# Property in Goods and the CISG

by

Till Maier-Lohmann

Fachmedien Recht und Wirtschaft I dfv Mediengruppe I Frankfurt am Main

*Basler Dissertation*



**Bibliographical data of the German National Library (Deutsche Nationalbibliothek)**

The German National Library lists this publication in the German National Bibliography (Deutsche Nationalbibliografie). Detailed bibliographical information is available online at http://dnb.de.

ISBN 978-3-8005-1942-2

dfv Mediengruppe



Printing: Beltz Grafische Betriebe GmbH, 99947 Bad Langensalza

Printed in Germany

# 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.

Additionally, I wish to thank Professor Reinhard Zimmermann for his early support during my studies in Freiburg and his interest in my research. Both of my stays at the Max Planck Institute for comparative and international private law Hamburg were invaluable to me due to the extraordinary and generous group of scholars who carry out research there. Furthermore, I am grateful to Professor Ingeborg Schwenzer who introduced me to the complexities of academic work on the CISG at her chair between 2014 and 2017.

Ben Köhler, Linus Dethloff-Wieland, Julian Juhasz, and Rory Price offered insightful feedback on specific chapters. Alissa Palumbo Högger provided linguistic revisions of this study. While it is difficult to fully capture their impact on this specific work, I am deeply indebted to Nadja Harraschain, Alexander Ruckteschler, Steffen Lindemann, David Tebel, and many others in the Vis Moot community. Their influence has profoundly shaped my approach to legal reasoning and argumentation, far more than they may realize.

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)

# Table of contents

# § 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]

---

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.*"

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] **5**

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. **6**

## 2. CISG and national property law

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. **7**

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?

---

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.