKoHGB/*Mankowski*, Art. 4 para. 17; *Mastellone*, 5 VJ (2001), 143, 148; contra, *Williams* 10 VJ 2006, 229, 244 et seq.

508 It is disputed under German law whether the non-transfer of property is to be treated distinctly from a legal defect and should fall under sect. 195, 199 German Civil Code, cf. BeckOK/*Faust*, § 438 BGB para. 15, which would only add further to the differences produced due to different legal defects.

509 See for the discussion and arguments, *Maier-Lohmann*, RIW 2021, 81; contra, *Magnus*, RIW 2002, 577, 582 who favors applying the thirty-year-limitation-period to claims.

However, the overall question is whether "rights of third parties" has any scope of application under the CISG apart from the situation in which the third party has not brought forward the right. To answer this question, it is not convincing to rely on differentiations introduced by national law. There is no indication that the CISG contains remedies just as a backup in case another remedy under the CISG is not enforceable due to national law. Moreover, many legal systems do not differentiate between limitation periods for rights and claims does not exist. For example, the UN Limitation Convention treats both breaches equally. In both cases, the limitation period is four years from the handing over of the goods (Articles 8, 10(2) of the UN Limitation Convention). Thus, in case such a law applies to prescription, "rights" under Article 41 of the CISG would once again be deprived of any scope of application apart from the situation in which the third party has not brought forward his or her claim at all. **250**

Therefore, also the second element of the premise is established: The CISG does not consider there to be additional remedies for the buyer in case of a third party right compared to a third party claim. **251**

cc) Summary

"Rights" in Article 41 of the CISG protects the buyer only from the situation in which the third party right exists but this third party has not raised the right, yet. Therefore, the opinion that considers the CISG to require the third party to raise his or her right under Article 41 for there to be a "right", or interprets the CISG to be structured around a protection from eviction, would render "rights" under Article 41 a legal nullity. The wording and the systematics within Article 41, thus, favor an interpretation that considers a breach of contract due to a third party right to already exist by the mere existence of a third party right. **252**

b) Purpose of Article 41 of the CISG

This understanding is further supported by the provision's purpose of protecting the buyer from rights and claims of third parties. The buyer could learn about an existing third party right before the third party asserts this right. This would cause considerable uncertainty for the buyer, since the third party could enforce his or her right at any time in the future until the time period under the statute of limitation has elapsed. However, in the meantime the seller could have become insolvent or the buyer's claims against the seller could in turn be time-barred. Moreover, buyers' use of the goods can already be impaired, since they might lose their investment in the goods if the third party claimed the goods, or they might become liable toward the third party if they resold the goods while knowing of the third **253**

party right. Buyers thus require protection from the uncertainty caused by the third party right.

254 Even under national laws that in principle only provide contractual remedies in case the goods have been evicted (for example, France and Switzerland, as described above), the need to protect the buyer under such circumstances is acknowledged. Swiss law allows the buyer to rescind the contract under Article 24(1) No. 4 of the Swiss Code of Obligations.[510] French law allows the buyer to treat the contract as null under Article 1599 of the French Civil Code if the seller was not the owner of the goods.[511] Roman law provided for a quick usucapion, which also limited the uncertainty for the buyer to a relative short period of time.[512] The lack of protection for a buyer facing encumbered goods and a passive third party having rights in the goods is, thus, an acknowledged weakness of an eviction-based liability system and is offset in other areas of the law. Yet, the CISG does not unify the areas of the law chosen to supplement the contractual fabric of an eviction-based system. To achieve a uniform set of rules for a sales contract, the CISG should be deemed to provide a purely contractual solution to the problem: A "right" of a third party under Article 41 of the CISG is a breach of contract irrespective of whether the third party has brought forward the right in any way.

c) *Travaux préparatoires*

255 Lastly, the historical record demonstrates that the departure from an eviction-based liability system and the protection of the buyer from mere rights of third parties in the goods was envisaged early on. The buyer is not left in uncertainty whether the third party will ever advance his or her right and whether the seller will still be solvent at that time or whether recourse might be time-barred at that time. This underlying thought can be traced back to *Rabel* who commented on his first draft of a provision governing legal defects:

> "*Le progrès dans la conception même des choses qui s'impose a déjà trouvé place dans la matière des vices affectant le droit du vendeur. Le Projet (art. 52 al. 2 et 3) a clairement abandonné toute la vieille doctrine de l'éviction qui subsiste encore dans le Code italien de 1942.*"[513]

256 It should be added that *Rabel* was an expert on eviction-based liability systems and the developments under German law. This is evidenced by his postdoctoral thesis "*Die Haftung des Verkäufers wegen Mangels im Rechte, Teil 1: Geschichtliche Studien über den Haftungserfolg*" in which he ana-

510 See above para. 111.
511 See above paras. 96 et seq.
512 See above para. 92.
513 U.D.P. 1950 – Etudes: IV Vente – Doc. 96, p. 3.

lyzed the liability for legal defects (including the obligation to transfer the property) in depth.[514] The departure from an eviction-based liability system like the one in Italy shows that a broader protection of the buyer before the eviction of the goods was envisaged. This fundamental concept of the regime already contained in the draft of 1939 governing legal defects was not deviated from at later stages of the development of uniform sales law.

d) Summary

257 The foregoing analysis establishes that the CISG has departed from the Roman law tradition and its eviction-based liability system that is still followed in many national legal systems today. Considering the wording, the systematics of "rights" and "claims" under Article 41 of the CISG, the purpose and the *travaux préparatoires* of the CISG, there is a breach of contract and a "right" under Article 41 as soon as a third party right exists. Third parties do not have to assert (or even know of) their right.

258 The assessment of Article 41 of the CISG, thus, yields the insight that while Article 30 speaks of an obligation to transfer the property, but does not contain an obligation to transfer unencumbered property, Article 41 by its reference to "rights of third parties" contains what scholars refer to when they speak of an obligation to transfer unencumbered property.

5. Broader protection for buyers under the CISG than a mere obligation to transfer unencumbered property

259 The buyer's protection under the CISG is even broader than under national laws that contain an obligation to transfer unencumbered property. The buyer's broad protection from claims of third parties under Article 41 of the CISG has already been compared to the protection from third party rights above.[515] Apart from the situation in which the third party has not asserted his or her right in any way yet, there will be a claim of a third party irrespective of whether this claim is substantiated or not, i. e., whether a third party right exists or is merely alleged. This protection is much more far-reaching than under legal systems that contain an obligation to transfer unencumbered property, such as German law. Yet, it is important to note that the perception that the seller is under an obligation to defend the buyer in the actual legal proceedings against the third party,[516] may stem from notions of national

514 *Rabel*, Mangels im Rechte, *passim*.

515 See above paras. 220 et seq.

516 *Audit*, p. 112; *Schlechtriem/P. Butler*, para. 165 ("*The defence of such claims is the seller's responsibility*"); Kröll/Mistelis/Perales Viscasillas/*Kröll*, Art. 41 para. 20 ("*seller has to fight off all claims at his own expense*").

law, and is ultimately still rooted in Roman law and its *obligatio auctoritas*.[517] This is because performance of the obligation to provide goods free from third party rights or claims is not achieved by the seller participating in legal proceedings. Moreover, the respective procedural law will determine whether the seller can join the proceedings in such a fashion as to "defend" the buyer. The mere fact that this may be possible under French procedural law[518] does not mean that this is possible in all procedural laws. Due to the differing content of the seller's obligations depending on the applicable procedural law, this interpretation of the CISG would thus violate Article 7(1). It is more in line with the remedial system of the CISG to allow the seller to freely choose how to remedy the legal defect.[519] The seller is, hence, not under an obligation to defend the buyer in court.[520]

260 Besides its general suitability, especially for international contracts,[521] this rule carries an additional advantage: The broad protection from claims of third parties alleviates the courts from the burden of analyzing whether rights exist or have actually been transferred under the applicable national laws. Instead of unifying the transfer of property, which was considered to be out of reach, or applying national law, the buyer's protection from mere claims provides a different, but adequate solution. In most cases the buyer will learn of the potential right of a third party when this third party approaches him or her or a public authority. Thus, in the majority of cases the differences found in national laws regarding both the transfer or property and other rights a party can have in goods have been rendered irrelevant. This further reduces the relevance of the fact that unification of the transfer of property was not achieved.

6. Preemption of remedies under national law regarding the non-transfer of property

261 Finally, with regard to Article 41 of the CISG, it must be analyzed whether the CISG preempts national law as far as the latter provides remedies for the non-transfer of property. The remedies under national law have been depicted above in detail and all concern the existence of third party rights. Thus, the preemptive effect of Article 41 of the CISG (and not Article 30 of the CISG under the proposed interpretation) is the subject of the following discussion.

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517 See above para. 86 on the *obligatio auctoritas.*

518 *Audit*, p. 112.

519 Brunner/Gottlieb/*Tebel*, Art. 41 para. 26; *Metzger*, 73 RabelsZ (2009), 828, 848.

520 Brunner/Gottlieb/*Tebel*, Art. 41 para. 26.

521 See for example, Kröll/Mistelis/Perales Viscasillas/*Kröll*, Art. 41 para. 17; Schlechtriem/Schwenzer/Schroeter/*Schwenzer*, 7th German edn, Art. 41 para. 9.

As noted above, the Swiss Supreme Court allows a rescission of the sales contract under Article 24(1) No. 4 of the Swiss Code of Obligations if the buyer erred in considering the seller to have absolute property in the goods; French law provides for the (relative) nullity if the seller is not the owner of the goods under Article 1599 of the French Civil Code; and English law acknowledges a total failure of consideration in similar circumstances.[522] **262**

Yet, the CISG, and in particular Article 41, might not preempt such remedies if they concern questions of validity under Article 4, sentence 2(a). Defining "validity" under this provision has proven difficult.[523] It is disputed whether "validity" under Article 4, sentence 2(a) is an autonomous term under the CISG,[524] whether it has to be left to national law to define "validity",[525] or whether Article 4, sentence 2(a) has no meaning on its own whatsoever.[526] **263**

Schroeter proposes that "*by provisions concerned with 'the validity of the contract' Article 4*[, sentence 2]*(a) of the CISG refers to legal limits to party autonomy.*"[527] In order for a provision to be considered as a limit to party autonomy, it must be intended to restrict the "*parties' ability to enter into a binding contract and to create contractual obligations.*"[528] In contrast, a provision does not concern matters of validity if it merely affects the performance of binding contractual obligations.[529] Some courts highlight that the term encompasses national law that renders a contract void, voidable, or unenforceable.[530] Under a more detailed definition, "*matters of validity are those where a contract is void ab initio by operation of law or rendered so either retroactively by a legal act of the State or of the parties such as* **264**

522 See above para. 111 for Swiss law, paras. 96 et seq. for French law, and paras. 139 et seq. for English law.

523 *Hartnell*, 18 Yale Journal of International Law (1993), 1, 21 considers the ambiguity to have been intended by the drafters.

524 *Bridge*, International Sale of Goods, para. 10.31.

525 *Drobnig*, 40 American Journal of Comparative Law (1992), 635, 636.

526 *Schroeter*, 58 Villanova Law Review (2013), 553, 557; *P. Huber*, ZEuP 1994, 585, 594 et seq.; Schlechtriem/Schwenzer/Schroeter/*Hachem*, 5th edn, Art. 4 para. 29.

527 *Schroeter*, 22 Uniform Law Review (2017), 47, 56.

528 *Schroeter*, 22 Uniform Law Review (2017), 47, 58.

529 *Schroeter*, 22 Uniform Law Review (2017), 47, 58.

530 *Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories, Inc.,* US District Court for the Southern District of New York, 10 May 2002, CISG-online 653 para. 206; *Barbara Berry, S.A. de C.V. v. Ken M. Spooner Farms, Inc.*, U.S. District Court for the Western District of Washington, 13 April 2006, CISG-online 1354; skeptical regarding the term "unenforceable" as it may be misunderstood in Germany, Schlechtriem/Schwenzer/*Schwenzer/Hachem*, 4th edn, Art. 4 para. 31 fn. 121. In my opinion, however, Court of Appeal of the State of Rio Grande do Sul, 30 March 2017, CISG-online 2819, para. 28 is erroneous as far as it could be understood to signify that Art. 7(1) CISG and "good faith" might prohibit a reliance on contractual invalidity based on national law.

rescission for mistake or 'withdrawal' or 'revocation' of consent under special provisions protecting certain persons such as consumers, or by a 'resolutive' condition (i. e., a condition subsequent) or a denial of approval of relevant authorities."[531] The nullities under French, Swiss, and English law described above could be interpreted to fulfill this definition, and thus, may be questions of validity of contract. What appears to support this interpretation is the fact that *Tunc* states in his Commentary on the ULIS that Article 8 of the ULIS (today's Article 4, sentence 2(a) of the CISG) would have preserved the buyer's option to rely on municipal rules providing that a sale of another person's goods should be null and void.[532]

265 Yet, despite the different opinions on how to interpret Article 4, sentence 2(a) of the CISG, it appears undisputed that the remedies under national law described above should generally be considered preempted by the CISG.[533] The *travaux préparatoires* support this interpretation. Under the ULIS, Article 1599 of the French Civil Code was (despite its non-preemption by Article 8 of the ULIS) not considered applicable. This was due to Article 53 of the ULIS which provided: "*The rights conferred on the buyer by Article 52 exclude all other remedies based on the fact that the seller has failed to perform his obligation to transfer the property in the goods or that the goods are subject to a right or claim of a third person.*" In this regard, *Tunc* argued the idea behind the interplay between Articles 8 and 53 of the ULIS was exactly to exclude the national remedies or rules on validity described in this section.[534] Beforehand, Luxembourg had posed the question of whether

531 Schlechtriem/Schwenzer/*Schwenzer/Hachem*, 4th edn, Art. 4 para. 31.

532 *Tunc*, Commentary on the Hague Conventions of the 1st of July 1964 on International Sale of Goods and the Formation of the Contract of Sale, Diplomatic Conference on the Unification of Law Governing the International Sale of Goods, The Hague, 2–25 April 1964, Vol. I – Records, p. 378. Art. 8 ULIS is similar to the wording employed in Art. 4, s. 2(b) CISG regarding the exclusion of validity from the scope of the Convention.

533 Cf. CISG AC Opinion 23 (*Beale*), para. 4.27; Staudinger/*Magnus*, Art. 41 para. 27; *Neumayer/Ming*, Art. 41 para. 1 fn. 1; Brunner/Gottlieb/*Tebel*, Art. 41 para. 34; Kröll/Mistelis/Perales Viscasillas/*Kröll*, Art. 41 para. 45; Schlechtriem/Schwenzer/Schroeter/*Schwenzer/Lutzi*, 8th German edn, Art. 41 para. 22; MüKoHGB/*Benicke*, Art. 41 para. 33; MüKoBGB/*Gruber*, Art. 41 para. 25; *Schlechtriem/Schroeter*, para. 433 (regarding Art. 1599 French Civil Code); *Schroeter*, Internationales UN-Kaufrecht, para. 510 (regarding Art. 1599 French Civil Code); *Schroeter*, 22 Uniform Law Review (2017), 47, 63–64 (regarding Art. 20 Swiss Code of Obligations); *Bucher*, Neuerungen, pp. 27, 47 (regarding Art. 20 Swiss Code of Obligations). But see Commercial Court Canton Aargau, 09 March 2022, CISG-online 5843 para. 42, which erroneously considered Art. 20 Swiss Code of Obligations not to be preempted by the CISG in case of initial, objective impossibility.

534 *Tunc*, Commentary on the Hague Conventions of the 1st of July 1964 on International Sale of Goods and the Formation of the Contract of Sale, p. 68: "*Article 53* […] *was in fact necessary to exclude the possibility, which Article 8 would otherwise have*

provisions such as Article 1599 of the French and Luxembourg Civil Code were applicable or preempted by the envisioned ULIS.[535] This question was answered by the Commission by highlighting that the provision that became Article 52 of the ULIS[536] should preempt the possibility of the buyer to rely on nullity under national law, but to avoid misunderstandings the provision that became Article 53 of the ULIS was introduced.[537]

While the provision was not maintained in the CISG, the results reached through this rule should be considered to match those under the CISG. Little attention was given to the wording of the provision that became Article 4 of the CISG and its requirement for an express provision. While some argued in favor of maintaining a provision equaling Article 53 of the ULIS,[538] the majority's opinion seems to have been that the provision's content was self-evident.[539] The Working Group deleted the provision in 1973, believing that the provision could lead to misunderstandings. They reasoned that because the Convention would generally displace national (unharmonized) law that was inconsistent with it, the insertion of an explicit exclusion of national law in "isolated instances" would raise unnecessary questions.[540] Thus, the idea remained that the provision that became Article 41 of the **266**

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preserved for the buyer, of relying on municipal rules providing that a sale of another person's goods should be null and void."

535 U. D.P. – Etudes: IV Vente – Doc. 102, p. 50; Diplomatic Conference on the Unification of Law Governing the International Sale of Goods, The Hague, 2–25 April 1964, Vol. II – Documents, p. 134 para. 5.

536 Art. 52(1) ULIS is comparable to today's Art. 41 CISG.

537 Diplomatic Conference on the Unification of Law Governing the International Sale of Goods, The Hague, 2–25 April 1964, Vol. II – Documents, p. 197.

538 Mexico, A/CN.9, Working Group II, Annex I, para. 16: "*I think its provisions should be maintained, as its text seems to be adequate to prevent the possibility of actions other than those for avoidance or damages, such as an action to invalidate the transaction as would be the case, for example, of nullity actions (especially in the case of the sale of goods not owned by the seller).*" Schlechtriem/Schwenzer/Schroeter/*Schwenzer/Lutzi*, 8th German edn, Art. 41 para. 22 would have liked to see a respective provision in the CISG as they doubts whether French judges will abstain from applying Art. 1599 French Civil Code without it. To date, this concern has not materialized.

539 *Schlechtriem*, Seller's Obligations, p. 6-31; BeckOGK/*Hachem*, 01.03.2021, Art. 41 CISG para. 2; W. Witz/Salger/M. Lorenz/*Salger*, Art. 41 para. 14 who however does not address Art. 1599 French Civil Code in the following list of examples of preempted legal concepts; *Schroeter*, 22 Uniform Law Review (2017), 47, 53 states that the deletion was not intended to change anything and must be interpreted in light of a comparable rule in Art. 9 of the 1972 Unidroit Draft Law on Validity that contained a similar rule.

540 UNCITRAL Yearbook IV (1973), p. 44 paras. 62 et seq. (this relates to Art. 34 ULIS that contained the mirroring provision regarding some non-conformities of the goods, but the reasoning was considered to also apply to Art. 53 ULIS, see UNCITRAL Yearbook IV (1973), p. 73 paras. 146, 147).

CISG governed the obligation to transfer the property, and that the CISG provided the sole remedies for the situation in which the seller fails to transfer the property, thus excluding of national law. Even though Article 4, sentence 2(a) of the CISG is partly understood to allow for validity rules to also be applicable despite a regulation by the CISG, the historical background clarifies that such doctrines and provisions under national law are preempted by the CISG regarding the failure to transfer the property.[541]

267 Hence, as far as the reference point for the nullity or validity of the contract is the transfer or lack of transfer of property, such rules will generally address the performance of the contract and the respective remedies in case of a breach. Because the rules applied under national law in such cases are generally preempted by the CISG, it is irrelevant whether they are considered as part of the applicable contract law or the non-contractual law of restitution. These rules should generally be considered to be preempted by the CISG.[542]

268 Therefore, Article 1599 of the French Civil Code should generally be preempted. The possibility of rescission under Article 24(1) No. 4 of the Swiss Code of Obligations and the notion of a total failure of consideration under English law meet the same fate.[543] Otherwise, the legal consequences of third party rights under Article 41 of the CISG would be distorted: If buyers avoid the contract, they have to account for the benefits they received from the goods under Article 84(2) of the CISG. In contrast, some national laws do not require buyers rescinding the contract to account for the benefits. An example is English law, exemplified by the case *Rowland v Divall*[544] where the buyer did not have to account for the benefits he had received by being able to use the car.[545] Regarding the English doctrine of (total) failure of consideration, it must be explicitly stated for a non-English lawyer that the dispute whether the doctrine of consideration is preempted under the

541 Less convinced, *Hartnell*, 18 Yale Journal of International Law (1993), 1, 78.

542 Cf. CISG AC Opinion 23 (*Beale*), para. 4.27; Staudinger/*Magnus*, Art. 41 para. 27; *Neumayer/Ming*, Art. 41 para. 1 fn. 1; Kröll/Mistelis/Perales Viscasillas/*Kröll*, Art. 41 para. 45; MüKoHGB/*Benicke*, Art. 41 para. 33; Brunner/Gottlieb/*Tebel*, Art. 41 para. 34; Schlechtriem/Schwenzer/Schroeter/*Schwenzer/Lutzi*, 8th German edn, Art. 41 para. 22; MüKoBGB/*Gruber*, Art. 41 para. 25; *Schlechtriem/Schroeter*, para. 433 (regarding Art. 1599 French Civil Code); *Schroeter*, Internationales UN-Kaufrecht, para. 510 (regarding Art. 1599 French Civil Code); *Schroeter*, 22 Uniform Law Review (2017), 47, 63–64 (regarding Art. 20 Swiss Code of Obligations); *Bucher*, Neuerungen, pp. 27, 47 (regarding Art. 20 Swiss Code of Obligations).

543 Agreement with regard to the preemption of this possibility under Swiss law, Court of Appeal Canton Zug, 23 February 2023, CISG-online 6313 para. 77; *Bucher*, recht 1996, 178, 186. Apparently differently for Dutch law, cf. District Court Gelderland, 23 February 2022, CISG-online 5842.

544 [1923] 2 KB 500.

545 See above on details of English law in this regard, paras. 139 et seq.

CISG[546] is not helpful to determine whether the doctrine of failure of consideration is preempted. While the doctrine of (total) failure of consideration shares the label "consideration" with the general doctrine of consideration, it is a distinct concept under English law.[547] If one looks past the label, the failure of consideration encompasses cases in which the performance was insufficient, and the reason for the claim of the aggrieved party is seen in this insufficient performance of the contractual partner.[548] While there are also other interpretations and situations in which the focus is on the validity of the transaction,[549] this only signifies that doctrines under national law cannot always be preempted in a black or white fashion. Only as far as the doctrines seek to provide rules or remedies on the performance of the contract and the respective transfer of property can they be considered excluded while other aspects or cases for application, such as, for example, fraudulent behavior,[550] remain untouched.

Therefore, the transfer of property is not relevant for issues of validity under the CISG. **269**

7. Applying the novel approach in direct comparison to approaches 1–3

Lastly, it is necessary to compare the three existing approaches and their practical consequences to the novel approach which considers property an autonomous term and defines it as the seller's legal interest in the goods without regard to the quality of that interest. **270**

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546 See opinions on "consideration" under CISG contracts, *Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories, Inc.,* US District Court for the Southern District of New York, 10 May 2002, CISG-online 653 paras. 210–212; *Bridge*, International Sale of Goods, para. 10.31; *Fandl*, 34 Berkeley Journal of International Law (2016), 1, 40; *Schroeter*, 22 Uniform Law Review (2017), 47, 62.

547 Cf. *Chambers*, 18 Oxford Journal of Legal Studies (1998), 363, 375 for an example of this distinction.

548 Sometimes it is even claimed that the doctrine is all about performance, *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Limited* [1943] AC 32, 48: "*performance of the promise* […] *if performance fails, the inducement which brought about the payment* [consideration] *is not fulfilled*"; cf. *Burrows*, The Law of Restitution, pp. 324.

549 Cf. *Mitchell*, 29 University of Queensland Law Journal (2010), 191.

550 CISG AC Opinion 23 *(Beale)*, black letter rule 1; *Schlechtriem*, 21 Cornell International Law Journal (1988), 467, 474; Schlechtriem/Schwenzer/Schroeter/*Schwenzer*, 7th German edn, Art. 41 para. 24. More far reaching Kröll/Mistelis/Perales Viscasillas/*Kröll*, Art. 41 para. 45 who argues national law should be applicable if the reason for the invalidity was "*bad faith behavior of the seller.*"

271 First, when goods are either stolen or the seller cannot transfer property as defined by the applicable property law, different outcomes may arise. Approach 1 would in itself differ in terms of practical consequences depending on whether an absolute or a relative notion of property is envisioned by the applicable property law.[551] If an absolute notion of property were to apply, then the seller who cannot transfer property (under national law) due to a third party's property in the goods would breach Article 30 of the CISG. Since the duty to notify the seller of the legal defect under Article 43 of the CISG does not apply to Article 30, a buyer could rely on the failure to transfer of property as a breach of contract even if this party has not notified the seller within a reasonable time of the defect. In contrast, under approaches 2,[552] 3, and the novel approach, the seller would be found in breach only of Article 41 of the CISG, and not Article 30 of the CISG. Consequently, Article 43 of the CISG would prevent the buyer from relying on the failure to transfer of property if the latter has not notified the seller of the defect in time.

272 Similarly, a valid limitation of liability clause regarding the buyer not becoming the owner of the goods could lead to diverging results depending on the approach followed. The situation was highlighted in a German case, in which the buyer did not become the owner due to a third party's property in the goods. The District Court Freiburg in applying approach 1 *obiter dictum* considered a limitation of liability clause not to have an effect on Article 30 of the CISG and its (main) obligation to transfer property in the goods.[553] If an absolute notion of property applied, the seller would have breached the contract and the limitation of liability clause would not extend to the breach of Article 30 of the CISG. In contrast, approaches 2, 3, and the novel approach would once again only consider Article 41 of the CISG to be breached, and so long as the limitation of liability clause is valid, exempt the seller from liability.

273 Second, differences in practical consequences occur if the goods in question are software or data. As will be argued below, irrespective of whether the applicable property law considers "property" rights to exist in software or data, the contracts could in any case still be CISG sales contracts under

551 See above para. 157.

552 Regarding approach 2, this could be assessed differently if one considered the obligation to do everything necessary under national law to transfer property to include an obligation to procure the power of disposition of property. In other words, the seller would have breached Art. 30 CISG by not having persuaded the third party to give up property in the goods (potentially against payment). Yet, this interpretation of approach 2 is not brought forward in literature and does not appear convincing, since it leads to a circumvention of Art. 43(1) CISG just as approach 1 does and is criticized for, see above para. 210.

553 District Court Freiburg, 22 August 2002, CISG-online 711.

Article 1(1).[554] National law may even consider a different legal interest to exist with regard to software or data. If sellers transfer their legal position, but not property in the goods due to there being no property right in such goods, there may be a breach of Article 30 of the CISG under approach 1. Approach 2's result is inconclusive since there are no steps necessary under national law to transfer "property" for these kinds of things if no property is considered to exist regarding them. In contrast, under approach 3 and the novel approach, the contract would not be breached.

274 If a seller were unwilling to transfer their legal position in goods consisting of software or data, approaches 1 and 2 would result in a breach of Article 30 of the CISG. Furthermore, in this situation, the novel approach would result in a breach of Article 30 of the CISG. Approach 3, which does not single out "property" of the seller, but rather considers all of the remaining seller's "rights" to be breaches of Article 41 of the CISG, would classify the seller's right as a breach of the this provision. Again, the practical difference lies in the fact that Article 43(1) of the CISG applies to Article 41 but not Article 30. Thus, under approach 3, the buyer generally would have to notify the seller of the legal defect. Yet, according to approach 3, regarding the seller's rights, Article 43(2) of the CISG would alleviate the buyer from this burden of notification as the seller will know of his or her right in the goods.[555] Minor practical differences nevertheless exist between approach 3 on the one hand and approaches 1, 2, and the novel approach on the other hand, since the buyer would have to prove the seller's knowledge thus introducing additional room for arguments in legal proceedings.

275 Third, the approach followed may dictate differing results in the situation in which the seller delivers the goods but is unwilling to transfer the property in the goods until the buyer has paid the price. If one applies approach 3 and considers the relevant point in time for the obligation under Article 41 of the CISG to be the delivery of the goods, the seller would be in breach of contract if he or she does not transfer property concurrently with the delivery of the goods. An opportunistic buyer who has concluded an unfavorable contract seize this breach to argue that he or she may avoid the contract. Even though in many cases there will not yet be a fundamental breach of contract, this interpretation introduces uncertainty for sellers merely seeking to ensure that payment is received before losing their legal interest in the goods. In contrast, approaches 1, 2, and the novel approach envision a different relevant point in time for Article 30 of the CISG compared to Article 41 of the CISG, and postpone the seller's obligation to transfer property in the goods to the point in time when the buyer pays the price.

554 See below paras. 332–333.
555 See above para. 211.

276 These examples demonstrate that apart from dogmatical and analytical reasons that favor of the novel approach, there are actual differences in practical consequences between the approaches. Thus, the discussion is not merely theoretical.

8. Summary

277 Despite the *travaux préparatoires* not envisaging a uniform term "property" under the CISG, "property" under Article 30 of the CISG should be interpreted as such a uniform term. It encompasses the legal interest the seller has in the goods with no regard to the quality of that interest. The obligation to transfer the property, consequently, obliges sellers to transfer their legal interest to the buyer. The scope and delineations of property under national law are thereby rendered mostly irrelevant under the CISG, which is in line with the finding that, notwithstanding all differences in reasoning, a special status of "property" in contrast to other rights in goods was never pondered in 2000 years of theoretical and dogmatic discussion.[556] Consequently, Articles 30 and 41 of the CISG can be distinguished by the person concerned: Article 30 governs sellers' rights and Article 41 governs third parties' rights for purposes of the seller's liability. Due to the broad protection from mere claims of third parties under Article 41, the actual location of property will seldom be relevant under the CISG. The remaining relevance of the property and other rights emerges in case the third party has not raised his or her claim. The CISG has departed from an eviction-based liability system. National laws that provide for remedies in case the seller does not transfer property are generally preempted by the CISG, because there is no lack of protection for the buyer, and the applicability would lead to unnecessary divergences depending on the applicable national law. Since the notion of property under the CISG is, thus, independent from national property law, the doubts that lingered early in the unification process concerning the "*difficulty of inserting a universal sales law of a new pattern into the remaining national laws of obligations and property*" are alleviated.[557]

556 *Bergmann*, 74 RabelsZ (2010), 25, 38 who rightfully excludes the idea of nullity of a sale of a good that is owned by somebody else from this statement.

557 See for these doubts, *Rabel*, 1 American Journal of Comparative Law (1952), 58, 60.

V. Outlook on unifications of law and specifically European law

278 The well-balanced result achieved by the CISG, which served as a blueprint for harmonization also on the European level, as can be seen under Article IV.A.-2:305 of the DCFR and Article 102(1) of the CESL, has for unknown reasons (potentially) been diluted or at least blurred under Article 9 Directive (EU) 2019/771:

> "*Where a restriction resulting from a violation of any right of a third party, in particular intellectual property rights, prevents or limits the use of the goods in accordance with Articles 6 and 7, Member States shall ensure that the consumer is entitled to the remedies for lack of conformity provided for in Article 13, unless national law provides for the nullity or rescission of the sales contract in such cases.*"

279 In contrast to the CISG, where remedies under national law are preempted, this provision does not unify the remedies available to the buyer since national laws can provide for nullity or rescission in such cases.[558] Moreover and importantly, it might be interpreted to shift the liability regime back in the direction of an eviction-based liability system, because the wording requires buyers to be prevented or limited in their use of the goods. While one could argue that already the existence of a third party right can limit buyers in their use, one could also argue the opposite. Therefore, it is not clear whether the mere existence of a third party right (without it being asserted) will be considered a breach of contract. This reintroduces uncertainty and dogmatic discussions that had been resolved under the CISG.

280 Moreover, as long as there is no unified property law or notion of property, (future) uniform sales laws may benefit from eliminating the reference to an obligation to transfer the property. Instead, the laws could refer to the seller's obligation to transfer his or her legal interest in the goods. Combining this obligation with an obligation to deliver goods free from third party rights and claims would render misunderstandings less likely, while providing the same level of protection for the buyer as the CISG under the proposed interpretation.

558 *Atamer/Hermidas*, AJP 2020, 48, 61.

§ 4: Property and the characterization of a sales contract under the CISG

Article 1 of the CISG states that the CISG applies to "*contracts of sale of goods*" but does not define explicitly when a contract can be thus qualified.[559] Article 1(1) requires examination of whether the characteristics of a sales contract are present in the parties' contract, regardless of the exam terms used by the parties.[560] To enumerate the characteristics of a sales contract is, however, a challenging endeavor and requires scrutinizing the obligations and remedies the parties agreed upon. This chapter will address whether property and its transfer are necessary or even relevant features of a sales contract under the CISG. **281**

I. Status quo and general opinion under the CISG

The starting point is that a sales contract is a contract for the allocation of the goods to the buyer against payment. Although the CISG contains no explicit rules on when the goods are sufficiently allocated to the buyer, it is commonly stated that one could derive from its Articles 30 and 53 that a contract is only a sales contract under the CISG if it requires the seller to transfer property in and possession of the goods and requires the buyer in turn to pay the price and take delivery of the goods.[561] The underlying rea- **282**

559 Court of Appeal 's-Hertogenbosch, 18 January 2011, CISG-online 2179 para. 4.4.2; High Commercial Court of the Republic of Croatia, 19 December 2006, CISG-online 3284; Schlechtriem/Schwenzer/*Schwenzer/Hachem*, 4th edn, Art. 1 para. 8; Schlechtriem/Schwenzer/Schroeter/*Hachem*, 5th edn, Art. 1 para. 8 MüKoHGB/*Mankowski*, Art. 1 para. 11; Mankowski/*Mankowski*, Art. 1 CISG para. 2; *Karollus*, p. 20; *Piltz*, Internationales Kaufrecht, para. 2-20.

560 In *Martini e Ricci Iamino S.p.A. v. Trinity Fruit Sales Co.*, US District Court for the Eastern District of California, 2 July 2014, CISG-online 2949 the court chooses the correct starting point in stating the CISG does not define the term "sale", but unfortunately (and in violation of Art. 7(1) CISG) uses the UCC's definition of a sale to delineate the scope of the CISG.

561 Supreme Court of Lithuania, 9 March 2012, CISG-online 5111; MüKoHGB/*Mankowski*, Art. 1 para. 11; *Torsello*, pp. 191, 196; *Gillette/Walt*, p. 43; *Ferrari*, 15 Journal of Law and Commerce (1995), 159, 163; Schlechtriem/Schwenzer/Schroeter/*Ferrari*, 8th German edn, Art. 1 para. 13; Brunner/Gottlieb/*Brunner/Meier/Stacher*, Art. 2 para. 7; cf. German Supreme Court, 28 May 2014, CISG-online 2513 para. 13; Schwimann/Kodek/*Posch/Terlitza*, Art. 1 CISG para. 6; *Achilles*, Art. 1 para. 2; *Karollus*, p. 20; *Piltz*, Internationales Kaufrecht, para. 2-20; *Neumayer/Ming*, Art. 1 para. 1; Enderlein/Maskow/Strohbach/*Maskow*, Art. 1 para. 1; Soergel/*Lüderitz/Fenge*, 13th edn, Art. 1 para. 22; Mankowski/*Mankowski*, Art. 1 CISG para. 2; Kröll/Mistelis/Perales Viscasillas/*Mistelis*, Art. 1 para. 25; *Diedrich*, pp. 169; *Nicolai*, pp. 259, 263–264;

son for referencing property is the presumed allocation of the goods: By allocating the property of the goods to the buyer, they are sufficiently allocated to the buyer for a sales contract. In the same vein, some scholars argue that the obligation to transfer the property cannot be excluded by the parties under Article 6 of the CISG as this obligation is a necessary building block of a sales transaction under the Convention.[562] According to them, if the parties were to exclude this obligation, the CISG would not apply. *Torsello* even argues that the obligation to transfer the property in the goods is the only obligation of the seller that is decisive for the characterization of a sales contract under the CISG.[563]

283 Under national sales laws, the relevance of property to characterize sales contracts is equally discussed and oftentimes affirmed.[564] However, such national debates do not have international contracts in mind, which adds the problem of diverging understandings of what property is and what things or objects can be subject to property rights. The discussions revolving around unharmonized national law cannot be taken at face value, and could not even be transplanted to the Convention if Article 7(1) of the CISG were not to exist.[565]

Höß, p. 48; *T. Fox*, p. 21; DiMatteo/Janssen/Magnus/Schulze/*Eiselen*, Ch. 5 para. 27; *Heuzé*, para. 318 ("*le transfert de propriété constitue, en effet, la caractéristique essentielle du contrat de vente, celle qui permet de le distinguer d'autres accords*"); *Cl. Witz*, para. 112.21; *Scheuch*, 118 ZVglRWiss (2019), 375, 391, who, however, favors an analogous application of the CISG to contracts that do not envision a transfer of property; *Muñoz*, 24 Uniform Law Review (2019), 281, 287, who, however, appears not to rely on national property law to assess whether property has been transferred. Differently, P. Huber/Mullis/*P. Huber*, p. 43, who refers to Arts. 31, 53 but merely mentions the delivery of the goods as being necessary on the side of the seller's obligations to characterize a contract as a sales contract and *Schroeter*, Internationales UN-Kaufrecht, paras. 88, 121 who does not rely on a transfer of property to characterize a sales contract.

562 *Sono*, FS Kritzer, pp. 512, 526; Brunner/Gottlieb/*Tebel*, Art. 41 para. 21.

563 *Torsello*, pp. 191, 199. Less convinced, however, in *Torsello*, 38 Journal of Law and Commerce (2019–2020), 273, 286, where he does not emphasize the obligation to transfer the property, and goes on to argue that contracts other than sales contracts can be subject to the CISG.

564 For example, *Kahn*, International Business Law Journal (2001), 241; *Niggemann*, IWRZ 2023, 99, 102; BK/*Giger*, Art. 184 OR para. 78: "*denn selbstverständlich kommt Besitz ohne Eigentum niemals kaufvertragliche Qualität zu. Erst die zusätzliche Pflicht, Eigentum zu verschaffen, löst den typisierenden Effekt aus, der beim Kauf Umsatz ist.*" For Canadian sales law, see *Fridman*, pp. 12–13.

565 Cf. *Perales Viscasillas,* 28 Uniform Law Review (2023), 293, 314; contra, *Magnus*, Borderline Problems, pp. 1171, 1176 claiming that the definition of a sale under the CISG corresponds to the definition under national law.

II. Transfer of property as understood under national laws is no necessary element of characterization of sales contracts under the CISG

As far as scholars and courts rely on "property" for contract characterization under the CISG, it has to be assumed that they refer to the respective national concept of property since no autonomous understanding of property under the CISG is currently adopted. Yet, defining a sales contract under the CISG with the assistance of national property law invites criticism because it cannot safeguard a uniform application due to the diverging notions of property under national laws. **284**

If property were a necessary element to define a CISG sales contract, differences between a relative and absolute understanding of property in the applicable property law could lead to an inconsistent scope of the CISG in violation of Article 7(1). For example, if both parties are aware that the goods in question were stolen, and the buyer would consequently not be able to become the absolute owner of the goods, one may deduce in a legal system with an absolute property concept that the contract is not a sales contract since no property in the sense of national property law is envisioned to be transferred.[566] Whereas, in a relative property system, the buyer would receive property in the goods albeit not the best title, which is why the contract could be characterized as a sales contract envisioning the transfer of property.[567] These differences in national property law should not have an impact on the contract and the applicability of the CISG since they are unrelated to the suitability of its rules. **285**

An example to the same effect can be formed based on the fact that some national laws might consider property not to exist with regard to certain objects or goods. For example, the discussions under national laws as to whether property of data either exists or should exist remain ongoing.[568] Moreover, some legal systems might, for political or other reasons, consider that certain things should not be objects of commerce and might forbid **286**

566 For example, under German law, the buyer could not become the owner due to sect. 935(1) German Civil Code.

567 For example, under English law, *Costello v Chief Constable of Derbyshire Constabulary* [2001] EWCA Civ 381, [2001] 1 WLR 1437.

568 Schlechtriem/Schwenzer/Schroeter/*Hachem*, 5th edn, CISG and Data Trading para. 14. For example, favoring an analogous application of property law to data under German law, *Hoeren*, MMR 2013, 486, 489, but see *Wellenhofer*, pp. 69, 78–81. Cf. also *Omlor*, ZVglRWiss 2020, 41 for the argument that "property" under common law thought might be more flexible than for example, German law and might be apt to encompass digital assets like tokens; *Bridge/Gullifer/Low/McMeel*, paras. 8-041 et seq. for crypto assets and cryptocurrencies under English law.

private property of them.[569] In India, for example, the liquor trade is limited based on the argument that liquor is a *res extra commercium*.[570] These two examples illustrate the lack of uniformity of the CISG's scope of application that would result from diverging national property law if property were to form part of the definition of a CISG contract. In both cases, the relevant question should be whether data or the *res extra commercium* are goods under Article 1(1) of the CISG.[571] This question can be answered without reverting to national law. If the respective national law regulates the validity of contracts concerning such objects, Article 4, sentence 2(a) of the CISG provides ample room for national law in this regard.[572] This does not, however, change the contract characterization, which must stay free of national concepts in line with the mandate under Article 7(1) of the CISG to promote uniformity in the Convention's application.[573]

287 *Scheuch* rejects this opinion and excludes data sales from the ambit of the CISG due to the absence of a transfer of property under Article 30 of the CISG.[574] In turn, *Scheuch* proposes an analogous application of the CISG to such contracts where property is not to be transferred.[575] If this were a viable option, it would weaken the argument that property cannot form part of contract characterization under the CISG due to the otherwise jeopardized uniformity of the application: The CISG could be applied directly in countries that consider property to exist with regard to the object in question and in analogy in the remaining countries. *Scheuch* acknowledges that analogies are only possible within the scope of application of the CISG, since Article 7(2) of the CISG references "*matters governed by this Convention*".[576] He reasons that the scope of application was "*undoubtedly*" a matter governed by the Convention which would, thus, allow for analogies.[577] Yet, this reasoning is circular: If the scope of application was itself a matter governed by this Convention, everything could be considered a matter of the Conven-

569 *Res extra commercium*, Schlechtriem/Schwenzer/Schroeter/*Hachem*, 5th edn, CISG and Data Trading para. 14.

570 *Datar*, 21 National Law School of India Review (2009), 133 who criticizes this use of the doctrine rooted in Roman law.

571 See for an answer whether data can be goods below para. 332.

572 Schlechtriem/Schwenzer/Schroeter/*Hachem*, 5th edn, CISG and Data Trading para. 14.

573 Schlechtriem/Schwenzer/Schroeter/*Hachem*, 5th edn, CISG and Data Trading para. 14; *Neumann*, 21 VJ (2017), 109, 116; *Perales Viscasillas*, 28 Uniform Law Review (2023), 293, 314. Also correct in regard to this general rule, but then reverting to a national concept in form of property to define a CISG contract, *Nicolai*, pp. 259, 260; *Piltz*, Internationales Kaufrecht, paras. 2-20, 2-27.

574 *Scheuch*, 118 ZVglRWiss (2019), 375, 391.

575 *Scheuch*, 118 ZVglRWiss (2019), 375, 385–391.

576 *Scheuch*, 118 ZVglRWiss (2019), 375, 385. This limitation is generally accepted, see MüKoBGB/*Gruber*, Art. 7 para. 35.

577 *Scheuch*, 118 ZVglRWiss (2019), 375, 385.

tion. This is because every matter could be subject to the scope of application of any rule. While it is correct that the scope of application is governed by the Convention, it does not mean that contracts that fall outside the scope of application can also be governed by the CISG due to Article 7(2) of the CISG. This is exactly what the general opinion avoids by requiring the CISG to be applicable in the first place before applying Article 7(2).[578] The correct question would rather be whether the sale of data is a matter governed by the CISG, especially if data is a good under Article 1(1). If it is, then the CISG can be applicable; if it is not, then it is not a matter governed by the Convention and, hence, no analogies are possible to remedy the lack of application.[579] Since no analogous application of the CISG to contracts that do not envision a transfer of property is possible, the uniformity of application cannot be achieved with this artifice. The argument based on Article 7(1) of the CISG to substantiate why property should not be considered relevant to characterize a CISG contract, thus, stays intact.

288 A few authors agree that property should not be a necessary part of the transaction.[580] Yet, some rely on Article 41 of the CISG to argue that the seller may retain rights in the goods and not transfer property in the context of software sales: This would not remove the contract from the Convention's scope, as Article 41 explicitly allows the buyer to agree to take the goods subject to a right or claim.[581] This argument's flaw lies in the disregard of the wording of Article 41 which is limited to third party rights. As has been argued above and against the apparently prevailing opinion, Article 41 excludes the seller's rights and is, thus, not the correct basis to determine which rights the seller can retain in the goods.[582] The fact that the buyer can agree to third party rights and claims does not give insight into whether the seller can retain rights in the goods without effect on the contract characterization.

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578 See for the general opinion Kröll/Mistelis/Perales Viscasillas/*Perales Viscasillas*, Art. 7 para. 56 ("*matters governed by the Convention are those issues that are within the field of application of the Convention*").

579 Contra, *Neumann*, 21 VJ (2017), 109, 113 who also appears to allow for analogies regarding the scope of application under Art. 1(1) CISG.

580 *Neumann*, 21 VJ (2017), 109, 116 but less clear at 125; *Primak*, 11 Computer L. J. 197 (1991), 197, 223–224; *Larson*, 5 Tulane Journal of International and Comparative Law (1997), 445, 468; *Mowbray*, 7 VJ (2003), 121, 124; *Niggemann*, IWRZ 2023, 99, 102; *Perales Viscasillas*, 28 Uniform Law Review (2023), 293, 314.

581 *Primak*, 11 Computer L. J. 197 (1991), 197, 223–224; *Larson*, 5 Tulane Journal of International and Comparative Law (1997), 445, 468; *Mowbray*, 7 VJ (2003), 121, 124. But see *Niggemann*, IWRZ 2023, 99, 103, who argues that the third party rights specifically concerning data and software can be so far-reaching as to render the CISG inapplicable.

582 See above para. 186.

289 All things considered, introducing national, and hence, diverging elements such as property to define the scope of the CISG should be avoided.

III. Transfer of property under Article 30 of the CISG is no necessary element of characterization of sales contracts under the CISG

290 The necessary uniformity in the scope of application also prevents making use of the autonomous term property under Article 30 of the CISG as developed above (the seller's legal interest in the goods without regard to the quality of this interest)[583] in the characterization of a CISG contract. This is because there can be sales contracts that, in contrast to the foregoing argument, concern goods that can be owned, but under which the seller never transfers the legal position to the buyer. The English case of *PST Energy 7 Shipping LLC and another v OW Bunker Malta Ltd and another* ("*The Res Cogitans*")[584] exemplifies such a constellation and will be analyzed under the applicable English law. The treatment and characterization of such a contract under the CISG will then be discussed.

1. *The Res Cogitans* and English sales law

291 Section 2(1) of the Sale of Goods Act 1979 reads: "*A contract of sale of goods is a contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price.*" With exception of the reference to "consideration", this definition is similar to the commonly cited definition of a sales contract under the CISG[585] and to many other (national and international) sales laws.[586]

a) The case

292 In *PST Energy 7 Shipping LLC and another v OW Bunker Malta Ltd and another* ("*The Res Cogitans*")[587] the English Supreme Court upheld the decisions of an arbitral tribunal and two judgments by lower courts in characterizing the contract in question not to be a sales contract under the Sale of Goods Act 1979.

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583 See above for this definition, paras. 172 et seq.
584 [2016] AC 1034 (UKSC), [2016] UKSC 22.
585 See above para. 282.
586 *Schwenzer/Hachem/Kee*, para. 7.01.
587 [2016] AC 1034 (UKSC), [2016] UKSC 22.

293 The Res Cogitans was a ship that lay in a Russian port in November 2014. Its owners and managers (hereafter: the shipowners) ordered bunkers (ship fuel) from *OW Bunker Malta Ltd* (hereafter: *OWBM*) to fuel said ship. *OWBM* bought the bunkers from its Danish parent company, *OW Bunker & Trading A/S* (hereafter *OWBAS*). *OWBAS* added to the chain of contracts by in turn ordering them from *Rosneft Marine (UK) Ltd* (hereafter: *RMUK*), which called on *RN-Bunker Ltd* (hereafter *RNB*), since the latter had facilities nearby the port and could deliver the bunkers directly to the shipowners. Subsequently *OWBAS* became insolvent.

294 The contracts within the chain differed but each one contained a reservation of property clause, according to which the property would not pass until full payment. Under the contracts, payment was to be effected within 30 (contract between *OWBAS* and *RMUK*) and 60 days (contract between the shipowners and *OWBM*) respectively. The ship-owners purportedly used the bunkers within these time-periods to fuel the ship[588] but did not pay *OWBM*. Fearful of being held liable by both their contractual partner, *OWBM*, and the original owners of the bunkers, they initiated arbitration proceedings against *OWBM* (and their bank *ING*, which may have been assigned the alleged claim for the price) asking the arbitral tribunal for a declaration that they were not liable for the price.

295 While the dispute ultimately concerned the correct legal basis for claiming the purchase price, and especially with the limits to section 49 of the Sale of Goods Act 1979 posing difficulties on its own,[589] the preliminary question arose regarding whether the contract at hand could be characterized as a sales contract under section 2(1) of the Sale of Goods Act 1979.

296 The main line of argument presented by *Lord Mance*, with the full support of *Lord Neuberger*, *Lord Clarke*, *Lord Hughes*, and *Lord Toulson* is based on the liberty of the shipowners to use the bunkers before payment thereof. Since the parties expected the shipowners to use the bunkers before paying, and due to the commercial reality that credit has value and full advantage will be taken, the contract should not be characterized as a straightforward agreement to transfer the property for a price.[590] The court further took issue with the fact that property in the goods would likely not have existed anymore as soon as the price would have to be paid. *Lord Mance* summarized his own reasoning:

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588 Although this fact is not beyond doubt, the arbitrators and judges were invited to assume this fact, *PST Energy 7 Shipping LLC and another v OW Bunker Malta Ltd and another ("The Res Cogitans")* [2016] AC 1034 (UKSC), [2016] UKSC 22, para. 12.

589 These difficulties will be discussed below paras. 353 et seq., 364.

590 *PST Energy 7 Shipping LLC and another v OW Bunker Malta Ltd and another ("The Res Cogitans")* [2016] AC 1034 (UKSC), [2016] UKSC 22, para. 27.

> "*But, in its essential nature, it offered a feature quite different from a contract of sale of goods – the liberty to consume all or any part of the bunkers supplied without acquiring property in them or having paid for them. The obligation on the part of OWBM to be able to pass the property in respect of any bunkers not so consumed against payment of the price for all the bunkers cannot make the agreement as a whole a contract of sale.*"[591]

297 Consequently, the contract was qualified to be *sui generis*,[592] to which the Sale of Goods Act 1979 did not apply. In contrast to the Court of Appeal, the Supreme Court found this contract not to be divisible into a *sui generis* part and a sales part regarding the number of bunkers not being used up before the price became due, since the arrangement called for a single price to be paid for all bunkers.[593]

298 *Lord Mance* took up two of the major arguments against the *sui generis* characterization. First, his Lordship rejected a relevant *scintilla temporis* (a spark of time). Also referred to as the "nanosecond argument", the argument is based on the idea that just before the bunkers were consumed, the reservation of property clauses were lifted and the shipowners became owners for a nanosecond. *Lord Mance* rejected the argument with the mere remark that doing so was right.[594] *Males J* had reasoned at first instance that the construction of a nanosecond transfer would contradict the express contract term allowing property only to pass upon payment although the parties had envisioned the goods to be consumed beforehand.[595]

299 Second, *Lord Mance* dismissed the argument that the contract at hand was a conditional sales contract.[596] According to section 2(3) of the Sale of Goods Act 1979 a sale can be conditional, and section 2(6) of the Sale of Goods Act 1979 provides that the "*agreement to sell becomes a sale when* […] *the conditions are fulfilled subject to which the property in the goods is to be transferr*ed." *Crow* QC, acting for the shipowners, had claimed that the contract could, hence, be regarded as an agreement to transfer property, conditional

591 *PST Energy 7 Shipping LLC and another v OW Bunker Malta Ltd and another ("The Res Cogitans")* [2016] AC 1034 (UKSC), [2016] UKSC 22, para. 34.

592 *PST Energy 7 Shipping LLC and another v OW Bunker Malta Ltd and another ("The Res Cogitans")* [2016] AC 1034 (UKSC), [2016] UKSC 22, para. 59 sub (i).

593 *PST Energy 7 Shipping LLC and another v OW Bunker Malta Ltd and another ("The Res Cogitans")* [2016] AC 1034 (UKSC), [2016] UKSC 22, paras. 29 sub iii), 31.

594 *PST Energy 7 Shipping LLC and another v OW Bunker Malta Ltd and another ("The Res Cogitans")* [2016] AC 1034 (UKSC), [2016] UKSC 22, para. 28 ("*once the theory of a nanosecond transfer of property is, rightly, rejected*").

595 *PST Energy 7 Shipping LLC and another v OW Bunker Malta Ltd and another ("The Res Cogitans")* [2015] EWHC 2022 (Comm), [2015] 2 Lloyd's Rep 653, para. 67.

596 *PST Energy 7 Shipping LLC and another v OW Bunker Malta Ltd and another ("The Res Cogitans")* [2016] AC 1034 (UKSC), [2016] UKSC 22, paras. 29–30.

on the bunkers remaining unburned when payment is made.[597] The rejection was threefold: the argument ignored that it addressed only one possibility, in that some of the bunkers would have to survive, while a condition under sections 2(3) and (6) of the Sale of Goods Act 1979 required it to apply to all goods under the contract, not just a part of them.[598] Furthermore, the property in the consumed bunkers would never pass and was not agreed to pass,[599] which is why there was no conditional sale with regard to these goods. Lastly, the price was a single price without any further distinction as to whether the goods had been consumed or not, which is why it was not convincing to focus on the agreement to pass property in the unconsumed bunkers at the time of payment.[600] The follow-up-argument that *OWBM* had undertaken to transfer the property at the date of payment and that they would also have transferred property in the bunkers consumed, was rejected due to its lack of legal and commercial sense and its metaphysical appearance.[601]

b) Reception in the English literature

Despite the clear consensus of the arbitrators and judges that decided this case, the characterization of the contract as *sui generis* has been criticized in English literature. While the overall result that *OWBM* or their bankers were entitled to the price is mostly welcomed,[602] a broad consensus seems to emerge that this decision creates unwarranted legal uncertainty.[603] This uncertainty extends to different directions. First, it is unclear which rules **300**

597 *PST Energy 7 Shipping LLC and another v OW Bunker Malta Ltd and another ("The Res Cogitans")* [2016] AC 1034 (UKSC), [2016] UKSC 22, para. 29.

598 *PST Energy 7 Shipping LLC and another v OW Bunker Malta Ltd and another ("The Res Cogitans")* [2016] AC 1034 (UKSC), [2016] UKSC 22, para. 29 sub i).

599 *PST Energy 7 Shipping LLC and another v OW Bunker Malta Ltd and another ("The Res Cogitans")* [2016] AC 1034 (UKSC), [2016] UKSC 22, para. 29 sub ii).

600 *PST Energy 7 Shipping LLC and another v OW Bunker Malta Ltd and another ("The Res Cogitans")* [2016] AC 1034 (UKSC), [2016] UKSC 22, para. 29 sub iii).

601 *PST Energy 7 Shipping LLC and another v OW Bunker Malta Ltd and another ("The Res Cogitans")* [2016] AC 1034 (UKSC), [2016] UKSC 22, para. 30.

602 Different on this point, *Theocharidis*, 49 Journal of Maritime Law and Commerce (2018), 127, 150, who seems to argue that the non-monetary obligation was not sufficiently fulfilled as to justify a claim for the price ("*no substantial performance by OWBM should lead to no action for the price*").

603 *Bridge*, Singapore Journal of Legal Studies (2017), 345 ("*The consequences of the decision are not easy to predict*"); *Gullifer*, 133 Law Quarterly Review (2017), 244, 268; *Yap*, 46 Common Law World Review (2017), 269, 278 ("*leads to significant uncertainty in relation to the characterization of subsequent contracts*"); *Low/Loi*, Journal of Business Law (2018), 229, 248; slightly more positive reception by *Moore*, 75 Cambridge Law Journal (2016), 465, 468 ("*Certainty and freedom of contract, then, remain compromised, but this may be a fair price to pay for the speed with which the Supreme Court reached a sensible outcome.*").

of the Sale of Goods Act 1979 can still be applied (analogously) to such *sui generis* contracts.[604] Second, it is unclear whether consumers and others can still expect to be protected under consumer laws[605] and the Unfair Contract Terms Act 1977.[606] Third, it is unclear to which kinds of contracts the characterization as *sui generis* contracts extends, since many contracts in many parts of the economy rely on retention of property clauses where the property in the goods might be lost by consumption or other use before payment of the price.[607] Additional uncertainties are created in light of the fact that a number of other jurisdictions have their own Sale of Good Acts, which are closely modelled on the Sale of Goods Act 1979 and within which decisions of the English Supreme Court still remain important.[608]

301 The following sections examine the arguments and solutions brought forward in literature to avoid this uncertainty and to characterize this contract as a sales contract under English law.

aa) Property-transfer for a nanosecond (*scintilla temporis*)

302 Even against the explicit rejection of the *scintilla tempori* argument,[609] scholars argue that a transfer of the property a nanosecond before the goods were consumed would be a preferable interpretation of English law.[610] Notably, the argument is not that this reasoning strikes one as being a necessary conclusion on its own or that the contract of the parties provides for it, but rather that it creates fewer uncertainties, inconsistencies, and problems than the *sui generis* characterization.[611]

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604 *Moore*, 75 Cambridge Law Journal (2016), 465, 467; *Low/Loi*, Journal of Business Law (2018), 229, 251–252; *Yap*, 46 Common Law World Review (2017), 269, 280.

605 *Bridge*, Singapore Journal of Legal Studies (2017), 345, 357 sub (d).

606 *Low/Loi*, Journal of Business Law (2018), 229, 251.

607 *Tettenborn*, Lloyd's Maritime and Commercial Law Quarterly (2016), 24, 26; *Low/Loi*, Journal of Business Law (2018), 229, 248; *Yap*, 46 Common Law World Review (2017), 269, 279.

608 Drawing this conclusion with regard to *The Res Cogitans* and the legal situation in Hong Kong and Singapore, *Yap*, 46 Common Law World Review (2017), 269, 276; similarly for India, *Bridge*, 29 National Law School of India Review (2017), 21.

609 See above para. 298.

610 *Tettenborn*, Lloyd's Maritime and Commercial Law Quarterly (2016), 24, 26 et seq.; *Low/Loi*, Journal of Business Law (2018), 229, 252; *Saidov*, Journal of Business Law (2019), 1, 6; *Bridge/Gullifer/Low/McMeel*, para. 20-010; *Gullifer*, 133 Law Quarterly Review (2017), 244, 260 et seq. who, however, does not advocate for this solution alone, but rather presents different solutions that have the result of a characterization of such contracts as sales contracts in common.

611 Cf. *Low/Loi*, Journal of Business Law (2018), 229, 253; *Saidov*, Journal of Business Law (2019), 1, 6.

The argument presupposes that property can pass before payment, because consumption of the goods can occur before payment. The courts found that the reservation of property contradicts this interpretation because such a clause prevents property from passing before payment.[612] However, this reasoning is criticized for being inconsistent with both the intention of the parties and commercial common sense: It is argued that within such a contract exists an implied term that property passes when the bunkers are used.[613] This is based on the idea that property in goods that are being consumed becomes worthless in the moment of consumption, and thus this interpretation does not violate the seller's intent to retain property in the goods.[614] The security for the claim for the price goes up in smoke concurrently with the bunkers. This is not changed by interpreting the contract to provide a license to consume, since in this case of consumption there is also no security for the party delivering the bunkers anymore.[615] A commercially sensible interpretation would be one that limited the effect of the retention of property clause to the period (one nanosecond) before consumption.[616] In contrast, the Supreme Court's interpretation is claimed to do more damage to the wording of the retention of property clause by changing the contract's nature.[617] **303**

Since property under this interpretation would pass a nanosecond before consumption, the contract would regain its characterization as a sales contract under the Sale of Goods Act 1979. **304**

bb) Functional interpretation of the retention of title clause

Examining the retention of property clause from a functional perspective provides grounds for characterizing the contract as a sales contract — an aspect the Supreme Court did not address.[618] The idea is that retention of property clauses in practice operate as a floating charge, i. e., the buyer is allowed to use the goods as if he or she had property in them and only in case of non-payment will the seller threaten steps to claim the goods back.[619] If **305**

612 See above para. 298.
613 *Gullifer*, 133 Law Quarterly Review (2017), 244, 260; *Tettenborn*, Lloyd's Maritime and Commercial Law Quarterly (2016), 24, 27.
614 *Gullifer*, 133 Law Quarterly Review (2017), 244, 260; *Tettenborn*, Lloyd's Maritime and Commercial Law Quarterly (2016), 24, 27; similarly, *Theocharidis*, 49 Journal of Maritime Law and Commerce (2018), 127, 136.
615 *Tettenborn*, Lloyd's Maritime and Commercial Law Quarterly (2016), 24, 27; *Low/Loi*, Journal of Business Law (2018), 229, 253.
616 *Low/Loi*, Journal of Business Law (2018), 229, 252–253.
617 *Bridge/Gullifer/Low/McMeel*, para. 21-010; *Gullifer*, 133 Law Quarterly Review (2017), 244, 260.
618 *Gullifer*, 133 Law Quarterly Review (2017), 244, 264.
619 *Gullifer*, 133 Law Quarterly Review (2017), 244, 264.

the buyer is insolvent, the insolvency officer, who will often have an interest in keeping the goods to allow for business to continue, will pay the seller.[620]

306 Consequently, one could claim that when the contract is a contract of sale, the property is transferred at the latest with delivery of the goods and the retention of property clause would create a floating charge over the goods, which would attach with their delivery.[621] No adaptation of the Sale of Goods Act 1979 would be necessary following this understanding, but other areas of the law such as the effect of a retention of property clause on the transfer of property and the creation of security rights would have to be changed.[622] An example and possibly the blueprint for the implementation of this argument is section 2-401(1), sentence 2 of the UCC.

cc) Conditional contract of sale of bunkers

307 The Supreme Court appreciated the argument that the contract could be a conditional sales contract, but ultimately still rejected it.[623] The Lords' reasoning, however, was not met with applause by scholars either.[624] Since the goods had not to be used up before the payment period elapsed, some scholars argue that the parties had envisaged property to pass merely under the condition that the goods had not been consumed yet.[625]

308 To support this line of thought, scholars point to contracts where risk passes before property in the goods is transferred: If the goods are destroyed before property was transferred, and even if the parties had envisioned this possibility of the property never passing, the characterization of the contract as one for the sale of goods would be unquestioned.[626] The transfer of property has, in this regard, been claimed to be conditional on the continued existence of the goods.[627] This conditionality is alleged to exist equally for the consumption and the loss of the goods.[628]

620 *Gullifer*, 133 Law Quarterly Review (2017), 244, 264.
621 *Gullifer*, 133 Law Quarterly Review (2017), 244, 265.
622 *Gullifer*, 133 Law Quarterly Review (2017), 244, 265.
623 See above para. 299.
624 *Tettenborn*, Lloyd's Maritime and Commercial Law Quarterly (2016), 24, 27 ("*less than convincing*"); *Bridge*, Singapore Journal of Legal Studies (2017), 345, 353.
625 *Tettenborn*, Lloyd's Maritime and Commercial Law Quarterly (2016), 24, 27.
626 *Bridge*, Singapore Journal of Legal Studies (2017), 345, 353; *Tettenborn*, Lloyd's Maritime and Commercial Law Quarterly (2016), 24, 28.
627 *Tettenborn*, Lloyd's Maritime and Commercial Law Quarterly (2016), 24, 28.
628 *Bridge*, Singapore Journal of Legal Studies (2017), 345, 353.

dd) Party autonomy in characterizing the contract

A different group of scholars emphasize the importance of party autonomy in the characterization of the contract in *The Res Cogitans*.[629] The numerous uses of the word "sale", specifically in the title of the agreement ("Terms and Conditions of Sale"), and the reference to the parties as seller and buyer are highlighted.[630] There was no reason to consider the parties' choice of this characterization to be erroneous.[631] **309**

2. The reasoning of *The Res Cogitans* and the CISG

This potential limitation of the scope of application of the CISG due to the definition of a sales contract referring to a transfer of property in cases comparable to *The Res Cogitans* has thus far not attracted much attention.[632] These different approaches to characterize contracts such as the one underlying *The Res Cogitans* might also be considered under the CISG. It is important to note that English law is hereby not taken to mirror the delimitation of what is a sales contract under the CISG.[633] "Contracts of sale of goods" must be interpreted with regard to its international character and the need to promote uniformity in the CISG's application, thus, autonomously under Article 7(1).[634] Yet, if the transfer of property formed part of the definition of a sales contract under the CISG, the reasoning of the Supreme Court and of dissenting scholars could at first sight be equally applicable irrespective of the Sale of Goods Act 1979. **310**

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629 *Theocharidis*, 49 Journal of Maritime Law and Commerce (2018), 127, 137; *Yap*, 46 Common Law World Review (2017), 269, 278.

630 *Theocharidis*, 49 Journal of Maritime Law and Commerce (2018), 127, 137; *Yap*, 46 Common Law World Review (2017), 269, 278.

631 *Theocharidis*, 49 Journal of Maritime Law and Commerce (2018), 127, 137; skeptically, *Goode/McKendrick*, para. 7.33.

632 Exceptions are Schlechtriem/Schwenzer/Schroeter/*Hachem*, 5th edn, Art. 1 para. 9 who at least states that reasoning in *The Res Cogitans* is not applicable under the CISG, and *Bridge*, International Sale of Goods, para. 11.45 who considers it unlikely for "*a court or tribunal applying the CISG* […] *to arrive at such an uncommercial conclusion.*"

633 Imprecise in describing the scope of application of the CISG with the delimitation found in German law therefore, German Supreme Court, 28 May 2014, CISG-online 2513, paras. 12 et seq.; rightly critical in this regard *Schroeter*, IHR 2014, 173, 176.

634 Cf. Schlechtriem/Schwenzer/Schroeter/*Ferrari*, 8th German edn, Art. 7 para. 9.

a) Property-transfer for a nanosecond and functional analysis of the retention of property clause

311 Both arguments regarding the property transfer for a nanosecond and the functional analysis of the retention of property clause rely on the interpretation of (national) property law: Under both arguments, property in the goods is transferred to the buyer, which in turn allows for a characterization of the contract as being a contract for the sale of goods. Especially in an international setting in which cases will be governed by the CISG, there are three disadvantages of such an interpretation. First, while it might be sensible to propose changes to English property law in introducing a functional interpretation of the transfer of property in such cases,[635] these changes would have to be reflected in all potentially applicable national laws to allow for a uniform scope of application of the CISG. Since the uniform interpretation of the different applicable national laws is uncertain at best,[636] the argument under English law carries less weight for the parallel problem under the CISG. Second, if one interprets the CISG to contain an implicit agreement of the parties to transfer the property a nanosecond before consumption or other loss of property, conflicts, or discrepancies with the law applicable to the transfer of property will arise, as these national laws will not necessarily accept such a transfer. Third, given the diverging national laws on the transfer of property in this respect, it is unlikely that the delegates negotiating the CISG provided for a solution of this question. Therefore, the CISG should not be interpreted to envision a nanosecond transfer or to provide that parties always transfer the property under a functional interpretation when the seller retains property.

b) Conditional contract of sale

312 A different argument that warrants consideration of transfer to the CISG concerns the conditionality of the CISG contracts: One could interpret the contracts to make the transfer of property conditional on the ongoing existence of the goods at the time of payment.[637] The CISG generally allows for conditions to be agreed upon by the parties (Article 6).[638] Yet, if the parties

635 Cf. *Gullifer*, 133 Law Quarterly Review (2017), 244, 260 et seq. and above paras. 305–306.

636 See for example the case law in Canada in this regard, *Hendrickson v Mid-City Motors Ltd* [1951] 3 DLR 276, 1 WWR (N. S.) 609 (Alta S. C.) para. 24 where a reservation of title clause was understood not to necessarily hinder the transfer of property; distinguished in *W. C. Fast Enterprises Ltd v All-Power Sports (1973) Ltd* 126 DLR (3d) 27 (CA), paras. 16–18.

637 Cf. above for this argument under English law, paras. 307–308.

638 Extensive analysis of conditional contract conclusion under the CISG, *Schroeter*, FS Magnus, pp. 301 et seq.

agree that the goods are consumed before payment, an interpretation under Article 8(1) of the CISG would accordingly find that no such condition was agreed upon. Moreover, a reasonable third person evaluating the transaction under Article 8(2) of the CISG would not find a condition to exist since property is not meant to be transferred according to the parties' arrangements. The suggested condition would, thus, be a mere fiction, which is why this argument does not convince.

313 Furthermore, the argument relies on alleged similarities to a loss of the goods: If the goods are destroyed before delivery and/or payment, the buyer might still be required to pay for the goods if the risk was shifted beforehand. Such contracts would still be considered contracts for the sale of goods. This could be considered to be comparable to consumption before payment. For this reason, one might claim that these contracts allegedly contain a similar conditionality.[639] As the CISG governs the transfer of risk in Articles 66–70, and the mere materialization of the risk would not change the character of the contract, the argument could generally be transferred to the CISG. It is important to note, however, that risk under the CISG is understood to encompass haphazard events that none of the parties are responsible for.[640] Consequently, these provisions govern situations that were not the desired outcomes of the transaction for any of the parties. Such a contract still called for the transfer of property. It is not comparable to a contract under which the parties agree that the goods can be consumed or destroyed before payment of the price although the property was retained by the seller until such payment. The intended outcome of the transaction is, however, the basis for the characterization of the contract. Therefore, a contract that cannot be fulfilled due to a materialization of risk and a contract under which loss of property due to consumption is envisioned and agreed upon by both parties should not be considered so similar as to allow reaching identical results regarding the characterization of contract.

c) Party autonomy in characterizing the contract

314 This leaves the argument concerning party autonomy. Party autonomy is enshrined in Article 6 of the CISG and considered to be a cornerstone of modern contract law.[641] Therefore, the argument raised under English law referencing the parties' choice of wording ("sale", "seller", and "buyer") to

639 Cf. above for this argument under English law, para. 308.

640 Art. 66 CISG: "[…] *unless the loss or damage is due to an act or omission of the seller*"; Schlechtriem/Schwenzer/Schroeter/*Hachem*, 8th German edn, Art. 66 para. 16.

641 MüKoHGB/*Mankowski*, Art. 6 para. 1.

express the intention of the parties to conclude a sales contract, can generally be transferred to the CISG.[642]

315 If "party autonomy" is understood to refer to the parties' ability to conclude a contract containing typical sales obligations and declaring them as such, no issue arises. It is questionable, though, whether the characterization of a contract is directly influenced by the parties' choice of words if a contract does not fall under the scope of application of the Convention. This is because Contracting States are bound to apply the CISG under Article 1(1)(a) without recourse to private international law, if the Convention is applicable.[643] If it were up to the parties to declare the CISG applicable by using terminology like "international sale" even if the contract would not be considered a sale of goods under the CISG, the parties could circumvent private international law to determine whether the choice of the parties amounts to a choice of the CISG and whether this choice is effective.[644]

316 This detour along the rules of private international law can be an important restriction. For example, Article 3 of the Rome I-Regulation does not allow the choice of a non-State body of law.[645] The CISG might fall under this designation if it is chosen without reference to a national law of which it might form part.[646] Therefore, the mere use of wording common for sales contracts cannot have a decisive impact on the characterization of a contract under the CISG. Instead, the agreed upon content and obligations of the parties should be analyzed and, in this regard, substance shall take precedence over form or wording.

317 Hence, party autonomy, understood as referring to the parties' wording, should not be relied upon to define a sales contract under the CISG and thereby the scope of the Convention's application.

3. Property as part of the definition of a CISG contract

318 Since the arguments raised under English law against the finding in *The Res Cogitans* should not be transposed to the CISG, it has to be evaluated if the non-applicability of the CISG to such contracts – due to the lack of a transfer of any legal position to the buyer and the seller retaining the rights until

642 Cf. above for this argument under English law, para. 309.
643 Schlechtriem/Schwenzer/Schroeter/*Ferrari*, 8th German edn, Art. 1 para. 63.
644 Cf. MüKoHGB/*Mankowski*, Art. 6 para. 19; contra the possibility of an opt-in under private international law, *Heuzé*, para. 125.
645 Art. 3 Rome I-Regulation mentions "law" in contrast to "non-State body of law" in recital (13).
646 MüKoHGB/*Mankowski*, Art. 6 para. 19; but see *Schroeter*, Internationales UN-Kaufrecht, para. 88.

the goods cease to exist – is a sensible solution. Courts and arbitral tribunals have not explicitly addressed the problem in publicly available decisions.[647]

319 There is at least one decision by the US District Court for the Northern District of Illinois that concerned a comparable situation:[648] The French company *Usinor Industeel* sold steel to the US company *Leeco Steel Products, Inc.* under a retention of property clause. The latter aimed to resell the steel to *Caterpillar* to be installed into trucks (whereby property in the goods sold might be lost before payment of the price). While considering these facts under English legal thought, it would be conceivable to argue that the American buyer was never envisioned to receive property in the goods. Nevertheless, the court found a sales contract under the CISG to exist without even mentioning the potentially limited transfer of property. This might be because under a retention of title clause under the UCC, the property in the goods would still be transferred while the seller only retains an unperfected security right.[649] Hence, under the UCC buyers would receive property in the goods, while under English law they would not. Accordingly, if property were to form part of the definition of a CISG sales contract, it would apply to the contract concerning goods to which the UCC was applicable regarding property, but not to the contract concerning goods under English property law. This divergence of the scope of application of the CISG is unacceptable. Since the contracts and parties' agreements are identical, it is merely the applicable property law which diverges. Not applying the CISG to such a contract would once again violate Article 7(1) of the CISG and its mandate to have regard to the necessity of uniformity in the application of the Convention. If the parties had concluded the same contract as found in *The Res Cogitans*, but without a retention of property clause, nobody would question the characterization as a sales contract.[650] Interpreting the parties' intention when inserting the retention of property clause, it is highly likely that they did not intend to change the obligations under the contract, but rather the seller tried to securitize the claim for the price.

320 The Court of Appeal Munich rendered another decision that supports the argument that the buyer does not have to receive property in the goods.[651] In

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647 It is unclear whether District Court Rotterdam, 18 September 2013, CISG-online 4665 in which the CISG was applied concerns comparable facts to *The Res Cogitans*. While bunkers were delivered, probably consumed, and not paid for, the decision does not reveal whether the parties had agreed on a retention of property clause.

648 *Usinor Industeel v. Leeco Steel Products, Inc.*, US District Court for the Northern District of Illinois, 28 March 2002, CISG-online 696.

649 Sect. 2-401(1), sentence 2 UCC: "*Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest.*"

650 *Goode/McKendrick*, para. 7.31 fn. 119.

651 Court of Appeal Munich, 2 March 1994, CISG-online 108 para. 15.

this case, the contract required the seller to deliver and transfer the property in five hundred tons of coke directly to the sub-buyer. The Court found that the buyer never received property in the goods. This was not even discussed with regard to potential implications for contract characterization, but rather with regard to a potential breach of contract by the seller.[652] The contract was held to be a CISG sales contract although there was no obligation to transfer the property in the goods to the buyer. This decision is not in conflict with a subsequent decision by the German Supreme Court in a different case: A contract under which the party receiving the goods promised to resell them without property ever being transferred to it was not held to be a sales contract but a distribution contract (*Geschäftsbesorgungsvertrag*).[653] Even though the party supplying the goods was promised a fixed price, the court interpreted this to be a (re)sales guarantee (*Verkaufsgarantie*) instead of a sales price.[654] This relationship between the parties was based on a cooperative sales organization, and the party reselling the goods received only a commission for its services. The lack of transfer of property to the latter party was not relevant in the contract's characterization.[655]

321 Thus, the fact that the seller does not transfer property should not be a relevant factor in characterizing a CISG sales contract and, accordingly, determining the applicability of the CISG.[656] This finding is not only supported by Article 7(1) of the CISG, but further by Article 1(1) of the CISG. Notably, unlike section 2(1) of the Sale of Goods Act 1979, the CISG does not contain a definition of a sales contract. Article 1(1) of the CISG merely states that the "*Convention applies to contracts of sale of goods*". At no point does the wording of the CISG require a transfer of property to be applicable. This omission exemplifies the meticulous drafting of uniform law.[657] A delegate of Guyana (*Pollard*) actually proposed adding a further provision, Article 1(3)(a), in 1972 containing the following definition of a sales contract: "*'contract of sale of goods' means a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for*

652 Court of Appeal Munich, 2 March 1994, CISG-online 108 para. 15.

653 German Supreme Court, 30 April 2003, CISG-online 790 p. 9.

654 German Supreme Court, 30 April 2003, CISG-online 790 p. 8.

655 Contra, Staudinger/*Magnus*, Art. 30 para. 10 interpreting the decision by the German Supreme Court to be due to the lack of an obligation to transfer the property ("*Ein Vertrag, die Ware lediglich zu vermarkten, fällt daher nicht unter das CISG*", emphasis added).

656 Similarly, *Schroeter*, Internationales UN-Kaufrecht, para. 89 who emphasizes the question whether the buyer is allocated the full economic value of the goods in characterizing the contract without relying on property; cf. also *Honnold/Flechtner*, para. 82; contra, *Sono*, FS Kritzer, pp. 512, 526; *Scheuch*, 118 ZVglRWiss (2019), 375, 384; *Torsello*, pp. 191, 198.

657 Contra, *Zhang*, p. 63 who considers the lack of a definition a deficit of the Convention.

a money consideration called the price".[658] Notwithstanding the skeptical remarks by *Michida* (Japan) and *Loewe* (Austria), the Chairman suggested that the Working Group should examine the proposed provision.[659] Yet, the proposal of introducing an explicit definition was not successful and this lacuna is in the spirit of *Rabel* who considered the key obligation of the seller to be the delivery of the goods, while not even providing for any sales rules connected to property in the first draft of the uniform sales law.[660] The wisdom and foresight of the drafters' deliberate exclusion should not be undone by reintroducing the transfer of property as a necessary component of a sales contract with reference to Articles 30 and 53 of the CISG, as apparently accepted by the general opinion under the CISG.[661] These provisions contain rules for a standard sales contract, but their positioning together with the absence of a definition of a sales contract suggests that these provisions were not meant to delineate the scope of the CISG. If the definition of a sales contract could be extracted from Articles 30 and 53 of the CISG then these provisions would have to be (partly) mandatory, because a modification of these provisions by the parties could render the CISG inapplicable. The absence of an explicit definition should rather be taken as a mandate for courts and scholars to clarify the exact delineations of the Convention without being restricted by developments in national property law, and to adapt the Convention for new developments, for example sales of data,[662] as far as possible.

For these reasons, the autonomous term property under Article 30 of the CISG as developed above should also not form part of the characterization of a CISG sales contract. **322**

IV. Proposed characterization of a sales contract under Article 1(1) of the CISG

Sono fears that dismissing property from the definition of a CISG sales contract would open up a Pandora's box and would even render the CISG applicable to leases.[663] Yet, this concern would only be valid if no other limiting factors for the characterization of contracts under the Convention could be **323**

658 UNCITRAL Yearbook III (1972), Supplement, p. 13; A/CN.9/V/CRP.6.
659 UNCITRAL Yearbook III (1972), Supplement, p. 14.
660 *Rabel*, 9 RabelsZ (1935), 1, 56.
661 For references of this general opinion, see above fn. 560. Cf. *Endler/Daub*, CR 1993, 601, 604 who consider a contract under which the parties have excluded the seller's obligation to transfer the property in the goods under Art. 6 CISG to remain a CISG contract.
662 On the applicability of the CISG to data sales, see below paras. 332, 333.
663 *Sono*, FS Kritzer, pp. 512, 526.

found. The question, thus, becomes whether other (legal) characteristics are more accurate in determining whether the goods have been sufficiently allocated to the buyer in order to consider the contract a sales contract under the CISG. It is important to note that for purposes of contract characterization the relevant allocation of the goods is the allocation between the parties.[664] Whether national property law extends the effects vis-à-vis third parties is subject to differing considerations (for example, fair allocation in cases of insolvency) that are not relevant when characterizing the contract between the contracting parties.

1. Delivery of the goods is not a necessary component of a sales contract

324 Citing *Rabel's* position that the obligation to deliver the goods is the key obligation of the seller (explicitly rejecting a similar relevance of the obligation to transfer the property),[665] one might argue that delivery of the goods should be the defining feature of a sales contract.[666] Yet, the buyer could already be in possession of the goods when the contract is concluded. In this case, there is no need for an obligation to deliver the goods, but the exclusion of such an obligation does not change the character of the contract as a CISG sales contract.[667] Furthermore, in string sales concerning goods that are being shipped when the contract is concluded, both parties may understand that the seller is not required to take any action to deliver the goods, and the buyer may never take possession of them.[668] The transfer of the documents providing control over the goods replaces a physical delivery of the goods in the chain of contracts. Nevertheless, such a contract is a sales contract under the CISG.[669] Both examples show that the delivery of the goods is not a necessary component of a sales contract under the CISG.

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664 Similarly for Canadian law, *Fridman*, p. 95.

665 For example, *Rabel*, 9 RabelsZ (1935), 1, 56.

666 See the heading in *Karollus*, p. 21.

667 *Torsello*, pp. 191, 199; Kröll/Mistelis/Perales Viscasillas/*Piltz*, Art. 31 paras. 8, 9.

668 *Singh*, 1(2) Nordic Journal of Commercial Law (2006), 1, 12; Kröll/Mistelis/Perales Viscasillas/*Piltz*, Art. 31 para. 62.

669 *Singh/Leisinger*, 20 Pace International Law Review (2008), 161, 182 rightfully highlight Secretariat Commentary, Art. 2 para. 8 that states "*This subparagraph* [became Art. 2(d) CISG] *does not exclude documentary sales of goods from the scope of this Convention even though, in some legal systems, such sales may be characterized as sales of commercial paper*"; *Torsello*, pp. 191, 199.

2. Benefits and risk of the goods as central elements

Instead, one might argue that the allocation of the benefits and use of the goods to the buyer could be a sufficient allocation under the CISG. Yet, this allocation also takes place under an agreement to rent or lease. **325**

There can be contracts under which the contract price is paid over the course of the full lifecycle of the goods: If a good is worn out after ten years and the initial value of the goods is 12,000, the buyer could agree to pay 100 every month for ten years. If the parties do not agree on anything else, it is not entirely clear whether this is a contract for rent or for sale under a retention of property clause.[670] Thus, the permanent allocation of the benefits and use of the goods is not sufficient to assess whether the contract is one for sale or rental.[671] Rather such determination can only be made by considering the benefits together with two additional factors: The party that originally had the goods has to be relieved of the risk of haphazard loss of or damage to the goods,[672] and may not retain a legal interest in the goods. This is what differentiates a sale and a final allocation of the goods to the buyer from a rental of movables where the party providing the goods continues to bear the risk of haphazard loss or damage.[673] The relevant question is whether the party receiving monthly payments continues to receive payments after the goods have been destroyed or damaged, or whether he or she has to replace or repair the goods to continue to be entitled to the payments. This understanding of risk also underlies Articles 66–70 of the CISG for the time frame until the seller has fully performed the contract. After the seller has performed the obligations under the contract, or if the buyer has consumed the goods, no regulation is necessary to make explicit that the buyer should bear the risk, since the seller cannot be deprived of the purchase price due or received. **326**

Neumann proposes a different approach with regard to software sales under which a software contract is a sales contract under the CISG if the buyer receives "dominant control" over the software.[674] According to him, dominant control "*could be the right to determine the software's location, its appearance, its reprogramming, or its destruction.*"[675] Thus, this approach focuses **327**

670 The example and the similar reasoning under unharmonized German law are borrowed from *Jahr*, pp. 14, 18–23.

671 Cf. also *Jahr*, pp. 14, 21 para. 14.

672 Cf. *Larenz*, p. 97 who argues under national German law that if the benefits (*Nutzungen*) and the risk (*Gefahr des zufälligen Untergangs und einer zufälligen Verschlechterung*) have passed to the buyer, the economic consequences of the sale have already taken place without regard to the transfer of property.

673 Cf. for the risk under a contract of rent, *Hager*, Gefahrtragung, pp. 20 (for civil law countries), 22 (for common law countries).

674 *Neumann*, 21 VJ (2017), 109, 124 et seq.

675 *Neumann*, 21 VJ (2017), 109, 124.

on the benefits and the use of the goods. It neglects the risk of haphazard loss or damage to the goods, which can also make a decisive difference with regard to software. It is possible that the provider of software allows the user to use the software, to reprogram it, to change the software's appearance, or even delete it. If the user's facility burns down due to an act of God after the execution of the contract and the user loses all copies of the software, it is decisive for the contract's characterization whether the user still has to pay the price if the provider does not or cannot deliver a new copy of the software.[676] If the user does not have to pay anymore, this signifies that the user does not bear the price risk that the software becomes non-functional due to a haphazard event. In such a case, the contract is not a sales contract but a license to use even though the user has (had) dominant control over the goods. Therefore, while *Neumann's* approach is superior to requiring the seller to transfer the property in goods, it lacks the crucial element that the seller is relieved of the risk of haphazard loss of or damage to the goods.

328 Therefore, a sales contract under the CISG is a contract that envisions the transaction of goods against payment. To this end, the goods are sufficiently allocated to the buyer when, as between the parties, the buyer permanently receives the benefits and use of the goods, and the seller does not bear the risk of haphazard loss of or damage to the goods and no longer retains a legal interest in them. This equals an economic or material understanding of a sales contract in contrast to the widely proposed formal understanding represented by the transfer of property. Whether and how national law comprehends and deals with the parties' allocation in terms of property should not be relevant.[677] Whether the historical connection between property and risk in many legal systems explains any bearing of property on the contract characterization cannot be pursued here, but just like the separation of risk from property under the CISG, the contract characterization should be decoupled from the transfer of property too.

329 The allocation of the goods to the buyer has to be permanent. However, permanence does not mean that the goods can never return to the seller: The contract might oblige the seller to repurchase the goods under certain conditions. The German Supreme Court correctly characterized such a contract as a CISG contract where the contract required the seller to repurchase the goods if the contractual partner of the buyer cancelled the leasing contract

676 *Hayward*, 44 UNSW Law Review (2021), 1482, 1510 argues that data is infinitely reproduceable. This is incorrect since data can be haphazardly destroyed without any chance of restoring it.

677 Dölle/*U. Huber*, Art. 18 ULIS paras. 2–5, who, however, has not carried this reasoning forward to his commentary of Art. 30 CISG, cf. von Caemmerer/Schlechtriem/*U. Huber*, 1st German edn, Art. 30 paras. 1–28.

with the latter.[678] In such a case, it is not up to the seller to reverse the transaction and, from his or her viewpoint, the goods are irretrievably allocated to the buyer.

3. Applying the proposed definition of a sales contract under the CISG

Applying this proposed definition to contracts that deviate from a standard sales contract reveals the advantages of the proposed definition of a sales contract under the CISG. **330**

In cases where the goods are not subject to property rights under national law (for example, a *res extra commercium*), the contract is a sales contract if the party paying for the goods receives the benefits of the goods and bears the risk of haphazard loss or damage. Thus, such contracts are subject to the CISG if the goods sold can be considered goods under Article 1(1). It makes no difference anymore if national law considers property to exist with regard to these goods. **331**

Under the proposed definition, the CISG can also be applied to data sales. The proposed definition defeats an important, formalistic argument against the application of the CISG to data sales: Since many national laws do not consider it possible for a person to have property in data,[679] some scholars argue that contracts for the allocation of data cannot be considered sales contracts due to the lack of an envisioned transfer of property in the goods.[680] Since the proposed definition of a sales contract under the CISG spares a reference to the transfer of property, the formalistic argument against the application of the CISG to data sales is unfounded. **332**

Nevertheless, the contract must provide for a sufficient allocation of the data to the buyer. This can only be assessed against the respective contract:[681] **333**

678 German Supreme Court, 28 May 2014, CISG-online 2513 paras. 12–13; approval by *Schroeter*, IHR 2014, 173, 175–176 in this regard.

679 See above para. 286.

680 *Scheuch*, 118 ZVglRWiss (2019), 375, 384 who, however, proposes an analogous application of the CISG to data. Likewise, Schlechtriem/Schwenzer/Schroeter/*Hachem*, 5th edn, CISG and Data Trading paras. 7, 13, 14 and *Eggen*, IHR 2017, 229, 231 consider the obligation to transfer the property under Art. 30 CISG to be the most important stumbling block for the CISG's application, but consider it a sufficient transfer of property if the buyer receives a legal position that is sufficiently strong and comprehensive to equate property in the goods (*Hachem*) or the power of disposition (*Eggen*). *Muñoz*, 24 Uniform Law Review (2019), 281, 287 also requires a transfer of property but states that this transfer "*come*[s …] *from the parties' intention to enter into a sales contract.*"

681 Correctly and repeatedly highlighting the necessity to analyze each contract on a case-by-case analysis, *Hayward,* 44 UNSW Law Journal (2021), 878, 899, 906, 907, 910.

Is the data permanently allocated to the buyer, and does the latter receive the benefits and bear the risks of the goods? Moreover, depending on the contract, the person providing the data may have additional obligations besides providing the data whereby the labor or service element of the contract (for example, updates) may become the preponderant part of the obligations under Article 3(2) of the CISG.[682] The majority of scholars rightfully argue that data can constitute goods under the CISG.[683] This is because first, there is no necessity to limit goods to corporal things.[684] Second, the extensive discussions regarding software in which the majority of scholars[685] and courts[686] reason that (at least standard-)software can be a good under the CISG apply equally to data.[687] Therefore, the remaining reasons against an application of the CISG to data sales would not be connected to data as goods or to the lack of property therein, but rather to its allocation between the parties and how the data is collected or created. In other words, the reasons that could lead to an inapplicability of the CISG are not connected to data as such, but apply to all other goods, too: If the goods were chairs, i. e., undisputedly goods under the CISG, the characterization as a sales contract would equally be questionable if the party ordering the chairs was required to give them back to the contractual partner at some point or if the latter

682 See Schlechtriem/Schwenzer/Schroeter/*Hachem*, 5th edn, CISG and Data Trading para. 11 for more examples of data contracts with a preponderant obligation consisting of the supply of labor or other services.

683 Schlechtriem/Schwenzer/Schroeter/*Hachem*, 5th edn, CISG and Data Trading para. 10; *Eggen*, IHR 2017, 229, 231; *Hayward*, 44 UNSW Law Journal (2021), 878, 900 et seq.; *Perales Viscasillas*, 28 Uniform Law Review (2023), 293, 314; *Schroeter*, Internationales UN-Kaufrecht, para. 122. Contra, *Scheuch*, 118 ZVglRWiss (2019), 375, 382–384, whose argument against the characterization of data as goods, however, is based on a systematic argument regarding Art. 30 CISG and its obligation to transfer the property.

684 *Green*, pp. 78, 79 et seq. convincingly argues that there are mostly historical reasons for even considering such a limitation in common law jurisdictions; *Hayward*, 44 UNSW Law Journal (2021), 878, 902. See for the unclear *travaux préparatoires* in this respect, *Diedrich*, pp. 178–186.

685 *Schlechtriem/Schroeter*, para. 86; *Schroeter*, Internationales UN-Kaufrecht, paras. 120–121; *Schmitt*, CR 2001, 145, 147–151; *Endler/Daub*, CR 1993, 601, 603–605; *Lookofsky*, pp. 22–24; *Schmitz*, MMR 2000, 256, 258.

686 District Court Midden-Nederland, 25 March 2015, CISG-online 2591; Court of Appeal Koblenz, 17 September 1993, CISG-online 91; Court of Appeal Cologne, 26 August 1994, CISG-online 132; Commercial Court Zürich, 17 February 2000, CISG-online 637; District Court Arnhem, 28 June 2006, CISG-online 1265 para. 8.

687 *Schroeter*, Internationales UN-Kaufrecht, para. 122; Schlechtriem/Schwenzer/Schroeter/*Hachem*, 5th edn, CISG and Data Trading para. 10. Contra, *Hayward*, 44 UNSW Law Journal (2021), 878, 902–903 who argues that the applicability of the CISG to software sales does not necessarily mean that non-software data sales should be encompassed as well. However, he reaches the same result and favors the CISG's application to data sales.

assumed additional service or labor obligations. Ultimately, under the proposed definition, the CISG is applicable to data sales.

The contract litigated in *The Res Cogitans* would also be a contract of sale under Article 1(1) of the CISG.[688] The buyer received the goods and was allowed to consume them before payment. Consuming the goods is the most extensive use of the goods. At the time of consumption, at the latest, the seller no longer bears the risk of haphazard loss of or damage to them and has lost his or her legal interest in them. The retention of property clause does not change anything with regard to the characteristics of the allocation of benefits and risks. Thus, the bunkers were sufficiently allocated to the last buyer to consider all contracts in the chain to have been sales contracts under Article 1(1) of the CISG. **334**

Similarly, the CISG applies to sales contracts within a chain of contracts, where the property in the goods is directly transferred from the first seller in the chain to the last buyer.[689] Under the proposed definition, the lack of transfer of property within the chain is irrelevant. The respective buyers permanently receive the benefits and the use of the goods and decide to transfer the benefits and the use to their respective sub-buyers by reselling the goods. After the execution of the transaction, the seller no longer bears the risk of haphazard loss or damage to the goods and does not retain a legal interest in them. The contracts within the chain of contracts are, hence, sales contracts under the CISG. The parties to the first contract in the chain amend Article 30 of the CISG under Article 6 of the CISG, in agreeing that the seller should not transfer his or her legal interest to the buyer, but rather to a sub-buyer directly. To explain why the last contract in the chain is a sales contract under the CISG, no amendments under Article 6 of the CISG have to be considered: The seller may not have a legal interest in the goods, but the non-transfer of a legal interest is not a breach of Article 30 of the CISG if the seller has no legal interest in the goods.[690] If the first seller does not transfer his or her legal interest to the last buyer, the last seller breaches Article 41 of the CISG. Thus, the CISG is perfectly apt to cover all contracts in a chain of sales contracts. **335**

Lastly, if stolen goods are being exchanged against payment and both parties know of their provenance, which prevents the parties from envisioning a valid transfer of property, the contract can still be a sales contract under the CISG. This presupposes that the parties envisioned the buyer to permanent- **336**

688 Schlechtriem/Schwenzer/Schroeter/*Hachem*, 5th edn, Art. 1 para. 9 stating that the reasoning in *The Res Cogitans* is not applicable under the CISG and *Bridge*, International Sale of Goods, para. 11.45 who considers it unlikely for "*a court or tribunal applying the CISG* […] *to arrive at such an uncommercial conclusion.*"

689 See above para. 176 for the respective seller's obligation to transfer in such contracts.

690 See above para. 176.

ly enjoy the goods at least as between the parties. This last qualification is necessary in this case because the parties might very well foresee that the actual owner could deprive the buyer of the goods. Since the paying party should also bear the risk of loss or damage, the contract fits squarely within the proposed definition. The public policy goals of national laws to prevent the sale stolen goods (similarly for the sale of a *res extra commercium*) can be safeguarded by way of the validity exception in Article 4, sentence 2(a) of the CISG. This, however, does not change the type of contract in the respective case.

337 In conclusion, the seller's obligation to transfer property is not mandatory for a CISG contract, and cannot only be postponed but even excluded without the contract losing its sales character.

V. Conclusion

338 While under a typical sales contract sellers are obliged to transfer the legal interest they have in the goods to the buyer, the envisioned transfer of property is not a prerequisite for a sales contract under the CISG, and the parties may deviate from this obligation of a standard sales contract. For a contract to be subject to the CISG, it must include a transaction of goods against payment. To this end, the goods are sufficiently allocated to the buyer when, as between the parties, the buyer permanently receives the benefits and use of the goods, and the seller does not bear the risk of haphazard loss of or damage to the goods and no longer retains any legal interest in them. This proposed solution and its decoupling from national concepts like property not only guarantees compliance with Article 7(1) of the CISG, but also provides a line of reasoning that might lead to more legal certainty for parties in international trade: Given the characterization of credit sales under which the buyer is allowed to consume the goods before payment by English courts and the (non-binding but persuasive) authority these judgments represent for many courts in common law countries whose sales laws are closely modelled on the Sale of Goods Act 1893/1979, the risk that these courts might transplant the uncertainty produced under English law to the CISG is palpable. On a highly theoretical level, one could find reasons regarding property why contracts comparable to the agreement underlying *The Res Cogitans* could be considered CISG sales contracts. But the insight that property has no relevance in defining a sales contract under the CISG gives these courts more obvious and accessible reasons not to transplant the reasoning from English law, and to find a truly uniform scope of application of the CISG. Parties worldwide could, hence, be more certain that safeguarding the purchase price with a retention of property clause or by similar mechanisms

under national property laws does not have implications on contract characterization. The lack of an explicit definition of a sales contract under the CISG provides flexibility to consider current developments in the realm of sales and similar contracts. All in all, it should be seen as a wise decision by the drafters of the ULIS and the CISG not to include an explicit definition of a sales contract.

VI. Outlook on unifications of law and specifically European law

339 The approach of not explicitly defining a sales contract should be maintained in future projects of unification of law. Attempts should be undertaken to describe a sales contract without referring to fields of the law that are not yet unified, specifically property law. Projects to harmonize European law have not taken this route. Article 2(k) of the CESL-draft reads:

> "*'sales contract' means any contract under which the trader ('the seller') transfers or undertakes to transfer the ownership of the goods to another person ('the buyer'), and the buyer pays or undertakes to pay the price thereof*".

340 In a similar manner, Article 2(1) of the Directive (EU) 2019/771 states:

> "*'sales contract' means any contract under which the seller transfers or undertakes to transfer ownership of goods to a consumer, and the consumer pays or undertakes to pay the price thereof*".

341 Both wordings may stem from Article IV.A.-1:202 of the DCFR,[691] but their incorporation into the CESL-draft and the Directive (EU) 2019/771 respectively overlooks that, in contrast to them, the DCFR does in fact concurrently provide unified rules on property law and the transfer of property. Without a uniform understanding what property is and how it is transferred, including property in the definition of a sales contract can lead to misunderstandings and divergent results with regard to contract characterization as this chapter has attempted to show.

691 "*A contract for the 'sale' of goods is a contract under which one party, the seller, undertakes to another party, the buyer, to transfer the ownership of the goods to the buyer, or to a third person, either immediately on conclusion of the contract or at some future time, and the buyer undertakes to pay the price.*"

§ 5: Property and the claim for the purchase price

Paramount for a seller is the buyer's obligation to pay the purchase price and the seller's means to enforce it against an unwilling counterparty. Unlike the enforcement of the obligation to deliver the goods, which has taken center stage in comparative law projects for decades, the existence, scope, and enforcement of the obligation to pay the price has remained largely backstage.[692] Yet, enforcing performance of the monetary obligation, i. e., claiming the purchase price, is much more common in practice than the enforcement of the obligation to deliver. **342**

Since a court judgment in favor of the seller will be expressed in terms of a claim for money, and enforcement will thus pose no more problems than the enforcement of damages claims,[693] the question is sometimes dismissed as "trivial",[694] "far less problematic",[695] or is completely ignored[696]. The lack of comparative insight prevents legal certainty for the seller as to whether he or she is allowed to insist on the claim for the price instead of mitigating the loss or damage by, for example, stopping the production of the goods or selling them elsewhere. **343**

I. Property in the goods and action for the price in the common law

Common law jurisdictions in general do not consider the seller to be entitled to the full purchase price solely because it is due under the contract, or because a duty to pay the price has arisen.[697] The understanding is that while the contract provides for the obligations and duties of the parties, it is the law that determines the parties' remedies.[698] While this statement broadly represents the understanding of common law jurisdictions, it should not – combined with the focus on "specific performance" of the obligation to de- **344**

692 *Flessner*, p. 147; *Bridge*, Debt Instead of Damages, p. 423; cf. *Zweigert/Kötz*, Rechtsvergleichung, do not discuss monetary obligations in their chapter on claim for performance (§ 35); Likewise, *Treitel*, p. 43 qualifies the distinction between enforced performance and compensation in money as less important in comparison.

693 See *Treitel*, p. 45 para. 39.

694 *Freund*, p. 38 fn. 11.

695 Jansen/Zimmermann/*Kleinschmidt*, p. 1186 para. 1.

696 For example, *Kötz*, para. 755 states that nobody in the realm of the common law doubted that the seller can always claim the purchase price, while the problems only lay with the "*specific performance*" of obligations other than the payment of money; *P. Butler*, 118 ZVglRWiss (2019), 231, 255 et seq.; *Unberath*, p. 263.

697 *Treitel/Peel*, para. 21-006.

698 *Treitel/Peel*, para. 21-006.

liver the goods – be taken to mean that the different jurisdictions that are usually pooled as representing the common law have developed a uniform solution for this problem that could be contrasted with the solution of civil law countries. This would paint an incomplete and inaccurate picture of the legal landscape. Even if still blurred and imprecise, a minimal distinction between countries that follow the approach of the Sale of Goods Act 1979 and the USA has to be made.

1. English law and legal systems that are inspired by the Sale of Goods Act 1979

345 Section 49(1) of the Sale of Goods Act 1979 states:

> "*Where, under a contract of sale, the property in the goods has passed to the buyer and he wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods.*"

346 The key question regarding the seller's price action is, thus, whether property of the goods has passed to the buyer.[699] Alternatively, recovery of the purchase price is possible if a payment on a day certain was agreed upon.[700] The latter threshold is one not crossed lightly, but rather addresses contracts under which the buyer is required to pay unconditionally, regardless of whether the seller has already performed.[701]

347 If the requirements for a price action are not fulfilled, the seller can only claim damages for non-acceptance (section 50 of the Sale of Goods Act 1979). This will usually not amount to the full purchase price, as generally only the difference in price between the market price at the time when the goods ought to have been accepted and the contract price is recoverable.[702] Moreover, the claim is subject *inter alia* to the doctrine of mitigation of damages, a defense the seller would generally not have to accept in a price action as a debt claim.[703] Notably, two procedural aspects should be highlighted. First, claiming the price is possible with a significantly lighter burden in gathering evidence and can be awarded by summary judgment.[704] Second, English law does not allow for a conditional judgment that awards

699 *Bridge*, Sale of Goods, paras. 3.01, 11.60; *Stadler*, Verkehrsschutz durch Abstraktion, p. 268.

700 Sec. 49(2) SGA 1979; highly skeptical regarding this provision, *Bridge*, Sale of Goods, para. 11.71; explaining the historical roots of the provision, *Weidt*, pp. 47 et seq.

701 Further explanations *Bridge*, Sale of Goods, paras. 11.67 et seq.

702 Sect. 50(3) SGA 1979.

703 *Jervis v Harris* [1996] 1 Ch 995, 202; *Bridge*, Sale of Goods, para. 11.61; *Treitel/Peel*, para. 21-013.

704 *Bridge*, Debt Instead of Damages, pp. 423, 425.

the purchase price under the condition that property is transferred.[705] This stands in contrast to the opposite constellation: If the buyer claims for specific performance, the court may condition the order on the payment of the price under section 52(3) of the Sale of Goods Act 1979.

a) Historical roots

348 This limited scope of the possibility to receive the price with the help of a common law court can be traced back to a fundamental decision hidden in the historic roots of the common law. Similar to the approach of Roman law, the common law was structured around limited actions.[706] Since a mere agreement did not give rise to an action, it was generally not enforceable in England during the Middle Ages.[707] Thus, in the thirteenth century, neither the seller nor the buyer could sue the other on the basis of a mere promise to sell or buy under the common law.[708] Sellers could only sue for the price with an action of debt when they had fulfilled their obligation, which meant that they had to have already delivered the goods since the transfer of possession onto the buyer was still a prerequisite for the transfer of property.[709]

349 This description of the historical status of the common law during that time should, however, not be taken to mean that it governed the private agreements of normal merchants. Remarkably, the law of merchants at that time, which was adjudicated outside of common law courts, already accepted the mere consent between two merchant parties sufficient to conclude binding and enforceable agreements.[710] The common law of that time was not concerned with (small) private agreements.[711] In the following centuries, the common law supplanted the law of merchants in a steady process, which was ultimately successful due to concurrent political developments.[712] In

705 *Weller*, JZ 2008, 764, 769; German Supreme Court, 28 April 1900, RGZ 46, 193, 198 et seq. regarding sections 49, 50 Sale of Goods Act 1893.

706 *Farnsworth*, 69 Columbia Law Review (1969), 576, 592.

707 *Holdsworth*, p. 412; *Farnsworth*, 69 Columbia Law Review (1969), 576, 592. Roman law, in contrast, while having been structures around actions and originally not having considered the mere agreement binding and actionable (*Eck*, p. 14), later seems to have considered a mere agreement of a sales contract to be actionable, *Zimmermann,* pp. 230 et seq. Yet, at a later stage of Roman law, the binding character of the sales contract was again tied to (partly) execution, *Zimmermann*, pp. 275 et seq. Also highlighting the contrast between English law and Roman law in this regard, *Rüfner*, pp. 233, 237.

708 *Holdsworth*, p. 282.

709 *Rheinstein*, p. 18.

710 *Rheinstein*, p. 43; *Rüfner*, pp. 233, 242, 246, 247; *Fandl*, 34 Berkeley Journal of International Law (2016), 1, 10.

711 *Farnsworth*, 69 Columbia Law Review (1969), 576, 592.

712 *Rheinstein*, pp. 43 et seq.

1666, the King's Bench held the law of the land and the law of merchants to be the same.[713] Nevertheless, the binding and enforceable agreement based on pure consent was not implemented into the common law, despite a remarkable attempt by *Lord Mansfield* to implement this idea.[714]

350 After 1400 under the common law, the buyer was allowed to require the specific goods bargained for with the action of detinue with conclusion of the contract.[715] This action was, however, understood to protect the property (and was not a contractual claim), leading to the opinion that the property in specific goods is generally transferred with the conclusion of the contract.[716] Since, for this reason, the seller had already fulfilled his or her obligation,[717] he or she was in turn allowed to recover the price with an action of debt.[718] This enforcement was not believed to follow from the "promise", but rather from a "*duty springing from the* [buyer's] *receipt of property.*"[719] It is, however, very important to note that this only applied to specific goods, while the seller could not claim the purchase price if generic goods or goods still to be produced were bargained for (later called contract to sell in contrast to sale of goods).[720]

351 The following extension of the action of debt in other situations (other than a sale) around the fifteenth century led to a generalization in the legal terminology: The performance of the party that claimed the price was tagged a "*quid pro quo*".[721] The action of debt, however, had its own historical restraints that hindered a direct development in the direction of a contractual claim as understood by civil law lawyers. Most notably, the buyer could raise the defense of "wager of law".[722] If the buyer together with eleven compurgators denied the existence of the debt, the claim of the seller was unsuccessful.[723] *Inter alia* for this severe practical limitation, the action of assumpsit (an action originally rooted in the law of torts) was further ex-

713 *Woodward v Rowe* (1666) 2 Keb 106, 84 ER 864; *Bainbridge*, 24 Virginia Journal of International Law (1984), 619, 626.
714 *Pillans v Van Mierop* (1765) 3 Burr 1663, 97 ER 1035. The House of Lords overturned the decision in *Rann v Hughes* (1778) 7 TR 350n, 101 ER 1014n (HL).
715 *Rheinstein*, p. 18; *Hager*, Gefahrtragung, p. 58; *Häcker*, ZEuP 2011, 335, 339.
716 *Rheinstein*, p. 18; *Hager*, Gefahrtragung, p. 58; *Holdsworth*, pp. 282 et seq.; *Goode*, Commercial Law, 2nd edn, p. 187.
717 Transfer of possession was not seen as necessary for that matter, see *Neufang*, p. 85.
718 *Rheinstein*, p. 18; *Hager*, Gefahrtragung, p. 58.
719 *Farnsworth*, 69 Columbia Law Review (1969), 576, 586.
720 For the distinction see *Neufang*, p. 86.
721 *Holdsworth*, p. 421; *Pollock/Maitland*, p. 212; *Rheinstein*, p. 19.
722 *Zimmermann*, p. 779; *Farnsworth*, 69 Columbia Law Review (1969), 576, 597.
723 *McGovern*, 54 Iowa Law Review (1968), 19, 26 et seq.

tended to encompass the cases that had previously belonged in the realm of the action of debt.[724]

During the seventeenth and eighteenth centuries, the common law developed a general theory of contract that provided for the enforcement of promises under the limiting prerequisite of a sufficient consideration.[725] It is important to note that this theory concentrates on the conclusion of binding agreements and unifies this legal question. This has to be differentiated from the remedies that are available to the parties once the contract has been concluded. In this respect, the old line of thinking regarding actions survived and evaded the hurdles of time and reform – without providing the *quid pro quo,* the creditor could not sue for the debt.[726] Even though courts of equity and common law were combined by the Supreme Court of Judicature Acts 1873 and 1875, a uniform system for procedure and pleadings was introduced and the different actions have since been available in the same process,[727] while the underlying distinction regarding the remedies still applies. **352**

b) Current English law

Against this backdrop, the discussion of the action for the (purchase or other) price in case law and scholarly work in the twentieth and twenty-first century appears coherent with the historical development, even for jurists with a civil law background. The Sale of Good Act 1893 cemented the established system of the common law in sections 49 and 50 for sales law. Section 17 of the Sale of Goods Act 1893 made the transfer of property only dependent on the intention of the party, and section 18 rule 1 of the Sale of Goods Act 1893 stated that unless a different intention of the parties appears, in case of specific goods, property passes with conclusion of the contract. Section 18(2) of the Sale of Goods Act 1893 clarified that the transfer of property in case of unascertained or future goods is dependent on the appropriation of the goods to the contract with the assent of the buyer. Presently, the Sale of Goods Act 1979 contains equivalents of each of these provisions. **353**

An important case to test the relevance of the historical roots for the current English law emerged from a sphere outside of sales law. *White & Carter (Councils) Ltd v McGregor*[728] is a contract law case from Scotland, but due to its reception and development in subsequent English case law, it can be **354**

724 *Rheinstein*, pp. 22 et seq.; *Ames*, 2 Harvard Law Review (1888–1889), 53.
725 *Beatson/Burrows/Cartwright*, pp. 16–17; *Furmston*, p. 10.
726 *Rheinstein*, p. 129.
727 *Cartwright*, p. 275.
728 [1961] UKHL 5.

regarded as forming part of English law.[729] *White & Carter* provided litter bins and imprinted them with advertising space which would be visible in public spaces. *McGregor* concluded a three-year contract for the display of their advertisement in 1954, which was extended for three years by his sales manager in 1957. This sales manager had, however, not been given authority to conclude or extend the contract and *McGregor* was unwilling to perform it, i. e., paying the sums due. *White & Carter* did not accept any cancellation by *McGregor*, prepared the plates, attached them to the bins, and displayed them for the full duration of the contract. Following the first judgment by the Sheriff-Substitute on 15 March 1960, the apparent or ostensible authority of *McGregor's* sales manager was no longer disputed. Nevertheless, neither the Sheriff-Substitute nor the Second Division of the Court of Sessions at second instance awarded the price to *White & Carter*.[730]

355 The House of Lords reversed the judgments by a slim majority decision and allowed the appeal of *White & Carter*. Both prior judgments had relied on *Longford & Co v Dutch*[731], a case with indistinguishable facts and which was, therefore, binding on the lower courts as all Lords accepted. In *Longford & Co v Dutch*, *Lord President Cooper* stated

> *"*[t]*he pursuers* [company providing the bins] *could not force the defender to accept a year's advertisement which she did not want, though they could of course claim damages for her breach of contract. On the averments the only reasonable and proper course, which the pursuers should have adopted, would have been to treat the defender as having repudiated the contract and as being on that account liable in damages* […]*."*

356 The conclusion was drawn that *Longford & Co* had no remedy to recover the price for the advertisement, but rather was restricted to claim damages. Due to the duty of mitigation, this specifically meant that the pursuers would have been required to look for an alternative interested party for the advertisement. While *Lord Morton of Henryton* and *Lord Keith of Avonholm* both argued that *White & Carter (Councils) Ltd v McGregor* should be decided accordingly, the majority consisting of *Lord Reid*, *Lord Tucker*, and *Lord Hodson* held that *Longford* had not been correctly decided. *Lord Reid* only considered there to be two possible explanations for denying the claim.

357 First, one could argue in favor of an equal treatment with the more common situation in which a party cannot perform his or her obligation without coop-

729 *Liu*, 74 Modern Law Review (2011) 171, 172.
730 The second instance: *White & Carter (Councils) Ltd v McGregor* (1960) SC 276.
731 (1952) SC 15.

eration of some kind from the other party.[732] As can be explained against the background of the historical development, parties cannot sue for the price as long as they have not performed themselves. For sales law, this idea is the foundation of the rule found in section 49(1) of the Sale of Goods Act 1893 (remained the same in the Sale of Goods Act 1979). As highlighted by *Lord Keith of Avonholm*, the parallel situation of a contract to sell should be understood to warrant an analogous application to the case of *White & Carter (Councils) Ltd v McGregor*.[733] Yet, the majority did not support the analogy and instead considered the possibility for *White & Carter* to fulfil its side of the contract without the help of *McGregor* or a court to be a decisive difference. *Lord Reid* saw no justification to treat these situations equally.

Second, his Lordship considered the existence of some general equitable **358**
principle or public policy that required a limitation of the remedies of the party that unilaterally fulfilled his or her obligations under the contract.[734] The only equitable principle that *Lord Reid* accepted was that parties should be denied the contract price and be limited to a damages claim when they had no "*legitimate interest, financial or otherwise*", in performing the contract.[735] This restriction has been criticized,[736] and in parts even regarded as merely *obiter*[737]. To many scholars, this exception to the general rule appears to be more important than the actual general rule of the case, i. e., that generally a claim for the price must be allowed if the claiming party completed the contract.[738] This exception has been developed and it seems to be good law that the legitimate interest is generally presumed to exist and it is up to the other party to prove that it is in fact absent.[739] It is, however, not relevant to sales law where sections 49 and 50 of the Sale of Goods Act 1979 provide an exhaustive rule,[740] and in most contracts (except for speci-

732 See *Lord Reids's* explanation in *White & Carter (Councils) Ltd v McGregor* [1961] UKHL 5.

733 See the explanation by *Lord Keith of Avonholm* in *White & Carter (Councils) Ltd v McGregor* [1961] UKHL 5.

734 *Lord Hodson*, while supporting the majority, did not accept any limitation in contrast to *Lord Reid* and potentially *Lord Tucker*.

735 *Lord Reid* in *White & Carter (Councils) Ltd v McGregor* [1961] UKHL 5.

736 *Bridge*, Sale of Goods, para. 12.52; *Liu*, 74 Modern Law Review (2011) 171, 189; but see, *Treitel/Peel*, para. 21-015 stating that the rule of the case "*represents a reasonable compromise between the interests of the two contracting parties*".

737 *Weidt*, p. 158.

738 For example, cf. *Liu*, 74 Modern Law Review (2011) 171 ("*critical issue in that case, the notion of 'legitimate interest'*"); same conclusion by *Flessner*, FS Bucher, pp. 145, 163.

739 *Ocean Marine Navigation Ltd v Koch Carbon Inc. (The Dynamic)* [2003] 2 Lloyd's Rep 693; *Zhu*, 8 King's Student Law Review (2017), 13, 16.

740 See *F. G. Wilson Engineering Ltd v John Holt & Co. Ltd* [2012] EWHC 2477 (Comm), 1 All ER 786, which clarifies that no other legal basis for claiming the purchase price

fied goods) the seller will not be able to perform the contract unilaterally.[741] The seller can specifically not transfer the property onto the buyer without the latter's assent and cannot claim the purchase price, even if the only lacking element of the delivery was the buyer's assent or acceptance.[742]

359 What is worth highlighting here regarding the topic of the claim for the purchase price, however, is a different facet: Efficiency is not considered to be relevant for the question of legitimate interest by the majority. The dissenting decisions by *Lord Morton of Henryton* and *Lord Keith of Avonholm*, in contrast, relied heavily on the wastefulness of the behavior of *White & Carter*.[743] Directly addressing this aspect, *Lord Hodson* even stated:

> *"it may be unfortunate that the Appellants* [White & Carter] *have saddled themselves with an unwanted contract causing an apparent waste of time and money. No doubt this aspect impressed the Court of Sessions but there is no equity which can assist the Respondent."*[744]

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under a sales contract that is subject to the SGA 1979 is applicable; *McKendrick*, Remedies of the Seller, para. 9-057; contra *Merrett*, Chitty on Contracts, para. 46-367, who advocates that the seller should be entitled to sue when the contract expressly or impliedly allows for it and the time for payment is not related to the passing of property or delivery. The legal situation might be different in Australia, cf. High Court of Australia, *Minister for Supply & Development v Servicemen's Cooperative Joinery Manufactures Ltd* [1951] HCA 15, (1951) 82 CLR 621, where *Williams J* stated: "*But the parties can make any contract they please with respect to the payment of the price and if they provide that it is to be paid before the property passes, the seller can sue for the price as soon as it becomes payable, for the payment of the price is a condition precedent to the passing of the property. Usually such a contract provides for the payment of the price on a day certain, but in the present case no day of payment is fixed.*"; different without explanation *Plaimar Ltd v Waters Trading Co* [1945] HCA 34, (1945) 72 CLR 304, at 318. *Lord Mance*'s obiter dictum in *PST Energy 7 Shipping LLC and another v OW Bunker Malta Ltd and another ("The Res Cogitans")* [2016] AC 1034 (UKSC), [2016] UKSC 22, para. 58 might signify that this conclusion under English law may be changed in the future.

741 Cf. *Ministry of Sound (Ireland) Ltd v World Online Ltd* [2003] EWHC 2178 (Ch), [2003] 2 All ER (Comm) 823 at para. 41; see also *Megarry J* in *Hounslow London Borough council v Twickenham Garden Developments Ltd* [1971] Ch 233, pp. 253 et seq., where he states that not only the necessity for active co-operation excludes the debt claim but also passive co-operation such as letting somebody work on his or her property; *Weidt*, p. 157.

742 *Colley v Overseas Exporters* [1921] 3 KB 302; *Bridge*, Sale of Goods, para. 11.65; *Goode*, Commercial Law, 2nd edn, p. 425.

743 *Liu*, 74 Modern Law Review (2011) 171, 180.

744 *Lord Hodson* in *White & Carter (Councils) Ltd v McGregor* [1961] UKHL 5.

This case shows how alive the historic roots in English law are.[745] Moreover, efficiency or wastefulness as a leading principle[746] is not supported by this part of English law.[747] Even though one could read an efficiency bar into the exception of "no legitimate interest", the required degree of unreasonableness or inefficiency would evidently have to be extreme.[748] The law is not concerned with the question of whether a seller should resell the goods or whether the buyer is better placed to fulfill the task of disposing of unwanted goods.[749] Rather, it still concentrates on whether the party claiming for the price provided a *quid pro quo*.[750] If a party can do so without the co-operation of the other party, only the exception regarding the lack of a legitimate interest can prevent the performing party from later claiming the price. Section 49 of the Sale of Goods Act 1979, in turn, seems to be a relic from a conception of "real" contracts,[751] even if the mere transfer of property is sufficient for a *quid pro quo*, while the transfer of possession is neglected. The latter fact is due to the rules in the Sale of Goods Act 1979, which allow for the transfer of property by mere agreement.[752] Since the transfer of property is dependent on the assent of the buyer, the seller can generally not "force" the goods onto the buyer.[753] Consequently, the seller cannot provide **360**

745 This case's connection with and its relevance within sales law is also accepted by *Twigg-Flesner/Canavan*, p. 398 fn. 2; whereas highly skeptical regarding the case and its radiating effect *Lord Denning MR* in *Attica Sea Carriers Corporation v Ferrostaal Poseidon Bulk Reederei GmbH (The Puerto Buitrago)* [1976] 1 Lloyd's Rep 250, 255. *Flessner*, FS Bucher, pp. 145, 163 concludes divergently that this case rather shows how far English law has moved away from the understanding with which section 49(1) SGA 1979 was drafted.

746 As claimed by *Liu*, 74 Modern Law Review (2011) 171, 179 et seq. At the same time, *Liu* argues the relevant issue is not whether a claim for the price exists after the conditions have been fulfilled, but rather whether a party should be allowed to fulfill them at all.

747 *Burrows*, Remedies, p. 387.

748 *Chen-Wishart*, Chitty on Contracts, para. 30-011.

749 Similarly *Liu*, 74 Modern Law Review (2011) 171, 184, when he accepts that the discussion about "*legitimate interest*", and in his view efficiency is irrelevant, if the contract requires cooperation, as is the case regarding most sales contracts; *Twigg-Flesner/Canavan*, pp. 402, 403.

750 Similar conclusion on sect. 49(1) SGA 1979, *Gullifer*, Lloyd's Maritime and Commercial Law Quarterly (2014), 564, 579: "*The original rationale for section 49(1) was that, until property had passed, the seller has not completely fulfilled his promise, and executed consideration was necessary for an action in debt. But with the abolition of the forms of action, this historical justification seems outdated, and as discussed above, many of the cases make no distinction between delivery and the passing of property.*"

751 Jansen/Zimmermann/*Kleinschmidt*, p. 1192 para. 5; probably with similar assessment *Rabel*, Recht des Warenkaufs II, p. 42.

752 Sect. 17 SGA 1979.

753 *Saidov*, Journal of Business Law (2019), 1, 13.

the *quid pro quo* unilaterally to pave the way for a claim for the price under section 49(1) of the Sale of Goods Act 1979.

361 This can be illustrated by an example:[754] If B buys a specific cow from S, property will pass immediately upon conclusion of the contract under section 18 rule 1 of the Sale of Goods Act 1979. Even without a transfer of possession, and even if B no longer wants the cow due to a declining market, S will be able to maintain an action for the price under section 49(1) of the Sale of Goods Act 1979 and receive the full price. In contrast, if B has just bought any cow from S (an unascertained good), the latter will generally have no possibility to enforce the claim for the price if B refuses to perform. If the seller cannot claim the price, he or she is left with damages under section 50 of the Sale of Goods Act 1979. Subsection 3 of this section reads:

> "*Where there is an available market for the goods in question the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted or (if no time was fixed for acceptance) at the time of the refusal to accept.*"

362 In addition, the doctrine of mitigation requires the seller who faces an unwilling buyer to resell the goods on the market.[755] The breaching buyer should not bear the consequences of a declining market, if the seller could reasonably resell the goods on the market.[756] In the example provided, S would have to sell the cow elsewhere within a reasonable time, because otherwise this calculation of damages would lead to him or her bearing the negative consequences of the drop in market price.

363 Section 50(3) of the Sale of Goods Act 1979 and the doctrine of mitigation could be taken to signify that the English legal system considers the seller to be better equipped to resell the goods on the market. This would, however, fail to recognize that under English law, diametrically different results are reached if a specific good was sold, although a specific good does not necessarily mean that there is no market for the good and the seller is not in a better position to dispose of the good. Moreover, if the seller is a consumer and the buyer is a dealer, this consideration would also not hold true.[757] For these reasons, combined with the development of English law analyzed above, efficiency is not the core purpose of the provision, but might just be the consequence in some cases. This is supported by the fact that case law

754 *Merkin/Saintier*, p. 416.

755 *McKendrick*, Contract Law, 13th edn, p. 368.

756 *Beheshti*, 24 Uniform Law Review (2019), 497, 510; citing *Jamal v Moolla Dawood* [1916] 1 AC 175, 179; *Bunge SA v Nidera BV* [2015] UKSC 43, 80, [2015] Bus LR 987.

757 *Merkin/Saintier*, p. 416 are skeptical for this reason.

lacks a discussion and analysis of the merits of a claim for the purchase price over a damages claim, instead of the traditional questions in the realm of the *quid pro quo*.[758] The differentiation along the line of *quid pro quo* and the possibility to fulfill the obligation without co-operation of the other party, indeed, appears arbitrary from the point of view of the party suing for the price.[759] The limitation of the action for the purchase price in section 49(1) of the Sale of Goods Act 1979, thus, does not further economic efficiency, but rather exposes its doctrinal roots.[760]

c) *The Res Cogitans* and future English law

364 While the depicted state of English law was, thus, relatively stable over many centuries, *PST Energy 7 Shipping LLC and another v OW Bunker Malta Ltd and another* ("*The Res Cogitans*")[761] may have been a seismic shock to English law and its action for the purchase price. As described above, the litigated contract was not considered a sales contract under section 2(1) of the Sale of Goods Act 1979 because it allowed the end-user to consume the goods in which property was retained before payment.[762] Consequently, a notable number of credit sales will hence no longer be subject to the limitations of section 49(1) of the Sale of Goods Act 1979.[763] Even more far-reaching with regard to the action for the purchase price is the *obiter dictum* of the Supreme Court stating that it would have overruled *F. G. Wilson Engineering Ltd v John Holt & Co. Ltd*[764] if it had been necessary.[765] The latter decision clarified that no other legal basis for claiming the purchase price under a sales contract that is subject to the Sale of Goods Act 1979 is applicable. This may signify a far-reaching extension of the action for the purchase price in the future, even in cases concerning sales contracts under the Sale of Goods Act 1979. The resulting smoke from the decision has

758 *Bridge*, Sale of Goods, para. 11.63.
759 *Chen-Wishart*, Chitty on Contracts, para. 30-009.
760 Cf. also *Saidov*, Journal of Business Law (2019), 1, 10 who for similar reasons considers the transfer of property as a prerequisite for the action for the price to be "*somewhat flawed*".
761 [2016] AC 1034 (UKSC), [2016] UKSC 22.
762 For the facts of the case and details on the contract characterization, see above paras. 292.
763 *Saidov*, Journal of Business Law (2019), 1, 6.
764 [2012] EWHC 2477 (Comm), [2014] 1 All ER 785.
765 *PST Energy 7 Shipping LLC and another v OW Bunker Malta Ltd and another ("The Res Cogitans")* [2016] AC 1034 (UKSC), [2016] UKSC 22, para. 58; cf. *Saidov*, Journal of Business Law (2019), 1, 9 et seq. on the consequences of this aspect for the action for the price.

not fully cleared yet, and the evolved landscape regarding the action for the price is difficult to assess in many regards.[766]

2. Other common law jurisdictions

365 Apart from England, there are many common law countries that follow similar rules. Comparable provisions to section 49(1) of the Sale of Goods Act 1979 exist in Australia.[767] Australia's different states have their respective Sale of Goods Acts, but they are very similar in structure and content.[768] All of them are based on the United Kingdom Sale of Goods Act 1893.[769] Hong Kong and Singaporean law likewise contain identical rules to English sales law.[770] The interpretation of these provisions by English courts is highly influential.[771] In addition, the Canadian provinces (apart from Québec) have adopted the Sale of Goods Act 1979's approach to the seller's action for the price.[772] Notably, there was an unsuccessful effort to modify the action for the purchase price under Canadian law in this regard in favor of the interpretation under the UCC in the USA discussed below.[773] In conclusion, many other common law jurisdictions have followed the English model of generally restricting the seller's claim for the price if property has not yet been transferred to the buyer.

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766 *Bridge/Gullifer/Low/McMeel*, para. 19-025; *Saidov*, Journal of Business Law (2019), 1, 11–12 who depicts different possible interpretations of the Supreme Court's obiter dictum regarding the exclusive character of sect. 49(1) SGA 1979. In contrast, *Goode/McKendrick*, paras. 7.33–7.35 consider the created uncertainty to be overstated and cite *Wood v Tui Travel plc* [2017] ECWA Civ 11, [2018] QB 927 and *Cockett Marine Oil DMCC v ING Bank NV and OW Bunker Malte Ltd* [2019] EWHC 1533 (Comm), [2019] Lloyd's Rep Plus 77 as examples of the decision being interpreted narrowly.

767 Sect. 55(1) Goods Act 1958 in Victoria; sect. 52(1) Sale of Goods Act 1954 in the Australian Capital Territory; sect. 51(1) Sale of Goods Act 1923 in New South Wales; sect. 50(1) Sale of Goods Act 1896 in Queensland; sect. 48(1) Sale of Goods Act 1895 in South Australia; sect. 48(1) Sale of Goods Act 1895 in Western Australia; sect. 53(1) Sale of Goods Act 1896 in Tasmania; sect. 51(1) Sale of Goods Act 1972 in the Northern Territory. See also *Automatic Fire Sprinklers Proprietary Ltd v Watson* [1946] HCA 25; (1946) 72 CLR 435, 464.

768 *Thampapillai*, p. 30.

769 *Thampapillai*, p. 30.

770 Sect. 51(1) Sale of Goods Ordinance in Hong Kong; sect. 49(1) Sale of Goods Act 1979 in Singapore. See for case law in Hong Kong, *Gilman and Company Ltd v Yokohama Musen Industrial (HK) Ltd* [1976] HKLR 821 with a critical comment in 7 Hong Kong Law Journal [1977] 128.

771 *Yap*, 46 Common Law World Review (2017), 269, 277.

772 See for example, sect. 52(1) Sale of Goods Act 1996 in British Columbia; sect. 47(1) Sale of Goods Act 1990 in Ontario.

773 *Bridge*, Debt Instead of Damages, pp. 423, 443.

3. Different motives for the shaping of the claim for the purchase price in the USA

US law originally had the same starting point as English law.[774] Questions regarding the *quid pro quo* and the lack of enforceability of a mere promise were also preeminent in legal thought across the Atlantic.[775] In line with English law, the seller who had promised to transfer property but later faced an unwilling buyer, could not recover the purchase price and was limited to damages.[776] But case law took a different turn: New York courts developed a rule that the seller could claim the purchase price, even if property had not passed, if the transfer was wrongfully prevented by the buyer (the so-called New York Rule).[777] Some courts in other US states followed this approach,[778] while others remained committed to the rule of English law, i. e., that passing of property is a necessary precondition and not possible against the buyer's will.[779] **366**

Despite this innovative approach of many courts in developing and following the New York Rule, the legislator sent the courts back to the law before the New York Rule in 1906, when it introduced section 63 of the Uniform Sales Act of 1906.[780] According to *Llewellyn*, although the New York Rule was a sensible and persuasive solution, it was rejected mainly because England had not developed its rule so far, and furthermore the rule had rested on "*dubious legal reasoning*".[781] The new provision restricted the availability of the price action in states that followed the New York Rule, while it was more readily available in states that had previously followed English law.[782] Section 63 of the Uniform Sales Act of 1906 stated: **367**

> *"(1) Where, under a contract to sell or a sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or*

774 *Gabriel*, 23 Barry Law Review (2018), 129, 131.
775 *Waite*, 17 Michigan Law Review (1918–19), 283, 284 et seq.
776 *Waite*, 17 Michigan Law Review (1918–19), 283, 287 et seq.
777 *Dustan v. McAndrews*, 44 N. Y. 72 (1870); *Heyden v. De Mets*, 53 N. Y. 426 (1873); *Habeler et al. v. Rogers et al.*, 131 F. 43 (2nd Cir. 1904); cf. *Williston*, §§ 562 et seq., pp. 1399 et seq. But see *Waite*, 17 Michigan Law Review (1918–19), 283, 291 arguing that the idea behind the rule was not to overturn the notion that the seller cannot thrust title on an unwilling buyer, but rather that the buyer will oftentimes already be in possession of the goods.
778 For example, in Missouri, *Crown Vinegar and Spice Co. v. Wehrs*, 59 Mo. App. 493 (1894); in Ohio, *Shawhan v. Van Nest*, 25 Ohio St. 490 (1874); *Williston*, § 562, p. 1400.
779 An example from case law is *Hoffman v. Gosline*, 172 Fed. 113, 96 C. C. A. 318 (6th Cir. 1909); for English law in this regard, see *Merrett*, Chitty on Contracts, para. 46-362.
780 *Jensen*, § 522.
781 *Lewellyn*, XV New York University Law Quarterly Review (1938), 159, 178.
782 *Williston*, Vol. 3, § 562, p. 1400.

refuses to pay for the goods according to the terms of the contract or the sale, the seller may maintain an action against him for the price of the goods.

(2) Where, under a contract to sell or a sale, the price is payable on a day certain, irrespective of delivery or of transfer of title, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract. But it shall be a defense to such an action that the seller at any time before judgment in such action has manifested an inability to perform the contract or the sale on his part or an intention not to perform it.

(3) Although the property in the goods has not passed, if they cannot readily be resold for a reasonable price, and if the provisions of section 64 (4) are not applicable, the seller may offer to deliver the goods to the buyer, and, if the buyer refuses to receive them, may notify the buyer that the goods are thereafter held by the seller as bailee for the buyer. Thereafter the seller may treat the goods as the buyer's and may maintain an action for the price."

368 Although section 63 of the Uniform Sales Act of 1906 returned in its first paragraph to the rule that the passing of property is a prerequisite for the price action, paragraph 3 broke with the historical reliance on a *quid pro quo*: In case a resale was not reasonably possible for the seller and where labor or expenses of material were necessary for the seller to produce the goods (section 64(4) of the Uniform Sales Act), the seller was allowed to claim the price even though property had not passed. The possibility of a resale and the case of specifically produced goods do not refer to situations in which a plus in terms of *quid pro quo* is involved compared to other sale contracts. Even if one considered the necessity for the seller to inform the buyer that he or she will hold the goods as a bailee for the buyer as a remaining (fictional) facet of the transfer of property,[783] the ties between the relict of limited enforcement of promises and the system of contractual actions were seriously weakened.

369 The introduction of the Uniform Commercial Code in 1951 can be seen as loosening the ties even more, since section 2-709(1)(b) of the Uniform Commercial Code dropped this requirement.[784] Section 2-709(1) of the UCC states:

783 *Neufang*, p. 95.
784 *Neufang*, pp. 90, 95.

> *"When the buyer fails to pay the price as it becomes due the seller may recover, together with any incidental damages under the next section, the price*
>
> *(a) of goods accepted or of conforming goods lost or damaged within a commercially reasonable time after risk of their loss has passed to the buyer; and*
>
> *(b) of goods identified to the contract if the seller is unable after reasonable effort to resell them at a reasonable price or the circumstances reasonably indicate that such effort will be unavailing."*

Moreover, section 2-709(1)(a) of the UCC replaced the requirement of passing of property with the requirement of acceptance of the goods on the part of the buyer. Even though some lawyers may be inclined to argue that the buyer has accepted the goods as soon as property passes, "acceptance" under the UCC is a term of art and is not to be equated with the transfer of property.[785] This is in line with the general theme of the UCC to eliminate the concept of property from the central role the concept had under the Uniform Sales Act.[786] *Llewellyn* – one of the principal drafters of the UCC – considered property to be a "*useless additional link in reasoning*" when deciding whether the price or damages is an adequate remedy for the seller.[787] The fact that the transfer of property became mostly irrelevant for the question of remedies between the parties in general, and the price action under the UCC in particular, was not met with applause everywhere.[788] However, this development lead to more discussions regarding the merits of the price action as to whether the buyer or the seller is better equipped to sell the goods elsewhere under the respective circumstances. *White* and *Summers* state explicitly that the policy behind section 2-709(1)(a) of the UCC is that in case the buyer does not accept the goods the seller is "*generally denied the price* […] *for the seller is usually in the business of selling those goods, is likely to have better market contacts and is therefore in a better position to salvage by redisposing of the goods through normal channels*."[789] This changes once the buyer has accepted the goods, which is why he or she cannot later claim that the seller has to take them back and dispose of them in order to mitigate the damage.[790]

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785 *White/Summers/Barnhizer/Barnes/Snyder*, p. 301.

786 *Neufang*, p. 87; *Stone*, p. 44.

787 *Lewellyn*, XV New York University Law Quarterly Review (1938), 159, 175.

788 *Williston*, Harvard Law Review (1950), p. 568 evaluated this to be "*unsatisfactory and can result only in confusion"* and opposed the new price action specifically on pp. 586 et seq.

789 *White/Summers/Barnhizer/Barnes/Snyder*, p. 299.

790 *Siemens Energy & Automation Inc. v. Coleman Electrical Supply Co. Inc.*, 46 F. Supp.2d 217 (1999).

371 It is questionable, however, whether the shift from "property" to "acceptance" as a prerequisite successfully cut the "*useless additional link in reasoning*", as *Llewellyn* may have had in mind. This is because the complex question of transfer of property was not replaced by a description of factual circumstances, but rather by the complex legal concept of "acceptance". Even though section 2-606 of the UCC defines acceptance, it is a difficult and normative notion.[791] Possession alone does not amount to an acceptance.[792] Moreover, under the UCC, the buyer can reject the goods in a procedurally correct manner even though there is no sufficient substantive reason for the rejection.[793] Therefore, when functionally compared to the rule in English law, the buyer under both rules still has the possibility to unilaterally prevent the seller from being able to claim the purchase price.

372 The real progress, thus, lies in sections 63(3) of the Uniform Sales Act 1906 and 2-709(1)(b) of the UCC.[794] In accordance with English law, the mitigation principle does not apply to the action for the purchase price under section 2-709 of the UCC.[795] Yet, section 2-709(1)(b) allows sellers to recover the full purchase price if they cannot reasonably resell the goods. Under these circumstances, this resale will most of the time mirror an action that would be required by the seller in terms of mitigating the damage. The difference lies in the fact that the buyer under the general doctrine would have to prove a missed opportunity of the seller to mitigate the damage, while under section 2-709(1)(b) sellers have to prove that they were not able to execute a reasonable resale or that any such efforts would have been unavailing from the outset. Since, in many cases in merchantable trade, sellers will be able to resell the goods, their claim for the purchase price would often be denied, but they are protected in cases where they cannot do so in a reasonable manner.[796] This is more seller-friendly than English law, where sellers would have to prove their damages in this case.

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791 Cf. *White/Summers/Barnhizer/Barnes/Snyder*, pp. 357 et seq.

792 *Whaley*, 24 Drake Law Review (1974), 52, 64; *White/Summers/Barnhizer/Barnes/Snyder*, p. 357.

793 *Zhong Ya Chemical (USA) Ltd v. Industrial Chemical Trading, Inc.,* 2001 WL 69438, 43 UCC2d 879 (2001) sub B, later clarified but without material changes in regard to the subject of citation by *Zhong Ya Chemical (USA) Ltd v. Industrial Chemical Trading, Inc.,* 2001 WL 1491378 (2001); *Brandeis Machinery & Supply Co. LLC v. Capitol Crane Rental Inc.,* 765 N. E.2d 173, 47 UCC2d 200 (Ind. App. 2002); *Honnold*, 107 University of Pennsylvania Law Review (1959), 299, 327; unclear whether this also holds true for a revocation of acceptance, *White/Summers/Barnhizer/Barnes/Snyder*, p. 302.

794 Similarly, *Neufang*, p. 95.

795 *White/Summers/Barnhizer/Barnes/Snyder*, p. 304.

796 See as an example for the latter situation *Jacobson v. Donnkenny, Inc.*, 1967 WL 8844, 4 UCC 850 (N. Y. Sup. 1967).

In the example of the sale of a cow,[797] the results under the UCC at first appear similar, but are different upon a closer look. First, in contrast to English law, it is not relevant whether a specific cow or any cow was sold, since the claim for the price under section 2-709(1) of the UCC is not dependent on a transfer of property. If B refuses to accept the cow and a claim under section 2-709(1)(b) of the UCC is not possible because a market for cows exists, S is confined to damages under section 2-706 of the UCC if he resells the cow or damages as calculated under section 2-708 of the UCC. From the time of performance, the seller thereby bears the risk of a drop in the market price. **373**

4. Summary

Thus, on the one hand, countries that follow the lead of the Sale of Goods Act 1893 or 1979 still exhibit the doctrinal problem that arose from the general rejection of enforcement of mere promises, and rely on the concept of property as a *quid pro quo* to decide whether the seller can successfully sue for the price. On the other hand, the USA has moved away from the concept of property to the concept of acceptance of the goods and the question of a reasonable resale. The USA has, thereby, evolved beyond past doctrinal issues. In the USA, in turn, the central question is instead whether the seller can be reasonably expected to sell the goods elsewhere under considerations of efficiency – a question that courts in England seem not to be as interested in. Yet, both legal systems concur – although for different reasons – that it is the seller who generally bears the burden of redisposing of the goods. If the seller cannot claim the price and still does not resell the goods despite a reasonable opportunity to do so, an adverse movement in the market is generally to his or her own detriment. **374**

II. Continental European laws' approach exemplified by German law

Continental European laws' starting point lies at the other end of the spectrum.[798] Most continental European laws generally accept that the obligation to perform a contract can be claimed in a court of law even if the other party refuses to accept the counter-performance.[799] The differentiation between the price being due under the contract, a "duty" to pay the price, and a rem- **375**

797 For the solution for this case under English law, see above paras. 361 et seq.

798 *Flessner*, FS Bucher, pp. 145, 148.

799 *Kötz*, para. 755; Schlechtriem/Schwenzer/Schroeter/*Mohs*, 8th German edn, Art. 62 para. 4; *Schwenzer/Hachem/Kee*, para. 43.12; *Schwenzer/Muñoz*, para. 43.12; *Ormanci*,

edy to claim the price as explained by *Peel*[800] would generally not be understood by a lawyer exclusively educated in a civil law jurisdiction today.

376 Exemplified by section 433(2) of the German Civil Code, the buyer is required to pay the price and the seller is allowed to base legal proceedings on this provision or even on the contract itself.[801] However, section 320 of the German Civil Code clarifies that generally the seller will in turn have to render performance simultaneously.[802] Consequently, a judgment for the purchase price will generally be conditional on the simultaneous performance of the seller to deliver the goods.[803]

1. German law in theory

377 In contemporary law, claiming the purchase price is not understood to be based on a remedy that is distinct from the substantive right, but instead follows from the contract or promise directly.[804] Although the original divide between the substantive right and the action was also present in 19th century European law, *Windscheid* started to distinguish the substantive right and the procedural right.[805] This approach has had a lasting impact on German law and underlies the German Civil Code. Amidst the material for the preparation of the German Civil Code is the following statement:

> "*Die Klagbarkeit kann dem Anspruch fehlen, aber sie fehlt ihm nur, wenn sie ihm abgesprochen ist. Die Klagbarkeit der Rechte ist die selbstverständliche Regel.*"[806]

378 An exception to the general rule of the enforceability of performance *in natura* is the "*Naturalobligation*". Under this kind of obligation, the debtor is obliged to perform, but a court of law will neither help the creditor with

14 Juridical Tribune – Review of Comparative and International Law (2024), 27, 38.

800 Treitel/*Peel*, para. 21-006.

801 *Martens*, 76 RabelsZ (2012), 705, 717; *Weller*, JZ 2008, 764, 768. A similar rule exists in Switzerland in Art. 184(1) Swiss Code of Obligations.

802 *Martens*, 76 RabelsZ (2012), 705, 715; *Weller*, JZ 2008, 764, 769; *Oetker/Maultzsch*, para. 428.

803 MüKoBGB/*Westermann*, § 433 BGB para. 65.

804 *Weller*, JZ 2008, 764, 765 et seq. with further explanation of the historical development.

805 *Weller*, JZ 2008, 764, 765; *Windscheid*, Die Actio des römischen Zivilrechts vom Standpunkte des heutigen Rechts, p. 46; *Windscheid*, Die Actio – Abwehr gegen Dr. Theodor Muther, p. 26.

806 My translation: It is possible that a claim is not enforceable, but enforceability is only lacking, if specifically denied. The enforceability of claims [for performance *in natura*] is the self-evident rule. German original in Motive zu dem Entwurfe eines Bürgerlichen Gesetzbuches für das Deutsche Reich, Vol. I, p. 357.

enforcement of such obligation nor the debtor to reclaim his or her executed performance later.[807] An example can be found in section 762 of the German Civil Code, according to which gambling does not create legally enforceable payment obligations.[808]

379 German jurists therefore find it self-explanatory that there is no need for a breach of contract to enable the seller to claim the purchase price.[809] Although some scholars have argued that the claim for performance was rendered a mere "remedy" by the reform in 2002,[810] these authors are concerned merely with the wording of section 275 of the German Civil Code and the dogmatic concept, while they do not argue that a breach of contract was a prerequisite for the remedy. Furthermore, this interpretation is not widely accepted in Germany, where most scholars and courts still speak of a "primary" obligation of performance *in natura*.[811]

380 In accordance with the general position in England and the USA, the duty to mitigate under section 254 of the German Civil Code does not apply to claims for performance of the contract *in natura*.[812] Nevertheless, the German Civil Code contains several provisions that effectively bar a claim for performance while the underlying idea oftentimes mirrors considerations of a duty to mitigate.[813] These provisions can, however, not be found in the area of sales law. In this area of the law, the duty to mitigate the damage arises only when the creditor abandons the claim for performance and pursues a claim for damages.[814] A cover transaction is not expected before the creditor turns to a claim for damages. To cover earlier may be even risky for the seller: The buyer may reconsider his or her refusal to perform and ask the seller to deliver the goods. If the seller has already disposed of the owed goods, he or she may be found to have breached the contract.[815]

381 On the other hand, the party that is under an obligation to pay the price can generally not evade this obligation by refusing to pay and referring the creditor to claim damages.[816] In practice, this empowers sellers, who can decide

807 *Schulze*, p. 405.
808 *Weller*, JZ 2008, 764, 766.
809 *Kötz*, para. 753; *Weller*, JZ 2008, 764, 767.
810 Skeptical regarding the change in concept, *Stoll*, JZ 2001, 589, 590; accepted by *Schlechtriem/Schmidt-Kessel*, para. 466; criticized by *Weller*, pp. 394–397 who, however, does not differentiate between the dogmatic concept and the question of whether a breach of contract is a prerequisite for the claim for performance.
811 *Schlechtriem*, Neues Schuldrecht, pp. 71, 75; *Albers*, ZEuP 2012, 687, 692.
812 *Peters*, JZ 1995, 754, 755.
813 *Peters*, JZ 1995, 754, 755. This holds true even after the reform of 2002.
814 *Weidt*, p. 152.
815 *Weidt*, p. 152.
816 *Wertenbruch*, 193 AcP (1993), 191, 192.

when to pursue a damages claim, while beforehand they bear no risk of a falling market price.

2. Practice of the courts

382 The rationale behind this position is that due to the contract, sellers have every right to insist on performance, which is why the duty to mitigate the damage cannot oblige them to abandon their claim for performance and sell the goods elsewhere. The German Supreme Court decided a case explicitly in this fashion in 1913.[817]

383 This commonly accepted stance was, however, seriously called into question by a decision of the German Supreme Court to which thus far little importance has been attached.[818] The facts relevant for the present purpose are as follows: a parcel of land was sold, but the buyer's plan for financing the project collapsed. Consequently, the latter signaled that the deal was off, and that the seller should look for an alternative buyer. Notwithstanding, the seller insisted on payment by the buyer and ignored two opportunities for a cover sale. One year later, the seller rescinded the contract due to the delay in payment, sold the parcel for less than the contract price and sued the buyer for damages (for the difference in price and for delay). The German Supreme Court accepted the argument of the appeal that the claim for damages should be reduced due to the failure of the seller to execute a cover transaction as soon as the buyer's inability to perform became clear. The legal basis for the argument is the duty to mitigate the damages under section 254 of the German Civil Code.[819] The court stated in this regard:

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817 German Supreme Court, 10 October 1913, RGZ 83, 176.

818 German Supreme Court, 17 January 1997 – V ZR 285/95, NJW 1997, 1231.

819 Sect. 254 German Civil Code: "*(1) Hat bei der Entstehung des Schadens ein Verschulden des Beschädigten mitgewirkt, so hängt die Verpflichtung zum Ersatz sowie der Umfang des zu leistenden Ersatzes von den Umständen, insbesondere davon ab, inwieweit der Schaden vorwiegend von dem einen oder dem anderen Teil verursacht worden ist. (2) Dies gilt auch dann, wenn sich das Verschulden des Beschädigten darauf beschränkt, dass er unterlassen hat, den Schuldner auf die Gefahr eines ungewöhnlich hohen Schadens aufmerksam zu machen, die der Schuldner weder kannte noch kennen musste, oder dass er unterlassen hat, den Schaden abzuwenden oder zu mindern.* […]" My translation: (1) If fault on the part of the damaged party has contributed to the occurrence of the damage, the obligation to pay compensation and the extent of the compensation to be paid shall depend on the circumstances, in particular on the extent to which the damage was predominantly caused by one party or the other. (2) This shall also apply if the fault of the aggrieved party is limited to the fact that it failed to draw the debtor's attention to the risk of unusually high damage of which the debtor was neither aware nor should have been aware or that it failed to avert or mitigate the damage.

> "*Erklärt der Käufer dem Verkäufer, daß ein Vollzug des Kaufvertrages wegen gescheiterter Finanzierung des Kaufpreises nicht mehr zu erwarten sei, so kann ein Mitverschulden des Verkäufers an der Entstehung des Schadens nicht mit der Begründung verneint werden, die Entscheidung, ob und wie lange er den Käufer an dem Vertrag festhalte, müsse ihm freigestellt bleiben. Denn nach dem Gedanken des § 254 BGB, daß derjenige, der die eigenübliche Sorgfalt außer acht läßt, den Verlust oder die Verkürzung seines Ersatzanspruchs in Kauf nehmen muß* [footnote omitted]*, ist in einem solchen Fall stets zu prüfen, ob der Verkäufer nicht früher ein Deckungsgeschäft hätte vornehmen können und den bestehenden Vertrag hätte beenden müssen*."[820]

384 This is accepted as good law in German literature.[821] Yet, at the same time it is pointed out that this duty does not apply to claims for performance *in natura*.[822]

385 *Weller* attempts to legitimize this decision by arguing that if the buyer refuses further performance of the contract, the seller would not be required to set an additional period for performance under section 281(2) of the German Civil Code.[823] Therefore, the claim for damages already arises with the buyer's refusal to perform (as a *verhaltener Anspruch*), which is why the duty to mitigate under section 254(2) of the German Civil Code would already be applicable.[824]

386 Accepting this position would lead to strange results: If sellers miss the first sensible opportunity to execute a cover transaction, they would be limited in their claims for damages but not in their (still existent) claims for performance. Even if at some later point they could effect a cover sale, which might also be in the interest of the buyer, they will be effectively deterred from proceeding with the cover transaction, since it bears negative conse-

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820 German Supreme Court, 17 January 1997 – V ZR 285/95, NJW 1997, 1231 sub. III. 1. My translation: If the buyer declares that execution of the purchase contract is no longer to be expected due to failed financing of the purchase price, then contributory responsibility on the part of the seller for the occurrence of the damage cannot be denied on the ground that the decision as to whether and for how long he keeps the buyer to the contract must remain at the seller's discretion. For according to the idea of section 254 BGB German Civil Code, the person who disregards the usual standard of care must accept the loss or the shortening of his claim for compensation [quotations omitted]. In such a case it must always be examined whether the seller could not have made a cover transaction earlier and should have terminated the existing contract.

821 MüKoBGB/*Oetker*, § 254 BGB para. 56; BeckOK/*St. Lorenz,* § 254 BGB para. 38.

822 BeckOK/*St. Lorenz,* § 254 BGB para. 7.

823 *Weller*, p. 418.

824 *Weller*, p. 418.

quences for them: The claim for performance is lost and sellers are left with a reduced damages claim.

387 Either one adheres strictly to the principle that a seller can insist on performance, which should in consequence also mean that later damages claims are not reduced even if the seller does not mitigate the loss by covering before abandoning the claim for performance. Or one limits the claim for performance and can consequently argue that the damages claim is limited, too. Limiting only one of the two claims merely serves to penalize an ill-advised seller that abandons the claim for performance, even in an attempt to finally meet the wishes of the buyer.

388 As one possible solution to limit the claim for performance, section 242 of the German Civil Code has been proposed.[825] Under this provision, the relevant threshold would not be reasonableness, but rather whether insistence on performance amounted to an abuse of rights in the respective case.[826]

3. Consumer laws

389 Beyond all discussions of *pacta sunt servanda* and similar doctrines in Germany, the rules applicable to consumers are often overlooked. If the buyer is a consumer as defined by the German Civil Code and has bought the goods on the internet or at home within a specific time period, he or she is allowed to rescind the contract without providing any reasons.[827] Even if the goods conform perfectly to the requirements under the contract and the law, the buyer can generally unilaterally rescind the contract. The result is even more buyer-friendly than the results in common law jurisdictions, since the seller immediately (and even retrospectively) bears the risk that the price in the marketplace drops. Hence, for consumer sales the observations on German law do not apply with equal force. Since this section on comparative law aims to provide the necessary background to understand the claim for the price under the CISG and the relevance of the property, the very different results produced by consumer laws are only mentioned here and will not be analyzed in more depth.

4. Summary

390 Central to the civil law understanding of the claim for the purchase price is the promise that leads to an obligation and is binding – a concept which is

825 *Weidt*, p. 154; similarly, but without mentioning sect. 242 German Civil Code explicitly, *Lisch*, WiB 1997, 999; *Hager*, Rechtsbehelfe, pp. 155, 162.
826 *Weidt*, p. 154; *Lisch*, WiB 1997, 999.
827 Sect. 312g(1) German Civil Code; exceptions in sect. 312g(2) German Civil Code.

often referred to as *pacta sunt servanda*. As long as creditors rely on this promise and obligation, Civil lawyers consider them as acting within their rights. Yet, recent German case law could be interpreted to be at odds with this principle.

III. Summary of national concepts

391 Jurists in each jurisdiction are aware of the respective problems with one or the other approach to claims for the purchase price. Yet, they place value on different arguments which consequently leads to different results. What "reasonable" sellers will do when the buyer does not pay the price can, therefore, differ depending on the jurisdiction with which the seller is familiar. Sellers from the US will understand that they must resell the goods elsewhere to achieve a favorable result for both parties. German sellers may be inclined to understand reasonable behavior to mean that they should hold the goods for the buyer and insist on their claim for the purchase price. English sellers, in turn, might try to find ways to perform their part of the transaction in order to be entitled to claim the purchase price. If they cannot find a way to perform themselves, sellers will try to resell the goods on the market and claim damages. It is, thus, not possible to conclude that there is one "reasonable" behavior of sellers to resell the goods as soon as reasonably possible and that consequently in practice no problems regarding the purchase price exist. Reasonableness in this regard can only be judged against the contract and the applicable law.

IV. Claiming the price under the CISG

392 Turning to the CISG, Article 61(1) reads: "*If the buyer fails to perform any of his obligations under the contract or this Convention, the seller may: (a) exercise the rights provided in articles 62 to 65;* […]." The referenced Article 62 states that "[t]*he seller may require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with this requirement.*" The aforementioned legal backgrounds explain why the explicit reference of a right to claim payment might appear superfluous from the perspective of a civil law jurist, and why a common law jurist would expect a provision to that effect but might find further prerequisites for an action for the purchase price lacking.

393 Thus, at first sight, the transfer of property seems irrelevant for the seller's possibility to claim the purchase price under the CISG. However, a closer look at Article 28 of the CISG plainly reveals that the divide between the

common law and the civil law tradition regarding the specific performance in contracts for the sale of goods was not bridged in the Convention.[828] This provision states:

> *"If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention."*

394 If section 49(1) of the Sale of Goods Act 1979 (and its equivalents in other jurisdictions) applied together with Article 28 of the CISG for a claim of the purchase price under Article 62 of the CISG, the relevance of the transfer of property might suddenly resurface in the uniform sales law and its remedies. Although England is not a Contracting State, the CISG might still be applicable before English courts if the rules of private international law led to the CISG. In that case, Article 28 would nevertheless be applicable, since a non-contracting State cannot be required to apply the CISG in a stricter fashion than a contracting State.[829] Furthermore, as has been described above, comparable rules to section 49(1) of the Sale of Goods Act 1979 exist, for example, in Canada, Australia, and Singapore, which are CISG Contracting States.[830] Moreover, the majority of scholars consider Article 28 of the CISG to be applicable in arbitrations as well.[831] Therefore, even though English law is discussed primarily here, it is of relevance despite England not being a CISG Contracting State.

395 To understand how important Article 28 of the CISG and its potential application to Article 62 of the CISG is, however, it is necessary to first understand the scope of Article 62 and the CISG's general position toward claiming the price. Thereafter, the CISG's rules on damages (Articles 74–77) have to be reviewed. This calculation of damages is – as has already been discussed in the section on national laws above – the practical consequence of different scopes of claims for the price.[832] Only then can one assess the

828 *Farnsworth*, 27 American Journal of Comparative Law (1979), 247, 249 (regarding the Draft Convention, which already included the predecessors of Arts. 28, 46, and 62 CISG).

829 Honsell/*Gsell*, Art. 28 para. 10; *Wethmar-Lemmer*, 2012 Journal of South African Law (2012), 700, 708.

830 For a list of these provisions, see above para. 365.

831 Kröll/Mistelis/Perales Viscasillas/*Björklund*, Art. 28 para. 17; *Lookofsky*, p. 172; Honsell/*Gsell*, Art. 28 para. 9; Schlechtriem/Schwenzer/Schroeter/*Müller-Chen/Atamer*, 8th German edn, Art. 28 para. 9; contra, *Gillette/Walt*, p. 375; *Schroeter*, FS Karrer, pp. 295, 299.

832 *Hager*, Rechtsbehelfe, p. 194.

relevance of Article 28 of the CISG, and possibly the transfer of property for that matter.

1. Article 62 of the CISG

No restriction of claims for the price can be found in the wording of Article 62 of the CISG itself. This leads to the impression that the CISG fully adopts the civil law concept of an unlimited claim for performance.[833] From a civil law perspective, the claim for the price would already exist due to the sales contract,[834] while the wording of Article 61(1) of the CISG prompts the conclusion that the seller has to prove the failure of the buyer to perform.[835] Thus, despite the broader wording, Article 62 of the CISG cannot be understood to be a complete civil law transplant. While Articles 79 and 80 of the CISG could also be relevant to assess the scope of Article 62 of the CISG, they are excluded from the following considerations as they do not relate to problems regarding the property in the goods. **396**

a) Notable widening of scope of Article 62 of the CISG compared to Article 61(2) of the ULIS

The broad wording of Article 62 of the CISG stands in sharp contrast to the predecessor found in Article 61 of the ULIS. The latter provision read: **397**

> *"1. If the buyer fails to pay the price in accordance with the contract and with the present Law, the seller may require the buyer to perform his obligation.*
>
> *2. The seller shall not be entitled to require payment of the price by the buyer if it is in conformity with usage and reasonably possible for the seller to resell the goods. In that case the contract shall be ipso facto avoided as from the time when such resale should be effected*."

The wording of Article 61(2) of the ULIS does not hide that it took its cue from the common law.[836] The seller's claim for the price is excluded from the outset if the possibility of a certain kind of resale exists. Even though a **398**

833 Kröll/Mistelis/Perales Viscasillas/*Bell*, Art. 62 para. 5.

834 Drawing this conclusion also for the CISG Ferrari/Kieninger/Mankowski/*Mankowski*, Art. 62 CISG para. 4.

835 Acknowledging this necessity despite the foregoing conclusion Kröll/Mistelis/Perales Viscasillas/*Bell*, Art. 61 para. 3; P. Huber/Mullis/*P. Huber*, p. 324.

836 *von Caemmerer*, AcP 178 (1978), 121, 131; *Hager*, Rechtsbehelfe, p. 192. Tracing back this provision to the draft of 1935 and to international trade usages, *Király*, 69(2) Acta Universitatis Carolinae. Iuridica (Charles University Law Review) (AUC Iuridica) (2023), 127, 130.

difference in the burden of proof[837] and the reference to usages may distinguish the solution under the ULIS from section 63(3) of the Uniform Sales Act and section 2-709(1)(b) of the UCC, the underlying concept is similar.[838] Usages to effect a resale were especially considered to exist regarding generic goods.[839]

399 The limitation of Article 61(2) of the ULIS would be relevant for the purpose of this work if the deletion of the resale-restriction in the drafts that became Article 62 of the CISG are interpreted to have granted the seller an unlimited claim for performance and to have barred similar restrictions from being reintroduced through other provisions or underlying ideas of the CISG. To interpret the deletion to have such far-reaching implications, however, would be stretching the historical record too far. Apart from the vagueness of the threshold of a usage and reasonable possibility,[840] the reference to usages in Article 61(2) of the ULIS was ultimately deemed superfluous, since the CISG would contain a provision that incorporated usages in Article 9(2).[841] The criticism regarding Article 61(2) of the ULIS was rather aimed at the automatic avoidance of the contract that did not require a declaration of avoidance by the seller (*ipso facto* avoidance).[842] Such an avoidance was deemed to be a sensible solution for trade in commodities where heavy prices fluctuations occur regularly, while the rule might not be appropriate for other goods where prices are more or less stable.[843] Moreover, legal uncertainty was feared, since it might be unclear to both parties whether the contract is still ongoing and requires them to perform, or whether it is already considered avoided.[844]

400 When commenting on the draft Convention on the International Sale of Goods in 1977, the USA suggested limiting the wording of today's Article 62 of the CISG with the following wording: "*The seller may require the buyer to pay the price* […] *unless* […] *in the circumstances the seller should reasonably mitigate the loss resulting from the breach by reselling*

837 Under the concept in the USA, the seller would generally bear the burden of proof that no reasonable opportunity for resale exists, *White/Summers/Barnhizer/Barnes/Snyder*, p. 306.

838 For the legal landscape under the Uniform Sales Act and UCC, see above paras. 366 et seq.

839 Court of Appeal Hamm, 5 April 1979, 2 U 266/78 as reported in Schlechtriem/Magnus, p. 368 where such a usage was, however, not sufficiently proven by the buyer.

840 See concerns in this regard by *Guest* (UK) in UNCITRAL Yearbook V (1974), p. 64.

841 UNCITRAL Yearbook V (1974), p. 43 para. 45; O. R., p. 331 para. 51.

842 See "*Ipso facto avoidance*" in the Uniform Law on the International Sale of Goods (ULIS): report of the Secretary General, (A/CN.9/WG.2/WP.9), UNCITRAL Yearbook III (1972), pp. 41 et seq.; see also *Scheifele*, p. 95.

843 UNCITRAL Yearbook III (1972), p. 43 para. 12.

844 UNCITRAL Yearbook III (1972), p. 43 para. 12.

the goods."[845] The Committee of the Whole I, established in 1977 to consider the draft convention, decided to discuss this proposed amendment rather under Article 59 of the draft (which became Article 77 of the CISG).[846] The majority voted against a limitation of the seller's claim for the price regarding a resale-opportunity, as this "*would destroy the distinction between an action for the price and an action for damages, a distinction which was fundamental in many legal systems.*"[847] This argument addressed the doctrinal consequences if the limitation were introduced through the duty to mitigate the damages, while it would not have been applicable with regard to the USA's original proposal to amend Article 43 of the draft (which became Article 62 of the CISG).

Therefore, the deletion of the limitation of Article 61(2) of the ULIS and the negotiations of Article 62 of the CISG do not necessarily mean that no limitation of the claim for performance exists under the CISG. Rather, the uncertainty caused by a possible *ipso facto* avoidance of the contract and the general duty to resell the goods were the cause for the changes. At several stages during the negotiations, usages were held to be a basis for a duty to effect a cover transaction. **401**

b) No limitation of the claim for the price under Article 77 of the CISG

If the buyer no longer has any economic interest in the goods, it might stand to reason that the seller could mitigate damages by reselling the goods to a third party. Consequently, an argument could be made that under the CISG Article 77 should also apply to Article 62 directly, limiting the seller's right to claim the price.[848] This has been discussed extensively in scholarly work on the CISG and is rightfully rejected.[849] Amendments to apply Article 77 to Article 62 were introduced more than once during the negotiations.[850] They were held to blur the lines between an action for the price and an action for **402**

845 UNCITRAL Yearbook VIII (1977), p. 133.

846 UNCITRAL Yearbook VIII (1977), p. 51 para. 371.

847 UNCITRAL Yearbook VIII (1977), p. 61, paras. 501–507, citation from para. 504.

848 *Fitzgerald*, 16 Journal of Law and Commerce (1997), 291, 297; cf. also the remarks by *Honnold/Flechtner*, para. 554.

849 Staudinger/*Magnus*, Art. 77 para. 6 with further references; MüKoBGB/*P. Huber*, Art. 77 para. 3 with further references.

850 UNCITRAL Yearbook VIII (1977), p. 133 where a proposed wording of the provision that became Art. 77 CISG is reproduced: "*The party who relies on a breach of contract must adopt such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to adopt such measures, the party in breach may claim a reduction in the damages, including any claim for the price, in the amount which should have been mitigated.*" A further attempt was made during the negotiations in Vienna by *Honnold* (USA), O.R., p. 133: "*if he fails to take such measures, the party in breach may claim a reduction in the damages in the*

damages.[851] Furthermore, the aggrieved party would thereby be robbed of the right to demand performance, which would contradict the concept underlying the CISG.[852] Against this historical record, an application of Article 77 cannot be convincingly justified. Moreover, the systematic location of the duty to mitigate within the section on damages (Articles 74–77) and the clear limitation to damages claims in the wording of Article 77, sentence 2, lead to the conclusion that no limitation of the claim of performance exists due to Article 77 of the CISG.[853] Hence, Article 77 does not bring about a limitation of the claim for the price under Article 62 of the CISG.

c) No limitation of the claim for the price under Articles 85, 87 of the CISG

403 If the buyer does not accept delivery of the goods and fails to pay the price, the seller must take reasonable steps to preserve the goods under Article 85 of the CISG. According to Article 87 of the CISG, the seller in this case is allowed to deposit the goods in a warehouse of a third person as long as the expense incurred is not unreasonable. This does not mean, however, that sellers are required to resell the goods if the costs exceed a reasonable amount, or that they lose their right to claim the price if they fail to resell the goods. Instead, their claim for damages regarding the costs will be reduced to a reasonable amount.[854]

404 *Flechtner* argues that a seller's disregard of Article 85 of the CISG can lead to the loss of the claim for the price under Article 62 of the CISG.[855] The constellation that gives rise to this conclusion is that in which the buyer might already bear the risk of the goods, and under these circumstances, a material deterioration due to the seller's omission should not be to the buyer's detriment. According to *Flechtner*, this approach is in line with the mitigation of loss under Article 77 of the CISG, while he concedes that the provision is not directly applicable to Article 62 of the CISG.[856] The result can, however, also be achieved without relying on a duty to mitigate the loss: Notwithstanding the deterioration of the goods, the seller can maintain a claim for the price and has delivered conforming goods, since at the time of passing of risk (Article 36 of the CISG) they had not yet deteriorated.

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amount which should have mitigated, or a corresponding modification or adjustment of any other remedy."

851 UNCITRAL Yearbook VIII (1977), p. 61, para. 504; *Scheifele*, p. 96.

852 O. R., pp. 396–398.

853 Kröll/Mistelis/Perales Viscasillas/*Djordjević*, *2nd* edn, 2018, Art. 77 para. 10; *Riznik*, 14 VJ (2010), 267, 270.

854 Kröll/Mistelis/Perales Viscasillas/*Sono*, Art. 87 para. 15.

855 *Flechtner*, 8 Journal of Law and Commerce (1988) 53, 105.

856 *Flechtner*, 8 Journal of Law and Commerce (1988) 53, 105 fn. 249.

Nevertheless, the seller has breached the duty to preserve the goods under Article 85 of the CISG, which enables the buyer to claim damages under Articles 45(1)(b) and 74 et seq. of the CISG.[857] Following this interpretation, there is no need for Article 85 of the CISG to limit Article 62 of the CISG.

d) No limitation of the claim for the price under Article 88 of the CISG

Under the CISG, Article 88(1) allows the seller to resell the goods if the buyer delays payment unreasonably, and Article 88(2) even requires taking reasonable measures to resell the goods. Some scholars consider the claim for the price under Article 62 of the CISG to be limited by Article 88(2).[858] If goods were to be considered "subject to rapid deterioration" when the market price is subject to rapid market fluctuations,[859] the solution under the CISG would not be so different from Article 61(2) of the ULIS. **405**

Such an interpretation, however, does not stand up to scrutiny. If the seller does not resell the goods, he or she does not lose and is not restricted in the claims for performance under Article 62 of the CISG. This becomes clear in Article 88(3) of the CISG, according to which the seller is only allowed to retain reasonable expenses for preserving the goods and the resale. The seller must further account to the buyer for the balance under Article 88(3), sentence 2 of the CISG. Thus, he or she sells the goods for the buyer and the price received minus the reasonable expenses represents a substitute for the goods. Therefore, the buyer is contractually entitled to this amount. The buyer remains, in turn, bound to pay the price under Article 62 of the CISG.[860] However, he or she will be able to claim damages under Article 45(1)(b) of the CISG if the seller fails to take reasonable measures to resell under Article 88(2) of the CISG due to a breach of this obligation.[861] The statement that Article 88(2) of the CISG limits the claim for the purchase price is, thus, only correct from a purely economic point of view after the seller's claim for the price and the damages claim by the buyer have been set off. **406**

Moreover, a declining price due to fluctuations of the market price are not a "deterioration" under Article 88(2) of the CISG. The opposite conclusion could be inferred from the Secretariat Commentary, which states regarding today's Article 88(2) of the CISG that the provision "*is not limited to a physical deterioration or loss of the goods but includes situations in which the* **407**

857 MüKoBGB/*P. Huber*, Art. 85 para. 11.

858 *Shen*, 13 Arizona Journal of International and Comparative Law (1996), 253, 276 et seq.; Schlechtriem/Schwenzer/Schroeter/*Mohs*, 8th German edn, Art. 62 para. 18; *Honnold/Flechtner*, para. 268.

859 For example, *Schlechtriem*, Einheitliches UN-Kaufrecht, p. 105.

860 MüKoBGB/*P. Huber*, Art. 62 para. 4.

861 MüKoBGB/*P. Huber*, Art. 88 para. 13; Staudinger/*Magnus*, Art. 88 para. 19.

goods threaten to decline rapidly in value because of changes in the market."[862] Yet, at the stage of the CISG's development when this remark was made, the provision still contained the wording "*subject to loss or rapid deterioration*".[863] The reference to loss was deleted after a proposed amendment by Singapore during the conference in Vienna, since the inclusion of economic fluctuations "*would place an undue burden on the party preserving the goods by exposing him to the risk of making a wrong commercial judgment.*"[864] It is doubtful, however, whether Singapore's concerns applied to both the seller and the buyer. Article 85 of the CISG can also require the buyer to preserve the goods (for example, after the avoidance of the contract). Especially *Lebedev* expressed his support for the proposal by stating that otherwise the provision "*placed an unreasonable burden on the buyer.*"[865] It could be argued that this unreasonable burden exists because the typical buyer does not necessarily have an overview of other potential buyers in the market, but rather has an overview of the sellers in the marketplace. Conversely, sellers typically have a better overview of the buyers in the market and are in a good position to make a commercial judgment whether to resell the goods. Nevertheless, the word "loss" was deleted from the wording and there is no indication that "deterioration" should be interpreted divergently for the seller and the buyer. Thus, against the historical background, Article 88(2) of the CISG should not be understood to encompass deterioration due to market price fluctuations.[866]

408 Summarizing, no limitation of the claim for the price under Article 62 of the CISG exists due to Article 88 of the CISG.

e) Possible limitation of the claim for the price under Article 9(2) of the CISG

409 Under Article 9(2) of the CISG the "*parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.*" A respective resale-usage that could limit Article 62 of the CISG may exist under the CISG.[867] As already stated, during the preparations and negotiations

862 Secretariat Commentary, Art. 77 para. 6.
863 See text of Art. 77 of the Draft Convention in Secretariat Commentary, Art. 77.
864 Singapore's proposal is reproduced in O. R., p. 174; the respective discussion in O. R., pp. 227 et seq.
865 O. R., p. 227 para. 43.
866 *Stoll*, 52 RabelsZ (1988), 617, 630 fn. 58; *Schlechtriem/Schroeter*, para. 797; *Schroeter*, Internationales UN-Kaufrecht, para. 928.
867 MüKoBGB/*P. Huber*, Art. 62 para. 9.

leading up to the CISG, the reference to usages in Article 61(2) of the ULIS was considered superfluous, since the CISG would contain a provision that incorporated usages (Article 9).[868] Yet, although usages in regard to resales were already relevant in Article 61(2) of the ULIS, and despite Article 9(2) of the CISG, there is no reported case law in which such a usage was in fact proven by the buyer or otherwise accepted.

410 The Unidroit Principles of International Commercial Contracts 2016 (UPICC) also contain a claim for performance of monetary obligations that allows the claim without restrictions in the wording.[869] This set of rules also rejects applying the duty to mitigate damage under Article 7.4.8 of the UPICC to claims for performance.[870] The official comments, however, provide that *"*[e]*xceptionally, the right to require payment of the price of the goods or services to be delivered or rendered may be excluded. This is in particular the case where a usage requires a seller to resell goods which are neither accepted nor paid for by the buyer.*" Nevertheless, similar to the case law on the CISG, there is no reported case law in which such a usage was in fact proven by the buyer or otherwise accepted.[871]

411 Yet, absence of evidence should not be taken as evidence of absence. In certain sectors, like the trade in commodities, where prices can fluctuate rapidly,[872] it is conceivable that a usage to resell unwanted goods as soon as possible exists.[873] The same applies to the trade in new electronic hardware, where the prices of goods typically decline rapidly with the steady and unrelenting technological development and release of newer cutting-edge products. A potential advantage of limiting such usages to certain sectors is the resulting ability to tailor the scope and weight attached to the claim for performance to the relevant sector. Whether such usages indeed exist is beyond the scope of this work, but might be a worthwhile object of investigation for a buyer, who faces a seller that has ignored economically sensible cover transactions while claiming performance.[874]

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868 UNCITRAL Yearbook V (1974), p. 43 para. 45; O. R., p. 331 para. 51.

869 Art. 7.2.1 UPICC 2016: "*Where a party who is obliged to pay money does not do so, the other party may require payment.*"

870 *Schwenzer*, European Journal of Law Reform 1999, 289, 295.

871 Vogenauer/*Schelhaas*, Art. 7.2.1 UPICC para. 7, who merely references the official comment to Art. 7.2.1 UPICC in this regard.

872 *Schmidt-Ahrendts*, p. 108; cf. *Mullis*, 71 RabelsZ (2007), 35, 37. *Mohs*, FS Schwenzer, pp. 1285, 1288 and *Bridge*, Singapore Journal of Legal Studies (2021), 271, 277 highlight that the contractual parties can hedge this price risk through futures.

873 For example, in the trade of corn in the USA: NGFA Grain Trade Rules, Rule 28(A)(3); Note, 19 William and Mary Law Review (1977), 253, 276.

874 The buyer bears the burden of proving the existence of such a usage under Art. 9(2) CISG; see Court of Appeal Dresden, 9 July 1998, CISG-online 559; *Graffi*, 59 Belgrade Law Review (2011), 102, 111. It should be noted that it is disputed whether the

f) Limitation of the claim for the price under Article 58 of the CISG

412 Article 58 of the CISG can also limit the seller's claim for the price.[875] Under Article 58(1), the buyer must generally only pay the price "*when the seller places either the goods or documents controlling their disposition at the buyer's disposal*". Article 58(3) even allows the buyer to postpone payment until he or she had the "*opportunity to examine the goods unless the procedures for delivery or payment agreed upon by the parties are inconsistent with his having such an opportunity.*" This examination should, however, not be mistaken for a full inspection as required by Article 38 of the CISG, but rather refers to a superficial control of the goods.[876] Nevertheless, Article 58(1), sentence 1 of the CISG is widely understood to contain the principle of simultaneous or concurrent performance regarding handing over of the goods and payment.[877] Although some argue that the seller typically must perform first under the CISG,[878] they acknowledge that the seller can condition full performance on the buyer's concurrent performance, referring to Article 58(1), sentence 2, in general, and Article 58(2) for cases involving carriage of goods.

413 Notably, thus, the disagreement between scholars and courts does not pertain to the question of transfer of property when discussing Article 58 of the CISG and the buyer's obligation to pay the price. A rare exception could be seen in a judgment by the Intermediate People's Court Xiamen.[879] An Australian buyer refused to pay for goods that were delivered under a FOB Xiamen Incoterm to Melbourne as there was a dispute about the quality of a foregoing delivery. The buyer stated that it was not willing to pay for the goods until the dispute regarding the prior delivery had been settled. The goods stayed in the port of Melbourne for 202 days and their whereabouts afterwards are unclear. The Taiwanese seller[880] sued for the price. The court denied the claim and *inter alia* referred to Article 30 of the CISG and the ob-

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burden of proof is regulated by the CISG, *Schroeter*, Internationales UN-Kaufrecht, para. 258.

875 *Schwenzer/Fountoulakis/Dimsey*, p. 794.

876 Schlechtriem/Schwenzer/Schroeter/*Mohs*, 8th German edn, Art. 58 para. 33; Brunner/Gottlieb/*Lerch/Rusch*, Art. 58 para. 12.

877 Schlechtriem/Schwenzer/Schroeter/*Mohs*, 8th German edn, Art. 58 para. 1; Kröll/Mistelis/Perales Viscasillas/*P. Butler/Harindanath*, Art. 58 para. 12; Court of Appeal Canton Valais, 27 April 2007, CISG-online 1721; Swiss Supreme Court, 20 December 2006, CISG-online 1426, para. 2.1.; MKAC, 10 February 1997, CISG-online 5197 para. 3.2. (explicitly stating that transfer of property is not required).

878 Honsell/*Schnyder/Straub* Art. 58 para. 58; *Piltz*, Internationales Kaufrecht, para. 4-152.

879 Intermediate People's Court Xiamen, Fujian Province, 17 December 2018, CISG-online 4803.

880 The judgment is not completely clear as to whether a Chinese company that was involved in the contract performance (foreign trade agent) was sufficient to apply the

ligation to transfer the property in the goods. It stated that while the transfer of risk had occurred, this should not be considered tantamount to fulfilling of the obligation to deliver the goods, especially since it had to be differentiated from the transfer of property, which was also necessary and had not occurred. On the other hand, the court refers to the seller not having "released" the goods to the buyer. This could be interpreted to signify that the seller had not offered the goods to the buyer against concurrent payment (but rather, merely demanded payment first) by not authorizing the carrier to take payment. If the contract involves carriage of goods, the seller and buyer do not meet face-to-face and consequently concurrent performance can only be executed between the buyer and the carrier. Therefore, the buyer is only required to pay concurrently with receiving the goods if he or she can pay the carrier directly.[881] Since the carrier may have lacked authority to receive payment (unclear from the text of the judgment), the buyer's obligation to pay the price might have not become due under Article 58 of the CISG. Thus, the exact legal reasoning of the decision and the relevance of the transfer of property therein remain unclear.

414 If the decision were understood to interpret Article 58 of the CISG as generally requiring the seller to fulfil all obligations under Article 30 of the CISG, i. e., also the transfer of property, before being able to successfully claim the price, it should not be followed. Placing the goods or documents controlling their disposition at the buyer's disposal under Article 58(1) of the CISG does not encompass the transfer of property judging from the wording. Moreover, *Rabel* called the decoupling of the transfer of property from the question of whether the seller has fulfilled the principal duty under the contract as "*considerable progress in legal technique, resulting in the removal of a source of many difficulties.*"[882] Otherwise, under an applicable law that requires the buyer's consent for property to pass, the buyer could unilaterally evade the obligation to pay the price. This would in turn mirror the legal situation in countries that follow the Sale of Goods Act 1979 as it would make the seller's claim for the price dependent on prior passing of property. The general idea behind Article 62 of the CISG as described above and the departure from Article 61(2) of the ULIS would be undermined if one considered the passing of property relevant by means of Article 58 of the CISG. The buyer cannot evade the duty to pay the price by not accepting the goods if the seller delivers conforming goods.[883] Consequently, under

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CISG under Art. 1(1)(a) CISG or alternatively the status of Taiwan under the CISG, i. e., whether it considers Taiwan to be part of the People's Republic of China.

881 Kröll/Mistelis/Perales Viscasillas/*P. Butler/Harindanath*, Art. 58 para. 24.

882 *Rabel*, 5 University of Chicago Law Review (1938), 543, 551.

883 Cf. MüKoHGB/*Wertenbruch*, Art. 58 para. 15. An exception to the rule is argued to exist if the delivery of the goods constitutes a fundamental breach of contract, see

the CISG, even a seller in possession of the goods can sometimes claim the full purchase price.[884] Hence, even if the seller must perform first, because the contract envisions carriage and he or she did not authorize the carrier to receive payment against the goods under Article 58(2) of the CISG, the seller must merely place either the goods or documents controlling their disposition at the buyer's disposal before he or she can claim the price.[885] The transfer of property, in contrast, only has to be effected concurrently with payment.

415 This mechanism within the CISG is the reason why there is no need to take recourse to national (unharmonized) law, and for example, refer to the German concept of "default in acceptance" (*Annahmeverzug*).[886] Article 58 of the CISG only provides a limitation on the seller's claim for the price, if the latter is unwilling to perform.

g) Limitation of the claim for the price under Article 7(1) of the CISG

416 Article 7(1) of the CISG states that "[i]*n the interpretation of this Convention, regard is to be had to* […] *the observance of good faith in international trade*." While the extent to which this provision obliges the parties to act in good faith is disputed,[887] the fact that provisions of the CISG should be interpreted to safeguard the observance of good faith is not controversial.[888] Thus, the right to claim the price under Article 62 of the CISG should only be granted to the extent that the existence of the claim is in good faith. To assess when this threshold is crossed, different contractual situations have to be distinguished.

Brunner/Gottlieb*Lerch/Rusch*, Art. 58 para. 12; critically regarding the threshold of a fundamental breach in this regard, *Hartmann*, IHR 2006, 181, 186.

884 *Bridge*, Debt Instead of Damages, pp. 423, 443.

885 MKAC, 10 February 1997, CISG-online 5197 para. 3.2. (English translation in 7 VJ (2003), 171–180).

886 Contra District Court Oldenburg, 24 April 1990, CISG-online 20 relying on Art. 32(2) Introductory Act to the German Civil Code old version (today Art. 12(2) Rome I Regulation).

887 Cf. *Felemegas*, Review of the Convention on Contracts for the International Sale of Goods 2000–2001, 115, Chapter 2: 5. Good Faith and the CISG; *Walt*, 33 Boston University International Law Journal (2015), 33, 37 et seq.

888 *Farnsworth*, 3 Tulane Journal of International and Comparative Law (1995), 47, 55; Kröll/Mistelis/Perales Viscasillas/*Perales Viscasillas*, Art. 7 para. 23; specifically with regard to Art. 62 CISG, *Kastely*, 63 Washington Law Review (1988), 607, 620. See *Bridge*, Singapore Journal of Legal Studies (2021), 271, 287 for the differentiation between the parties' duty to act in good faith and the courts' and tribunals' duty to safeguard good faith in interpreting the CISG.

Article 7(1) can only limit Article 62 when the insistence on the claim for the price represents an abuse of law.[889] With regard to a typical sales contract, there are few circumstances under which it is conceivable that the seller abuses the right to the purchase price. If the buyer refuses to accept the goods, sellers do not abuse their rights by insisting on performance of the contract even if they are still in possession of the goods as long as they are willing to perform.[890] Whether property has already been transferred is also not relevant in this regard. **417**

Sellers that merely insist on performance to harm the buyer by increasing the loss will see their claim for the price curtailed by Article 7(1) of the CISG.[891] This does not mirror the rule in English law, i. e., whether the creditor has "no legitimate interest" in requiring the other party to perform. Rather, the contractual obligation to pay the price generally means that the seller has a legitimate interest in requiring its performance. The buyer, thus, has to prove that the seller pursues illegitimate interests, which is a higher threshold.[892] **418**

If sellers insist on performance of the buyers' obligation to pay the price for an extended period, their damages claims are not generally reduced even if they could have been expected to decide whether they intended to avoid the contract.[893] This is because it is unclear when exactly this point in time is and as long as sellers do not pursue illegitimate aims, they should not be understood to abuse their rights.[894] The seller, thus, can claim the price under Article 62 of the CISG and does not have to resell the goods elsewhere in an effort to mitigate the loss. **419**

In addition to typical sales contracts, contracts in which the seller has to manufacture or produce the goods can be subject to the CISG due to Article 3(1), "*unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.*" Under such contracts, there is uncertainty as to whether the buyer can "cancel" the order and, thereby, foil the seller's claim for the full price. **420**

889 Schlechtriem/Schwenzer/Schroeter/*Mohs*, 8th German edn, Art. 62 para. 9; Staudinger/*Magnus*, Art. 62 para. 19; MüKoHGB/*Werthenbruch*, Art. 62 para. 5.

890 Cf. *Bridge*, Debt Instead of Damages, pp. 423, 443.

891 Court of Appeal Munich, 8 February 1995, CISG-online 143; *Schmidt-Ahrendts*, pp. 116, 155; Soergel/*Budzikiewicz*, Art. 62 para. 6; probably also *Flechtner*, 8 Journal of Law and Commerce (1988), 53, 69; potentially contra, Soergel/*Lutzi*, Art. 77 para. 3.

892 Potentially advocating a slightly lower threshold: Staudinger/*Magnus*, Art. 62 para. 19: "*in krassen Fällen, in denen das Erfüllungsverlangen als Missbrauch erscheint*"; MüKoHGB/*Werthenbruch*, Art. 62 para. 5: "*in krassen Fällen* […] *der Verkäufer bewusst eine Wertminderung eintreten lässt*"; Ferrari/Kieninger/Mankowski/*Mankowski*, Art. 62 CISG para. 19.

893 Contra Court of Appeal Braunschweig, 28 October 1999, CISG-online 510, sub. 3.a).

894 Similarly, Polish Supreme Court, 9 October 2008, CISG-online 3985 where the buyer waited for half a year before avoiding the contract.

If production of the goods is completed, the contract should not be treated differently than a typical sales contract as the seller is not using up further resources to produce potentially unnecessary goods. Thus, the seller can sell the goods after production, and claim the full purchase price under Article 88(1) of the CISG if the buyer does not take delivery.[895]

421 This situation might be different if production of the goods has not started yet or is ongoing. As a cancellation at this point in time is possible under many national laws,[896] and the seller's continued production may appear wasteful. It is debatable whether the position of the CISG is in line with these national laws. It is undisputed that the CISG lacks a provision that explicitly governs this situation and no right to cancel a contract for goods to be produced exists.[897] Some authors take the wording of the provision literally, and consequently, argue that the seller can continue with the production and claim the full purchase price.[898] Yet, many authors and courts agree that the seller should not be entitled to the full purchase price if stopping the production would have saved costs, albeit with different reasoning. Some interpret Article 77 of the CISG to block the claim for performance under Article 62 of the CISG in these cases.[899] Others argue that Article 28 of the CISG would in most cases exclude the claim for performance due to the national laws that allow the buyer to cancel such contracts.[900] A different argument posits that the seller is under a duty to cooperate in this situation: Continuing production would amount to a breach of said obligation, which is why the buyer has a claim against the seller in the amount of the costs that could have been avoided by stopping the production.[901] Since property in the goods under national law has not passed to the buyer in such cases, this work need not reach a conclusive decision.

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895 *Ramberg*, p. 152.

896 For example, Art. 377 Swiss Civil Code, sect. 648 in combination with sect. 650 German Civil Code, sect. 1168(1) Austrian Civil Code, Art. 1794 French Civil Code, Art. 1671 Italian Civil Code.

897 *Weidt*, p. 159.

898 *Hellner*, FS Riesenfeld, pp. 71, 98; Soergel/*Lutzi*, Art. 77 para. 3; *Schroeter*, Internationales UN-Kaufrecht, para. 671, the latter however accepts that potential claims for damages of the seller would be reduced under Art. 77 CISG in the amount of costs for production incurred after cancelation by the buyer.

899 *Ormanci*, 14 Juridical Tribune – Review of Comparative and International Law (2024), 27, 39; potentially, *Schwenzer/Manner*, FS Kritzer, 2008, pp. 470, 485 who, however, also see the arguments against this interpretation and alternatively rely on Art. 7 CISG. Potentially also, *Gildeggen/Willburger*, IHR 2021, 45, 48.

900 Schlechtriem/Schwenzer/Schroeter/*Mohs*, 8th German edn, Art. 62 para. 16; Schlechtriem/*U. Huber*, 3rd German edn, Art. 28 para. 38.

901 *Schlechtriem/P. Butler*, para. 236; *Ramberg*, p. 152.

Hence, when interpreting Article 62 of the CISG in light of Article 7(1) of the CISG and its mandate to safeguard the observance of good faith when interpreting the CISG, the seller's claim for the price is limited to the threshold of illegitimate pursuance by the seller. **422**

h) Summary

Article 62 of the CISG equips sellers with a broad claim for the purchase price. Property in the goods is irrelevant in this regard. As long as sellers are willing to perform, only Article 7(1) limits their claim under Article 62 of the CISG in case sellers pursue solely illegitimate interests in claiming the price. **423**

2. Damages claim instead of the claim for the price

Before discussing Article 28 of the CISG, it is necessary to provide an overview of the situation when the seller abandons the claim for performance and seeks damages instead. This is because the seller under the CISG will be restricted to claims for damages if Article 28 applies to Article 62 and these consequences will have to be taken into account when interpreting Article 28 below. If the recoverable loss for the seller was less than the purchase price, the application of Article 28 to Article 62 (and thereby, potentially the transfer of property) would have severe consequences for the seller. **424**

In case the buyer does not fulfil the contract, the seller can claim damages under Articles 61(1)(b), 74–77 of the CISG. If the seller avoids the contract, he or she can calculate damages based on a cover transaction executed after avoidance (Article 75 of the CISG) or based on a hypothetical cover transaction (Article 76 of the CISG). In some situations, the courts have dispensed with the requirement to avoid the contract, for example, when the other party definitively refuses to fulfil the contract.[902] All these exceptions from the requirement of prior avoidance of contract are generally to the benefit of the aggrieved party. **425**

On the other hand, the possibility of a resale might work against the aggrieved party if it was a required reasonable measure to mitigate damage under Article 77 of the CISG. In this regard, courts and scholars have ex- **426**

902 Court of Appeal Hamburg, 28 February 1997, CISG-online 261 (buyer refused performance); Court of Appeal Brandenburg, 5 February 2013, CISG-online 2400 (seller refused performance). Scholars have sometimes criticized this legal reasoning and instead propose calculating the damages under Art. 74 CISG if the contract was not avoided prior to the cover transaction, Schlechtriem/Schwenzer/Schroeter/*Schwenzer*, 7th German edn, Art. 75 para. 5; Schlechtriem/Schwenzer/Schroeter/*Schwenzer/Köhler*, 8th German edn, Art. 75 para. 5a; *Schmidt-Ahrendts*, pp. 76 et seq.

pressed diverging interpretations that mirror the (unharmonized) law of common law and civil law countries.

a) Article 77 of the CISG after extinction of performance claim

427 Undisputedly, the seller is under a duty[903] to mitigate damage under Article 77 of the CISG when he or she has no longer has a claim for the price or for taking delivery. The extinction of these claims could be due to an avoidance of contract by the seller (Article 81(1) of the CISG discharges such obligations of the buyer) or due to a limitation of Article 62 of the CISG in line with Article 7(1) of the CISG.[904] A resale will then likely represent a reasonable measure to mitigate the damage and a seller who does not make use of such possibility will face a reduction of the damages claims under Article 77, sentence 2 of the CISG if the price drops afterwards.[905] The uniformity in result is not surprising considering that all the national laws analyzed above also require the seller to attempt a reasonable resale under such circumstances.

b) Article 77 of the CISG while claim for performance still exists and is due

428 If the buyer is still under an obligation to take delivery and pay the price, the situation is much less clear. It is important to first of all differentiate the problem at hand from a different discussion: It is disputed whether sellers can calculate damages under the CISG based on Article 75 or Article 74 if they resell the goods when facing a buyer who definitively refuses to perform.[906] However, this dispute concerns whether sellers are allowed to resell the goods, while the question at hand is what consequences sellers face if

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903 Duty in this regard does not mean that the buyer can base damages claims on a breach of it, see for the understanding of duty or obligation to mitigate the damage, *Saidov*, 14 Pace International Law Review (2002), 307, 352 et seq.

904 See above paras. 416 et seq. for the limitation of Art. 62 CISG in line with Art. 7(1) CISG.

905 CIETAC, June 1999, CISG-online 1671; *Treibacher Industrie AG v. Allegheny Technologies, Inc. et al.*, US Court of Appeals (11th Cir.), 12 September 2006, CISG-online 1278, pp. 10 et seq. where the court found the seller to have reasonably mitigated the loss by reselling, even though the price obtained was less than the contract price; Staudinger/*Magnus*, Art. 77 para. 11; *Demir*, pp. 196 et seq.

906 Favoring Art. 75 CISG, Court of Appeal Hamburg, 28 February 1997, CISG-online 261 (buyer refused performance); Court of Appeal Brandenburg, 5 February 2013, CISG-online 2400 (seller refused performance). Favoring Art. 74 CISG, *Schmidt-Ahrendts*, pp. 76 et seq.; Schlechtriem/Schwenzer/Schroeter/*Schwenzer*, 7th German edn, Art. 75 para. 5.

they are not willing to effect a cover transaction due to Article 77 of the CISG.[907]

aa) Article 77 of the CISG and damages due to delay

429 One aspect is uncontroversial: If one party does not perform properly, the other party has a claim for damages resulting from the delay in performance. In regard to these sums, Article 77 of the CISG requires the aggrieved party to take reasonable measures to mitigate the damage. For buyers, mitigating damages due to delay could mean that they have to purchase (or rent) the goods elsewhere. Indirectly, the aggrieved party may thereby be required to abandon his or her claim for performance, effect a cover transaction and claim damages.[908] In practice, the impact on sellers is unclear because with regard to damages for delay, an aggrieved buyer has more conceivable reasons for damages compared to the seller.

(1) Storage costs

430 The obvious costs that could arise if the buyer does not pay and take delivery are costs for storage. In a case addressing storage costs, the Commercial Court Zurich found that in order to avoid storage costs, a seller was generally required to resell the goods under Article 77 of the CISG when a buyer refused to take delivery and pay the price: Since the seller should have immediately resold the goods, the costs for storage of the goods were avoidable, and consequently could not be recovered.[909]

431 To date, too little attention has been paid to Article 87 of the CISG in this regard. According to the provision, if the buyer fails to take delivery or pay the price, the seller "*may deposit them in a warehouse of a third person at the expense of the other party provided that the expense incurred is not unreasonable*." Courts do not consider an immediate resale necessary to avoid these costs.[910] The costs for storage are considered unreasonable if they exceed the price of the goods.[911] Even if costs exceed this threshold, they do

907 Correctly pointed out by *Schmidt-Ahrendts*, p. 114 and *Schlechtriem*, FS Georgiades, sub. II.2.

908 *Schmidt-Ahrendts*, p. 164; but see *Tebel*, IHR 2023, 66, 68 para. 32.

909 Commercial Court Zürich, 17 September 2014, CISG-online 2656, sub. 3.3.2. (the case was appealed to the Supreme Court but affirmed in this regard); accord by Brunner/Gottlieb/*Schäfer*, Art. 77 para. 9.

910 CIETAC, October 2007, CISG-online 1931; MKAC, 25 April 1995, CISG-online 367.

911 Kröll/Mistelis/Perales Viscasillas/*Sono*, Art. 87 para. 14; MüKoBGB/*P. Huber*, Art. 87 para. 6; lowering even this threshold if the goods are subject of special affection *Schroeter*, Internationales UN-Kaufrecht, para. 920 with an example of a piece of art in para. 921.

not invalidate a deposit at a warehouse, but rather reduce the recoverable amount to the reasonable costs.[912] To maintain coherence within the CISG, this should extend to the interpretation of Article 77.[913] In contrast to the opinion of the Commercial Court Zurich, as long as the costs for depositing the goods in a warehouse are not unreasonable and the buyer is still obliged to take delivery and pay the price, Article 77 does not require the seller to resell the goods merely to mitigate the respective costs. On the other hand, goods that can only be stored with unreasonable costs require a seller to resell them under Article 88(1) and (2) of the CISG or avoid the contract and calculate damages under Articles 75 or 76 of the CISG. If he or she fails to do so, the damages claim will be reduced in accordance with Article 77 of the CISG regarding the costs that were unreasonable to incur.

(2) Financing costs

432 Conceivable loss due to delay could also occur in form of financing costs, for example, interest on a loan to bridge the delay in payment.[914] As long as the claim for the price exists, the seller can rely directly on Article 78 of the CISG to demand interest on the price as a sum in arrears. If the seller claims damages instead, Article 78 can nevertheless be applied,[915] or the loss in the form of interest can be claimed under Article 74 of the CISG. Article 78 and Articles 61(1)(b), 74 of the CISG are two different legal bases to claim interest. These legal bases are not mutually exclusive, but interest as loss under Article 74 of the CISG cannot be claimed in a fashion that would allow for double reimbursement for the identical interest.[916] This means that a seller eligible to receive a loan with interest that is less than or equal to the applicable interest rate under Article 78[917] may rely on this provision without further proof. If more was charged, he or she will have to prove the loss under Article 74.

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912 *Schroeter*, Internationales UN-Kaufrecht, para. 920; contra, Ferrari/Kieninger/Mankowski/*Ferrari*, Art. 87 CISG para. 1.

913 Similar thought but with regard to Arts. 85–88 CISG and Art. 74 CISG, MüKoHGB/*Mankowski*, Art. 74 para. 39.

914 District Court Oldenburg, 24 April 1990, CISG-online 20; *Asam/Kindler*, RIW 1989, 841, 843; cf. Schlechtriem/Schwenzer/Schroeter/*Schwenzer/Köhler*, 8th German edn, Art. 74 para. 91; MüKoHGB/*Mankowski*, Art. 74 para. 38.

915 CISG AC Opinion 14 (*Atamer*), black letter rule 3.b. and comment 3.16; *Bridge*, Debt Instead of Damages, p. 426 evaluates this statement by the CISG Advisory Council to be "*bold*". Cf. regarding this uncertainty, Schlechtriem/Schwenzer/Schroeter/*Bacher*, 8th German edn, Art. 78 para. 6.

916 Schlechtriem/Schwenzer/Schroeter/*Bacher*, 8th German edn, Art. 78 para. 41.

917 The applicable interest rate is not stipulated in the CISG and national law has to be applied in this regard, CISG AC Opinion 14 (*Atamer*), black letter rule 9.

Yet, if Article 77 of the CISG were interpreted to mean that the seller has to mitigate such losses,[918] he or she might in practice either have to resell the goods to a different buyer to avoid a reduction of the recoverable damages or forfeit interest on the amount due in damages. As with Article 87 of the CISG and storage costs, in interpreting Article 77 of the CISG one should look to nearby Article 78 for guidance: The provision embodies the idea that a sum in arrears might accrue interest, and the breaching party has to pay the interest, even if a more extensive and comprehensive agreement on interest could not be reached in Vienna.[919] Although, in contrast to Article 78, the seller will have to prove the loss under Article 74, Article 77 should not be interpreted to reduce the interest that can be claimed under Articles 61(1)(b), 74 of the CISG to a lower level than the seller could claim under Article 78. This is because Article 78 signifies that interest under an applicable statutory interest rate on a sum in arrears is not a loss that the creditor has to avoid. Article 78 of the CISG, hence, provides the minimum amount of interest that can be claimed for a sum in arrears. **433**

(3) Summary

Neither storage costs under Article 87 of the CISG nor interest under Article 78 of the CISG could be claimed by the seller under Article 62 of the CISG as they do not form part of the purchase price. The CISG contains an independent basis to claim these sums respectively. This section is meant to illustrate the way in which the claim for the price under Article 62 of the CISG and the calculation of damages in this regard might differ. A deeper analysis of potential divergences between Articles 78, 87 on the one hand and Article 77 on the other hand, is not necessary due to the lack of connection with Article 62. **434**

Thus, although Article 77 of the CISG applies to damages due to delay for the seller, in practical terms, the restrictions are slim and do not limit the recovery of expenses due to delay that can be claimed under Articles 78 and 87 of the CISG. Even when applicable, only the damages due to delay might be reduced under Article 77, sentence 2 of the CISG. **435**

bb) Approach 1: Article 77 of the CISG generally requires a resale if the buyer refuses to perform

There is no consensus on the question whether Article 77 of the CISG can require the seller to resell the goods to avoid further damages due to a decline in the price of the goods. A judgment by the Commercial Court Zurich **436**

918 Unclear in this regard, CISG AC Opinion 14 (*Atamer*), para. 3.52.
919 Kröll/Mistelis/Perales Viscasillas/*Atamer*, Art. 78 para. 3.

exemplifies a case in which the different approaches materialize in different results:[920] In 2008 an Italian and a Swiss company concluded two contracts for the sale of wire rod. When the wire rod arrived in Italy in August 2008, the Italian buyer refused to take delivery due to multiple alleged breaches of contract by the seller (*inter alia* late delivery and non-conformity of the goods). In the subsequent months, the parties negotiated, and several tests were performed on the wire rod. In October 2008, the buyer informed the seller that it would not take over the goods and would not pay the price due to non-conformities of the goods. In November 2008, the buyer allowed a deadline to elapse that was set by the seller to clearly and definitively formulate whether the buyer intended to perform the contract or not. The seller resold the wire rod in January, February, August, and November 2009.

437 The main dispute concerned whether the buyer could have avoided the contract, and thus would have been entitled to refuse taking delivery of the goods. The court found that the seller had not committed a fundamental breach. Consequently, the buyer's refusal to take delivery was unjustified. The seller's claim for USD 4'337'015.59 in damages was based on the difference between the contract price (USD 7'300'585.68) and the proceeds of the resales (USD 2'963'570.09). The significant markdown on the wire rod was due *inter alia* to the declining overall market price of steel.

438 According to the court, the seller had the right and also the duty to effect a cover transaction at the latest when the buyer refused to take delivery and pay the price in October 2008.[921] Considering the amount of wire rod, the seller could not be required to sell everything at once, but rather a time period between mid-October 2008 to mid-November 2008 was proposed by the court.[922] The court held that the duty to effect a cover transaction was not dependent on a prior avoidance of contract.[923] It explicitly stated that "*Ist der Verkäufer noch im Besitz der Ware und verweigert der Käufer die Annahme definitiv, ist der Verkäufer im Lichte der Schadensminderungspflicht gemäss Art. 77 CISG und des Grundsatzes von Treu und Glauben unter Umständen auch dann, wenn er nicht die Vertragsaufhebung erklärt und ihm mithin ein Erfüllungsanspruch nach Art. 62 CISG zustehen würde, zur Vornahme eines möglichen und zumutbaren Deckungsverkaufs verpflichtet, wodurch der Kaufpreisanspruch entsprechend reduziert wird*".[924]

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920 Commercial Court Zürich, 17 September 2014, CISG-online 2656.

921 Commercial Court Zürich, 17 September 2014, CISG-online 2656, pp. 91 et seq.

922 Commercial Court Zürich, 17 September 2014, CISG-online 2656, p. 94.

923 Commercial Court Zürich, 17 September 2014, CISG-online 2656, p. 92.

924 Commercial Court Zürich, 17 September 2014, CISG-online 2656, p. 88. My translation: If the seller is still in possession of the goods and the buyer refuses definitively to take delivery, in light of the duty to mitigate the damage under Art. 77 CISG and the principle of good faith, the seller is obliged to effect a possible and reasonable cover

This judgment has been taken to support the idea that Article 77 of the CISG can require sellers to resell the goods even though they still have a claim for performance.[925] The Court of Appeal Munich reached a similar result, holding that a seller should have avoided the contract due to Article 77 and denied the seller's damages claims.[926] Whether the Polish Supreme Court accepts this effect of Article 77 was left undecided, since the unwilling seller did not prove the loss that could have been mitigated.[927] Likewise, *Schlechtriem* accepted the seller's duty to resell the goods.[928] However, to support his view he cites only one decision by the Court of Appeal Hamm that does not address this question since the contract in that case was avoided, and the question was rather whether the seller would have been able at that point in time to conclude a cover transaction above the market price.[929] Furthermore, he refers to the statements made by a Norwegian delegate during the negotiations of the CISG in Vienna (*Rognlien*), who stated that if the seller informs the buyer that he or she would not perform the obligations, the buyer is under a duty to mitigate the damage and, thus, cannot freely speculate on the developments of the market price.[930] **439**

cc) Approach 2: Article 77 of the CISG does not generally require a resale if the buyer refuses to perform

In contrast, the Court of Appeal Braunschweig decided that the seller can generally demand performance as long as such a claim exists under Article 62 of the CISG and the seller is at that point in time not under a duty to resell the goods elsewhere due to Article 77 of the CISG.[931] This even holds true when the buyer definitively refuses performance and negative developments of the market price are foreseeable.[932] This view is widely shared in literature.[933] Exceptions are, however, accepted where it could be expected **440**

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transaction, even if the seller has not declared avoidance of the contract and, thus, still has a claim for performance under Art. 62 CISG.

925 Brunner/Gottlieb/*Schäfer*, Art. 77 paras. 2, 9.

926 Court of Appeal Munich, 8 February 1995, CISG-online 143.

927 Polish Supreme Court, 9 October 2008, CISG-online 3985.

928 See e. g., *Schlechtriem*, FS Georgiades, sub. II.2; Similar opinions by *Enderlein/Maskow/Strohbach*, Art. 28 para. 2.2.; American Bar Association Report to the House of Delegates, 18 International Lawyer (1984), 39, 48; MüKoHGB/*Mankowski*, Art. 77 para. 14; Schlechtriem/Schwenzer/Schroeter/*Schwenzer/Köhler*, 8th German edn, Art. 77 para. 10.

929 Court of Appeal Hamm, 22 September 1992, CISG-online 57.

930 *Schlechtriem*, FS Georgiades, sub. II.1. citing O. R., p. 222 para. 40.

931 Court of Appeal Braunschweig, 28 October 1999, CISG-online 510, sub 3.a).

932 Court of Appeal Braunschweig, 28 October 1999, CISG-online 510, sub 3.a).

933 *Schmidt-Ahrendts*, pp. 116, 155; Staudinger/*Magnus*, Art. 77 paras. 6, 11, 12; MüKoBGB/*Gruber*, Art. 28 para. 15; MüKoBGB/*P. Huber*, Art. 77 para. 9; Kröll/

from the aggrieved party to have decided on whether or not to avoid the contract long ago,[934] or where the insistence on performance serves only the purpose of increasing the damages.[935]

dd) Discussion

441 The CISG does not generally require sellers to resell the goods as long as their claim for performance under Article 62 exists. An exception stems indirectly from Article 77 when unreasonable damages for delay accrue and a cover transaction is the only possibility to avoid these losses, although it is not apparent whether this will apply to the seller with any practical significance.[936] As a starting point regarding damages other than those for delay, it is important to highlight that Article 77 aims not at reducing any loss that could be avoided, but as is apparent from Article 77, sentence 2, the focus is on losses that should have been mitigated.[937] It is, thus, not only a factual question but one that encompasses a normative element, as in what loss should be avoided by mitigation efforts and which can be incurred without mitigation efforts by the aggrieved party.

442 Answering this question requires looking at a panoramic view of the CISG and its underlying principles. Once again, reference is to be made to the attempts of the USA in 1977 and at the conference in Vienna to limit the claim for performance through Article 77 of the CISG.[938] In this context, the idea that the aggrieved party should be allowed to insist on the claim for performance and should not be required to elect a different remedy than performance was clearly expressed. The statements in the context of today's Article 88(2) of the CISG are based on the same understanding: Today's wording goes back to a Singaporean proposal at the conference in Vienna to delete "*subject to loss or rapid deterioration*" from the wording. This was because this wording could encompass fluctuations as to the price of the goods and would, thus, "*place an undue burden on the party preserving*

Mistelis/Perales Viscasillas/*Djordjević*, Art. 77 para. 24; jurisPK/*Janal*, Art. 77 CISG para. 5; BeckOK/*Saenger*, Art. 77 CISG para. 4; BeckOGK/*Fountoulakis*, 01.01.2024, Art. 62 CISG para. 17; probably also *Flechtner*, 8 Journal of Law and Commerce (1988), 53, 69.

934 Court of Appeal Braunschweig, 28 October 1999, CISG-online 510 sub. 3.a); *Demir*, p. 198. Potentially also, Court of Appeal Düsseldorf, 14 January 1994, CISG-online 119.

935 Court of Appeal Munich, 8 February 1995, CISG-online 143; *Demir*, p. 198 ("*ohne plausiblen Grund*").

936 See above paras. 429 et seq.

937 *Saidov*, 14 Pace International Law Review (2002), 307, 350, who refers to losses that "could" be avoided. However, on p. 351 he refers to losses that "should" have been avoided.

938 See above paras. 400, 402.

the goods by exposing him to the risk of making a wrong commercial judgment."[939] This reasoning applies to Article 77 of the CISG as much as it does to Article 88(2) of the CISG. Both the *travaux préparatoires* and the generally unlimited wording of Article 62 of the CISG support the conclusion that damages due to a change in market prices do not form part of the damages that *should* be avoided under Article 77 of the CISG.

Schlechtriem's argument is not diminished by the fact that he relied on **443**
Rognlien's proposition that Article 77 of the CISG might require a cover transaction and, consequently, the possibility for speculations in the realm of Article 76 of the CISG is limited. *Rognlien* stated that if sellers do not intend to perform, they will have to inform the buyer accordingly and after being informed, "*the buyer would under article 73* [today's Article 77 of the CISG] *have the duty to mitigate the loss by taking appropriate measures, and would consequently have nothing to gain by speculating in price movements thereafter.*"[940] First, this statement was made in regard to the buyer and could, thus, aim at the (here accepted) proposition that damages for delay can sometimes only be reasonably mitigated by a cover transaction. Second, even if this statement was meant more broadly, it is not clear how many delegates shared this interpretation.[941] The understanding of some delegates in this regard should not lead to a contrary interpretation that goes against the common understanding of Articles 77 and 88(2) of the CISG.

A different angle to explain why these damages are distinguishable from the **444**
that "should" be mitigated, is the seller's option of a sale under Article 88(1) of the CISG – a provision that until now has been paid too little attention in this regard. If there is an unreasonable delay of the buyer to take the goods or pay the price, the seller can reasonably inform the buyer of his or her intention to sell the goods, and is subsequently allowed to sell them. The seller can then keep a sum equal to his or her expenses for preserving the goods and selling them. The buyer's obligation to take delivery of the goods ceases to exist, but the contract is otherwise kept intact. Most importantly, the seller can still claim the full purchase price.[942] The latter can set-off the price claim against the proceeds of the sale directly under the CISG, or under the otherwise applicable national law.[943] If one were to interpret Article 77 of the

939 Singapore's proposal is reproduced in O.R., p. 174; the respective discussion is in O.R., pp. 227 et seq.

940 *Rognlien* in O.R., p. 222 para. 40.

941 For this reason, *Schmidt-Ahrendts*, p. 118 denies the relevance of this historical argument.

942 *Flechtner*, 8 Journal of Law and Commerce (1988), 53, 105. As seen above, para. 447, the claim for the purchase price under Art. 62 CISG is generally not limited by considerations of possible resales and, thus, exists in full.

943 It is disputed whether the set-off is a matter governed by the CISG and whether the CISG contains rules on set-off, cf. for an affirmative opinion German Supreme Court,

CISG to apply to the seller in the sense that he or she might have to resell the goods to mitigate possible damages that are due to a market decline, the damages claim would not be equal to the amount of the full purchase price if the seller passes up a reasonable opportunity for resale. If this were true, whether the seller would be able to claim an amount equal to the full purchase price or just the difference between the contract price and the price offered in a hypothetical cover transaction, would depend on whether the seller resold the goods under Article 88(1) instead of Articles 74 or 75 of the CISG. Although the facts underlying these resales would not differ, the outcomes could be quite different. This is not convincing.[944] There should be no difference depending on how the seller's behavior is explained in terms of legal arguments. Otherwise, the question of whether the seller's claim is reduced depends more on legal advice than on commercial reasonableness. Therefore, as long as the seller could sell the goods under Article 88(1) of the CISG, Article 77 of the CISG should not be interpreted to require a resale by the seller unless it is invoked to reduce unreasonable damages for delay. Accordingly, if the buyer refuses to perform and the price declines, the seller can generally insist on performance. If the buyer cannot avoid the contract, it falls upon him or her to resell the goods. The problem in practice is less often that the buyer is prevented from reselling the goods or that the seller would be in a vastly better position to resell them, but rather that the buyer does not want the goods anymore because he or she could buy them cheaper elsewhere and will often deny any contractual commitment.[945]

445 Thus, the judgment by the Commercial Court Zurich discussed above[946] should not be followed as far as it requires a resale when the buyer wrongfully refused to take delivery and market prices continued to drop while the seller was still allowed to claim performance under Article 62 of the CISG.[947] Also, the court's conclusion that expenses for storage are not to be reimbursed since they could have been avoided is mistaken, because as long as the claim for performance exists the court undermines Article 87 CISG. The relevant question should have been whether the seller was in fact still

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24 September 2014, CISG-online 2545; CISG AC Opinion 18 (*Fountoulakis*), black letter rule 1; contra for example, MüKoBGB/*P. Huber*, Art. 4 para. 39.

944 Cf. *Atamer*, FS Hopt, pp. 3, 18, who highlights similar coordination problems of rules under the PECL and DCFR.

945 Similar argument regarding the unharmonized German law, *U. Huber*, Leistungsstörungen II, p. 170, § 35 VI 3.

946 Commercial Court Zürich, 17 September 2014, CISG-online 2656.

947 Correct in contrast, CIETAC, 25 July 2006, CISG-online 2003, where the seller set an additional period of time for the buyer to issue a letter of credit although the prices for the goods already started to drop, and resold the goods only after avoidance of contract one month after the expiration of the additional period.

entitled to insist on performance. As stated above,[948] the latter claim might have been excluded due to a possible trade usage in commodities trade under Article 9(2) of the CISG and/or because of the limitation of good faith under Article 7(1) of the CISG. The court mentions in passing that the seller was not allowed to rely on performance after the buyer's definitive refusal to perform.[949] When the claim for performance ceases to exist, Article 77 of the CISG indeed requires a resale.[950]

Concluding, if the seller does not resell the goods while he or she still has a claim for performance under Article 62 of the CISG, a price decline does not limit a later claim for damages under Article of the 77 CISG. **446**

c) Summary

It is important to note that the mere reference to "reasonableness" in regard to a possible resale or end to production is not helpful. Notions of reasonableness differ around the world. Therefore, there is no universal answer to whether reasonableness allows insisting on the claim for the price or requires immediately reselling the goods and claiming damages. As the section on national laws has revealed, a Common lawyer will most probably consider a resale a reasonable and required measure when the other party refuses to perform, while a Civil lawyer will insist that the claim for performance exists and the aggrieved party can generally not be required to shift to a damages claim. For purposes of Article 77 of the CISG, the question of whether a resale is a reasonable measure to mitigate the damage has to be decided with regard to what the CISG determines to be reasonable: Due to the unlimited wording of Article 62 and the general existence of claims for performance, the *travaux préparatoires* regarding today's Articles 77 and 88 and otherwise arising contradictions between Article 88(1) and Articles 74 and 77, the seller is not required under Article 77 to resell the goods as long as the claim under Article 62 of the CISG exists. The only indirect exceptions are damages for delay, where sometimes the only mitigation measure is a resale, although it seems questionable what kind of damages of the seller would fall under this category due to Article 87 CISG's special rule. **447**

948 See above paras. 409 et seq. on Art. 9(2) CISG and above paras. 416 et seq. on Art. 7(1) CISG.

949 Commercial Court Zürich, 17 September 2014, CISG-online 2656, p. 90.

950 See above para. 427.

3. Article 28 of the CISG and the claim for the price under Article 62 of the CISG

448 Against the backdrop of the general position of the CISG regarding the seller's claim for the price under Article 62 and the correct interpretation of Article 77 in this regard, the question of whether the transfer of property in combination with Article 28 has any impact must be addressed. First, it has to be determined whether Article 28 can be applied to Article 62 at all in light of the above analyses. Second, if Article 28 is applicable to limit the seller's claim for the price under Article 62, it has to be assessed what "under its own law" means exactly, in order to understand whether the transfer of property is really the relevant factor or whether it is only meant to uphold peculiarities in national law.

a) Applicability of Article 28 of the CISG to the claim for the price under Article 62 of the CISG

449 While the buyer's obligation to take delivery and perform his or her obligations other than paying the price under Article 62 of the CISG is certainly limited by Article 28 of the CISG,[951] the latter provisions' applicability to the claim for the price is disputed.[952] However, the discussion is often abstract when the question posed refers to whether Article 28 is applicable. In order to remove the discussion out of the realm of the abstract and into commercial reality, the first step is analyzing the consequences of Article 28 CISG's applicability, and comparing it to the general position of the Convention on the claim for the purchase price under Article 62 of the CISG. Next, it is necessary to discuss whether these limitations are supported by

951 Schlechtriem/Schwenzer/Schroeter/*Mohs*, 8th German edn, Art. 62 para. 15.

952 In favor of applying Art. 28 to the obligation to pay the price under Art. 62 CISG: *W. Witz*, FS Schlechtriem, pp. 293, 299; Schlechtriem/Schwenzer/Schroeter/*Mohs*, 8th German edn, Art. 62 para. 14; *Honnold/Flechtner*, para. 273; *Schlechtriem/Cl. Witz*, para. 310; *Kastely*, 63 Washington Law Review (1988), 607, 635; Kröll/Mistelis/Perales Viscasillas/*Bell*, Art. 62 para. 11; Brunner/Gottlieb/*Brunner/Mosimann*, Art. 62 para. 3; Soergel/*Budzikiewicz*, Art. 28 para. 3; *Saidov*, Journal of Business Law (2019), 1, 15; MüKoHGB/*Wertenbruch*, Art. 62 para. 3; MüKoBGB/*P. Huber*, Art. 62 para. 5; *Bortolotti*, 25 Journal of Law and Commerce (2005–2006), 335, 337; Ferrari/Kieninger/Makowski/*Ferrari*, Art. 28 CISG para. 3. Some scholars argue that Art. 28 CISG should be applied to limit the claim for the purchase price under Art. 62 CISG and that the restrictions of this claim under common law jurisdictions were no limitations due to "specific performance" and, thus, Art. 28 CISG would have no effect with regard to the claim for the purchase price, Staudinger/*Magnus*, Art. 62 para. 12; Ferrari/Kieninger/Mankowski/*Mankowski*, Art. 62 CISG para. 11. Against the application of Art. 28 to the claim for the price under Art. 62 CISG, *Bridge*, FS Magnus, pp. 161, 169–170; *Herber/Czerwenka*, Art. 62 para. 3; *Reinhart*, Art. 28 para. 4; *Posch*, pp. 153, 160.

the wording, from a systematic point of view, by the *travaux préparatoires* and the purpose of Article 28.

aa) Potential consequences if Article 28 of the CISG were applicable to the claim for the price under Article 62 of the CISG

(1) (Im)possibility to force the buyer to pay the price in a foreign currency

450 One might consider in case Article 28 of the CISG applied to Article 62 of the CISG that it could be used to enforce national law that limits or forbids claims for money in foreign currencies. Yet, there is widespread agreement that the issue of whether a claim can be made in a foreign currency is not governed by the CISG (Article 4, sentence 2(a))[953] or covered by Article 28, as national law to that effect does not limit the specific performance generally.[954] Thus, the effect on currency limitations need not be taken into account when discussing whether Article 28 is applicable to the seller's remedy to claim the price under Article 62.[955]

(2) (Im)possibility to force the goods *de facto* onto the buyer

451 Although the buyer's obligation to take delivery of the goods under Article 62 of the CISG is undisputedly subject to the limitation of Article 28 of the CISG, the application of this provision to the claim for the price under Article 62 of the CISG might additionally be necessary to ensure that the buyer indeed does not have to take the goods. This is because if the seller could claim the full purchase price, the buyer could not argue that the price has to be reduced given that the seller still is in possession of the goods and that he or she cannot judicially force the buyer to take them. To avoid a double loss (paying the price without receiving the goods), the buyer will *de facto* have to take the goods.[956] If Article 28 of the CISG applied, however,

953 Schlechtriem/*U. Huber*, 3rd German edn, Art. 28 para. 16; Schlechtriem/Schwenzer/Schroeter/*Müller-Chen*, 7th German edn, Art. 28 para. 7; MüKoBGB/*Gruber*, Art. 28 para. 12; Honsell/*Gsell* Art. 28 para. 20; *Achilles*, Art. 28 para. 2.

954 BeckOGK/*Thomale/Lindemann*, 01.04.2024, Art. 28 CISG para. 9.

955 The understanding of Arts. 16 and 61 ULIS may have been different in this regard, cf. for example, the statement by *Wortley* (United Kingdom), Diplomatic Conference on the Unification of Law Governing the International Sale of Goods, The Hague, 2–25 April 1964, Vol. I – Records, pp. 106–107; cf. moreover, the assessment by the Swiss Government, Diplomatic Conference on the Unification of Law Governing the International Sale of Goods, The Hague, 2–25 April 1964, Vol. II – Documents, p. 176.

956 *Honnold/Flechtner*, para. 460 stating that "*recovering the full price is functionally the equivalent of compelling the buyer to consummate the transaction*" and para. 268: "*for the significant feature of the remedy of price recovery (as contrasted with damages) is to force the buyer to take possession of the goods.*"

the calculation of damages would take into account that the seller still has the goods and reduce the damages accordingly by the value of the goods.

452 Considering the existing case law and scholarly work, this consequence of Article 28 of the CISG seems to be more of a theoretical nature.[957] The seller will, in most cases, dispose of the goods at some point before the decision of the court. Thus, the more relevant inquiry is whether the seller is free in deciding when to dispose of the goods and who bears the risks of a potential change in price.

(3) (No) indirect duty of the buyer to resell the goods

453 As argued above, under the CISG, a seller who faces a buyer unwilling to fulfil the contract can generally decide freely when to shift from the claim for the price to a damages claim and resell the goods. In a recent decision by the Court of Appeal of Ontario, the interesting question surfaced whether Article 28 of the CISG could change this position when a case is decided by a court in a country that generally does not provide for specific performance in its national law.[958] This topic has received no in-depth discussion in literature as far as apparent.

(a) Solea International BVBA v Basset & Walker International Inc

454 *Solea International BVBA* (hereafter *Solea*) sold frozen shrimp to *Bassett & Walker International Inc.* (hereafter *BWI*) and was to deliver CIF to a Mexican port. *BWI* was not able to clear customs and one month after arrival of the shrimp refused to pay for the goods, which were delivered back to *Solea*'s supplier in Ecuador one month later. The court of first instance granted *Solea's* claim for the full purchase price.[959] One of *BWI*'s main arguments on appeal was that *Solea* had a duty to mitigate the loss after *BWI* refused to pay for the goods.[960] *Solea* should have resold the goods and its damages should therefore be reduced to zero.[961]

455 The Court of Appeal first, rightly and in accordance with the opinion expressed above, reasoned that the seller's claim for the price under the CISG

957 *Honnold/Flechtner*, para. 461.

958 *Solea International BVBA v Bassett & Walker International Inc.*, Court of Appeal of Ontario, 25 July 2019, CISG-online 4505.

959 In between, the first judgment was appealed and set aside due to the lack of discussion whether the CISG applied to the case. In the second judgment by the court of first instance, the seller, however, was awarded the full price again under the CISG.

960 *Solea International BVBA v Bassett & Walker International Inc.*, Court of Appeal of Ontario, 25 July 2019, CISG-online 4505, paras. 12(i), 14.

961 *Solea International BVBA v Bassett & Walker International Inc.*, Court of Appeal of Ontario, 25 July 2019, CISG-online 4505, para. 29.

is not subject to the duty to mitigate.[962] After citing a commentary that provided that Article 28 could mean that the seller was under a duty to mitigate the damage, the court deserves high praise for not simply finding a duty to mitigate, but rather considering whether this would be consistent with the Convention despite little discussion in literature of the topic.[963] Ultimately, the court left open whether the seller is under a duty to mitigate when Article 28 of the CISG blocks the claim for the price, because even if a duty to mitigate existed, the seller had no reasonable opportunity to mitigate. Consequently, the court dismissed the appeal.[964]

456 In this case, however, the court skipped a major consideration regarding Article 28 of the CISG: The applicability of the provision was broadly assumed by the court, since Ontario is a common law jurisdiction and generally does not consider specific performance to be the primary remedy for breach of contract. The court merely stated: "*However, any ultimate characterization of Solea's claim for the purpose of determining whether an Art. 77 duty to mitigate applies would need to take into account the availability of an Art. 62-based specific performance remedy in a common law jurisdiction such as Ontario in view of the limitation placed by Art. 28."*[965] The limitations of national law, however, have to be applicable to the case in question if Article 28 of the CISG shall limit Article 62 of the CISG. Section 47(1) of the Ontario Sale of Goods Act 1990 is similar to the English section 49(1) of the Sale of Goods Act 1979 in that it allows for a claim for the price if property has passed to the buyer.[966] However, it seemed undisputed that title in the goods had passed in the Mexican port and the buyer was in possession of the goods.[967] Thus, the claim for the price would also have been available under national (unharmonized) law. Under such circumstances, Article 28 of the CISG does not limit Article 62 of the CISG.

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962 *Solea International BVBA v Bassett & Walker International Inc.*, Court of Appeal of Ontario, 25 July 2019, CISG-online 4505, paras. 13–21.

963 This goes against the prediction by Kröll/Mistelis/Perales Viscasillas/*Bell*, Art. 62 para. 10: "*Effectively, courts in Common law jurisdictions will continue to refuse to grant specific performance and will usually require the seller to mitigate his loss by reselling the goods when he still has them."*

964 *Solea International BVBA v Bassett & Walker International Inc.*, Court of Appeal of Ontario, 25 July 2019, CISG-online 4505, para. 35.

965 *Solea International BVBA v Bassett & Walker International Inc.*, Court of Appeal of Ontario, 25 July 2019, CISG-online 4505, para. 25.

966 Sect. 47(1) Ontario Sale of Goods Act 1990: "*Where, under a contract of sale, the property in the goods has passed to the buyer and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against the buyer for the price of the goods.*"

967 *Solea International BVBA v Bassett & Walker International Inc.*, Court of Appeal of Ontario, 25 July 2019, CISG-online 4505, paras. 30, 31.

457 Nevertheless, the Court of Appeals identified the correct question to be answered in cases in which no claim for the price would be available under national law. To find an answer, the question has to be broken down further: First, under which law or against which standards are damages to be calculated – CISG or national law? Second, if the CISG applies, is there a duty to mitigate as far as the claim for performance is not enforceable due to Article 28 of the CISG?

(b) Law applicable to calculation of the damages

458 Article 28 of the CISG merely states as a legal consequence that a court is not bound to enter a judgment for specific performance. Thus, the claimant is indirectly required to claim damages instead. The wording contains no indication that damages should not be calculated in line with Articles 74–77 of the CISG.

459 One could, however, argue that the difference in allowing specific performance or considering damages to be the primary remedy for breach of contract is the economic difference that stems from national damages law. From the perspective of a US jurist, the duty to mitigate damages through resale of the goods naturally flows from the refusal to grant the action for the price under section 2-709 of the UCC. Therefore, it is conceivable that excluding the remedy of specific performance due to the limitations found in common law jurisdictions only truly respects the fundamental idea behind it if damages are calculated accordingly under national law.

460 However, in contrast to claims for specific performance, no unbridgeable gap was thought to exist with regard to damages claims and their calculations: Although the common law and civil law traditions exhibit different preferences in this regard, the CISG provisions on damages contain elements of both traditions.[968] Therefore, as long as specific performance is excluded in situations in which the common law jurisdictions do not provide such a remedy, the starting point for the calculation of damages is the Convention itself and not national law.[969]

(c) Influence of Article 28 of the CISG on Article 77 of the CISG

461 If the claim for the price is not enforceable due to Article 28 of the CISG, it would be questionable whether this has an impact on the question of whether the seller is required to resell the goods to meet the requirements of Arti-

968 Cf. Staudinger/*Magnus*, Art. 74 para. 5 highlighting that the provisions were nevertheless strongly influenced by US law.

969 Staudinger/*Magnus*, Art. 28 para. 10; *Reinhart*, Art. 28 para. 5; Schlechtriem/*U. Huber*, 3rd German edn, Art. 28 para. 23; Soergel/*Budzikiewicz*, Art. 28 para. 5.

cle 77 of the CISG. Most of the few opinions expressed so far merely supply a conclusion without providing analysis. The majority of authors seem to be of the opinion that the seller is under a duty to mitigate the damage under Article 77 and resell the goods if the claim for the price is limited by Article 28.[970] Others, in contrast, claim that Article 28 does not have such an impact and that the common law viewpoint could not prevail under the CISG, which means that sellers are generally still free to decide when to shift from their claim for the price to a claim for damages and potentially a cover transaction.[971]

462 If one wanted to substantiate that the seller's duty to mitigate requires a cover transaction under Article 77 of the CISG in case Article 28 of the CISG applied, one could argue that due to Article 28 the claim for performance ceased to exist and, consequently, the seller could not insist on performance. Therefore, Article 77 could be interpreted to require the seller to effect a cover transaction.

463 However, the claim for performance under Article 62 of the CISG does not cease to exist due to Article 28 of the CISG. Article 28 CISG merely causes a court not to be bound "*to enter a judgment for specific performance*". This means the remedy will be unenforceable in the respective court. However, it does not necessarily mean that the claim ceases to exist.[972] If the claim would cease to exist due to Article 28 and Article 77 required the seller to cover, legal certainty would be severely undermined. Sellers facing a buyer that refuses to take delivery or pay the price have to be able to assess from the contract and the applicable law whether they bear the risk of a drop in market price if they do not resell the goods at the next reasonable opportunity. At

970 Schlechtriem/Schwenzer/*Hager/Maultzsch*, 5th German edn, Art. 62 para. 14; W. Witz/Salger/M. Lorenz/*W. Witz*, Art. 77 para. 8; *Hellner*, FS Riesenfeld, pp. 71, 88 (although he is uncertain whether Art. 28 CISG is applicable to the claim for the price); *Saidov*, 14 Pace International Law Review (2002), 307, 362: "*If the innocent party is not successful in enforcing this remedy* [due to Art. 28 CISG]*, then he will have no choice but to treat the contract as avoided and certainly will be under a duty to mitigate his loss.*"

971 MüKoBGB/*Gruber*, Art. 28 para. 15; Schlechtriem/*U. Huber*, 3rd German edn, paras. 7, 8; probably also *Neymayer/Ming*, Art. 28 para. 2: "*les prétentions en règlement du prix sont toujours égales au minimum à l'intérêts positif d'une action en dommages-intérêts*"; BeckOK/*Saenger*, Art. 28 CISG para. 11.

972 *Walter*, FS Vogel, pp. 317, 324; Honsell/*Gsell*, Art. 28 para. 25; *Schroeter*, Internationales UN-Kaufrecht, para. 398 ("*Artikel 28* […] *begrenzt* […] *die Durchsetzbarkeit von Erfüllungsansprüchen* […] *Berufung auf Art. 28 CISG bedeutet nicht, dass der Erfüllungsanspruch erlischt oder erloschen ist.*"); BeckOGK/*Thomale/Lindemann*, 01.04.2024, Art. 28 CISG para. 24; BeckOK/*Saenger*, Art. 28 CISG para. 11; cf. already *Tunc*, Diplomatic Conference on the Unification of Law Governing the International Sale of Goods, The Hague, 2–25 April 1964, Vol. I – Records, p. 370 regarding the predecessor provision in the ULIS.

this point in time, it will often not be clear yet before which court the parties will litigate (courts of different countries could be competent to hear the dispute). While an unenforceable claim for performance is not detrimental to sellers who can claim damages instead of performance during the proceedings, a missed opportunity to resell the goods could be detrimental because the sellers' damages claim might be reduced due to the drop in price.

464 The conclusion that the claim for the purchase price merely becomes unenforceable under Article 28 of the CISG might, nevertheless, come as a surprise: If the remedy cannot be enforced in court, a jurist with a common law background might be inclined to state that in this case the remedy does not exist.[973] What the respective party is left with in his or her eyes might be a right or claim, but without enforceability it is not worth much. Yet, it is important to understand "remedy" here as a term of the CISG, thus, to be interpreted autonomously, and not to take a common law understanding as a basis. The interpretation that the claim is merely unenforceable is supported by the fact that the claim would otherwise have to reappear if a claim for performance were to subsequently be raised before a different court where Article 28 of the CISG did not limit the claim for performance. If it is correct that the claim for performance under Article 62 of the CISG is just rendered unenforceable, but the remedy continues to exist, then the arguments raised above (regarding why Article 77 of the CISG should generally not be understood to require a resale by the seller as long as the claim for performance exists)[974] apply here, too.

465 The genesis of Article 28 of the CISG also support this understanding. As indicated above, Article 61(2) of the ULIS had a different approach than the CISG and denied the seller a right to claim the price "*if it is in conformity with usage and reasonably possible for the seller to resell the goods. In that case the contract shall be ipso facto avoided as from the time when such resale should be effected."* At the same time, Article 16 of the ULIS in combination with Article VII of the ULIS already contained the compromise later found in Article 28 of the CISG. There is no clear indication in the *travaux préparatoires* of the CISG that the already reached uniform solution under the ULIS (i. e., limiting the claim for the price in combination with *ipso facto* avoidance and consequently the risk of a drop in price on the seller if he or she misses the opportunity for a reasonable resale at a higher price) was abandoned in favor of two different, hence non-uniform, solutions depending on the court before which the respective case is litigated. Although the documentation of the discussions in Vienna is inconclusive in this regard,[975]

973 Cf. *Michaels*, Sachzuordnung durch Kaufvertrag, p. 266.

974 For these arguments, see above paras. 441 et seq.

975 *Lebedev* (Union of Soviet Socialist Republics), O. R., p. 332 para. 67 in the discussion of a limitation of the remedy to claim performance appears to have interpreted Art. 28

it appears unlikely that the drafters sought to reduce uniformity from the ULIS to the CISG.

Concluding, comparative law has revealed that the main practical difference of the national approaches to specific performance concerns whether the aggrieved party has to perform a cover transaction or not and who bears the economic risks of market price fluctuations in the meantime.[976] However, as the foregoing analysis shows, this link between an enforceable remedy for the price and the necessity to mitigate the damage by a cover transaction has been severed in the CISG. **466**

(4) Summary

Article 28 of the CISG, if applicable to Article 62 of the CISG, would certainly mean that the seller is left without means to "force" the unwilling buyer to take the goods. When one agrees with the arguments raised here, this would be the only effect of Article 28 of the CISG with regard to the obligation to pay the price. **467**

Upon contract conclusion, the buyer assumes the risk that the price of the goods is too high or that the price may drop after contract conclusion. As long as the contract is not avoided and the seller's insistence on contract performance does not violate Article 7 of the CISG, even though the seller has no remedy to claim the price under the CISG due to Article 28, the buyer cannot shift this risk back onto the seller by refusing to take over the goods, and relying on Article 77 of the CISG to argue that the seller bears the risk of movements in price after the first reasonable opportunity to resell the goods. Yet, the buyer does not assume full risk of loss that the seller might have with regard to anything other than the goods and their price if the seller could have reasonably been expected to avoid these risks (this concerns primarily damages for delay). In contrast to the situation in which the seller does not deliver the goods, the analysis showed that a seller will not often have to effect a cover transaction, because reasonable storage costs and reasonable financing costs are not reasonably expected to be avoided by the **468**

CISG to encompass questions of cover transactions, while *Hjerner* (Sweden) O.R., p. 332 para. 63 could be interpreted to have been of the opposite opinion: "*The difficulties encountered by the Common law countries had already been met to a certain extent by replacing the word 'could' by the word 'would' in article 26* [became Art. 28 CISG]*, but that amendment was not designed to release the party from his promise. The United States amendment, on the other hand, not only removed the enforceability of the promise, but also relieved the seller of his obligations under it, a very serious and far-reaching change*."

976 Schlechtriem/*U. Huber*, 3rd German edn, Art. 28 para. 6.

seller, while other damages due to delay are less frequent for a seller compared to a buyer.[977]

bb) Arguments for and against the application of Article 28 of the CISG to the claim for the price

469 Against the backdrop of the impossibility for the seller to *de facto* force goods onto an unwilling buyer as the only consequence of an application of Article 28 of the CISG to the seller's claim for the price under Article 62 of the CISG, the arguments for and against said application have to be reviewed.

(1) Wording of Article 28 of the CISG

470 The wording of Article 28 of the CISG encompasses "*any obligation by the other party*" and seems to focus on whether requiring the performance of the respective obligation would be requiring the court to order "*specific performance*". Some scholars argue Article 28 should also apply to the obligation to pay the price, because its wording contains no limitations and refers to "*any obligation*".[978]

471 Others, in contrast, argue that an action to recover the purchase price is commonly not understood to be "specific performance" throughout legal systems that are based on English law.[979] This is due to the fact that "specific performance" is a term that stems from equity and describes when a debtor of a non-monetary obligation can be ordered to perform this obligation, while the action for the price is an action at law.[980] As the action for the price would not be a "specific performance" although its result might rightfully be called "specific",[981] some scholars, therefore, argue that Article 28 of the CISG is not applicable to the right to require payment of the price under

977 See above paras. 429 et seq.

978 Schlechtriem/Schwenzer/Schroeter/*Mohs*, 5th edn, Art. 62 para. 14; Honsell/*Gsell*, Art. 28 para. 14; BeckOGK/*Fountoulakis*, 1.1.2024, Art. 62 CISG para. 16.

979 *Honnold/Flechtner*, para. 460; Fawcett/Harris/Bridge/*Bridge*, para. 16.145; *Farnsworth*, 27 American Journal of Comparative Law (1979), 247, 249 et seq. (addressing Art. 26 of the Draft Convention, which became Art. 28 CISG); also cf. *McKendrick*, Contract Law, p. 913; Schwimann/Kodek/*Posch*, Art. 62 CISG para. 4. Yet, in some common law jurisdictions, such as Australia, the claim for the price is partly considered to be a claim for specific performance, cf. *Barnett/Harder*, para. 10.119 with further references.

980 *Anderson*, 1 Georgia State University Law Review (1984), 27, 28 et seq.; *Posch*, pp. 153, 160.

981 *Farnsworth*, 27 American Journal of Comparative Law (1979), 247, 250; *Kastely*, 63 Washington Law Review (1988), 607, 634.

Article 62 of the CISG.[982] Especially *Bridge* rightfully maintains that the action for the price is a debt action under which the court enjoys no discretion, which stands in stark contrast to a specific performance in equity.[983] According to *Bridge*, it should be noted that the CISG uses the term "specific performance" only once (in Article 28 of the CISG), while it contains the (potentially broader) term "require performance" elsewhere.[984]

472 In reply to this argument, Article 7(1) of the CISG and its mandate to interpret the Convention in a manner that promotes uniformity are invoked.[985] Against this background, it is argued that national understandings of "specific performance" cannot be relied upon when interpreting the CISG.[986]

473 It is important to note that the notion of autonomous interpretation of the CISG, i. e., not looking to national law to interpret its wording, is based on the mandate to interpret the CISG having regard to its international character under Article 7(1).[987] Yet, when applying these maxims, it has to be kept in mind that Article 28 is an exception and deviates from the system of remedies the CISG routinely provides.[988] Thus, if the restrictive understanding in common law jurisdictions of "specific performance" is not considered the basis for a (restrictive) interpretation of the wording of Article 28, the exception from the general system of the CISG in Article 28 is broadened. It is questionable, whether this result would be in accordance with the maxim of an interpretation that has regard to the need to promote uniformity in the

982 Fawcett/Harris/Bridge/*Bridge*, para. 16.145; *Farnsworth*, 27 American Journal of Comparative Law (1979), 247, 249 et seq. (addressing Art. 26 of the Draft Convention, which became Art. 28 CISG); *Bridge*, International Sale of Goods, para. 12.48; *Posch*, pp. 153, 160; Schwimann/Kodek/*Posch/Terlitza*, Art. 62 CISG para. 4; Staudinger/*Magnus*, Art. 62 para. 12 who agrees to apply Art 28 CISG and leave it to the respective court to qualify the limitation to the claim for the purchase price, while he claims that most common law courts would not qualify the action as "*specific performance*".

983 *Bridge*, Debt Instead of Damages, pp. 423, 424–425; *Bridge*, FS Magnus, pp. 161, 169. Cf. also on the divide between a debt action, i. e., the action for the purchase price, and enforcement of a contract, *McKendrick/Maxwell*, 1 The Chinese Journal of Comparative Law (2013), 195, 199.

984 *Bridge*, International Sale of Goods, para. 12.48.

985 Schlechtriem/Schwenzer/Schroeter/*Mohs*, 5th edn, Art. 62 para. 14; MüKoBGB/*Gruber*, Art. 28 para. 4; *Wethmar-Lemmer*, 2012 Journal of South African Law (2012), 700, 704.

986 Schlechtriem/Schwenzer/Schroeter/*Mohs*, 5th edn, Art. 62 para. 14; Kröll/Mistelis/Perales Viscasillas/*Bell*, Art. 62 para. 11; MüKoBGB/*Gruber*, Art. 28 para. 4; *Kastely*, 63 Washington Law Review (1988), 607, 634; *Wethmar-Lemmer*, 2012 Journal of South African Law (2012), 700, 704.

987 For example, *Schroeter*, Internationales UN-Kaufrecht, paras. 126 et seq.

988 *Ferrari*, IHR 2006, 1, 18.

Convention's application under Article 7(1) of the CISG.[989] Thus, the aim of Article 7(1) might not be an autonomous interpretation of Article 28 that does not take any cue from national law, but rather one that allows the Convention (!) as a whole to be applied in a uniform manner.

474 On the other hand, it is unclear how this interpretation could be equally valid with regard to all six official languages of the CISG. For example, the French ("*l'exécution en nature*") and the Spanish wording ("*el cumplimiento específico*") cannot be interpreted to only refer to the concept of "specific performance" when merely relying on the wording. Also, the Russian, Chinese, and Arabic texts do not clearly link the wording to the specific common law concept.[990]

475 One explanation for Article 28 CISG's non-applicability to the claim for the price is that payment under Article 62 of the CISG does not consist of a performance such as required by the wording (*Naturalleistung*, *l'exécution en nature*), but rather as a monetary obligation.[991] This interpretation would split the obligations under the CISG into monetary and non-monetary obligations, as for example, the UPICC do in Articles 7.2.1 and 7.2.2 of the UPICC. This differentiation is, however, not mirrored in the CISG and cannot be based on its wording. A payment in money can be understood to represent a performance in kind.

476 Consequently, the wording of Article 28 of the CISG is inconclusive as to whether the provision encompasses the buyer's obligation to pay the price.

(2) Systematic interpretation

477 From a systematic point of view, Article 28 can be found in the CISG's Part III, Chapter I General Provisions. This first chapter of Part III applies to the obligations of both parties (in contrast to Chapter II (Obligations of the Seller) and Chapter III (Obligations of the Buyer)). Since it can be found in a chapter that applies to both parties of a sales contract, one could argue that Article 28 should also be applied to the seller's remedies.[992]

478 To assess the persuasiveness of the argument, it has, however, to be kept in mind that it appears undisputed that Article 28 of the CISG limits the seller's remedy to require the buyer to "*take delivery or perform his other obliga-*

989 This argument is insinuated by *Schlechtriem* with regard to the lack of an obligation to take delivery under Austrian law, which should not trigger the application of Art. 28 CISG in his view in *Doralt*, p. 191.

990 *Kastely*, 63 Washington Law Review (1988), 607, 634 fn. 131.

991 *Herber/Czerwenka*, Art. 28 para. 3, Art. 62 para. 7; *Reinhart*, Art. 28 para. 4.

992 Schlechtriem/Schwenzer/Schroeter/*Mohs*, 5th edn, Art. 62 para. 14; *Schlechtriem/Schroeter*, para. 558; *Schroeter*, Internationales UN-Kaufrecht, para. 669; MüKoBGB/*Gruber*, Art. 62 para. 5; *Honnold/Flechtner*, para. 460; Honsell/*Gsell*, Art. 28 para. 7.

tions" under Article 62 of the CISG.[993] Thus, the placing of Article 28 in the section of "General Provisions" could also make sense in this regard without necessarily having to extend to also encompass the claim for the price. Nevertheless, the argument cannot be completely negated by the undisputed application to some of the obligations under Article 62 of the CISG, since there is nothing in the systematics that would allow for a differentiation between the claim for the price and the claim for the buyer to take delivery of the goods.

(3) Travaux préparatoires

479 Moreover, the drafting history is sometimes interpreted to favor the application of Article 28 of the CISG to the claim for the price under Article 62 of the CISG.[994] This is due to the fact that during the drafting of the CISG the limitation of today's Article 28 was found to apply only regarding the taking of delivery and performance of other obligations in the provision that became Article 62, but was later extended by broadening the wording moving the provision in Part III, Chapter I General Provisions.[995]

480 Yet, the *travaux préparatoires* do not provide persuasive grounds for such an unequivocal interpretation. The first draft of 1935 contained the following Article 70(1): "*Si l'acheteur ne paie pas le prix dans les conditions fixées par le contrat, le vendeur est en droit d'exiger le paiement du prix, à moins que ce droit ne lui soit pas reconnu par la loi nationale du tribunal saisi.*"[996] Thus, the first draft made the seller's claim for the price subject to the national law of the forum which would be comparable to applying Article 28 of the CISG to the claim for the price under Article 62 of the CISG today. The historical record reveals that this was the clear intention during the first stage of the development of uniform sales law at Unidroit between 1929 and 1950. It is important to note that *Rabel's* often cited statement that "[t]*he basic ideas are too far away from each other for a thorough unification*" was not made in connection with the claim for performance of the non-monetary

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993 For example, Schlechtriem/Schwenzer/Schroeter/*Müller-Chen/Atamer*, 8th German edn, Art. 28 para. 6 with further references. Notably, the seller's remedy to force the buyer to take delivery of the goods is considered a "specific performance" under English law, *Bridge*, Sale of Goods, para. 11.59.

994 Schlechtriem/Schwenzer/Schroeter/*Mohs*, 5th edn, Art. 62 para. 14; exactly the opposing assessment with regard to the *travaux préparatoires*, *Schlechtriem/Cl. Witz*, para. 310; *Cl. Witz*, para. 343.82.

995 Schlechtriem/Schwenzer/Schroeter/*Mohs*, 5th edn, Art. 62 para. 14.

996 My translation: Where the buyer fails to pay the price in accordance with the terms of the contract, the seller shall be entitled to sue for the price if his right to do so is recognized by the national law of the court to which he applies.

obligation (delivery of the goods), but rather with regard to the action for the price and specifically in connection with Article 70(1) of the draft of 1935:

> "*The most impressive phenomenon in this connection remains untouched by the international draft, viz., the rule that the action for the price can not be brought unless the title has passed to the buyer. It is very curious that the seller's right to obtain the price should depend on any thing other than his own choice, and moreover on an event so difficult to ascertain and so often casual. Where the transfer of the title has been postponed by mutual agreement, one should think that it is left with the seller as a security for the price. Yet, in that system it is declared to be impossible for the seller, at least as a general rule, to have both property in the goods and a right of action for the price. However, the draft had nothing to reform in this matter. It had but one course to follow in face of the abyss between the Anglo-American and the continental concepts of specific performance. The basic ideas are too far away from each other for a thorough unification. In this one point the only sound solution was to leave the existing differences untouched. The draft provides that in the matter of specific performance the courts of each country are allowed to follow their own traditional course. Thus, English and American courts will not be troubled with new principles. All other courts would grant judgments for specific performance as they do now.*"[997]

481 This explains the idea underlying the draft of 1935, which was maintained in the drafts of 1939 and 1956.[998] It leaves no doubt that *Rabel* considered the limitations of the action for the price in common law jurisdictions described above[999] to remain applicable under uniform sales law. *Rabel* died in 1955 and with him the clarity on why the claim for the price should be limited under uniform sales law if a court in a common law jurisdiction heard the case.

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997 *Rabel*, 5 Chicago Law Review (1938), 543, 559. Similarly, *Rabel*, 9 RabelsZ (1935), 339, 348; similarly, not restricting the limitation of performance in kind to the delivery of the goods, *Gutteridge*, L'unification, pp. 273, 283 et seq.

998 Rome draft (1939): "*Article 64. Si l'acheteur ne paie pas le prix dans les conditions fixées par le contrat, le vendeur est en droit d'exiger ce paiement, si ce droit lui est reconnu par le droit national tribunal saisi, à moins que la vente ne porte sur une chose pour laquelle une vente compensatoire est conforme aux usages commerciaux.*"; draft of 1956: "*Article 72. Si l'acheteur ne paie pas le prix dans les conditions fixées par le contrat et par la présente loi, le vendeur est en droit d'exiger que le paiement lui soit effectué dans ces conditions, si ce droit lui est reconnu par le droit national du tribunal saisi. Le vendeur n'a pas le droit de réclamer le prix lorsque les usages imposent une vente compensatoire; dans ce cas, le contrat est résolu de plein droit dès le moment ou cette vente doit être réalisée.* […]".

999 See above paras. 344 et seq.

482 At the second stage of the drafting of uniform sales law under the auspices of the Special Commission, the underlying idea of the limitation was blurred. The comments to the draft of 1956 disclose, for example, that the reason of the limitation was seen in the reluctance of national laws to allow a seller to claim payment in a currency other than the local currency.[1000] The understanding that the limitation was due to problems of enforcement of payment claims in foreign currencies seems to have been the prevailing understanding at the conference of 1964 leading to the ULIS (the third stage of development).[1001] For example, *Tunc* writes in the commentary on the ULIS:

> "*Article 61 first states the rule that if the buyer fails to pay the price in accordance with the contract and the Law, the seller may require him to perform his obligation. It will be seen that in this case the rule is not even impliedly subject to the reservation in Article 16* [today's Article 28 CISG]. *Some jurisdictions do refuse to decree the specific performance of some course of action but not, of course, the payment of a price.*"[1002]

483 This reveals that *Rabel's* original thought underlying the limitation of the claim for the price had been forgotten in the meantime. *Tunc's* comment that the decree of specific performance was "of course" not refused regarding payment of the price reveals that some delegates at The Hague may not have been aware that common law jurisdictions contained severe limitations of this remedy. On the other hand, it has to be kept in mind that Article 61(2) of the ULIS contained a severe limitation of the claim for the purchase price in case a resale of the goods was in line with usages. Maybe this provision was interpreted to align the uniform sales law with the restrictions of the claim in common law jurisdictions.

484 Unfortunately, the clarity of *Rabel's* thought did not resurface during the drafting of the CISG between 1966 and 1980. In 1972 the English delegate (*Guest*) brought up the subject once again and noted that it was unclear when the limitation of Article 61(2) of the ULIS would apply, and explicitly

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1000 Report of the Special Commission [on the Draft Uniform Law on Sale (1956)], Diplomatic Conference on the Unification of Law Governing the International Sale of Goods, The Hague, 2–25 April 1964, Vol. II – Documents, pp. 26, 37.

1001 See for example, the statement by *Wortley* (United Kingdom), Diplomatic Conference on the Unification of Law Governing the International Sale of Goods, The Hague, 2–25 April 1964, Vol. I – Records, pp. 106–107; cf. moreover the assessment by the Swiss Government, Diplomatic Conference on the Unification of Law Governing the International Sale of Goods, The Hague, 2–25 April 1964, Vol. II – Documents, p. 176.

1002 *Tunc*, Diplomatic Conference on the Unification of Law Governing the International Sale of Goods, The Hague, 2–25 April 1964, Vol. I – Records, p. 380.

referred to section 49(1) of the Sale of Goods Act 1893 as a better solution and to section 2-709 of the UCC to at least be considered.[1003] The limitation contained in Article 61(2) of the ULIS was subsequently deleted in the drafting of what became Article 62 of the CISG. At the fifth session of the Working Group in 1974, several delegates emphasized that the wording of the provision adopted at the fourth session[1004] did not sufficiently reflect that the buyer's obligation to pay the price should not be subject to limitations under national law.[1005] Therefore, the provision was amended to read:

> "*Article 71*
>
> *1. If the buyer fails to pay the price, the seller may require the buyer to perform his obligation.*
>
> *2. If the buyer fails to take delivery or to perform any other obligation in accordance with the contract and the present law, the seller may require the buyer to perform to the extent that specific performance could be required by the court under its own law in respect of similar contracts of sale not governed by the present law.*
>
> *3. The seller cannot require performance of the buyer's obligations where he has acted inconsistently with such right by avoiding the contract under article 72 bis*."[1006]

485 Thus, the limitation of specific performance (now in subsection 2) at that time was considered not to apply to the claim for the price under subsection 1.[1007] Carrying on this thought, at the sixth session of the Working Group, the reference to specific performance in the provisions concerning the buyer's and seller's remedies was deleted in favor of the general limitation by Article 16 (which became Article 28 of the CISG).[1008] The distinction between the two paragraphs seen above in Article 71 was maintained. After this session, the UNCITRAL secretariat drafted the Draft Commentary on the Draft Convention on the International Sale of Goods. This Draft Com-

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1003 UNCITRAL Yearbook V (1974), p. 64 para. 4 and Appendix A and B on the same page.

1004 Art. [71]: "*The seller has the right to require the buyer to perform the contract to the extent that specific performance could be required by the court under its own law in respect of similar contracts of sale not governed by the Uniform Law, unless the seller has acted inconsistently with that right by avoiding the contract under article* [72 bis]." UNCITRAL Yearbook V (1974), p. 33.

1005 UNCITRAL Yearbook V (1974), p. 33 para. 42.

1006 UNCITRAL Yearbook V (1974), p. 56.

1007 Schlechtriem/Schwenzer/Schroeter/*Mohs*, 8th German edn, Art. 62 para. 14.

1008 UNCITRAL Yearbook VI (1975), p. 101 paras. 122 et seq. (regarding buyer's remedies), p. 105 para. 163 (seller's remedies).

mentary explicitly states that the limitation by Article 12 (which became Article 28 of the CISG) shall not apply to the seller's claim for the price.[1009]

486 However, between the sixth and seventh session of the Working Group, there appears to have been a change in understanding. The differentiation between the two paragraphs (payment of price and taking delivery) was abandoned in Article 43 (which became Article 62 of the CISG) and, additionally, Article 12 (which became Article 28 of the CISG) was considered without documented reasoning to apply to the seller's claim for the price.[1010] It is very important to keep in mind, however, that at this stage of the drafting, Article 12 (which became Article 28 of the CISG) had a different wording ("*a court is not bound to enter a judgment providing for specific performance unless this could be required by the court under its own law* […]") and was considered only to limit the seller's claim for the price if the court could under no circumstances award the seller the price under national law.[1011] It is not clear which national law the drafters could have had in mind under which the court has no authority under any circumstances to award the price. The proposal by the US at the eighth session of the Working Group could be interpreted to signify that their delegates did not understand possible limitations under their own law to already be applicable to the seller's claim for the price.[1012] Yet, potentially – as was the case under the ULIS – the idea was that issues of enforcement of payment claims in foreign currencies existed under some national laws.

487 At the conference in Vienna, the wording was changed to read that the court would now not only be allowed to abstain from granting specific performance if it "could not" grant it under national law, but also be allowed to abstain if it "would not" order specific performance.[1013] The concerns that lead to the broadening of the wording did not, however, relate to the seller's claim for the price. Rather, the British delegate (*Feltham*) referred to specific performance of goods when invoking that courts would generally have the jurisdiction to order it but rarely made use of it.[1014] Thus, it is unclear whether the implications this change in wording might have for Article 28 CISG's application to the seller's claim for the price under Article 62 of the CISG were even recognized.

488 While it is true that the Secretariat Commentary explicitly states that Article 26 (which became Article 28 of the CISG) applied to Article 58 (which

1009 Draft Commentary on the Draft Convention on the International Sale of Goods (A/CN.9/WG.2/WP.22), p. 73 para. 6.
1010 UNCITRAL Yearbook VII (1976), pp. 93, 102.
1011 UNCITRAL Yearbook VII (1976), p. 102 Art. 12 para. 3.
1012 UNCITRAL Yearbook VIII (1977), p. 156, Art. 43 paras. 3, 4.
1013 O. R., p. 304.
1014 O. R., p. 305 para. 44.

became Article of the 62 CISG),[1015] this was drafted before the conference in Vienna, and accordingly before the broadening of Article 26 there. The suggested application can, however, not be transplanted into the CISG where the scope of application of Article 28 was significantly broadened.[1016]

489 In sum, after *Rabel's* death in 1955, the point of reference of whether limitations under national law applied to the claim for the price was lost: It appears that issues of currency were at the forefront of the delegates' minds when the application of today's Article 28 of the CISG was discussed. Especially delegates of civil law jurisdictions may not have been aware of the differences in national law regarding the claim for the purchase price. In addition to this uncertainty, the broadening of the wording of Article 28 of the CISG at the conference in Vienna produces further uncertainties. This is because there was no discussion of the potential implications of the broadening on the claim for the price. Therefore, while the question of whether Article 28 of the CISG should apply to the seller's claim for the price under Article 62 of the CISG surfaced during the drafting of the provisions, the *travaux préparatoires* do not provide unequivocal guidance on the applicability of Article 28 of the CISG regarding the limitations of the claim for the price discussed in this chapter. The development of the claim for the price under the CISG is a prime example for the necessity to extend the relevant historical material beyond the UNCITRAL Yearbooks and the Official Records of the conference in Vienna.[1017] Without considering the statements of *Rabel* and the first drafts, the inconclusiveness of the *travaux préparatoires* would not be as obvious.

(4) Purpose of Article 28 of the CISG

490 Attempting to describe the purpose Article 28 seeks to fulfil within the CISG is a difficult endeavor. When the question is posed in this broad manner, some scholars argue Article 28 covers only limits that are due to problems with the enforcement of obligations other than money or procedural barriers, not with the diverging requirements in national (unharmonized) law regarding the right to require performance.[1018] However, as many studies have elaborated, it can be random whether limitations on claims for perfor-

1015 Secretariat Commentary, Art. 58 para. 6.

1016 Overlooked by Schlechtriem/Schwenzer/Schroeter/*Mohs*, 8th German edn, Art. 62 para. 14 who relies on the Secretariat Commentary in this regard.

1017 See above paras. 19 et seq.

1018 *Herber/Czerwenka*, Art. 62 para. 7, who apply Art 28 CISG nevertheless in cases of payment in a foreign currency; *Loewe*, p. 81; same result but without reasoning Soergel/*Lüderitz/Budzikiewicz*, 13th edn, Art. 28 para. 3, Ferrari/Kieninger/Mankowski/*Mankowski*, Art. 62 CISG para. 10; *Freund*, pp. 367 et seq.

mance are located in procedural or substantive law.[1019] Consequently, the majority of scholars convincingly argue that common law jurisdictions' general position opposing the specific performance of contracts is not limited to procedural barriers but enforces considerations of substantive law, too.[1020] The limitation by Article 28 was envisioned to cater to the needs of common law jurisdictions not to bind their courts to order specific performance in cases in which the national law would only allow damages claims.[1021] The purpose of Article 28 is to allow jurisdictions that principally do not allow a party to legally enforce the performance by the contractual partner to maintain this stance even under the CISG.[1022]

491 Assessing the applicability of Article 28 to the claim for the price under Article 62 of the CISG against the backdrop of this purpose, the practical consequences of the application have to be considered. As has been analyzed above, applying Article 28 would in effect mean that the seller could not *de facto* force the buyer to take over the goods.[1023] This consequence is in line with the purpose of Article 28 of the CISG, which favors an application to the claim for the price under Article 62 of the CISG.

492 First, it is undisputed that Article 28 limits the seller's remedy to require the buyer to "*take delivery*" under Article 62 of the CISG.[1024] If the buyer has not performed his or her obligation to take delivery, it is considered exceptional in common law jurisdictions to order the buyer to specifically perform this obligation.[1025] Arguments that militate against ordering the buyer to take delivery overlap with arguments against specific performance of the seller's obligation to deliver the goods: A perhaps overly harsh interreference with the liberty of the debtor and the strain of the courts to supervise the specific

1019 *Freund*, p. 370; Honsell/*Gsell*, Art 28 para. 13; Schlechtriem/Schwenzer/Schroeter/*Müller-Chen/Atamer*, 8th German edn, Art. 28 para. 11.

1020 Schlechtriem/*U. Huber*, 3rd German edn, Art. 28 para. 17; Honsell/*Gsell*, Art. 28 para. 13; Brunner/Gottlieb/*Brunner/Bodenheimer*, Art. 28 para. 2; Ferrari/Kieninger/Mankowski/*Ferrari*, Art. 28 CISG para. 6; *Karollus*, p. 178.

1021 See for example, regarding the roots of Art. 16 ULIS which became Art. 28 CISG, *Riese*, 29 RabelsZ (1965), 1, 28 et seq.

1022 Honsell/*Gsell*, Art. 28 para. 17; MüKoHGB/*Benicke*, Art. 28 para. 12. Similarly, but highlighting the requirement of national laws to oppose enforcement as such, which is argued to be fulfilled if respective damages claim exists notwithstanding the lack of a performance claim, *Neufang*, pp. 414 et seq.; Schlechtriem/Schwenzer/Schroeter/*Müller-Chen/Atamer*, 8th German edn, Art. 28 para. 11.

1023 See above paras. 451–452, 467. Notably, that statement concurrently signifies that the applicability of Art. 28 CISG to the seller's claim for the purchase price would not have any implications with regard to cover transactions or the currency of the payment obligations.

1024 For example, Schlechtriem/Schwenzer/Schroeter/*Müller-Chen/Atamer*, 8th German edn, Art. 28 para. 6 with further references.

1025 For example, under English law, *Bridge*, Sale of Goods, para. 11.59.

performance.[1026] While the *de facto* obligation to take the goods to avoid not receiving anything for the purchase price may at first sight not require the court to supervise the performance, the strain on the buyer's liberty is similar to the strain on the seller's liberty regarding the obligation to deliver. Thus, the similarities between the consequence of *de facto* requiring the buyer to take over the goods and the obligation to take delivery under Article 62 CISG favor the applicability of Article 28 of the CISG to the obligation to pay the price.[1027]

493 Second, considering the notion of efficiency that at least partly underlies the limitation of performance claims under the UCC,[1028] the applicability of Article 28 of the CISG to the claim for the purchase price is also consistent with the purpose of Article 28 of the CISG: A buyer who is unwilling to perform will in some cases need to resell the goods while it would typically have been more efficient under the suggested consideration of efficiency if the seller resells the goods immediately.[1029]

494 Third, and apparently not highlighted yet with regard to the applicability of Article 28 of the CISG, the claim for the purchase price in common law jurisdictions is even more restricted than the claim for specific performance. The law generally does not provide the seller with a remedy to receive the price if the buyer refuses to perform the contract.[1030] In contrast to the remedy for delivery of the goods, there is no remedy in equity for the seller even if damages are not adequate. Maybe this is because it appears inconceivable that the price (due in money) could not be adequately compensated with damages (due in money). Nevertheless, if the seller does not want to perform and no performance has yet been rendered, the buyer potentially has an equitable remedy (specific performance), while the seller that faces a buyer unwilling to perform is not provided with a remedy for performance. Forcing the unwilling buyer to pay the price, thus, seems to be even more restricted than forcing an unwilling seller to deliver the goods. This reasoning applies to jurisdictions that follow the approach of the English Sale of Goods Act 1893/1979. It also convinces regarding the UCC in the USA: Although

1026 A summary of these aspects and more that militate against the general availability of specific performance in common law jurisdictions by *Akenhead J* in *Transport for Greater Manchester v Thales Transport and Security Ltd* [2012] EWHC 3717 (TCC), 146 Con LR 194, para. 17. See also *Schwartz*, 89 Yale Law Journal (1979) 271, 293 et seq.

1027 MüKoBGB/*Gruber*, Art. 28 para. 4; BeckOGK/*Thomale/Lindemann*, 01.04.2024, Art. 28 CISG para. 7.

1028 See above para. 370.

1029 Specifically arguing in favor of applying sect. 2-709 UCC under Art. 28 CISG and highlighting considerations of efficiency, *Honnold/Flechtner*, paras. 273, 458.

1030 Sect. 49(1) SGA 1979; Sec. 52 SGA 1954 (Australia). An exception to this rule exists if the buyer has agreed to pay the price on a day certain, sect. 49(2) SGA 1979.

the seller's claim for the price under the UCC is broader, since the seller can also claim the price if the goods are not reasonably resalable,[1031] the claim for the price is nevertheless more restricted than the claim for delivery of the goods as *Flechtner* highlights.[1032] Bearing in mind the purpose of Article 28 of the CISG to allow jurisdictions that principally do not order a debtor to perform and the limitation on the payment claim being even stricter than on specific performance of non-monetary obligations, the provision should also apply to the claim for the purchase price.

For these reasons, the purpose of Article 28 of the CISG favors the applicability of the provision to the seller's claim for the purchase price under Article 62 of the CISG. **495**

(5) Result

While neither the wording nor the *travaux préparatoires* clearly indicate whether the provision should be applied to the claim for the purchase price under Article 62 of the CISG, the systematic placing of Article 28 of the CISG taken together with its purpose supports the application and the consequent limitation of the claim for the price. This is also in line with *Rabel's* insights and the divergence between the common law and the civil law approaches to the claim for the price. The differences that he had in mind and led him to propose forgoing unification of the claim for the price in uniform sales law exist to this day. **496**

b) Application of its "own" law with regard to the claim for the purchase price

Since Article 28 of the CISG applies to the claim for the purchase price under Article 62 of the CISG, the next question that arises is what rules the court will apply as its "own" law when deciding whether to grant specific performance under the CISG. **497**

There has been uncertainty from the time Article 28 of the CISG was drafted as to whether the respective "own" law refers to the rules of the national substantive law or rather the rules of the respective private international law. While a Greek delegate in Vienna (*Krispis*) seems to have been of the opinion that private international law has to be consulted when applying the provision,[1033] the majority of scholars and courts read the reference to the respective law as being one to the rules of substantive law without interposing **498**

1031 See above para. 372.

1032 *Honnold/Flechtner*, para. 458.

1033 O.R., p. 305; the same idea was brought forward by Austria with regard to the same problem under the ULIS, Doc/V/Prep/11, Diplomatic Conference on the Unification

private international law.[1034] Already the first draft of 1935 contained a rule similar to today's Article 28 of the CISG and the comments accompanying this draft stated that its reference was not meant to include the private international law rules of the forum.[1035] At the conference in 1951 regarding the draft that became the ULIS and later Article 28 of the CISG, *Bagge* maintained the position that the reference should be understood as referring to the national substantive law without recourse to private international law: If an English court was to find that French law would apply to a contract, it may still deny specific enforcement as English law as the law of the court would prevail.[1036]

499 Thus, an English court would apply section 49 of the Sale of Goods Act 1979 and courts in other jurisdictions following the approach of the Sale of Goods Act 1893/1979 would apply the equivalent provision of the respective Sale of Goods Act.[1037] The subsequent question is, how a court determines whether property in the goods has passed: Is it relevant whether the property in the goods has passed under the law applicable to the property in the goods, or is merely the English or equivalent law of the forum relevant?

500 One could be consistent with the discussion of whether Article 28 of the CISG refers to private international law or substantive law and argue that under the applicable rule of national law that requires the seller to have transferred property, the court should consider the legal situation for (completely national) facts and, consequently, also apply national property law irrespective of the applicable property law. Yet, if the question posed by Article 28 of the CISG to the judge is whether specific performance would be available in the case under national law, the question has left the realm of the

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of Law Governing the International Sale of Goods, The Hague, 2–25 April 1964, Vol. II – Documents, p. 334.

1034 *Magellan Int'l Corporation v. Salzgitter Handel GmbH*, US District Court for the Northern District of Illinois, 7 December 1999, CISG-online 439 p. 6 (applying the UCC directly); *Styles v. Movie Star Muscle Cars, Inc. et al.*, Circuit Court of the 17th Judicial Circuit (Broward County) of the State of Florida, 18 January 2017, CISG-online 4684 para. 8 (applying the UCC and Florida law); Kröll/Mistelis/Perales Viscasillas/*Björklund*, Art. 28 para. 16; *Hayward/Perlen*, 15 VJ (2011), 119, 139; *Honnold/Flechtner*, para. 271; *Kastely*, 63 Washington Law Review (1988), 607, 637–638; *Wethmar-Lemmer*, 2012 Journal of South African Law (2012), 700, 704; contra, *Grigera Naón*, pp. 89, 108.

1035 League of Nations 1935 – International Institute in Rome for the Unification of Private Law – Draft I (L. O.N. 1935 – U. P.L. – Draft I), p. 39.

1036 Unidroit, Actes de la Conférence convoquée par le Gouvernement Royal des Pays-Bas sur un projet de Convention relatif à une loi uniforme sur la vente d'objets mobiliers corporels, 1952, Rome, Éditions Unidroit, p. 164. Highlighting that this understanding continued to persist in the Special Commission that prepared the ULIS draft, *Honnold/Flechtner*, para. 271.

1037 A list of such provisions can be found above in para. 365.

CISG, Article 28 of the CISG is no longer decisive, but rather national law determines whether section 49 of the Sale of Goods Act 1979 or equivalent provisions contain an incidental question which requires the judge to apply conflict of laws rules.

501 As seen above, section 49 of the Sale of Goods Act 1979 and equivalent provisions generally depend on the answer to the question of whether a *quid pro quo* has been provided.[1038] If one takes the relevance of a *quid pro quo* as the basis, the question of whether property in the goods has passed could be answered by applying the law applicable to the property in the goods, i. e., mostly the *lex rei sitae*.[1039] Hence, section 49 Sale of Goods Act 1979 requires determining whether property in goods has passed under the law applicable to the property in the goods. It does not appear problematic in this context that the applicable property law may provide for an absolute notion of property.[1040] For example, under German property law, if the buyer does not receive absolute property because the goods were stolen (section 935 of the German Civil Code), the seller could not sue for the price. In contrast, under English property law, the seller may have transferred (relative) property. Considering these results under the CISG, a court in England concerned with goods situated in Germany might consider the seller's claim for the price under Article 62 unenforceable due to Article 28, while if the goods were situated in England, the action for the price would lie. Whether this even more restrictive (relative to English law) approach to the claim for the price would convince an English court appears doubtful, especially since it would not enforce such a contract under national law due to a total failure of consideration.[1041] English law is not clear on this point, since the characterization of "property" under section 49(1) of the Sale of Goods Act 1979 in an international case under conflict of law rules is not sufficiently settled by case law. It might be possible to characterize the question of whether property has been transferred under section 49(1) of the Sale of Goods Act 1979 as a contractual question to avoid the consequences just presented.[1042]

502 Lastly, it is important to note that Article 28 of the CISG does not necessarily lead to section 49(1) of the Sale of Goods Act 1979 in a case before an

1038 The different approach in the USA under the UCC, where considerations of efficiency play a more prominent role, does not pose a similar problem, since there is no requirement of a transfer of property (or title under the UCC) in the goods.

1039 See above paras. 66 et seq. on the law applicable to property.

1040 Similar assessment by BeckOGK/*Prütting*, 01.10.2023, Art. 43 EGBGB para. 123.

1041 Cf. above paras. 139–140.

1042 Cf. but without explanation *W. Witz*, FS Schlechtriem, pp. 293, 301 stating: "*Eine Kaufpreisklage ist im englischen Recht gemäß Art. 49 SGA (1979) in der Regel nur dann möglich, wenn der Verkäufer seine Lieferpflicht bereits erfüllt hat*."

English court. As shown by *The Res Cogitans*,[1043] credit sales in which the goods are envisaged to be consumed before payment is due are not sales contracts under the Sale of Goods Act even though they are sales contracts under the CISG.[1044] Yet, the national characterization under Article 28 of the CISG regarding limitations of the claim for the purchase price remains decisive. In such cases, the claim for the price under Article 62 of the CISG will, thus, be more readily available than under a sales contract under the Sale of Goods Act 1979.

c) Summary

503 Article 28 of the CISG is applicable to the seller's claim for the purchase price under Article 62 of the CISG. If the competent court is seated in England or in a jurisdiction that follows the approach of section 49 of the Sale of Goods Act 1979, the transfer of property is relevant for deciding whether the seller's claim is granted. If property has not passed and the seller is denied the claim for the price, the first practical consequence is that the seller is not able to *de facto* "force" the goods onto the buyer. It is true that there is probably little practical relevance to this aspect, since the seller who will receive legal advice in case of a dispute with the buyer will usually not hold on to the goods forever and try to force them onto the buyer by judgment, but rather resell them. This is evidenced by the case law cited thus far. No case contained facts wherein the seller still had the goods at the time of the judgment and tried to claim the difference between the price under the contract and the price of the cover transaction. The relevant question always appears to be whether the seller should have taken an earlier or otherwise more favorable possibility to resell the goods. To answer this question, Article 28 of the CISG is irrelevant, as argued above. Therefore, the second practical consequence is a damages claim under Articles 61(1)(b), 74 et seq. of the CISG for the seller that generally amounts to the full purchase price and any further loss that has occurred, but is reduced by the value of the goods at the last relevant point in time under the applicable procedural law. Thus, sellers have to resell the goods if they do not want to keep them, but bear no economic risk until the relevant point in time for the calculation of damages is reached.

1043 *PST Energy 7 Shipping LLC and another v OW Bunker Malta Ltd and another* ("*The Res Cogitans*") [2016] AC 1034 (UKSC), [2016] UKSC 22.

1044 See above para. 334 with regard to contract characterization.

V. Conclusion

The CISG does not make the remedy to claim the price dependent on the passing of property. Nevertheless, the relevance of the passing of property to this end resurfaces due to Article 28 of the CISG in jurisdictions that contain a provision to the effect of section 49(1) of the Sale of Goods Act 1979 in their national sales laws. The practical effect of this limitation is very slim, since it only concerns the question whether the seller can *de facto* force the goods onto the buyer. **504**

§ 6: Exclusion under Article 4, sentence 2(b) of the CISG

505 The CISG does not apply to all conflicts arising between the parties. Although Article 30 provides for an obligation to transfer the property, Article 4, sentence 2(b) excludes "*the effect which the contract may have on the property in the goods sold*" from the scope of the Convention. This provision's general rule dates back to the earliest stages of the unification process when the members of the Commission at Unidroit faced the undeniable reality of far-reaching differences in the transfer of property under national law[1045] outlined above.[1046] Already then, the practical insight prevailed that it might be possible to untie the relevant questions under international sales contracts from property and, thereby, make uniform rules on the transfer of property dispensable.[1047] This approach won the day and was nearly verbatim adopted by the Secretariat's Commentary many years later:

> "*It was not regarded possible to unify the rule on this point nor was it regarded necessary to do so, since rules are provided in the convention for several questions linked, at least in certain legal systems, to the passing of property: the obligation of the seller to transfer the goods free from any right or claim of a third person not accepted by the buyer; the obligation of the buyer to pay the price; the passing of the risk of loss or damage to the goods; the obligation to preserve the goods.*"[1048]

506 Surprisingly, when commercial law in parts of Africa was unified by the *Organisation pour l'Harmonisation en Afrique du Droit des Affaires* ("OHADA") by its Acte uniforme relatif au droit commercial général of 1997 (OHADA Uniform Commercial Law 1997), the transfer of property was explicitly regulated in Articles 283–284. Slightly amended in 2010, Articles 275 and 276 of the OHADA Uniform Commercial Law 2010 provide for the transfer of property generally to take place when the buyer takes delivery of the goods, while the parties can agree on a retention of property clause in line with Articles 72–78 of the OHADA Uniform Security Law 2010.

1045 *Hamel*, pp. 301, 307.

1046 For the different approaches to the transfer of property, see above paras. 57 et seq.

1047 *Hamel*, pp. 301, 308. Contra Netherlands, sub. e) part of S. D.N.-U. D.P. 1936 – Etude IV Vente – Doc. 82 and Poland, part of S. D.N.-U. D.P. 1936 – Etude IV – Vente – Doc. 82, who considered leaving out the transfer of property to be a notable deficit.

1048 Secretariat Commentary, Art. 4 para. 4; this wording was already contained in UNCITRAL Yearbook VII (1976) p. 101 Art. 7 para. 4.

507 Yet, OHADA did not face the same challenges encountered by the drafters of global uniform sales law, as it did not have to debate a generally acceptable rule nor the remaining relevance of property: At the time of this writing, OHADA has 17 Member States from Central Africa. With the exceptions of Guinea-Bissau, Equatorial Guinea and Cameroon, all Member States are former French colonies.[1049] A unification of the transfer of property would consequently not have been met with the argument of unbridgeable gaps in the respective existing national laws. Thus, it is unsurprising that a uniform solution was found. Yet, these countries decided against the French model of transfer of property *solo consensu* in favor of the approach requiring handing-over of the goods. This can only be explained against the background of the connection between the transfer of risk that is undertaken by Article 277 of the OHADA Uniform Commercial Law 2010.[1050] This connection, in turn, explains why rules on the transfer of property could not be omitted in the OHADA Uniform Commercial Law. For these reasons, it was necessary but also possible to unify rules on the transfer of property under the OHADA Uniform Commercial Law in contrast to the CISG.

I. Effect on "property" under Article 4, sentence 2(b) of the CISG

508 To discuss the provision in more detail, the meaning of "property" thereunder and the potential indirect of impact the CISG on the transfer of property under national law must be analyzed.

1. "Property" as an autonomous term under Article 4, sentence 2(b) of the CISG

509 It has not been the subject of discussion whether "property" under Article 4, sentence 2(b) of the CISG is an autonomous term or refers to property under the respective national law. This stands in contrast to Article 4, sentence 2(a) of the CISG and its exclusion of matters of "validity" where the corresponding question has been fiercely discussed for years.[1051] While *Bridge* is correct in pointing out that Article 4 of the CISG does not "formally" define property,[1052] it is proposed here to apply the definition of an autonomous term "property" developed above: Property should be understood as the

1049 *Chianale*, Singapore Journal of Legal Studies (2016), 29, 40.
1050 Art. 277 OHADA Uniform Commercial Law 2010: "*Le transfert de propriété entraîne le transfert des risques à l'acheteur.*"
1051 Cf. Schlechtriem/Schwenzer/Schroeter/*Ferrari*, 8th German edn, Art. 4 para. 16.
1052 *Bridge*, International Sale of Goods, para. 10.29.

legal interest the seller has in the goods without regard to the quality of this interest.[1053] Thus, defining the term would comply with Article 7(1) CISG's instruction of a uniform interpretation, thereby providing a coherent underlying understanding of the term, since the CISG makes use of this term only in Articles 30 and 4 of the CISG. Accordingly, the CISG has no effect on the seller's legal interest in the goods including when or how it is transferred. Under the proposed definition, the exclusion extends to limited rights in the goods such as liens.[1054] The term property is, accordingly, limited to the legal position of the seller and does not extend to third party rights in the goods, such as property for example.

510 The obvious counterargument to applying this definition to Article 4, sentence 2(b) of the CISG is that the provision would then not exclude any effect the CISG could have on third party interests. In contrast to the notion of property under, for example, Swiss or German law (absolute property), the proposed definition only refers to the seller's legal interest. At first sight, one might be prompted to conclude that the CISG could consequently have an effect on third party rights in the goods, because such an effect would not be excluded under Article 4, sentence 2(b) of the CISG. However, as Article 4, sentence 1 already clarifies, the CISG only governs the relationship between the seller and the buyer. This wording is coherent with the rest of the Convention, which gives no indication of regulating the legal situation of or relationships with third parties (apart from the Contracting States and their obligations under public international law under Articles 89–101 of the CISG).[1055] Article 41 of the CISG is no exception to that rule, since third party rights or claims are only governed in their consequences regarding a potential breach of contract by the seller vis-à-vis the buyer. Therefore, there is no need to explicitly state that the CISG does not affect the property under national law in the goods as far as third parties are concerned or more abstract the legal position of third parties. Thus, defining "property" as proposed does not render the CISG applicable to questions of (absolute) property under national law and other third parties' interests. The same result is achieved if one agrees with *Schroeter* that Article 4 of the CISG should not be interpreted to provide any clear insight as to the scope of the Convention.[1056] If the question arises who the owner of certain goods is, the CISG provides no answer on its own.

1053 See above for the definition under Art. 30 CISG, para. 172.

1054 Corresponding to the result reached in *Easom Automation Systems, Inc. v. ThyssenKrupp Fabco, Corp.*, US District Court for the Eastern District of Michigan, 28 September 2007, CISG-online 1601.

1055 *Schroeter*, 58 Villanova Law Review (2013), 553, 556 with the accurate remark that the regulation the Contracting States' obligations under public international law renders Art. 4, s. 1 CISG an (innocent) misrepresentation.

1056 *Schroeter*, 58 Villanova Law Review (2013), 553, 556–558.

2. Indirect relevance of the CISG on the transfer by way of incidental questions

511 Nevertheless, this does not mean that the CISG cannot form part of the chain of reasoning in deciding who is the owner of the goods or whether the seller has transferred his or her legal interest (i. e., property under the CISG). The law applicable to property may make the transfer of rights dependent on certain contractual questions that are subject to the CISG. Private international law terminology would describe this as a preliminary or incidental question (*Vorfrage*, *question préalable*).[1057] In a causal system that conditions the transfer of property on a valid contract transferring property (for example, French law in Article 1583 of the French Civil Code), the CISG determines whether a contract has been concluded as far as the CISG is the applicable contractual law.[1058] Since the CISG itself does not influence the property in the goods, the applicability is merely indirect by way of an incidental question. The reason for the applicability of the CISG is, consequently, national private international law. The latter could pose this question also to unharmonized national contract law without a breach of the respective countries' public international law obligations under the CISG. Considering public international law, only this interpretation avoids a discrimination of legal systems with a causal relationship between contract and property law, since an abstract system (for example, German law in sections 929 et seq. of the German Civil Code) also does not apply the CISG to answer such questions. This interplay of the CISG and national property law requires countries to separate questions of property and contract more clearly than under national law and presupposes a separation principle (*Trennungsprinzip*). Yet, it does not concurrently require the countries to introduce an independent or abstract treatment of both questions. At the same time, it does not preclude turning to the CISG for incidental questions. This leaves room for both causal and abstract systems. Conversely, the CISG does not interfere with the decision of a legal system between transfer *solo consensu* or by *traditio*: the CISG does not broaden the requirements for a transfer of property under national law, for example a handing-over, just because Article 30 generally requires delivery of the goods.[1059]

1057 See generally on this concept in regard to sales contracts and transfer of property, MüKoBGB/*Wendehorst*, Art. 43 EGBGB para. 86; *Collins/Harris*, paras. 2-044–2-063; *Gotlieb*, 25 International & Comparative Law Quarterly (1977), 734.

1058 Whether the concluded contract is valid can, in turn, be dependent on national law due to Art. 4, s. 2(a) CISG or due to the applicable property law.

1059 Unfortunate and ambiguous mixture of delivery under Art. 30 CISG and handing-over under national property law by Schlechtriem/*U. Huber*, 3rd German edn, Art. 30 para. 7.

The only decision that is sometimes cited to contradict the idea that the CISG does not interfere with the transfer of property, *Victoria Alloys, Inc. v. Fortis Bank SA/NV* decided by the US Bankruptcy Court for the Northern District of Ohio, can be explained against this background.[1060] *Victoria Alloys* had bought pig iron from its parent company before becoming bankrupt. In bankruptcy proceedings, the question arose whether the pig iron formed part of the bankruptcy estate under section 541(a) of the Bankruptcy Code. This would have been the case if *Victoria Alloys* had been the owner of these goods. According to the court citing Articles 53–57 of the CISG, payment was a decisive factor in finding whether property had been transferred. Yet, the court cited provisions on payment not because the CISG dictates that property can only pass with payment of the goods, but rather because the parties had agreed on a cash-against-documents transaction. The linkage between payment and property, thus, did not stem from the CISG, but stemmed in this case from a parties' agreement that the applicable property law accepted. Whether payment has been effected might be considered an incidental question to be answered by the CISG, which, however, only confirms the aforesaid. **512**

II. Retention of property clauses

Article 4, sentence 2(b) of the CISG does not explicitly refer to retention of property clauses. The CISG's applicability and its scope in case of such clauses has to be described in even more detail. Retention of property clauses (also referred to as retention of title or Romalpa clauses) are common in sales transactions to safeguard the seller in case of the buyer's non-payment or bankruptcy.[1061] Under a simple version of such a clause, the transfer of property is postponed and made dependent on the payment of the full purchase price. There are also more extended versions that, for example, broaden the condition of the transfer of property to the buyer's additional performance of payment obligations under other contracts.[1062] The main objective is better protection in case of bankruptcy, since the seller would in any case **513**

1060 *Victoria Alloys, Inc. v. Fortis Bank SA/NV*, US Bankruptcy Court for the Northern District of Ohio, 10 April 2001, CISG-online 589. Cited by Schlechtriem/Schwenzer/Schroeter/*Ferrari*, 8th German edn, Art. 4 para. 30 fn. 179 and Kröll/Mistelis/Perales Viscasillas/*Djordjević*, Art. 4 para. 28 fn. 77 as an example that diverges from the general understanding.

1061 *McCormack*, p. 729; *Schillig*, pp. 376, 377; *Torsello*, International Business Law Journal (2000), 939, 945.

1062 Cf. the list of different retention of property clauses by *McCormack*, p. 728; *Schillig*, pp. 376, 386 et seq.

have contractual claims under the CISG if the buyer does not pay, but these claims may not be strong enough in bankruptcy to safeguard the seller.[1063]

1. Effects on property in the goods excluded under Article 4, sentence 2(b) of the CISG

514 As far as is apparent, courts and scholars agree that whether the transfer of property under national law is postponed or not and whether this protects the seller in the bankruptcy of the buyer, concerns the effect the contract might have on the property under national law and is, consequently, excluded from the Convention under Article 4, sentence 2(b).[1064] Applying the proposed definition of property[1065] would result in the same non-applicability of the CISG to these questions. It is notable that the first draft of 1935 had contained rules on retention of property clauses and their effect in bankruptcy in Annex 1.[1066] The proposal to incorporate this question into the uniform sales law was, however, met with strong national resistance,[1067] and was dropped in the development of uniform sales law soon after. It, thus, left national law to determine whether a retention of property clause has any effect on the allocation of the goods. Similarly, it is for national law to decide whether property under national law is considered not to pass or whether property under national law passes but a new security right in the goods is created instead, as for example, under section 2-401(1), sentence 2 of the UCC. Moreover, additional requirements by national laws for the effect of retention of property clauses are subject to national law: For example, under Swiss law a retention of property clause has to be registered to be effective pursuant to Article 715(1) of the Swiss Civil Code: "*Der Vorbehalt des Eigentums an einer dem Erwerber übertragenen beweglichen Sache ist nur dann wirksam,*

1063 See below for more details on property in insolvency, paras. 561 et seq.

1064 *Roder Zelt- und Hallenkonstruktionen GmbH v Rosedown Park Pty Ltd*, 28 April 1995, CISG-online 218; *Usinor Industeel v. Leeco Steel Products, Inc.*, US District Court for the Northern District of Illinois, 28 March 2002, CISG-online 696; Foreign Trade Court of Arbitration of the Chamber of Commerce and Industry of Serbia, 15 July 2008, CISG-online 1795; Court of Appeal Arnhem-Leeuwarden, 2 June 2020, CISG-online 5289, para. 24; *Schlüter*, IHR 2001, 141, 148; *Schlechtriem*, 36 Victoria University of Wellington Law Review (2005), 781, 789; *Dutton*, 7 European Journal of Law Reform (2005), 239, 265; *Schroeter*, FS Magnus, pp. 301, 317; *Honnold/Flechtner*, para. 95; *Piltz*, IWRZ 2022, 243, 244.

1065 See above para. 172.

1066 Text of the draft *Rabel*, 9 RabelsZ (1935), 1, 41–42 and his remarks *Rabel*, 9 RabelsZ (1935), 1, 46.

1067 See for example, France 11 January 1937, part of S. D.N.-U. D.P. 1936 – Etude IV – Vente – Doc. 82.

wenn er an dessen jeweiligem Wohnort in einem vom Betreibungsbeamten zu führenden öffentlichen Register eingetragen ist."[1068]

2. Effects on contractual rights and obligations not excluded under Article 4, sentence 2(b) of the CISG

515 Postponing the transfer of property should not be confused with the obligation to transfer the property under Article 30 of the CISG: As far as the retention of property clause sets out to modify or exclude rights and obligations under the contract and the CISG, the Convention remains directly applicable.[1069]

516 To avoid breaching the contract by not transferring property under Article 30 of the CISG, an extended retention of property clause will generally have to be interpreted to modify the relevant point in time for the obligation to transfer property under Article 30: While the seller is generally only in breach of the obligation to transfer the property when the buyer has paid in full,[1070] which is why no modification under Article 30 is necessary, making the transfer of property dependent on additional or alternative obligations (for example, under All Monies clauses) will necessitate modifying the obligations under the CISG. This modification, specifically the required consent, is subject to the CISG and not national law.[1071] Similarly, a retention of property clause can be meant to modify or facilitate the contract avoidance by the seller in case of non-payment. For example, the parties could provide that the seller is allowed to avoid the contract immediately if the buyer does not pay on time.[1072] Whether the respective clause can be interpreted in this way will have to be evaluated under the CISG's rules.[1073] Again, there seems to be no disagreement in jurisprudence and academic literature in this regard.

1068 "*Reservation of ownership in respect of a chattel transferred to the acquirer is only effective provided it is entered in the official register kept by the debt enforcement office at his or her current domicile.*" This is the non-binding English translation of the Swiss Civil Code provided by the State administration in Switzerland, which is available on the Swiss government's website. See recently on retention of property under Swiss law, *Loher*, Der Kauf unter Eigentumsvorbehalt im schweizerischen Recht, *passim*.

1069 *Piltz*, European Journal of Commercial Contract Law 2009, 134, 136; *Honnold/Flechtner*, para. 95 fn. 39; *Cl. Witz*, para. 114.91.

1070 See above para 194.

1071 MüKoBGB/*P. Huber*, Art. 4 para. 20; *Schroeter*, Internationales UN-Kaufrecht, para. 221. This holds true except for issues of validity under Art. 4, s. 2(a) CISG.

1072 *Schroeter*, Internationales UN-Kaufrecht, para. 223.

1073 *Schroeter*, Internationales UN-Kaufrecht, para. 223; *Piltz*, MAH Internationales Wirtschaftsrecht, § 7 para. 164.

3. Consent regarding the retention of property clause under Articles 14–24 of the CISG or under national law?

517 A more difficult question is whether or not the parties' consent regarding a retention of property clause is subject to the CISG (Articles 14–24, 8). At first sight, there are different approaches to answering this question.

518 On the one hand, the Court of Appeal Koblenz found that the CISG does not regulate whether and how parties can agree on a retention of property clause in an international transaction.[1074] *Ferrari* and *Schroeter* approve of this decision and align themselves with this view that could be interpreted to result in the non-applicability of the CISG also to the question of consent regarding the retention of property clause.[1075] On the other hand, the Court of Appeal Arnhem-Leeuwarden applied the CISG to determine whether the parties had agreed on a retention of property clause: "*the CISG does apply to the question of whether a retention of title clause has been agreed.*"[1076] The court thereby followed the approach of Dutch courts in applying the CISG regarding consent to a retention of property clause.[1077] In the same vein, *Von Doussa J* found the CISG applicable to determine the parties' consent to a retention of property clause in *Roder Zelt- und Hallenkonstruktionen GmbH v Rosedown Park Pty Ltd*.[1078] *Piltz* and *Vennmanns* appear to agree with this approach, and argue that the CISG applies to the creation of a retention of property clause, while merely the "effect" of such clauses on the property under national law was left to national law, not their existence in terms of the necessary consent.[1079]

519 In my view, the opinions expressed obscure an important part of the necessary reasoning:[1080] If the question arises who the owner of the goods is, the starting point is the law applicable to the property in the goods, generally the

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1074 Court of Appeal Koblenz, 16 January 1992, CISG-online 47, para. 10. Sometimes, District Court Magdeburg, 16 May 2001, 5 O 3116/00 is cited to support this reading of the CISG, but in this case the retention of property clause was agreed upon in a purely national contract between two German parties and the decision, thus, provides little guidance on the issues discussed here.

1075 Schlechtriem/Schwenzer/Schroeter/*Ferrari*, 8th German edn, Art. 4 para. 30; *Schroeter*, FS Magnus, pp. 301, 317.

1076 Court of Appeal Arnhem-Leeuwarden, 2 June 2020, CISG-online 5289 para. 24 (translation by *Vennmanns*).

1077 Court of Appeal 's-Hertogenbosch, 29 May 2007, CISG-online 1550.

1078 *Roder Zelt- und Hallenkonstruktionen GmbH v Rosedown Park Pty Ltd*, 28 April 1995, CISG-online 218, para. 25.

1079 *Piltz*, MAH Internationales Wirtschaftsrecht, § 7 para. 164; *Piltz*, Internationales Kaufrecht, para. 4-84; *Vennmanns*, IHR 2020, 205, 206–207. In *Piltz*, IWRZ 2022, 243, 247, the author pragmatically argues that when the requirements of the CISG are satisfied, national law rarely imposes more stringent conditions.

1080 Evidence of the created obscureness can be found in *Gabriel*, 9 VJ (2005), 219, 220

lex rei sitae and not the CISG.[1081] Considering an abstract transfer system, i. e., one in which the transfer of property is treated separately from the sales contract, there is no need to apply the CISG to any part of the transfer (or retention) of property.[1082] For example, under sections 929 et seq. of the German Civil Code, consent between the parties regarding the transfer of property is evaluated under German (unharmonized) law.[1083] Considering a causal transfer system in which the transfer of property is directly linked to a valid sales contract, the CISG might once again come into play by way of an incidental question: When determining the owner of the goods, Dutch law looks at contract law to decide whether the requirement of a valid sales contract under Article 3:84 of the Dutch Civil Code is fulfilled. It is, thus, an incidental question for the applicable Dutch property law whether a valid contract exists. If a sales contract exists and it would generally transfer property, there is a need for an agreement between the parties under the contract to postpone the transfer with a retention of property clause. If the applicable contract law was the CISG, Articles 14–24, 8 can be applied to assess the consent as regards the retention of property clause. Yet, the relevance of the thus determined consent under the CISG is due to national property law. Similarly, Australian sales law codifications make the transfer of property dependent on the contractual consent, hence, posing an incidental question to the applicable contract law.[1084] The seemingly contradicting case law can, thus, be explained coherently: The CISG is not directly applicable to determine whether sufficient consent exists with regard to the seller's retention of property. Article 4, sentence 2(b) excludes this question from the scope of the CISG. Instead, the CISG can become relevant if the applicable property law poses an incidental question to the applicable contract law, which can

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fn. 7 who questions the delineations and considers it "*likely to continue to cause confusion*".

1081 See above on the relevant private international law rules, paras. 66 et seq.

1082 Cf. for retention of property and CISG under German property law, *Schroeter*, FS Magnus, pp. 301, 317.

1083 Besides the parties' consent that the seller should remain the owner of the goods until payment is effected or a different condition is fulfilled, the seller in an abstract transfer system can also retain property by simply not giving his or her consent to transfer the property. It could be that the seller thereby breaches the contract, which would have to be assessed under the CISG.

1084 For example, sect. 22 of the Goods Act 1958 (Vic): "*22. Property passes when intended to pass*
(1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.
(2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract the conduct of the parties and the circumstances of the case."

be the CISG. Article 4, sentence 2(b) does not prevent the application of the CISG's rules on consent to a question that is outside its scope of application.

520 Irrespective of this coherence in case law, the arguments in favor of applying the CISG have to be considered. *Vennmanns* advances two arguments. In his view, first, Article 7(1) of the CISG requires an interpretation that furthers a uniform interpretation and applying the uniform law to as many aspects as possible concerning international sales transactions.[1085] Yet, Article 7(1) and its mandate to promote a uniform interpretation is restricted to the scope of the Convention and would be misunderstood if it were considered to require an extension of the CISG to as many aspects of an international sales transaction as possible. Moreover, it is unclear why the rules of consent under the CISG should apply to the prerequisites of a retention of property clause, while other requirements, such as form and necessary registrations of security rights, are not claimed to be governed by the Convention. Second, *Vennmanns* argues that the wording only excludes the "effect" the contract might have on the property under national law and not the consent regarding the retention of property clause, which is why a narrow interpretation of the wording allows applying the CISG to the consent requirement of a retention of property.[1086] If one were to follow the argument that only the "effects" of such clauses were excluded from the Convention, one would either have to assume that the other requirements are also subject to the CISG or one would have to explain the differentiation. Given the background of the failed attempt of the first draft of a uniform sales law in 1935 to include an annex on retention of property clauses,[1087] it seems improbable that the drafters considered the Convention to preempt national law regarding the prerequisites for retention of property clauses. A differentiation between consent and other requirements also seems improbable, since the drafters did not regard the uniform sales law as relevant to parts of the retention of property clause. *Bagge* who was involved since the very beginning of the unification process at Unidroit repeated this common understanding when stating that the retention of property was a subject "*trop brûlant*" and the Commission, therefore, wished not to treat it at all.[1088] Both arguments in favor of applying the CISG are, therefore, not convincing.

521 Article 4, sentence 2(b) of the CISG, hence, also excludes the consent and other requirements for a valid transfer of property clause from the CISG without prejudice to whether the CISG can be applied indirectly if the appli-

1085 *Vennmanns*, IHR 2020, 205, 206 ("*Im Lichte dieser Kriterien* [wird der Gedanke gefördert]*, dass das CISG auf möglichst viele Aspekte des Warenkaufs angewendet wird*").

1086 *Vennmanns*, IHR 2020, 205, 206.

1087 See above para. 514.

1088 Special Commission, Doc. 227, pp. 13, 14.

cable national law asks the applicable contract law whether sufficient consent exists. If one takes into account the respectively applicable property laws, the case law to date fits squarely with this analysis.

4. Summary

Retention of property clauses are only encompassed by the CISG to the extent that they modify or exclude the CISG's provisions. As far as their effect on the property under national law is concerned, Article 4, sentence 2(b) of the CISG requires national law to be applied, including the rules on whether sufficient consent exists and other requirements for an effective retention of property are fulfilled. The CISG may nevertheless be applicable to assess the consent if the applicable property law raises a respective incidental question to the law applicable to the contract. **522**

III. The CISG's position on parties' agreements to regulate the transfer of property

Party autonomy is one of the cornerstones and general principles of the CISG and has a sure footing in Article 6:[1089] "*The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.*" Despite the broad wording, the freedom provided should not be overestimated with regard to the transfer of property under national law. **523**

1. (No) mandatory character of Article 4, sentence 2(b) of the CISG

First of all, it might appear questionable whether parties can even deviate from Article 4 of the CISG or whether this provision should be considered mandatory. *Bonell* opines that Article 4 is indeed not optional and cannot be derogated from or excluded by parties' agreements.[1090] If this were accurate, the parties' freedom to regulate the transfer of property under national law under the CISG would already be ruled out. Yet, Article 6 explicitly excludes Article 12 from the parties' freedom to modify the CISG. It can be inferred from this explicit exclusion that no deviation from other provisions of the CISG is off limits. *Magnus* and *Ferrari* argue that considering the provision to be mandatory is not necessary since a parties' exclusion of Article 4 of the **524**

1089 *Audit*, p. 37 ("*la source première*").
1090 Bianca/Bonell/*Bonell*, Art. 6. para. 3.4.

CISG would not have any practical effect.[1091] This is because the CISG does not provide for respective rules on validity and, thus, questions of validity would nevertheless have to be answered by applying unharmonized national law.[1092] This argument can be extended to the transfer of property: While some rules of the CISG are linked to the property in the goods, they are in no way meant to provide for the point in time or requirements of the transfer of property. Thus, even if Article 4, sentence 2(b) of the CISG were excluded by party agreement, the CISG would not regulate the effect the contract has on the transfer of property under national law. Specifically rules on the delivery of the goods under Articles 31–33 should not be misunderstood to indicate that the CISG contains a preference for a transfer of property concept requiring the handing over of the goods.[1093]

2. Regulating the transfer of property under Article 6 of the CISG

525 That the parties may deviate from Article 4, sentence 2(b) of the CISG does not necessarily mean that the parties can effectively provide their own rules on the transfer of property or simply agree on the point in time when the property should pass under the CISG. *Aboukdir* has undertaken an extensive analysis of the latter question and concludes that the parties can agree on the relevant point in time and the requirements of the transfer of property due to the party autonomy provided under Article 6 of the CISG.[1094] He elaborates that the CISG does not provide "*default rules regarding the issue of transfer of property*", but nothing prevents the parties from agreeing on rules of their wishing.[1095] Even though Article 4, sentence 2(b) of the CISG excludes the transfer of property from the Convention, *Aboukdir*, nevertheless, considers the matter covered implicitly by the principle of party autonomy.[1096] It is not entirely clear whether his argument is meant to encompass also unascertained goods, and consequently allow the parties to transfer property in such goods.[1097]

1091 Staudinger/*Magnus*, Art. 6 para. 54; Schlechtriem/Schwenzer/Schroeter/*Ferrari*, 8th German edn, Art. 6 para. 11.

1092 Staudinger/*Magnus*, Art. 6 para. 54; Schlechtriem/Schwenzer/Schroeter/*Ferrari*, 8th German edn, Art. 6 para. 11.

1093 Correct in this regard, *Aboukdir*, p. 91.

1094 *Aboukdir*, pp. 99–100. Unclear in this regard, *Gabriel*, 38 Journal of Law & Commerce (2019–2020), 333, 347–348 who considers it possible that parties may agree on the rules for the transfer of property but does not highlight whether this is possible due to Art. 6 CISG.

1095 *Aboukdir*, p. 99.

1096 *Aboukdir*, p. 99.

1097 Cf. his comparison between English law and the CISG, *Aboukdir*, p. 100.

This interpretation relies on a misunderstanding of Article 6 of the CISG. The provision allows the parties to exclude the CISG or modify its rules within its scope of application. By contrast, the CISG itself does not allow the parties to extend the scope of application. If the parties choose the CISG as the applicable law and the requirements under Article 1(1) of the CISG are not fulfilled, the effect of such a choice-of-law is subject to the applicable private international law. Nothing prevents the parties from declaring that the CISG applies to questions of transfer of property or agreeing on how the transfer of property should be considered to operate. However, if the applicable private international law declares the *lex rei sitae* to be applicable to questions of property, the rules by the parties on the transfer of property can only be considered to have an effect as far as the *lex rei sitae* accepts the regulation provided for by the parties (so-called incorporation by reference in contrast to a choice of law).[1098] In the same vein and for the same reasons, the sometimes proposed choice of subsidiary law for matters not governed by the CISG[1099] cannot be considered to be effective under Article 6 of the CISG. If such a choice of law is effective, this can only be due to the applicable private international law. **526**

3. Relevance of parties' agreement outside of the CISG

Although the CISG does not give effect to a parties' agreement regarding the law applicable to property or their own respective rules, such agreements may nevertheless have an impact on the transfer of property. The CISG is merely indifferent to such agreements. It affects them neither positively nor negatively. It is up to the applicable rules of private international law to assess the effect of a choice of law regarding matters of property and up to the applicable property law to evaluate whether effect is given to the parties' agreement on when and how property is supposed to pass. **527**

1098 Cf. *Karrer*, p. 71. This is comparable to Recital (13) of the Rome-I-Regulation: "*This Regulation does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention.*".

1099 *Gul*, Hacettepe Hukuk Fakultesi Dergisi 2016, 77, 96; *Honnold*, 3rd edn, para. 70; *Gabriel*, 38 Journal of Law & Commerce (2019–2020), 333, 347–348.

IV. No contradiction between Article 4, sentence 2(b) CISG and Articles 30, 41 of the CISG

528 In contrast to doubts raised at the conference in 1964 when negotiating the provisions that later became Articles 4, sentence 2(b), 30 and 41 of the CISG,[1100] the exclusion of the effect of the contract on the property in the goods from the scope of the CISG does not contradict Article 30. It fits squarely: The CISG governs the rights and obligations of the seller and the buyer toward each other, including the seller's obligation to transfer the property. This obligation stipulates that the transfer has to take place and when the transfer has to take place if the seller wants to avoid breaching the contract. This obligation can be expressed without regulating whether, when, and how this transfer is actually effected and whether third parties retain rights in the goods, which is excluded by Article 4, sentence 2(b) of the CISG.[1101]

V. Suitability of the exclusion under Article 4, sentence 2(b) of the CISG

529 Considering the heavy chains that link national sales (contract) laws to their respective property laws, it may appear regrettable that the CISG has only unified one part of the equation and has left property to national law.

530 Yet, if one agrees with the interpretation of the CISG proposed in the third and fourth chapter above,[1102] neither the obligation to transfer the property under Article 30 nor the characterization of a sales contract under the CISG remain interwoven with property law. Furthermore, the transfer of risk representing a field of sales law that is considered dependent on the transfer of property under many national laws, has been completely detached under the CISG.[1103] Moreover, the obligation to preserve the goods that is connected to the property in the goods under some national laws is also exhaustively

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1100 For example, *Katona* (Hungary), Diplomatic Conference on the Unification of Law Governing the International Sale of Goods, The Hague, 2–25 April 1964, Vol. I – Records, p. 96 regarding Arts. 8, 18, and 52 ULIS (Arts. 12 and 62 of the draft that was discussed at The Hague).

1101 Contra, *Schmid*, p. 50 who considers there to be a conflict which is ultimately resolved in favor of Arts. 30, 41 CISG due to the "*except otherwise expressly provided in this Convention*" in Art. 4, s. 2 CISG.

1102 See above paras. 74 et seq. (third chapter) and paras. 281 et seq. (fourth chapter).

1103 Schlechtriem/Schwenzer/Schroeter/*Hachem*, Introduction to Arts. 66–70 para. 18; *Torsello*, International Business Law Journal (2000), 939, 944. See on *Res perit domino* and references to national laws containing the principle, Schlechtriem/Schwenzer/Schroeter/*Hachem*, Introduction to Arts. 66–70 para. 8.

regulated by the CISG without a need to recur on property in the goods.[1104] As the fifth chapter has attempted to show,[1105] the claim for the purchase price under Article 62 of the CISG is generally also independent of the transfer of property. The described exception under Article 28 of the CISG does not reintroduce a direct relevance of the transfer of property under the CISG. The exception is rather indirectly due to the English law decision to connect the action for the price under section 49(1) of the Sale of Goods Act 1979 to the transfer of property, which can only be explained against the historical development of English law.[1106] Even if one had been able to agree on rules on the transfer of property under the CISG, this would not have reconciled fundamentally opposing views on the seller's remedies to claim the purchase price while forcing the goods onto the buyer.

531 Hence, the exact point in time and the requirements for the transfer of property have no relevance under the CISG. This progressive drafting renders the exclusion of the effect the contract has on the seller's and third party rights a suitable rule.[1107] As a matter of fact, it would have even been regrettable if rules on the transfer of property had been incorporated into the CISG during its drafting: The considerations and effects of these rules would lie outside of the CISG, and therefore, should only be drafted within a uniform law project that touches on matters where the variations of the transfer of property under national law cause practical problems and divergences.

VI. Conclusion

532 Article 4, sentence 2(b) excludes the CISG's potential effect on the property in the goods from the Convention. Property is an autonomous term and refers to the seller's legal interest in the goods without regard to the quality of this interest. Nevertheless, third party rights in the goods are also outside the scope of application of the CISG. The contract law applicable to the relationship between the seller and buyer does not need to explicitly reference this exclusion. Article 4, sentence 2(b) CISG's exclusion generally extends also to retention of property clauses with the exception of modifications of provisions of the CISG that can occur in cases of retention of property clauses. In all cases, the CISG may become relevant by way of incidental questions posed by national property law. Article 6 of the CISG does not allow

1104 Schlechtriem/Schwenzer/Schroeter/*Bacher*, Introduction to Arts. 85–88 para. 2.
1105 See above paras. 342 et seq.
1106 See above paras. 348 et seq. on the historical development.
1107 Similarly, *Torsello*, International Business Law Journal (2000), 939, 947. Less positive assessment, *Sauer*, 118 ZVglRWiss (2019), 81, 115; *Bucher*, ZEuP 1998, 615, 617; *Ferrari*, ZEuP 1993, 52, 78.

for party autonomy with regard to choices of laws or rules on the transfer of property.

§ 7: Remedies based on (national) property law

Property without remedies to enforce one's legal position is of little value. The CISG unifies parts of sales contract law but does not provide for remedies based on property. Yet, national laws protect the owner of goods based on property. Against this background, the relationship between such remedies under national laws and the CISG must be assessed. In contrast to considering all claims based on national laws to be preempted or allowing for complete concurrent availability of remedies, a more nuanced approach should be taken. **533**

I. Different approaches regarding claims based on property under national law

National laws equip owners of goods to a diverging degree with specific claims based on property. Many continental European legal systems follow the approach of Roman law and provide the owner with a claim to vindicate the goods from the unlawful possessor.[1108] This kind of claim is aimed at (re) gaining possession of the goods. Swiss law may serve as an example. Article 641(2) of the Swiss Civil Code reads: **534**

> "[Der Eigentümer] *hat das Recht, sie von jedem, der sie ihm vorenthält, herauszuverlangen und jede ungerechtfertigte Einwirkung abzuwehren.*"[1109]

In contrast, English law and the law of common law jurisdictions following a similar approach, favor protecting the owner with remedies in tort law rather than allowing for specific property claims.[1110] These remedies, however, are generally not aimed at reallocating possession, but rather seek to compensate the owner financially through damages.[1111] *Pollock* wrote in his famous essay on possession in the common law that "*the Common law nev-* **535**

1108 See the overview of this type of claim under German, Greek, Austrian, Swiss, Dutch, Italian, Spanish, Portuguese, French, and Belgian law, *von Bar/Clive*, pp. 5175–5187 paras. 1–11.

1109 "*He or she* [the owner] *has the right to reclaim it [the object] from anyone withholding it from him or her and to protect it against any unwarranted interference.*" This is the non-binding English translation of the Swiss Civil Code provided by the State administration in Switzerland, which is available on the Swiss government's website.

1110 *Birks*, 11 King's College Law Journal (2000), 1, 6–12. For English, Welsh, and Irish law, *von Bar/Clive*, p. 5188 para. 13.

1111 *Tettenborn,* Conversion, Tort and Restitution, p. 825; *von Bar/Clive*, p. 5188 para. 13.

er had […] *any adequate process at all in the case of goods, for the vindication of property pure and simple.*"[1112]

536 In Nordic laws, there are no specific remedies in statutory property law to protect property, mirroring the general (adverse) stance toward a uniform concept of property.[1113] It goes without saying that an owner of goods is not without protection in these legal systems. Under Norwegian law, for example, the idea that the owner of a good can claim possession is so self-evident that it is not even spelt out in the written law.[1114]

II. Claims by or against third parties

537 The CISG does not preempt or modify claims based in national law in the following two scenarios. First, if a third party claims to be the owner and aims to revindicate or claim damages for the goods from either the buyer or the seller. Second, if one of the latter aims to revindicate the goods or claim damages from a third party. Vis-à-vis a third party, the questions of who should be in possession of the goods or who must be compensated are not matters that can be decided or influenced by a sales contract to which the third party is not a party. Furthermore, whether the claim is based on a right *in rem* and, consequently, may be considered superior compared to a claim by a different, unsecured creditor under the CISG, exceeds the CISG's scope.[1115] The ranking of creditors is outside the sales transaction.

538 This includes the seller's claims based on property against the carrier who transports the goods to the buyer: Article 71(2) of the CISG allows the seller to stop the goods in transit if it becomes evident that the buyer will not perform a substantial part of the obligations because of a serious deficiency in the ability to perform, or in the creditworthiness or conduct in preparing to perform or in performing the contract. Sentence 2 of this paragraph limits its effect to the rights to the goods as between the seller and the buyer. This limitation is due to the mentioned limitation of the CISG's scope to the sales contract and the parties to it: A seller's right to stoppage that the carrier has to follow cannot result from a contract the carrier is not a party to. Such a right was deemed necessary in legal systems like French and English law where property passes with contract conclusion and where there are no obvious methods for the seller to safeguard the claim for the price by means

1112 *Pollock/Wright*, p. 5.
1113 *von Bar/Clive*, pp. 5188–5189 paras. 14–16. For the general approach to property matters in these laws, see above paras. 51 et seq.
1114 *von Bar/Clive*, p. 5188 para. 14.
1115 *Honnold/Flechtner*, para. 96.

of a retention of property clause.[1116] Similarly, the idea behind the right to stoppage in transit underlying Article 71(2) of the CISG is that even though property may have passed to the buyer, the seller should still be entitled to hold back the goods or suspend delivery under the circumstances referred to.[1117] Thus, if the property has already passed, this right might improve the seller's legal position toward the buyer. And if sellers have not yet transferred the property, their legal position is not adversely affected. The seller can, hence, rely on property in the goods toward the carrier and demand the stop of the delivery based on the applicable national property law. If the carrier follows the request and the prerequisites of Article 71(2) of the CISG were not fulfilled, the seller might be in breach of the sales contract. Yet, the seller's breach of contract has, in principle, no direct relevance for the carrier. To find that the seller is allowed to stop the transit even though property has passed or even though the buyer has a bill of lading based on a loyalty duty and Article 71(2) of the CISG, as might have been found by the Norwegian Supreme Court, appears to potentially go beyond the constrains of the CISG's scope of application.[1118] This broad interpretation of the right to stoppage in transit has some tradition, for example, under English law, but also faces concerns due to the negative or limiting effect the contract would have on a third person, the carrier.[1119]

539 In the same vein, property in the goods may be relevant if a third party damages or destroys the goods. Many national tort laws will allocate the claim for compensation to the party that had property at the point in time when the goods were damaged. For example, section 823 of the German Civil Code protects absolute rights, such as property, and generally equips the owner with a damages claim against the third party.[1120] The CISG does not influence which of the contractual parties has a claim vis-à-vis the third party. Yet, the CISG may lead to a different allocation of the entitlement to the compensation. For example, if goods under a retention of property clause are damaged and the buyer subsequently pays the full purchase price, the CISG requires the seller to either assign the claim against the third party

1116 *Stadler*, Verkehrsschutz durch Abstraktion, p. 415; *Landfermann*, 34 RabelsZ (1970), 523, 530.

1117 *von Ziegler*, 25 Journal of Law and Commerce (2005–2006), 353, 364.

1118 Norwegian Supreme Court, 6 February 2019, CISG-online 4318, but see the Dissenting Opinion by Justice Sæbø in paras. 106 et seq.

1119 *Landfermann*, Sicherungen des vorleistenden Verkäufers, pp. 44, 120.

1120 On property under sect. 823 German Civil Code generally, MüKoBGB/*Wagner*, § 823 BGB paras. 242 et seq. This restriction is, however, watered down, since for example, a buyer under a retention of property clause already receives an expectancy (*Anwartschaftsrecht*, cf. *Kieninger*, p. 249) which could also allow the buyer to sue to a third party for damaging the goods, cf. MüKoBGB/*Wagner*, § 823 BGB paras. 312–315.

to the buyer or compensate the buyer accordingly. For the purposes of this work, this is not relevant, since the CISG does not base this allocation of the goods to property and does not preempt national law that provides one (or both) of the contractual parties with a claim against a third party.

540 Concluding, third party claims against one of the contractual parties or vice versa are not preempted by the CISG.

III. Claims between the seller and the buyer

541 Less clear-cut regarding the preemptive effect of the CISG on claims based on national property law are claims between the parties to the sales contract. Article 4, sentence 2(b) of the CISG does not provide any insight, since the provision merely excludes the effect the contract has on the property in the goods from the CISG's scope of application. Hence, it does not refer to the remedies based on property. Therefore, it is necessary to delineate the scope of the CISG. National law can only be preempted as far as the CISG governs all matters that shape the claim under national law.[1121] Once again, it is not helpful to consider merely the label ("claim based on property"). It is decisive whether the national law applies to a factual situation that the CISG also applies to and that it pertains to a matter that is also regulated by the CISG.[1122]

542 The following three scenarios in which parties could raise arguments based on property all represent factual situations to which the CISG also applies: first, if a buyer sues for the goods after the contract's conclusion; second, if the seller claims possession or damages for the goods after avoidance of contract; and third, if the seller aims to regain possession based on property due to a retention of property clause. In all three scenarios, the question to be answered is whether the CISG governs these matters and whether it does so exhaustively.

1. Buyer's claim based on property after contract conclusion

543 Does the CISG govern the buyer's claim for the goods after contract conclusion, and if so, does it do so exhaustively? A case in which this may become relevant is if the buyer becomes the owner of the goods by mere contract conclusion and without being in possession of the goods. Could the buyer require the goods from the seller based on a claim found in national property law?

1121 *Schroeter*, Internationales UN-Kaufrecht, para. 148.
1122 *Schroeter*, 58 Villanova Law Review (2013), 553, 563 et seq.

544 While Articles 30 and 46(1) of the CISG make it unmistakably clear that the buyer's claim for the goods is a matter regulated by the CISG, it is open for discussion whether the respective claim under the CISG governs the matter exhaustively. From the very beginning, *Rabel* considered the buyer's claims based on national property law to be available concurrently with contractual claims for performance.[1123] This assessment has subsequently not been refuted. Even regarding tort claims, *Rabel* stated that national law may allow for concurrent application if the prerequisites of both types of claims are fulfilled.[1124]

545 Yet, a more differentiated approach is appropriate: Whether the CISG governs this matter exhaustively cannot be answered by a simple yes or no, but the aspects of the respective claim must rather be broken down further. For example, Article 58(1), sentence 2 allows the seller to make payment a condition for handing over the goods. The uniformity in the application of the Convention would be severely undermined if the buyer could claim the goods based on national law without paying the price first or at least concurrently. On the other hand, if the claim based on the CISG was merely barred due to the applicable statute of limitations, while a claim based on property was still enforceable, there is no reason to consider the CISG to preempt the claim based on property under national law. The CISG does not govern limitation periods and should, thus, not be considered to preempt claims merely because a different limitation period applies. This reasoning is supported by the fact that nothing within the CISG could hinder national law from generally applying a different limitation period to contractual claims too. Moreover, a claim based on national property law will in some cases be considered stronger than a claim for performance under the CISG vis-à-vis a third party seeking an enforcement order against the seller for the goods. Also under such circumstances, there is no reason why the CISG should preempt this claim based on national law that is otherwise identical in content. This would deprive the buyer of the goods even though the contract and the CISG envisage that the buyer receives the goods.

546 Thus, the test should be whether a claim for the goods exists under the CISG. If no such claim exists, the more extensive claim based on national property is preempted. If a claim also exists under the CISG but the claim based on national law offers a more advantageous position to the buyer for reasons outside the CISG's scope of application, for example, regarding the statute of limitations or the effectiveness with regard to third parties, the CISG does not displace national law in this regard.

1123 *Rabel*, Recht des Warenkaufs I, p. 516.
1124 *Rabel*, Recht des Warenkaufs I, p. 516.

2. Seller's claims based on property after avoidance of contract

547 A different situation in which a contractual party might rely on property is after the avoidance of the contract: The seller may want to reclaim the goods based on national property law.

548 This would in some cases be immediately ruled out if the CISG were to prevent the seller from once again becoming the owner of the goods upon avoidance. This approach favored by *Schlechtriem* and other scholars will be discussed and opposed below,[1125] because it does not exhaustively rule out cases in which the seller can base claims on property. For example, under a retention of property clause, the seller can remain the owner of the goods even if one were to follow *Schlechtriem*'s approach. For the purposes of the discussion at hand and in line with the result reached below, it will be assumed that the seller can be the owner of the goods after avoidance of the contract.

549 *Fountoulakis* argues that the seller should not be allowed to rely on claims based on property after avoidance of contract. She relies on Article 7(1) of the CISG to argue that the CISG provides a uniform set of rules for the consequences of contract avoidance, and that remedies stemming from diverging national laws should not be available in addition. She singles out the unequal treatment between the buyer and seller that could otherwise occur: Usually only the seller will have claims based on property with regard to the goods, since today's payments methods will render cases in which the buyer retains (or ever had) property in the paid money merely theoretical. If claims based on property were not preempted by the CISG, this would hence favor the seller who is more likely to have such a claim. It would, however, neither be the concept of the CISG to differentiate between claims for the goods and claims for money, nor to treat the buyer's and seller's rights after avoidance differently.[1126] *Fountoulakis*, thus, considers the availability of (any) claims of the parties after avoidance of the contract a matter exclusively governed by the CISG.

550 Staying true to this train of thought, one may reason that a claim based on property should also be preempted in case of a retention of property clause, since otherwise the same unequal treatment would result. *Fountoulakis* does not address this question explicitly, but generally asserts claims based on national law to be preempted.[1127] The inference that claims based on property in case of a retention of property clause are necessarily preempted too is not compelling, since a retention of property clause could be interpreted under Article 6 of the CISG as also relaxing the preemptive effect of the CISG on

1125 See below paras. 570 et seq.
1126 Schlechtriem/Schwenzer/Schroeter/*Fountoulakis*, 5th edn, Art. 81 para. 10.
1127 Schlechtriem/Schwenzer/Schroeter/*Fountoulakis*, 5th edn, Art. 81 para. 10.

claims based on property. Yet, when writing this section she also followed *Schlechtriem*'s approach in considering property not to fall back to the seller automatically upon avoidance of contract.[1128] Considering that if buyers are in possession of the goods, they will generally have acquired property in them even under property laws that provide for a relatively late transfer of property, the relevant scenario of *Fountoulakis'* opinion is, thus, the case in which a retention of property clause has been agreed upon.

Yet, it appears questionable whether Article 7(1) of the CISG can be relied upon in this context. The provision's mandate to favor uniform interpretations is limited to the Convention itself ("*the need to promote uniformity in its* [this Convention's] *application*"). As highlighted above,[1129] the relative strength of a claim based on property compared to a CISG claim vis-à-vis third parties is not a matter governed by the CISG. For this reason, the unequal treatment of the seller and the buyer vis-à-vis creditors of the respective contractual partner also does not render this a question within the scope of the CISG. Complex considerations under national law can lead to the result of which *Fountoulakis* disapproves. In the conflict between creditors who supply goods and creditors who "merely" provide capital, national laws can (and do) privilege the supplier of goods in finding it more important for the continuation of trade and not as easy to replace as the provider of capital. The CISG, focusing on the relationship between the seller and the buyer, does not evaluate the relative strength and importance of one of the parties' claims with third party claims. While *Fountoulakis* acknowledges that third party rights can have priority under the applicable national insolvency procedures,[1130] she in effect excepts sellers under CISG contracts from this protection under insolvency law if their priority would be based on property in the goods. The comparison to the status of third parties shows that the CISG does not govern the matter exhaustively. *Fountoulakis'* proposed interpretation is more detrimental to the allocation of assets in insolvency than the concurrent application of remedies based on national law would be to uniformity under Article 7(1) of the CISG. Moreover, the concept of not treating the parties unequally in the rewinding process cannot be found within the CISG. While it is true that the CISG aims to provide a balanced set of rules, the parties are not treated equally. For example, Article 84(1) of the CISG provides that the seller has to pay interest on the price he or she is obliged to refund, while according to Article 84(2) of the CISG the buyer has to "*account to the seller for all benefits which he has derived from the*

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1128 Schlechtriem/Schwenzer/Schroeter/*Fountoulakis*, 7th German edn, Vorbemerkungen zu Artt. 81–84 para. 4. The respective sentences were deleted in the new 8th German edn.

1129 See above para. 545.

1130 Schlechtriem/Schwenzer/Schroeter/*Fountoulakis*, 5th edn, Art. 81 para. 11.

goods or part of them". The interest the seller must pay is independent from whether it was earned.[1131] The benefits the buyer has to account for, in contrast, are based on the actual benefits.[1132] It is difficult to conclude that the CISG contained a concept of treating the buyer and the seller equally after avoidance of contract.

552 Therefore, the claim for possession based on property should generally be available concurrently with the seller's claim based on Article 81(2) of the CISG. *Mohs* states that there is "*no danger of contradiction with the principles of the Convention*" in this regard.[1133] This holds true if the seller concurrently offers to repay the price or if the buyer has not paid the price, yet. However, if the claim based on property was allowed without regard to the counter performance, Article 81(2), sentence 2 of the CISG and its principle of concurrent performance could be undermined. For this reason, the approach developed with regard to the buyer's claim based on property after contract conclusion can also be applied here: If the same claim exists under both the CISG and national law, and the latter offers a more advantageous position for the seller, for example, regarding the statute of limitations or the effectiveness with regard to third parties, the CISG does not displace national law in this regard. Yet, if no claim for the goods exists under the CISG, remedies based on national property law are preempted as well. This reasoning can also explain why claims based on national tort law that do not provide for the restitution of the goods but for damages are preempted as far as no such claim is provided by the CISG, specifically based on Articles 81–84.[1134] The CISG contains rules for compensation for these specific circumstances and would be undermined if national law were to provide the seller with diverging claims.

3. Seller's claims based on a retention of property clause

553 Lastly, sellers may claim for possession of the goods without avoidance the contract if they have retained property by way of a retention of property clause and the buyer does not pay the price. In contrast to section 449(2) of

1131 Cf. ICC 6653/1993, 26 March 1993, CISG-online 71; *Bridge*, FS Magnus, pp. 161, 175; Kröll/Mistelis/Perales Viscasillas/*Bridge*, Art. 84 para. 11.
1132 Kröll/Mistelis/Perales Viscasillas/*Bridge*, Art. 84 para. 15.
1133 *Mohs*, Effects of avoidance and restitution of the goods, pp. 252, 256.
1134 Cf. *Mohs*, Effects of avoidance and restitution of the goods, pp. 252, 256.

the German Civil Code,[1135] the CISG has no explicit rule in this regard. This problem has not received attention in literature or case law.[1136]

554 The Convention does not directly address which of the parties should be in possession of the goods. Yet, it provides claims that clarify which party should be in possession of the goods in Articles 30, 33, 58, and 81(2) of the CISG. Furthermore, Article 58(1), sentence 2 of the CISG allows the seller to make payment a condition for handing over the goods. However, once the buyer is in possession of the goods, the CISG provides no remedies for the seller to regain possession apart from Article 81(2), which only applies if the contract has been avoided. This is in line with the reasoning underlying the elevated requirements for an avoidance of contract under the CISG: In international cases the transport of the goods typically entails even more risks and costs than in national cases.[1137] The CISG aims at limiting these risks and costs by allowing contract avoidance only in limited circumstances and not in response to any breach of contract.[1138] If the goods were to be transported back to the seller and the buyer ultimately paid before the contract is avoided, the goods would have to be transported yet another time. Since the CISG aims to prevent one additional transport, it should be interpreted to also limit the necessity of two transports. Hence, the rule developed above can be applied in this regard too: A claim based on property should only be available to the seller if the CISG provides such a claim. Since the CISG does not provide such a claim after the buyer has received the goods but before avoidance of contract, claims based on property before contract avoidance should generally be considered preempted.

555 It is important to note that this question only arises when the parties have opted for a retention of property clause. The question is, thus, whether such a clause modifies the stance of the CISG described in the preceding paragraph under Article 6 of the CISG as to allow the seller to repossess the goods in case of mere non-payment without prior avoidance of contract. Article 8 of the CISG provides the tools to interpret the parties' behavior and the contractual clauses. Under subsection 1, the parties' intent is decisive and if no intent can be found or proven, subsection 2 explains that state-

1135 Sect. 449(2) German Civil Code: "*Auf Grund des Eigentumsvorbehalts kann der Verkäufer die Sache nur herausverlangen, wenn er vom Vertrag zurückgetreten ist.*" My translation: A retention of property clause entitles the seller to demand the return of the thing only if he or she has rescinded the contract.

1136 *Mohs* addresses a claim based on property when a retention of property clause was agreed upon, but does so in a chapter concerned with the avoidance of contract. Therefore, it remains unclear whether his remarks can be interpreted to also apply if the contract was not yet avoided, *Mohs*, Effects of avoidance and restitution of the goods, pp. 252, 255–256.

1137 Cf. German Supreme Court, 28 May 2014, CISG-online 5682 para. 50.

1138 Schlechtriem/Schwenzer/Schroeter/*Schroeter*, 8th German edn, Art. 25 para. 15.

ments "*are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances*." To discover the understanding of a reasonable person, the parties' respective interests have to be investigated.

556 On the one hand, sellers have an interest to part with the goods only if they receive the full purchase price. Sellers emphasize this interest by insisting on a retention of property clause. The possibility to repossess the goods prior to avoidance would not discharge sellers from their obligation to deliver the goods to the buyer. The obligation would only be discharged by avoidance according to Article 81(2) of the CISG. Thus, sellers would have to keep the goods to remain capable of performance and not be in breach of the contract in case the buyer decided to pay. On the other hand, the buyer has an interest to remain in possession of the goods. Oftentimes, the buyer needs to be in possession of the goods to generate the revenues necessary to pay the price either by using or reselling the goods.[1139] Depriving the buyer of possession, thus, makes it considerably less likely that the buyer will be able to pay the price. For this reason, the interpretation of the retention of property clause to modify the CISG's rules to allow the seller to repossess the goods would violate the economic motivation for this type of contract. A reasonable person would, therefore, generally not consider the buyer's consent to the retention of property clause to mean that it allowed the seller to repossess the goods without prior avoidance of contract. Yet, nothing would prevent the parties from agreeing otherwise under Article 6 of the CISG.

557 In conclusion, the mere existence of a retention of property clause generally does not provide a sufficient basis for the seller to claim possession of the goods if the contract has not yet been avoided. As far as national property law allows such a claim, it is preempted by the CISG.

IV. Conclusion

558 National laws provide claims that protect the property in the goods. Yet, there are major differences. While some legal systems protect owners by allowing them to (re-)gain possession of the goods, other legal systems protect owners through respective damages claims. As far as a third party raises any of such claims against a party to a CISG contract, the CISG does not preempt the claim. As far as a party to a CISG contract relies on such claims against a third party, the CISG also does not preempt the claim. When either the buyer or the seller to a CISG contract relies on such claims against the contractual partner, the central question is whether the CISG would also

1139 Cf. for a similar reasoning German Supreme Court, 1 July 1970, NJW 1970, 1733, 1735–1736.

provide a claim for the goods or for damages. If the CISG provides for such a claim, it does not preempt national law. This interpretation makes a difference to a general preemption of national law when the claim under the CISG is not enforceable or does not exist for reasons outside the Convention, for example, due to the applicable statute of limitations, or if the claim based on property is also effective vis-à-vis third parties. This rule generally also applies to retention of property clauses: The CISG provides no remedies for the seller to repossess the goods prior to avoidance of contract if the buyer is in possession of them. The agreement on a retention of property clause should not be interpreted to modify the CISG under Article 6 of the CISG in this regard without further indications.

§ 8: Insolvency and property in the goods

The relationship between the CISG and insolvency laws has not been discussed in-depth in literature.[1140] For the most part, it is a question of the relationship between national laws and the CISG. Although there have been notable developments and unification efforts to facilitate the handling of international insolvencies, for example, the UNCITRAL Model Law on Cross-Border Insolvency (1997) and on the European level the Regulation (EU) 2015/848 on Insolvency Proceedings (Recast) of 2015, these efforts are mainly targeted at determining the competent court, procedural aspects, and the applicable law.[1141] In terms of substantive insolvency law, the four-part UNCITRAL Legislative Guide on Insolvency Law[1142] contains many guiding principles, for example regarding priorities and distribution of proceeds.[1143] However, UNCITRAL's Legislative Guides are less likely to achieve unification of laws compared to Conventions or Model Laws.[1144] On the other hand, the Legislative Guides provide more flexibility.[1145] On the European level, the substantive insolvency law has come more and more into focus and resulted, *inter alia*, in the new Directive (EU) 2019/1023 on Restructuring and Insolvency,[1146] which only addresses a part of corporate insolvency law.[1147] Notwithstanding these numerous projects, parties to a CISG contract face widely differing national substantive insolvency laws. **559**

1140 But see *Schmidt-Kessel*, FS Schlechtriem, pp. 255 et seq.

1141 This statement may be only partially true for the European Regulation on Insolvency Proceedings which is considered to contain some substantive rules under the surface, for example, with regard to *inter alia* retention of property clauses, cf. *Wessels*, 8 European Company Law (2011), 27, 29 regarding the (in this regard unchanged) version of 2002 of the regulation. Cf. also Opinion of the Advocate-General *Colomer*, Case C-339/07, *Christopher Seagon v Deko Marty Belgium NV*, 16 October 2008, para. 59: "*There have been other developments in the secondary legislation on the subject, all of which have the same aim and together form the body of Community insolvency law*" and the accompanying footnote that references multiple regulations.

1142 UNCITRAL Legislative Guide on Insolvency Law, Parts One and Two (2004); UNCITRAL Legislative Guide on Insolvency Law, Part Three: Treatment of Enterprise Groups in Insolvency (2010); UNCITRAL Legislative Guide on Insolvency Law, Part Four: Directors' Obligations in the Period Approaching Insolvency (2013/2019). All parts are available on the UNCITRAL website.

1143 UNCITRAL Legislative Guide on Insolvency Law, Part Two (2004), pp. 266–275.

1144 *Lehavi*, p. 261.

1145 *Lehavi*, p. 261; *Block-Lieb/Halliday*, 42 Texas International Law Journal (2007), 475, 479 who refer to Legislative Guides as "*new legal technologies*" of UNCITRAL.

1146 Directive (EU) 2019/1023 of the European Parliament and of the 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132.

1147 *de Weijs*, 15 European Company and Financial Law Review (2018), 403, 404.

560 The interplay poses difficult questions such as the status of the contract before and during insolvency proceedings;[1148] whether the calculation of loss within remedies under national insolvency laws is influenced by the CISG; whether additional remedies are available to an insolvency administrator besides the contractual remedies under the CISG;[1149] and more.[1150] These questions fall outside the scope of this work. Yet, in assessing the relevance of property in international sales transactions, the insolvency of one of the contractual parties will bring questions of property to the forefront of all interested parties' minds.[1151] Consequently, the interplay between the CISG and insolvency laws has to be analyzed as far as property in the goods is concerned.

I. Elevated relevance of property in insolvency cases

561 At its core, insolvency law aims at collectively protecting the creditors in cases in which not all outstanding debts and claims can be served. Underlying most national laws is the idea of the *pari passu* (literally, in equal steps) sharing principle, according to which generally all creditors are entitled to an amount of the debtor's assets which mirrors the relation between their respective claims and the sum of overall outstanding debts.[1152] A key aspect of (and not an exception to) this principle is that the assets that form part of the pie that can be distributed consist of the debtor's assets – assets of other persons are generally beyond the reach of creditors.[1153] The fact that the owner of goods in the debtor's possession might simultaneously be a creditor of said debtor does not deprive him or her of the possibility to vindicate the goods from the debtor, since these goods were never part of the pie that has to be shared by all creditors. Since the remaining assets of the debtor might (and will often) be so few that a contractual claim (for example, under

1148 Staudinger/*Magnus*, Vorbemerkungen zu Art 81 ff para. 6.

1149 See for example, *Helen Kaminski Pty. Ltd v. Marketing Australian Products, Inc.*, US District Court for the Southern District of New York, 21 July 1997, CISG-online 297 where a party argued that the insolvent contractual partner could not rely on sect. 108(b) Bankruptcy Code of the USA to gain an additional period of time to cure, since the national Bankruptcy Code was superseded by the CISG as an international convention. The court found the CISG not to be applicable which is why it did not have to assess the question of supersession.

1150 Cf. *Schmidt-Kessel*, FS Schlechtriem, pp. 255 et seq.

1151 Cf. *Burrows*, Remedies, p. 495 who states that the allocation in insolvency is the "*most significant consequence of deciding whether property in goods has passed or not*"; *Bridge/Gullifer/Low/McMeel*, para. 18-019; *Schwenzer/Muñoz*, para. 39.04.

1152 *Calnan*, para. 1.01.

1153 *Calnan*, paras. 1.75 et seq.

the CISG) is economically speaking worthless, the existence of a proprietary claim based on property can make all the difference.

562 For example, under English law, pre-liquidation real rights, such as rights and remedies of those who own things in the possession of the company are respected even in bankruptcy.[1154] English law does not stop there, but appears to extend the availability of remedies of the contractual partner in insolvency if property has already passed to the buyer: While generally an owner's claim for delivery up of the goods will not be granted if damages are adequate in line with the test for specific performance under a sales contract,[1155] the overlap between delivery up and specific performance stops with the contractual partner becoming insolvent. While a specific performance claim would still not be granted, the remedy of delivery up becomes available to protect the owner of the goods, even though the goods are not unique and there are no further reason why damages would not be appropriate, aside from the limited value such a claim will generally have in insolvency.[1156] This exemplifies how property is of elevated relevance in insolvency even under English law which generally does not approach property with such extensive protection, including the reallocation of possession as is common in many other legal systems.

563 Under German law, the insolvency estate is limited to the debtor's assets (section 35 German Insolvency Code). If the insolvent party is in possession of goods in which a different party has absolute property, the latter party can claim the goods under section 47, sentence 2 of the German Insolvency Code, section 985 of the German Civil Code. In this regard, this party is not considered to be a party to the insolvency proceedings. The protection offered by section 47 of the German Insolvency Code is not restricted to property in goods but rather excludes from the insolvency proceedings all claims to things that do not form part of the insolvency estate.[1157] Similarly, under Swiss law, goods that are not part of the insolvency estate can be reclaimed (Article 242 of the Swiss Debt Enforcement and Bankruptcy Law). While this action is, once again, not limited to property, property in the goods is the most important case of application.[1158]

1154 *Goode/McKendrick*, paras. 31.14–31.17.

1155 See on the same test under specific performance of a sales contract and delivery up, *McCardie J* in *Cohen v Roche* [1927] 1 KB 169, 180–181, as cited by *Burrows*, Remedies, p. 494.

1156 *Burrows*, Remedies, p. 495.

1157 Cf. *Stadler*, Verkehrsschutz durch Abstraktion, p. 450 citing BT-Drucksache 12/2443, Begründung zum Regierungsentwurf. § 54 InsO, p. 124 who, for this reason, states that property in the goods is not always decisive.

1158 BSK SchKG/*Bauer*, Art. 242 SchKG para. 15.

564 Thus, while the details of national insolvency laws differ, the property in the goods is of pivotal importance under most of them. This is because property in the goods generally allows the owner to reclaim the goods without becoming a party to the insolvency proceedings.

II. The CISG does not supersede national insolvency law on the available assets for distribution and priorities

565 Parties to litigation have occasionally argued that claims based on the CISG in its form as an international Convention could supersede national (insolvency) law.[1159] This argument seemingly relies on the general idea that an international Convention could enjoy priority of application over "simple" national law due to a higher rank in the hierarchy of legal norms. *Schmidt-Kessel* rightfully highlights that the dividing line between national contract and insolvency law is irrelevant and insolvency law is superseded or preempted by the CISG as far as the scope of application of the Convention stretches.[1160]

566 The latter limitation holds the key to resolving the argument's issue. To supersede the distribution of assets under insolvency law or amend the priorities, the ranking of CISG claims vis-à-vis claims by third parties would have to be a matter governed by the Convention. At no point does the wording of the CISG suggest that the relative strength of CISG claims compared to other claims to the same goods by third parties is regulated by the Convention.[1161] On the contrary, the seller's right to stoppage in transit under Article 71(2) of the CISG is limited by its second sentence to effectiveness between the buyer and the seller.[1162] Whether a third party, for example like the carrier, has to respect the seller's wish to stop the transit and handing over the goods is a matter not regulated in the CISG but subject to the oth-

1159 *Helen Kaminski Pty. Ltd v. Marketing Australian Products, Inc.*, US District Court for the Southern District of New York, 21 July 1997, CISG-online 297; Court of Appeal Canton Ticino, 20 April 2016, CISG-online 2759.

1160 *Schmidt-Kessel*, FS Schlechtriem, pp. 255, 270.

1161 *Bridge*, International Sale of Goods, para. 10.30; *Honnold/Flechtner*, para. 603; *Walt*, 26 Texas international Law Journal (1991), 211, 222; *Audit*, para. 189; similarly, *Ndulo*, 38 International and Comparative Law Quarterly (1989), 1, 5. Cf. Court of Appeal Canton Ticino, 20 April 2016, CISG-online 2759 where the CISG was found not to supersede national priorities of claims in insolvency of one of the contractual partners.

1162 Art. 71(2), s. 2 CISG: "*The present paragraph relates only to the rights in the goods as between the buyer and the seller.*"

erwise applicable law.[1163] The CISG only governs the rights and obligations of the parties to the contract, hence, the content of the respective claims, but not their "strength" or the question of whether they should be considered to be rights *in rem*.

567 This interpretation is underpinned by the historical record. The Secretariat Commentary explicitly stated that the right to require restitution under the provision that became Article 81(2) of the CISG "*may be thwarted by other rules which fall outside the scope of the international sale of goods. If either party is in bankruptcy or other insolvency procedures it is possible that the claim of restitution will not be recognized as creating a right in the property or as giving a priority in the distribution of the assets.*"[1164] At the conference in Vienna, a Canadian delegate (*Ziegel*) proposed amending the provision because his delegation feared that it would also encompass the buyer's bankruptcy and situations in which third parties' rights were concerned.[1165] The aim of the amendment was to introduce an additional paragraph in Article 81 of the CISG that would make it clear that the Convention would not interfere with the legal positions of third parties and creditors of the insolvent party.[1166] Delegates of Austria (*Loewe*), Czechoslovakia (*Kopać*), and Egypt (*Shafik*) opposed the amendment with the main argument that the question of bankruptcy was complex and there were different approaches under national law regarding the priority between creditors. Moreover, it was not a problem that concerned sales only, which is why the matter should be considered to fall outside of the CISG's scope of application.[1167] Even though this did not persuade *Ziegel*,[1168] the opinion that the matter fell outside the scope appears to have been held by most delegates.

568 Therefore, the relative strength of CISG claims vis-à-vis third parties' claims is not a matter governed by the CISG. Whether, for example, the buyer's claim based on Article 30 in case of the seller's insolvency or the seller's claim for restitution under Article 81(2) can be considered to enjoy priority over other claims is regulated by the applicable national law. Consequently, the CISG does not supersede national insolvency law on the available assets for distribution and priorities.

1163 Secretariat Commentary, Art. 62 para. 12; Staudinger/*Magnus*, Art. 71 para. 54a; Schlechtriem/Schwenzer/Schroeter/*Fountoulakis*, 8th German edn, Art. 71 para. 43.

1164 Secretariat Commentary, Art. 66 para. 10; this wording was already provided in UNCITRAL Yearbook VII (1976) p. 132 para. 10.

1165 O. R., p. 414 para. 77.

1166 O. R., p. 414 para. 77.

1167 O. R., p. 414 paras. 78–80.

1168 O. R., p. 414 para. 81.

III. (No) indirect influence on seller's property after avoidance of contract by the CISG

569 Even though the CISG leaves the applicability of national insolvency law regarding priorities unimpaired, the reasoning presented above[1169] does not necessarily mean that there is no indirect influence of the CISG on the allocation of goods in insolvency. On one hand, some national laws might consider the seller never to have parted with the property in the goods if the seller avoids the contract. French law, for example, provides for an automatic re-transfer of property in certain cases of avoidance.[1170] Based on the consensual nature of the transfer of property and its natural connection with the sales contract, property is considered to have never passed to the buyer, because the contract ceases to exist *ex tunc*. There is no explicit rule to this effect (although one may infer it from Article 117 of the Loi n° 85-98 of 25 January 1985 in France), but it follows from the general approach to the transfer of property under these laws. Since there is no sales contract mandating the transfer of property (anymore), property does not pass. Article 117(1) of the Loi n° 85-98 clarifies that the contract has to have been avoided before the insolvency proceedings are opened. On the other hand, the seller may have retained property by a clause in the contract. These two constellations have caused discussions on the potential indirect influence of the CISG on the seller having or relying on property in the goods.

1. *Schlechtriem* and the *causa* surviving contract avoidance

570 *Schlechtriem* reached the result in his analysis that property does not fall back to the seller automatically upon avoidance of the contract under the CISG.[1171] He strictly applied the reasoning of consensual property laws and posed the question of whether the sales contract that originally transferred property onto the buyer still exists. This question is considered to be an incidental question in parlance of private international law and is to be answered by the applicable contract law. While, to this day, it is still disputed whether

1169 See above paras. 565 et seq.

1170 For France, including the assessment that this has not been changed by the 2016 reform of the French Civil Code, *Meier*, 80 RabelsZ (2016), 851, 885; *Hellenringer*, pp. 207, 211. Similarly under Italian law, Art. 1458(1) Italian Civil Code, *Landfermann*, Sicherungen des vorleistenden Verkäufers, pp. 114–115. Cf. Jansen/Zimmermann/*Hellwege*, Art. 9:305 para. 13.

1171 *Schlechtriem*, Internationales UN-Kaufrecht, para. 330. This approach has found approval from *Schroeter*, Internationales UN-Kaufrecht, para. 897; *Schlechtriem/P. Butler*, para. 330; Schlechtriem/Schwenzer/Schroeter/*Fountoulakis*, 7th German edn, Vorbemerkungen zu Artt. 81–84 para. 4 (the respective sentences were deleted in the 8th German edn); *Sonnentag*, pp. 256–257.

avoidance of a contract under the CISG extinguishes the contract subject to the exceptions in Article 81(1) or whether the contract is merely amended into a reverse transaction, *Schlechtriem* favored a continued but amended existence of the contract and relied on Article 7(1) of the CISG and its mandate to further the uniformity in the interpretation of the Convention to underpin his argument: Since national laws may differ in terms of remedies available if the seller were to become owner of the goods again, considering the contract to continue to exist in combination with consensual property systems leads to the inapplicability of these remedies and, thus, uniformity.[1172] This, in turn, led him to conclude that property does not fall back automatically with avoidance, since national property law must consider the contract to continue to exist, whereby the *causa* for the original transfer of property remains unimpaired.[1173]

2. *Landfermann, Hornung, Krebs, Claude Witz* arguing for the irrelevance of the CISG

At the other end of the spectrum, *Landfermann*, *Hornung*, *Krebs*, and *Claude Witz* have argued that the CISG should not be interpreted to indirectly influence the allocation of property after avoidance under the CISG.[1174] First of all, supporters of this opinion highlight the exclusion of the effect the contract has on the property in the goods under Article 4, sentence 2(b) of the CISG and reason that this should also extend to the effect of avoidance, which shifts the question outside the scope of the CISG.[1175] *Landfermann*, moreover, opposes the consequences if one were to consider the CISG to preempt either the automatic retransfer of property or a preemption of claims based on property: A French or Italian judge would have to reach divergent conclusions with regard to who is the owner of the goods depending on whether French law, Italian law, or the CISG was applicable in otherwise completely identical cases.[1176] Under this approach, the CISG does not have any effect on the property in case of avoidance. If the applicable national law provides for a system of consensual property transfers, the seller is considered never to have parted with the property upon avoidance.[1177] **571**

1172 *Schlechtriem*, Internationales UN-Kaufrecht, para. 330.
1173 *Schlechtriem*, Internationales UN-Kaufrecht, para. 330.
1174 *Landfermann*, Auflösung des Vertrages, pp. 133–134 (his reasoning is based on the ULIS but remains applicable under the CISG); *Hornung*, p. 116; *Krebs*, p. 53; *Cl. Witz*, paras. 114.81, 358.41.
1175 *Hornung*, p. 116; *Krebs*, p. 53.
1176 *Landfermann*, Auflösung des Vertrages, p. 133. This reasoning is supported by *Hornung*, p. 116.
1177 *Landfermann*, Auflösung des Vertrages, pp. 133–134 (his reasoning is based on the ULIS but remains applicable under the CISG); *Hornung*, p. 116; *Krebs*, p. 53.

3. Discussion

572 While the opinions described focus on the CISG, it is important to note in a first step that the problem raised lies beyond the scope of the Convention. The question rather goes to the core of the interplay between private international law, property law, and contract law. The answer requires an analysis of the interplay between CISG, private international law, and national property law in more depth than the currently expressed opinions under the CISG. *Schlechtriem*'s opinion is based on undisclosed and incorrect premises.

a) Challenging the premise of the continuing existence of a *causa* for purposes of national property law as a matter governed by the CISG

573 *Schlechtriem* relies on Article 7(1) of the CISG even though he acknowledges that the question of whether property falls back is regulated by the *lex rei sitae*, and is thus outside the scope of the Convention. At the same time, however, he argues that the question of whether a sufficient *causa* for the transfer of property still exists must be answered by the applicable contract law by way of the national property law referring the question thereto. Even though the effect on property was not "expressly" addressed by the CISG, uniformity and Article 7(1) should prevail.

574 Article 7(1)'s mandate to favor uniform interpretations is limited to the Convention itself ("*the need to promote uniformity in its* [this Convention's] *application*"). The question of whether a sufficient *causa* exists (or continues to exist) after avoidance of contract is decisive if goods are situated, for example, in France, to assess whether sellers are protected in the buyer's insolvency due to their property in the goods. If they are not, they would have to get in line with the buyer's other unsecured creditors, reasonably expecting to be awarded only a fraction of their claim's value. The question of the seller's protection in the buyer's insolvency is neither explicitly nor implicitly addressed by the CISG. Not allowing property to automatically fall back would only serve uniformity from the point of view of legal systems that would not protect the unsecured seller who has transferred the property to the buyer, for example, German and Swiss law. Hence, while the question of whether the avoidance of contract lets the contract cease to exist *ex tunc* or *ex nunc* could be answered by relying on Article 7(1) of the CISG, the provision has no effect if the question to be answered falls outside the scope of the CISG. If national property law were to refer this question to the CISG (the second premise that will be discussed below), Article 7(1) would again not be a convincing basis to argue for any result, since its scope remains the scope of the CISG itself: A uniform result will in any case not be reached, since only some national laws would refer the question to the applicable

contract law, while others – for example, German law – would decide the question on their own due to the abstractness of the transfer of property from the sales contract.

Thus, Article 7(1) of the CISG cannot be raised to argue that property should or should not fall back onto the seller after avoidance of contract. The question should be left completely to national law. **575**

b) Challenging the premise of an incidental question to the applicable contract law

The second premise that underlies *Schlechtriem's* reasoning is that the applicable (causal or consensual) property law poses an incidental question of whether the contract still exists, and that this is the only gateway through which the avoidance of contract might become relevant. **576**

aa) The correct methodology of incidental questions is not decisive

Based on the same premise, *Sonnentag* has described the whole discussion as revolving around whether the law applicable to the incidental question would have to be found by way of applying the private international law of the forum (*selbstständige Vorfrage*) or the rules of the private international law of the law applicable to the main question (*unselbstständige Vorfrage*).[1178] While the correct method regarding incidental questions is to this day subject to discussion,[1179] it is not decisive here. For this discussion to be relevant, the *lex causae* would have to be a foreign law for the competent court, since otherwise both methods would apply identical conflict of law rules, and additionally the conflict of law rules of the *lex causae* and the *lex fori* would have to lead to different applicable laws.[1180] Against the background of most private international laws allowing the parties to choose the law applicable to their contract and, for example, the unification under the Rome I Regulation, the applicable contract law will in most cases be the same irrespective of whether the rules of the *lex causae* or of the *lex fori* are applied. Furthermore, it is inaccurate to interpret *Landfermann, Hornung*, *Krebs*, and *Claude Witz* to argue that the solution is to be found in applying the law of the *lex causae* to the incidental question (*unselbstständige Vor-* **577**

1178 *Sonnentag*, pp. 254–257.

1179 For English law, see for example, *Collins/Harris*, paras. 2-044 et seq.; for European and German law, MüKoBGB/*v. Hein*, Einleitung zum Internationalen Privatrecht para. 181.

1180 MüKoBGB/*v. Hein*, Einleitung zum Internationalen Privatrecht para. 181 who lists these prerequisites with the remark that the relevance of the discussion on the correct method is limited.

frage).[1181] They do not advocate applying the conflict of law rules of the *lex causae* (which is the *lex rei sitae* to this end), but rather to apply the material rules of the *lex causae* regarding the question of whether avoidance has an effect vis-à-vis third parties.[1182] Thus, the relevant question is not one of methodology of incidental questions within private international law.

bb) Introducing a discussion on the same problem in private international law literature

578 Rather, the question is whether the applicable contract law should be exclusively relied upon to decide the incidental question posed by national property laws, for example, in France. It should be noted that there have been sophisticated discussions on the relevance of contract law in this regard in literature on private international law. These discussions, however, have gone unexamined by literature on the CISG. *Niboyet* has dedicated a substantial part of a monography to the interplay between contract and property law.[1183] He discerned that, for example, under Article 1138 of the French Civil Code old version[1184] for property to pass, four requirements would have to be fulfilled in line with Article 1108 of the French Civil Code old version: *consentement*, *capacité*, *objet* and *cause licite*.[1185] Yet, French property law does not indicate which law applies to determine whether these requirements are fulfilled; the law applicable to these questions must be found by applying conflict of law rules.[1186] Later, *Niboyet* even went further and argued that these questions should *de lege ferenda* be answered entirely by the *lex rei sitae*.[1187] The main discussion that his analysis caused was on the question of whether the validity of the sales contract for purposes of the transfer of property was subject to the applicable contract law, the rules on validity of the legal system that was applicable to property, or a combination of both.[1188]

1181 But see *Sonnentag*, pp. 254–255.

1182 *Hornung*, p. 116; Krebs, p. 53. Slightly differently, *Landfermann*, Auflösung des Vertrages, pp. 133–134 who argues that national law should decide whether the contractual obligations cease to exist *ex tunc* or *ex nunc*.

1183 *Niboyet*, L'acquisition de la propriété, pp. 123–185.

1184 A comparable rule is found in today's Art. 1196(1) French Civil Code.

1185 *Niboyet*, L'acquisition de la propriété, p. 150. Today's Art. 1128 lists only three: *consentement*, *capacité* and *contenu licite et certain*. Most notably, the *cause* has been dropped as an explicit requirement, cf. generally on the *cause* (and its potentially enduring relevance) under the reformed French Civil Code, *Deshayes/Genicon/Laithier*, 13 European Review of Contract Law (2017), 418.

1186 *Niboyet*, L'acquisition de la propriété, pp. 152–155.

1187 *Niboyet*, Traité IV, pp. 260, 368 et seq.

1188 Cf. the elaborations by *Privat*, p. 92; *Sovilla*, p. 39; *Stadler*, Verkehrsschutz durch Abstraktion, p. 662; *Ritterhoff*, pp. 120–125; *Bornheim*, 36, 52–53. For example,

Nevertheless, also the consequences of a contract avoidance and whether the intent to transfer property can be rescinded have been touched upon in the periphery of the main discussion. *Niboyet* has argued that applying the rules of other fields of law of the *lex rei sitae* (specifically contract law) to the requirements posed by the *lex rei sitae* would lead to a desirable uniformity in cases of avoidance of contract.[1189] *Lalive* also favors an interpretation regarding the comparable Article 1543 of the Quebec Civil Code old version and argues that the proprietary effect of the contract's dissolution should be left to the *lex rei sitae*.[1190] *Zaphiriou* follows *Bartin* in arguing that one has to distinguish between the sales contract and the consensual element of the transfer of property.[1191] While the sales contract is governed by the applicable contract law, the consensual element is subject to the *lex rei sitae*.[1192] This specifically extends to the question of whether the consensual element is annulled or rescinded, for example, by avoidance of contract.[1193] *Rabel*'s remarks can be understood to be in line with the latter approach.[1194] **579**

The arguments that, for example, *Privat* has raised against this approach are aimed at the relevance of validity of the contract under the *lex contractus* and the *lex rei sitae* and, thus, not directly at effects of an avoidance of contract. Nevertheless, his criticism of the approach of *Lalive* and *Zaphiriou* is correct as far as he criticizes that it assumes a consensual element in French property law distinguishable from the consensual contractual element.[1195] Echoing *Privat*'s analysis, most scholars in the German-speaking regions have argued that in causal property systems, all questions of consent and existence of contract should, by way of an incidental question, be left to the applicable contract law.[1196] **580**

cc) *Contrat translatif* as a requirement under the national property law

In my opinion, property laws in both causal and consensual systems indeed encompass incidental questions concerning consent: Whether a contract has been concluded is determined by the applicable contract law. Also, it goes **581**

Zitelmann, p. 362 favors a cumulative application of the *lex contractus* and the *lex rei sitae* and would deny a transfer of property if the contract was invalid under either one of these two laws. This approach is supported by *Sovilla*, p. 39.

1189 *Niboyet*, Traité IV, p. 260.
1190 *Lalive*, pp. 143–144.
1191 *Zaphiriou*, p. 70.
1192 *Zaphiriou*, p. 70.
1193 *Zaphiriou*, p. 70.
1194 *Rabel*, Conflict of Laws, p. 36.
1195 *Privat*, p. 92.
1196 Staudinger/*Mansel*, Art. 43 EGBGB paras. 792, 793; MüKoBGB/*Wendehorst*, Art. 43 EGBGB para. 86.

without saying that the contract is governed by the applicable contract law, including the question of under which circumstances the contract can be avoided. For example, French property law requires the contract to be of translative character, as is evidenced by Article 1196(1) of the French Civil Code.[1197] The question of whether the contract as it exists under the applicable contract law at the relevant point in time exhibits the characteristics of what French law would consider a sufficient basis to transfer property, should be considered relevant for the requirement under the French property law as the *lex rei sitae*. Thus, if French law considers a sales contract avoided by the seller due to the buyer's failed payment as no longer exhibiting these characteristics, there is no longer a *contrat translatif* (a contract with proprietary effect)[1198] which would allow considering the buyer to never have become the owner of the goods. This effect is, hence, due to national property law and is independent from the question of whether the applicable law, for example the CISG, considers avoidance of a contract to have retroactive effect or not. If, in a causal legal system like Swiss law, the contract is considered sufficiently intact after avoidance for purposes of property law as to maintain that the property has passed,[1199] there is again no need to revert to the applicable contract law in this regard. The results reached under this approach mirror the opinions of *Landfermann*, *Hornung*, *Krebs*, and *Claude Witz* under the CISG.

582 In contrast to the approach favored by *Schlechtriem*, this interpretation avoids a disadvantage that has been pointed out by *Niboyet* in the parallel discussion: Under *Schlechtriem*'s approach, the buyer would not become the owner of the goods after avoidance of the contract but would have to transfer property concurrently against repayment of the price under Article 81(2) of the CISG. Yet, for example, French law does not regulate how the buyer could retransfer the property, since the law does not provide for separate real contracts or abstract contracts to transfer property.[1200]

583 Moreover, leaving the question of whether avoidance of contract has retroactive effect to the applicable contract law is destined to cause haphazard outcomes: This is because the applicable contract law might have been drafted without any consequences for property law in mind. The consequences

1197 Art. 1196(1) French Civil Code: "*Dans les contrats ayant pour objet l'aliénation de la propriété ou la cession d'un autre droit, le transfert s'opère lors de la conclusion du contrat*."

1198 *Hellenringer*, pp. 207, 210.

1199 See *Huguenin*, OR AT/BT, paras. 2662–2664; *Honsell*, OR BT, pp. 119–120; Swiss Supreme Court, 16 May 1988, BGE 114 II 152 (with regard to Art. 109 Swiss Code of Obligations); leaving open the question of whether this can be generalized, Swiss Supreme Court, 3 May 2011, BGE 137 III 243 para. 4.4.7; contra, BK/*Giger*, Art. 208 OR para. 9; *Keller/Siehr*, p. 88.

1200 *Niboyet*, Traité IV, p. 260.

of an avoidance of a contract for property are a case in point: The idea of a *Rückgewährschuldverhältnis* was created in Germany, a country that considers the contract and the transfer of property generally to be separate from one another (*Abstraktionsprinzip*). The *Rückgewährschuldverhältnis* was first and foremost meant to overcome problems with damage claims after avoidance of a contract and not for implications on the property in the goods (since the questions as to whether a contract ceased to exist *ex tunc* or *ex nunc* was and is in principle completely irrelevant for questions of property under German law).[1201] The spirit of the incidental question of whether rather the seller or the buyer should be protected by remaining the owner of the goods is, thus, completely missed by some applicable contract laws, such as for example, German law. On a similar note, this could also explain why the delegates did not find it necessary to decide whether a contract under the CISG can be avoided with retroactive effect,[1202] since effects on property were excluded from the CISG under Article 4, sentence 2(b).

584 A practical illustration of the haphazard results stems from the example of German and French sellers that conclude identical sales contracts with a French buyer. Yet, one contract is subject to German law, while the other is governed by French law. The goods are delivered to the buyer in France, and it becomes evident that he or she might not be able to pay. Both sellers rightfully avoid their respective contract under the respectively applicable contract law. Subsequently, the buyer becomes insolvent. Applying the opinion that makes property dependent on whether the contract still exists or whether it ceased to exist *ex tunc* under the applicable contract law, the French seller would be considered the owner of the goods, while the German seller would not.[1203] There is no material reason under French insolvency or French property law why a seller under a different contract law should (without further agreements between the parties) be treated less favorably. *Landfermann* has rightfully pointed out that this result would startle an Italian or French judge.[1204]

585 French law could have also regulated the protection of the unpaid seller who avoids the contract before insolvency in insolvency law.[1205] The fact that it indirectly placed the rule in contract law due to its overall causal system

1201 Cf. *Jaeger*, AcP 213 (2013), 507, 512.

1202 Cf. *Landfermann*, Auflösung des Vertrages, p. 133 on the lack of decision regarding the effect of avoidance under the ULIS, which was not discussed again under the auspices of UNCITRAL.

1203 Under German law, avoidance of contract due to non-payment only amends the contractual relationship.

1204 *Landfermann*, Auflösung des Vertrages, p. 133.

1205 Cf. *Schlechtriem/Coen/Hornung*, 9 European Review of Private Law (2001), 377, 387–388 who state that the question whether it is a proprietary (or "title-based") claim is one of labels, while the substantive question is "*in what circumstances*

should not obscure the view that this rule is in effect a protection in insolvency. The location of the rule is more due to a national lawmaker's view that its legal system is a unit, while the impact that such a rule might have after a fragmentation into different applicable laws in international cases is less at the forefront of his or her thinking.[1206] The seller's protection by relapse of property was especially necessary in France, because during the time it was developed, the French legal system did not allow retention of property clauses to have an effect on property in the goods.[1207] The principle of causality and consensus that subordinates the property law to contract law should not be taken so strictly as to override the relevance of the allocation of property in insolvency. There is no reason why an abstract property system, such as German law, should be privileged in deciding according to national standards when property passes even in international cases,[1208] while causal systems are required to adhere to the consequences of a foreign contract law that might never have been checked in this regard since national law does not link such consequences to the (merely obligatory) contract.

586 Also, German and Swiss scholars may have sympathy for this interpretation since it results in the contract avoidance not having retroactive effect. This is a consequence they are familiar with due to their own national laws. However, if one were to take the interpretation literally, it could produce very different results, too. If goods were situated in Switzerland but the respective sales contract was subject to French contract law, the avoidance of the contract would lead to its non-existence *ex tunc*. The applicable causal Swiss property law would under the interpretation in question find that no contract exists, and the property has never passed from the seller to the buyer. Thus, even if one follows the approach under Swiss law that avoidance of a (national) sales contract should not lead to the automatic relapse of property,[1209] this would nevertheless result if French contract law applied. It cannot be assumed that a causal property system gives up its reign over

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should a restitutionary claim be so strong as to have priority over competing claims by other creditors?".

1206 Cf. *Hellinger*, pp. 207, 208 who highlights that the regulation of proprietary effects of contracts in the Book on contracts within the French Civil Code has historical reasons.

1207 Cf. *Kieninger*, p. 255.

1208 Cf. German Supreme Court, 20 July 2012 – V ZR 135/11, BeckRS 2012, 17500, para. 30 where it was found that German law ultimately decided whether the contractual consensus under a foreign law suffices to effect consequences in property law.

1209 See *Huguenin*, OR AT/BT, paras. 2662–2664; *Honsell*, OR BT, pp. 119–120; Swiss Supreme Court, 16 May 1988, BGE 114 II 152 (with regard to Art. 109 Swiss Code of Obligations); leaving open the question of whether this can be generalized, Swiss Supreme Court, 3 May 2011, BGE 137 III 243 para. 4.4.7; contra, BK/*Giger*, Art. 208 OR para. 9; *Keller/Siehr*, p. 88.

such a central property question for the *lex rei sitae* just to stay true to the principle of causality.

587 These issues can be avoided by preserving the principle of causality and addressing the question of contract existence through the applicable contract law by way of an incidental question. Yet, whether this contract exhibits the characteristics of a contract that effects a transfer of property is left to the applicable *lex rei sitae*. In contrast to what *Privat* has argued, this approach does not apply two different laws to the contract and, thereby, does not split up the contract under two diverging laws.[1210] Rather, the question of whether the contract is a *contrat translatif* is without relevance for contract law and its supremacy over the contract between the parties. Moreover, the interpretation does not contradict the opinion of the Comité français de droit international privé that *Privat* cites to argue that the applicable contract law should assume these kinds of questions altogether. He cites Article 89 of the "*avant-projet de réforme du Code Civil*" and the accompanying comments to argue that "*contrats relatifs à la constitution ou à la transmission d'un droit réel sur un meuble*" should also be subject to the law chosen by the parties.[1211] Yet, this Article only envisaged the obligatory effects of the contract (*"les contrats sont soumis, en ce qui concerne* […] *leurs effets obligatoires"*).[1212] The accompanying discussion that *Privat* cites concerned the suitability of applying the *lex rei sitae* to the obligatory effects of the contract if the parties have not chosen an applicable law.[1213] This is not a convincing basis upon which to argue whether or not the law applicable to the contract should have an impact on property, or should have relevance by way of incidental questions from the applicable *lex rei sitae*.

c) Advantages of the proposed interpretation for the CISG

588 Although the question discussed here should not be influenced by the CISG as discussed above,[1214] the interpretation proposed here would clear the path for more international consensus and uniformity in the understanding of the consequences of avoidance under Articles 81–84. It is to this day disputed whether the contract under the CISG generally ceases to exist *ex tunc* with Article 81(1), sentence 2 of the CISG representing the exception of parts of the contract that survive the avoidance, or whether the contract continues to exist with this provision only stating the obvious. While it can rightfully be asked what practical differences are caused by the divergent interpretations

1210 *Privat*, p. 92.
1211 *Privat*, pp. 93–94 citing Comité français de droit international privé, Codification, pp. 27–28, 211 et seq.
1212 Comité français de droit international privé, Codification, p. 27.
1213 Comité français de droit international privé, Codification, p. 212.
1214 See above paras. 573 et seq.

and whether this discussion is, hence, even worth having,[1215] excluding the possibility that this discussion has an effect on property may limit the discussion to even fewer consequences and, thus, increase the odds of finding international consensus. This would further the objectives sought by Article 7(1) of the CISG, whereas *Landfermann*'s approach to leave the question of whether the contract avoidance has retroactive effects entirely to national law[1216] would jeopardize this uniformity.

4. Summary

589 There is no indirect influence of the CISG on the seller's property after avoidance of contract. In legal systems that link the transfer of property causally to the conclusion of the contract, there can be an incidental question as to whether a contract exists that is subject to the applicable contract law. However, whether this existing contract exhibits the characteristics of a contract that suffices under national law to transfer property has to be left to the *lex rei sitae*. The transfer based on the principle of causality should not be granted the status of a master in its own right to the detriment of national property and insolvency laws.

IV. Conclusion

590 Questions of property in the goods in insolvency are outside the CISG's scope of application and are, thus, not a matter governed by it. Although the CISG may rank higher than national law due to its status as an international Convention, it does not supersede national insolvency or property laws in this regard. Moreover, there is no indirect influence of the CISG by way of incidental questions.

1215 See *Mohs*, Effects of avoidance and restitution of the goods, pp. 252, 255.
1216 *Landfermann*, Auflösung des Vertrages, p. 133.

§ 9: Conclusions and theses

I. Conclusions

Both property and sales contracts are legal notions dependent on the legal system they stem from. While the CISG has unified parts of sales contract law and has its own notion of what a sales contract is, property in goods has remained in the realm of national, unharmonized law. The transfer of risk connects the transfer of property with many unharmonized sales laws, but this link is severed in the CISG. This work aims to demonstrate that the remaining connections between the CISG and property law are either exaggerated or disregarded. **591**

The obligation to transfer property under Article 30 of the CISG should be independent of national property notions. The CISG has its own notion of property. Property under the CISG is the legal interest the seller has in the goods without regard to the quality of that interest. Whether property in the sense of national law has been transferred is, thus, not directly relevant for Article 30. Article 41 of the CISG protects the buyer from mere claims of third parties, rendering the existence of third party rights (for instance, (absolute) property in the goods) largely irrelevant. But even if the third party right becomes relevant, the CISG does not differentiate whether the third party has property or any other right in the goods. Thus, no connection between the national notions of property and Articles 30 and 41 of the CISG exists. **592**

Similarly, no link exists between the characterization of a sales contract under the CISG and property per national law. Contrary to common scholarly and judicial opinion, property in goods should not form part of the characterization equation under Article 1(1) of the CISG. Differing national property interpretations could otherwise cause inconsistencies in the CISG's scope, violating Article 7(1) of the CISG. The proposed definition of property should also not be employed to characterize a sales contract under the CISG, as it could lead courts in common law jurisdictions to exclude credit sales involving goods consumed before payment. For a contract to be subject to the CISG, it must include a transaction of goods against payment. To this end, the goods are sufficiently allocated to the buyer when, as between the parties, the buyer permanently receives the benefits and use of the goods, and the seller does not bear the risk of haphazard loss of or damage to the goods and no longer retains any legal interest in them. **593**

An elusive connection persists between property law and the CISG concerning the claim for the price under Article 62 due to Article 28. If the law of the forum requires property transfer for the seller's price claim, the only **594**

practical consequence of the limitation under Article 28 of the CISG is that the seller is not able to economically force the buyer to take delivery of the goods. The transfer of property does not impact critical issues like whether and when the seller has to resell the goods if the buyer indicates he or she no longer intends to fulfill the contract. This connection between property and the CISG is, thus, much smaller and much less relevant than the connection between some common law sales and property laws.

595 In conclusion, the relevance of national property law on the CISG is likely overestimated regarding the seller's obligations (Articles 30 and 41) and contract characterization. Conversely, it is underestimated concerning the buyer's obligations (Articles 62 and 28). This finding supports the assessment by *Gutzwiller* (Switzerland) in 1953 that the transfer of property was for the most part a theoretical question without notable importance for unified sales law.[1217] This limited relevance of property in the goods under the CISG allows for another conclusion: By not excluding the CISG in international sales transactions, parties can mitigate the effects of national property law differences. In contrast to national sales law, parties can thereby avoid subsequent legal surprises and costly discussions of national property laws in case of litigation or arbitration.

596 Beyond the influence of property in the goods on the CISG, it is equally important to consider the often misunderstood impact of the CISG on property in the goods. Article 4, sentence 2(b) of the CISG excludes the effect which the contract may have on the property in the goods sold. Even if one applies the definition of property proposed in this work and consequently limits the property to the legal interest the seller has in the goods, the CISG has no effect on third party rights. This exclusion extends to retention of property clauses between the parties as far as their effect on property stands to reason. Yet, national property laws can still pose incidental questions impacting property in goods, but these effects stem from national law, not the CISG. The CISG does not allow parties to choose the rules on property transfer.

597 Remedies based on property under national law are unaffected for third parties, contractual parties' claim can only exist to the extent that the requirements of a remedy with the same content under the CISG are fulfilled. More far-reaching remedies under national law are preempted. This nuanced interpretation stands in contrast to the opinions that either consider national law completely preempted or that recognize unrestricted concurrent application of remedies under the CISG and national law.

598 Property in the goods is crucial if a contractual party becomes insolvent before the contract is fully performed. The CISG does not supersede national insolvency law. In contrast to an opinion in scholarly work, the CISG also

1217 Special Commission, Doc. 98, p. 34.

does not hinder the applicable property law from considering the property in the goods to revest with the seller in case of contract avoidance. Therefore, the impact of the CISG on property transfer is overestimated.

599 These insights on the interplay between the property in the goods and the CISG can also be extrapolated to the future unification and guide harmonization of law on the European and global level. If one interprets the CISG as is proposed in this work, the relevance of the transfer of property for the CISG is such that no convincing argument can be made regarding a necessity to unify the transfer of property. Differences in national property law are more pertinent for goods allocation in insolvency and non-contractual remedies. Discussions should focus on these areas rather than contract law distinctions like abstract or causal transfers.

600 The conclusions reached at hand could also be considered with regard to the unification of private international law and the common cry for more party autonomy regarding a choice of law of the applicable property law. One argument in this regard is that a possibility of a choice of law would allow the parties to adjust the law applicable to property to the contract law of their liking and, thereby, avoid frictions between both applicable laws.[1218] If one agrees with the interpretation of the CISG in this work, the CISG shows that it is possible to create uniform contract law that is so decoupled from national property law that it renders the interplay an unconvincing argument in favor of allowing choice of law regarding the applicable property law.

601 Furthermore, the decoupling of property in goods and the CISG should be considered a blueprint for further unification and harmonization of contract law. Neither the obligation to transfer property in the goods nor contract characterization should be taken back in time and retied to national notions of property. The CISG's progress from an eviction-based liability system to one in which the mere existence of a third party right is a breach of contract should not be nebulized again by requiring a "*restriction* [that] *prevents or limits the use of the goods*" as has happened in Article 9 Directive (EU) 2019/771. Until property in goods and its transfer are unified, contract law unification should avoid referencing property in goods, opting instead for uniform legal concepts.

1218 Cf. for this argument for example, *Ritterhoff*, pp. 126–133, 292.

II. Theses

Chapter 2:

1. While most courts and scholars seem to assume that "property" is a very similar notion in many legal systems, there are relevant differences (apart from the transfer of property) that are rarely mentioned. Some legal systems consider property to be a relative notion, other legal systems take an absolute notion of property as a basis, while for example, Nordic countries try to solve all arising conflicts without reference to a single concept such as property at all.

Chapter 3:

2. The CISG should be interpreted to have its own notion of "property" in Article 30 of the CISG.
3. "Property" under Article 30 of the CISG refers to the legal interest the seller has in the goods with no regard to the quality of this interest.
4. Articles 30 and 41 of the CISG contain distinguishable obligations with regard to the transfer of property based on the definition in the prior thesis. The concerned persons are different, the relevant point in time might be different, and Article 6 of the CISG is to be applied separately. This interpretation deviates from current interpretations of the relationship between Articles 30 and 41 of the CISG.
5. The actual transfer of property in the sense of national law is very limited in practical relevance, since "claims" of third parties also breach the contract in the context of Articles 30 and 41 of the CISG. The most important situation for the "mere" right of a third party is if the third party remains passive and the buyer nonetheless relies on the breach of contract. The CISG protects the buyer already at this stage, and thereby follows the approach of what is called "*Eigentumsverschaffungspflicht*" in Germany, while deviating from many other legal systems.
6. For purposes of the CISG, "property" in the sense of national laws is merely one right a seller or a third party can have in the goods among many and is not singled out.

Chapter 4:

7. If "property" is understood to refer to what the respective national law considers to be property, these (diverging) notions should not be used in defining the scope of application by indirectly defining a sales contract

under Articles 30 and 53 of the CISG. Otherwise, the scope of the CISG would differ depending on the applicable property law.

8. The reasoning in the English Supreme Court case *PST Energy 7 Shipping LLC and another v OW Bunker Malta Ltd and another* ("*The Res Cogitans*") should not be extrapolated to the characterization of a sales contract under the CISG.
9. Considering the case *PST Energy 7 Shipping LLC and another v OW Bunker Malta Ltd and another* ("*The Res Cogitans*") under the CISG shows that also the proposed, autonomous definition of property (Chapter 3, Thesis 3) should not form part of the characterization requirements of CISG contracts.
10. A sales contract under the CISG is a contract that envisions the transaction of goods against payment. To this end, the goods are sufficiently allocated to the buyer when, as between the parties, the buyer permanently receives the benefits and use of the goods, and the seller does not bear the risk of haphazard loss of or damage to the goods and no longer retains any legal interest in them.

Chapter 5:

11. Article 28 of the CISG applies to the seller's claim for the price under Article 62 of the CISG. Consequently, the transfer of property can have an impact on the seller's remedies under the CISG.
12. The practical difference between applying Article 28 of the CISG to the claim for the price under Article 62 of the CISG and not applying it, is limited to whether the seller can economically force the buyer to take the goods by being able to sue for the full purchase price. In particular, Article 28 of the CISG has no impact on the seller's duty to mitigate the loss under Article 77 of the CISG by requiring the seller to effect a timely cover transaction.

Chapter 6:

13. If one defines "property" as the legal interest the seller has in the goods with no regard to the quality of this interest (Chapter 3, Thesis 3), this understanding can also be put to use in Article 4, sentence 2(b) of the CISG.
14. OHADA succeeded in harmonizing the transfer of property in contrast to the CISG, which is, however, due to the similar legal roots of legal

systems of the Contracting States of OHADA and is not conceivable under the CISG.

15. The CISG does not apply directly to the question whether there is sufficient consent between the parties to hinder the transfer of property by a retention of property clause. International case law only appears to be contradictory in this question at first sight, but is consistent if one understands that the CISG can be relevant to determine consent by way of an incidental question depending on the applicable property law.
16. The parties cannot regulate the transfer of property by means of Article 6 of the CISG, and may only do so as far as the applicable international private law and applicable property law allow for party autonomy.
17. A unification of the contract's effect on the CISG was and is not necessary under the CISG, since under the interpretation put forward in this study, property is not relevant under the CISG. The exception of the relevance of the transfer of property for the claim for the purchase price under Articles 62 and 28 of the CISG is due to fundamental differences between national sales laws. These differences would, however, not be reconciled by unifying the rules on the effect the CISG has on property.

Chapter 7:

18. Claims based on property can concern matters that are not governed by the CISG, and should thus not be considered generally preempted by the CISG.
19. Even if the parties have agreed on a retention of property clause, the CISG in principle prevents the seller from repossessing the goods before avoidance of contract.

Chapter 8:

20. The CISG does not supersede national law regarding the available assets for distribution and priorities under national insolvency law even though the former is an international convention.
21. Whether property is automatically "retransferred" to the seller after avoidance of contract if the goods are situated in France or Italy is not a matter governed by the CISG, and Article 7(1) of the CISG cannot support any interpretation to this end.
22. Whether a CISG contract can still be considered a *contrat translatif* under the applicable property law after avoidance is not a preliminary question for the *lex contractus* but should be governed the *lex rei sitae*.

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