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Transfer of Ownership in International Sales of Goods

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I. Preface

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II. Abbreviations

Central	Center for Transnational Law
CISG	United Nations Convention on Contracts for the International Sale of Goods
CC	Swiss Civil Code
CO	Swiss Code of Obligations
DEBL	Swiss Debt Enforcement and Bankruptcy Law
p./pp.	page (-s)
PECL	Principles of European Contract Law
PIL	Private International Law
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
USA	United States of America

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III. Considerations

A. Introduction

This thesis deals with how ownership is transferred in connection with international sale contracts. It shows what stumbling blocks might be avoided by observing peculiarities of the law applicable to an international sales contract and especially to the transfer of ownership. Thereby, the following legal systems will be taken into consideration: Lex Mercatoria, Swiss Law, South African Law and English Law.

The aim of every domestic and international sales contract is to pass the property of goods from one contract party to the other contract party against the payment of a certain price. Contracts of sales whether written, oral or simple because of a conclusive behaviour are always the basis for transfer of ownership. Every international sales contract is governed by a particular national law or by the so called Lex Mercatoria.[1] Since it is in the parties' autonomy to choose the law governing the contract (freedom of choice)[2] it is critical to know what consequence this choice has on transferring the property, or whether this choice has a consequence at all.

International sales contracts mean contracts where parties of different countries are involved.[3] Internationality is defined in Article 1 (1) of the United Nations Convention on Contracts for the International Sale of Goods (hereinafter: CISG) as: *"This convention applies to contract of sales of goods between parties whose places of business are in different states"*[4]. The obligations of the seller and the buyer are stated in Article 30 and 53 CISG. *"The seller must deliver the goods, hand over any documents relating to them and transfer the property as required by the contract and this Convention." "The buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention"*. Section 2 (1) of the English Sale of Goods Act 1979 defines a contract for the sale of goods as: *"… a contract by which the seller transfers or agrees to transfer the property in goods to the buyer for*

[1] Sellman P., 'Law of International Trade', p. 1
[2] Koppenol-Laforce Marielle, 'International Contracts', p. 1
[3] Todd, P., 'Cases and Materials on International Trade Law', p. 3
[4] 'United Nations Convention on Contracts for the International Sale of Goods' (1980)

a money consideration, called the price." Article 184 Section 1 of the Swiss Code of Obligations (CO) states the following: *"A contract of sale is a contract whereby the seller obligates himself to deliver to the buyer the object of purchase and to transfer title thereto to the buyer, and the buyer obligates himself to pay the purchase price to the seller"*. In South Africa there is obviously no specific act on the sales of goods. Therefore, the requirements for a valid contract have to be derived from common law. Hackwill states that a sales contract is a mutual contract for the transfer of possession of an object in exchange for a price.[5]

As mentioned above the contract between seller and buyer is always the basis for the transfer of ownership. However, how the ownership finally transfers in the mentioned legal systems will be established below. All of the mentioned systems of law are more or less based on Roman Law which established the parameters/rules for property law. South African's law of property, sales, and contracts[6] as well as English and Swiss Law can be traced back to Roman Law.[7] Examining this common background by tracing the conceptualization of transfer of ownership in the Roman Property Law will illustrate the extent to which the rules on the transfer of property have evolved since the classical era in order to meet changing needs of modern legal systems.

B. Significance of Ownership and its Roman Background

Before reviewing modern legal systems, it is important to understand the significance of ownership in today's time and to present the principles of Roman Property Law. By presenting the principles of Roman Property Law, this thesis will also provide a comparative analysis of the current regulations in Switzerland, South Africa and England concerning the described principles of Roman Property Law.

[5] Hackwill G R J, 'Mackeurtans's Sale of Goods in South Africa', p. 1
[6] OECD 'Peer Review: Competition Law and Policy in South Africa', p. 11
[7] Pryles M., 'International Trade Law', p. 60

1. Significance of Ownership

Property law in modern capitalistic economies has a fundamental significance in order to keep the economy going and to generate wealth. In '*The Mystery of Capital,* De Soto highlights the enormous importance of property law in modern, capitalistic legal systems. He describes the impact that an effective working law of property might have: *"[t]he recognition and integration of extralegal property rights was a key element in the United States becoming the most important market economy and producer of capital in the world"*.[8] He establishes further that the lack of an efficiently drafted legal right to have property, integrated into a formal legal system, marginalizes people in many developing countries by preventing them from using property to generate capital. That fact might be one of the problems why the economies in many developing countries do not lift off like the US economy did when a revolution of the property rights was carried out. In order for developing nations to escape from poverty, it will be, beside other measures, necessary to introduce laws that strictly uphold and enforce individual property rights.[9] The importance of guaranteed ownership has motivated the countries in question to guarantee the right of ownership on a constitutional level:

- Article 26 of the Swiss Constitution guarantees everyone with property in Switzerland that their right will be respected on constitutional level: *"1. The right to property is guaranteed. 2. Expropriation and restrictions of ownership equivalent to expropriation shall be fully compensated."*

- Section 25 of the South African constitution states that: *"(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property. (2) Property may be expropriated only in terms of law of general application – (a) for public purposes or in the public interest; (b) and subject to compensation, the amount, timing, and manner of payment, of which must be agreed, or decided or approved by a court."*

[8] De Soto H., 'The Mystery of Capital', p. 148
[9] De Soto H., 'The Mystery of Capital', p.149

- Apparently, the United Kingdom does not have a codified constitution. However, the property rights are guaranteed in the Human Rights Act 1998, Part II, Article 1. The Human Rights Act incorporates the European Convention on Human Rights into English Law. According to the British Department of Constitutional Affairs, it has constitutional character.[10] Part II Article 1 states that: *"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."*[11]

2. Roman Law of Things

2.1. The Concept of Roman Property Law: Ownership and Possession

The following overview concerning the Roman Property Law concentrates mainly on the legislation of Justinian. Firstly, the significant distinction between ownership and possession will be explained. Later, it will be described how ownership could be acquired.

2.1.1. Ownership

Ownership was the officially styled "dominium ex iure Quiritium" and was the most extensive right of property that the Roman Law conferred.[12] Originally, this was the sole type of ownership that was only open to Roman citizens and could only be created in terms of Roman Law. However, in order to protect a transferee who did not acquire ownership, according to the terms of Roman Law, the praetor gave full protection to the transferee and effectively recognised with

[10] http://www.dca.gov.uk/peoples-rights/human-rights/faqs.htm (17/11/2006)
[11] Human Rights Act 1998, Ch. 42, Sch. 1, Pt. II (Eng.)
[12] Spiller P., 'Manual of Roman Law', p. 101

this protection a new form of ownership. This new form was called praetorian or bonitary ownership. It is important to stress that this kind of ownership was only an interim measure. As soon as the transferee acquired ownership, according to the terms of Roman Law, he obtained full Roman ownership ("dominium ex iure Quiritium"). Both kinds of the above described ownership were not open to foreigners. The foreigners had to be satisfied only with an action to protect their right to possession. [13]

The person who acquired ownership could assert his title against anyone. He had the absolute right to a thing. This absolute nature was evident in at least three aspects: the owner had absolute title, he had extensive rights over his property and he had powerful remedies which were available to protect use, enjoyment and possession. It was the right of exclusive legal control over a thing.[14] The major remedy by which the owner ("dominium ex iure Quiritium") was protected was the "rei vindicatio". With this remedy he could force anyone to hand over the thing in his ownership. The remedy of the owner protected by the praetor was called "actio publiciana".

However, the unlimited right of exclusive control over a thing was at that time, like today, only a principle. It was the owner himself who could limit his right. He could grant certain rights over the property such as personal or real servitudes like "Ususfructus"[15] or real security to a third person. Furthermore, ownership was restricted by many laws such as building restrictions or legal rules such as the rights of neighbours.[16]

The Roman Law also acknowledged a joint ownership. Joint ownership meant that the right to one thing was vested in several

[13] Thomas PhJ, van Meerwe CG, Stoop BC., 'Historical Foundations of South African Private Law', p. 164
[14] Thomas PhJ, van Meerwe CG, Stoop BC., 'Historical Foundations of South African Private Law', p. 162
[15] A ususfructus is the right of using and taking the fruits of something belonging to another. Normally it was given for the life of the receiver unless a shorter period was expressed. It could exist in land, houses, slaves, beasts, and in short in everything except what was consumed by use (Hunter, W., 'Introduction to Roman Law', p. 69)
[16] Thomas PhJ, van Meerwe CG, Stoop BC., 'Historical Foundations of South African Private Law', p. 162

owners. Any joint owner could transfer his share of the joint property. However, with regard to the thing as a whole, only all joint owners together had the right to alienate the whole thing. Finally, no joint owner was forced to remain against his will. Therefore, any co-owner had at any time the right to claim division of the joint property ("actio communi dividundo").[17]

To distinguish from the absolute or quasi absolute right to a thing is the factual control over a thing. This right was called "possessio".

2.1.2. Possession

Lay persons often use the terms possession and ownership as synonyms. However, a sharp distinction between these two terms has existed since Roman times. In legal terms there is an important distinction between the two concepts. Ulpian stated: *"Ownership has nothing in common with possession."*[18]

Possession is the physical control over a thing and the exclusion of other persons from such control. This right might be enjoyed by the owner of the property as well as by a third person who is not the owner of the property. However, it was and is one of the important rights flowing from ownership to possess.[19] Possession was acquired by taking a thing physically with the intention to possess it.[20]

The statement of Ulpian might go too far. It is correct as far as ownership implies the legal right in terms of which a person may use or dispose of his thing. However, ownership and possession are often dependent on each other. Often possession and another legal fact led to ownership. For example, possession in good faith for a specific period could lead to ownership by means of prescription. Furthermore, ownership was not only acquired by a mutual agreement to transfer

[17] Thomas PhJ, van Meerwe CG, Stoop BC., 'Historical Foundations of South African Private Law', p. 163
[18] Spiller P., 'A manual of Roman Law', p. 120
[19] Spiller P., 'A manual of Roman Law', p. 119
[20] Thomas PhJ, van Meerwe CG, Stoop BC., 'Historical Foundations of South African Private Law', p. 156

ownership but only once the transferee acquired possession of the thing (see below). Finally, possession played another important role. It was assumed that the possessor is the owner of the thing as long as another person does not prove that he has the ownership over that thing. Therefore, the person who was in possession of a thing enjoyed an advantage over a non-possessing person who was for example the owner.[21]

In Swiss Law this supposition plays an important role, Article 930 (1) of the Swiss Civil Code states that: *"[t]he person of a movable chattel is presumed to be its owner."* In South Africa the possessor of a thing is protected as well by a so-called spoliation remedy. The spoliation remedy is aimed at undoing the results of taking of property by means of unlawful self-help.[22] In Nino Bonino v De Lange it was stated that: *"… the law will not allow a man to take the law into his own hands and to take out of the possession of another […] property which he thinks he as a claim to or may have a very good and very just claim to."*[23] Finally, possession is also protected in England. The Court of Exchequer acknowledged the protection of possession in Rogers v Spence.[24]

2.2. Acquisition of Ownership by "Mancipatio", "In Iure Cessio" and "Traditio"

In the classical era, Roman Law made a fundamental distinction between "res mancipi" and "res nec mancipi". At the time of Justinian this distinction was definitively gone.[25]. This distinction has therefore no relevance in contemporary legal systems as well. However, in order to complete this section this distinction shall be reviewed shortly (see 2.2.1).

[21] Thomas PhJ, van Meerwe CG, Stoop BC., 'Historical Foundations of South African Private Law', p. 149
[22] Van der Walt AJ., 'Introduction to the law of property', p. 224
[23] Nino Bonino v De Lange 1906 TS 120
[24] 13 M. & W. R. p. 581
[25] Hunter, W., 'Introduction to Roman Law', p. 49

2.2.1 "Mancipatio"

As mentioned above "Mancipatio" does not have a role in modern legal systems. However, in early Roman times only few articles of any importance could be transferred without "Mancipatio"[26]. The meaning of the distinction between "res mancipi" and "res nec mancipi" in classical times rested mainly in the manner of the transaction. The transfer of the actual Roman civil property right to "res mancipi" had to take place under the observation of certain solemn formalities known as "Mancipatio". "Mancipatio" is a fictitious sale made in the presence of witnesses; the right was restricted to Roman citizens.[27] The objects that required "Mancipatio" were land and houses in what is today called Italy, slaves, draught and burden animals and rural but not urban servitudes.[28]

The objects that did not require "Mancipatio" ("res nec mancipi") could be validly transferred by delivery ("traditio", see: 2.2.3.). Alongside the formal ceremonies of transaction, the Roman Law recognized the informal tradition, handing over the thing, as a basis for the acquisition of property. This process became sufficient for the transfer of "res mancipi" as well.[29] However, delivery did not always transfer ownership. Sometimes things were handed over for the sake of payment of a loan, rent, etc.

2.2.2. "In Iure Cessio"

"In iure cessio" is described as a fictitious law-suit. According to § 24 of the Institutes of Roman Law by Gaius, the surrenderee is grasping the object in the presence of some magistrate and says: *"I say this slave is my property."* Then the magistrate interrogates the surrenderer whether

[26] However, both res mancipi and res nec mancipi could be conveyed by handing over in court. This action was called "in iure cessio". But this was even more difficult to get through the procedure than Mancipatio. Generally it was used for other purposes (see 2.2.2.) Hunter, W., 'Introduction to Roman Law', p. 49
[27] Tamm, D., 'Roman Law and European Legal History', p. 74
[28] Hunter W.A., 'Introduction to Roman Law', p. 49
[29] Levy E., 'West Roman Vulgar Law', p. 128

he makes an objection or not. If the surrenderer makes no objection the magistrate awards the object to the surrenderee. [30]

"In iure cessio" was not used often as a means of conveyance, since it was easier to handle it with other instruments. One of the main reasons for not using the "in iure cessio" might have been the fact that it was an implied public lawsuit.[31] As a result, everyone knew about the business dealings – a situation which is not always desirable.

2.2.3. "Traditio"

"Traditio" was the delivery of a thing with the intention to pass and to receive ownership. It applied to land as well as to movables. However, before the time of Justinian it could do no more than transfer the limited interest in provincial land and confer bonitary ownership in Italic land.[32]

It has to be noted that ownership did not pass every time a person is transferring a thing to another person. There might be other reasons to hand over a chattel like pledge, loan, etc. Ownership only passes in those cases where the passing was based on an "iusta causa". "Iusta causa" signified a transaction in consequence of which ownership usually passes. Both parties had the intention to pass ownership. The below listed transactions were recognised as sufficient for the transfer of ownership. This listing is by far not complete but shows the main intention to pass ownership.

- a contract of sale,
- a donation, and
- a payment of a debt.[33]

Again it is important to note that an "iusta causa" was not in itself a mode of acquisition. The conclusion of a contract of sale did not in itself

[30] Gaius, 'The Institutes of Roman Law' § 24
[31] Leage R.W., 'Roman Private Law', p. 133
[32] Spiller P., 'A Manual of Roman Law', p. 102
[33] Leage R.W., 'Roman Private Law', p. 196

transfer ownership. Ownership was only transferred once the thing was handed over with the intention to pass ownership. Therefore, only the handing over of a thing did not in itself affect the transfer of ownership. The handing over had to be based on the intention to transfer ownership.[34] Note that Justinian required also the payment of the price in order to pass ownership.[35]

The above described concept is still being followed in Switzerland. Article 184 of the Swiss Code of Obligations states that: *A contract of sale is a contract whereby the seller obligates himself to deliver to the buyer the object of purchase and to transfer title thereto to the buyer, and the buyer obligates himself to pay the purchase price to the seller.“* Delivery to the buyer is necessary for the transfer of ownership (Article 714 Swiss Civil Code). However, as stated in Article 714 Swiss Civil Code payment of the price is not a condition to pass ownership, unlike to Justinian's legislation. South Africa also follows this concept. In this connection it is important to note that in Switzerland and South Africa the system of ownership is abstract. As a consequence, the invalidity of the sale contract does not affect the validity of the transfer of ownership as long as there was a valid real agreement, coupled with delivery. In Commissioner of Customs and Excise v Randles, Brothers and Hudson the court decided: *“… there may be direct evidence of an intention to pass and acquire ownership and if there is, there is no need to rely on the preceding legal transaction in order to show that ownership has, as a fact, passed.”*[36] However, it is important to note that payment of the price is a requirement in South Africa in order to transfer ownership (see below). In England, however, the handing over of the good from one party to the other is not a necessary condition for the transfer of ownership. The Sale of Goods Act 1979 states in Section 17: *“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.”* If there is no intention of the

[34] Leage R.W., ‘Roman Private Law’, p. 196
[35] Thomas PhJ, van Meerwe CG, Stoop BC., ‘Historical Foundations of South African Private Law’, p. 171
[36] Commissioner of Customs and Excise v Randles Brothers and Hudson Ltd 1941 AD 369

parties as to the transfer of ownership, the ownership passes by concluding the sale contract (Section 18 of the Sale of Goods Act).

In Roman Law as well as in modern legal system there are different forms of delivery ("traditio").

- Simple or effective delivery

  Effective delivery is the physical hand over of the thing to another person.[37] This was the most common handing over of things. However, there were cases were an effective delivery could not take place. There are also cases where the good was too heavy or situated in another country or it was an immovable thing. Therefore, other methods of handing over were used.

- Delivery by the long hand

  It was considered sufficient if the transferor pointed out the boundaries of the property or handing over the key to a warehouse to transfer ownership. This made the transferee immediately owner of such thing. Transfer of ownership by transfer of documents occurred only late in the Eastern Empire.[38]

- Delivery by the short hand

  This kind of delivery took place when a physical handover was not necessary because the buyer was already possessor of the thing. The agreement between the parties was regarded as sufficient to acquire ownership.[39]

[37] Leage R.W., 'Roman Private Law', p. 196
[38] Thomas PhJ, van Meerwe CG, Stoop BC., 'Historical Foundations of South African Private Law', p. 170
[39] Thomas PhJ, van Meerwe CG, Stoop BC., 'Historical Foundations of South African Private Law', p. 171

- "Constitutum Possessorium"

  The delivery "constitutum possessorium" is the opposite of the delivery by the short hand. The transferor wished to give ownership but wished to retain control temporarily. It was not necessary to hand the thing back and forth.[40]

2.3. Acquisition of Ownership by "Ususcapio"

Finally, the Roman Law provided another instrument, called "Ususcapio", to acquire ownership. "Ususcapio" or prescription was to ensure that the legal situation was brought in harmony with the factual situation. "Ususcapio" made it possible for a possessor to become owner after a certain period of time. To become owner through prescription the following requirements had to be fulfilled:[41]

- The thing must have been capable of being acquired ownership by prescription. This means that it had to be a "res habilis", a thing which was not a "res extra commercium"[42]. It was furthermore not possible to acquire ownership of a stolen thing.
- The thing must have been in the uninterrupted possession of the potential future owner for a period of ten years for immovables where the original owner resided in the same province and 20 years where the parties were domiciled in different provinces. For all other things a period of three years was required.
- The thing had to be in possession of the potential owner because of an "iusta causa". That was a transaction in consequence of which ownership in normal circumstances passes.
- Finally, the acquirer was required to act in good faith. He must reasonably have believed that he acquired ownership on the basis of an "iusta causa".

[40] Thomas PhJ, van Meerwe CG, Stoop BC., 'Historical Foundations of South African Private Law', p. 171
[41] Leage R.W., 'Roman Private Law', p. 201
[42] "Res extra commercium" were thing which could not be owned by individuals such as things dedicated to good (temples, altars) (Leage R.W., 'Roman Private Law', p. 154)

Prescription does exist in Swiss Law. Movable things can be acquired by prescription if: *" … a person has been continuously in bona fide and peaceable possession of another's chattel for five years as owner, he is held to have acquired the ownership by prescription"*, (Art. 728 of the Swiss Civil Code). The period for immovable things (piece of land) is ten years if the acquirer was registered in the land register without having a title. The period is thirty years if the acquirer is not registered in the land register (Articles 661 and 662 of the Swiss Civil Code).

In South Africa, the Prescription Act 18 of 1943 and the Prescription Act 68 of 1969 are decisive. The prerequisites to obtain a thing by prescription are stated in Section 1 of the Prescription Act 68 of 1969. In terms of Section 1, a person becomes owner of a thing which he openly and as if he were the owner has possessed for an uninterrupted period of thirty years or for a period that, together with the periods for which the things have been possessed in this way by his predecessors in title, would constitute an uninterrupted period of thirty years. In Pienaar v Rabie 1983 3 SA 126 the court stated that the aim of the prescription is not to punish a negligent owner but to provide a clear legal situation.[43]

In England, prescription is regulated by the Prescription Act 1832 Chapter 71 and the Law of Property Act 1925.[44]

2.4. Protection of Possession and Ownership through "Interdicts", "Rei Vindicatio" and "Actio Publiciana in Rem"

2.4.1. Protection of Possession through "Interdicts"

Possession was protected by "Interdicts". "Interdicts" were invented to solve a legal dispute in a fast and efficient way by the praetor. By granting an interdict, the praetor did not decide on the merits of the case.

[43] Thomas PhJ, van Meerwe CG, Stoop BC., 'Historical Foundations of South African Private Law', p. 177
[44] http://web.lexis-nexis.com/professional (22/11/2006)

The aim of the interdict was only to restore or to maintain the status quo between the parties. The party who claimed the better right on a thing than the possessor had to take recourse to the normal legal procedures. In this proceeding he has to prove that he has the better right (ownership). The following possessors were protected:

- the owner of the thing,
- the bona fide possessor of a thing, and
- the mala fide possessor of a thing (for example a thief).

Furthermore, there were four possessors protected who did not possess for themselves:

- the pledge creditor,
- the sequester,
- the hereditary lease holder, and
- the holder at will.

The Roman Law knew interdicts to maintain or protect possessions and interdicts to regain possessions that were lost.[45]

The Swiss Law is consistent with the above described protection of possession. It states that: "*A person in possession has the right to use all necessary force to prevent any unlawful attack on his rights. Where he has been deprived of his possession secretly or by violence, he can, if it is a movable chattel, retake it by force provided he can catch the disturber in the very act or in immediate pursuit",* (Article 926 Swiss Civil Code). The possessor has furthermore a right of restitution: *"Where any person has wrongfully deprived another of his possession, he is bound to restore it even though he maintains that he has a better right to the property in question",* (Art. 927 Swiss Civil Code).

In South Africa possession is protected as well. In Setlogelo v Setlogelo it was stated that: *"The possessor of property has a right to*

[45] Thomas PhJ, van Meerwe CG, Stoop BC., 'Historical Foundations of South African Private Law', p. 153

protection."[46] The protection is provided by so called interdicts. As it is understood in South African Law, an interdict is a summary court order by which a person is ordered to do something, to stop doing something or to refrain from doing something in order to stop or prevent infringement of property.[47] In Setlogelo v Setlogelo it was furthermore defined what requirements are needed to grant an interdict: *" ... a clear right, injury actually committed or reasonably apprehended, and the absence of similar protection by any other ordinary remedy."*[48]

2.4.2. Protection of Ownership through "Rei Vindicatio" and "Actio Publiciana in Rem"

The "Rei Vindicatio" was the remedy of the owner "ex iure Quiritium" to reclaim possession of his thing from any person who was in possession thereof. Often this remedy had to be raised against the protection of the possession ("Interdict"). It did not matter whether the possessor was in bona or mala fide possession. A person who was not owner "ex iure Quiritium" could not raise the "Rei Vindicatio". However, these owners were protected by the praetor. He created a special action, the "Actio Publiciana" whereby the owner could claim the thing from any person in possession thereof, like the "Rei Vindicatio".[49]

In modern legal system there are no distinctions between owner "ex iure Quiritium" and other types of ownership. However, the "Rei Vindicatio" still exists in the contemporary legal systems.

Swiss Law provides the "Rei Vindicatio" in Article 641 of the Swiss Civil Code: *"The owner of anything has the right, within the limits of the law, to dispose of it at will. He has the right to demand it back from*

[46] Setlogelo v Setlogelo 1914 AD 223
[47] Van der Walt AJ./Pienaar GJ., 'Introduction to the Law of Property', p. 222
[48] Setlogelo v Setlogelo 1914 AD 224
[49] Spiller P., 'A manual of Roman Law', p. 119

anyone who wrongfully detains it and take measures to prevent any unlawful interference with it."

In South Africa Law the importance of this action follows from Chetty v Naido: *"It is inherent in the nature of ownership that possession of the res should normally be with the owner, and it follows that no other person may withhold it from the owner unless he is vested with some rights enforceable against the owner. The owner, in instituting a rei vindicatio, need, therefore, do no more than allege and prove that he is the owner and that the defendant is holding the res – the onus being on the defendant to allege and establish any right to continue to hold against the owner."*[50]

2.5. "Occupatio", "Specificatio" and "Accessio"

In order to complete this chapter it shall be mentioned that the Roman Law provided more methods of acquiring ownership.

Ownership by "Occupatio" was acquired by a person if that person took possession of a thing which did not belong to anyone with the intention to become owner thereof.[51] Swiss Law states that: *"[a]ny person, who takes possession of a chattel that has no owner with the intention of becoming owner of it, acquires ownership in it"*, (Article 718 Swiss Civil Code).

"Accessio" means joining together of two things that belonged to two different owners in such a manner that one thing lost its identity by being joined to the other. Separate ownership over both things was no longer possible.[52] This situation can be seen as the same as one where building material has been joined with the plot of land. To avoid this problem the Swiss workmen are entitled to the creation of a mortgage registered to secure the right over their property if they have supplied material and labour or labour alone (Article 837 (3) Swiss Civil Code). Furthermore, one could

[50] Chetty v Naido 1974 3 SA 12 (A) 20 B - D
[51] Thomas PhJ, van Meerwe CG, Stoop BC., 'Historical Foundations of South African Private Law', p. 178
[52] Thomas PhJ, van Meerwe CG, Stoop BC., 'Historical Foundations of South African Private Law', p. 179

compare this situation to one where grain or oil of different owners is mixing together in order to transport the things.

"Specificatio" finally occurred when a person created a new thing out of existing materials. This is similar to making of wine from grapes or the making of a sculpture out of wood. If the new thing could be reduced to its former state the owner of the material became owner, if it was not possible the maker became owner.[53] Swiss Law knows the same regulation: *"Where a person has used another's material to make or transform some article, the new product becomes the property of the craftsman if the work done is more valuable than the material and that of the owner of the material in the contrary case"*, (Art. 726 Swiss Civil Code).

C. Transfer of Ownership in international Sale of Goods

In international trade the buyer and the seller are in different countries. At the heart of every trade there is a contract between a buyer and a seller. Like any other contract, an international sales contract is governed by a particular national law or the law merchant, also called "Lex Mercatoria". The question of which law governs the contract is answered by rules known as the rules of private international law (PIL). Since every country has its own PIL it is necessary to decide which country's rules should be applied in order to decide which system of law governs the contract.[54] The widely recognized freedom of choice rules in PIL stipulate that the parties are free to choose the law governing the contract. The freedom of choice is a general rule agreed upon and named as the doctrine of autonomy.[55] The parties are free to choose:

- the law of the country of one party: The Swiss Law states this principle in Article 116 (1) of its Private International Law (PIL): "*The contract is subject to the law chosen by the parties."* In South Africa the matter was stated in Guggenheim v Rosenbaum: *"… the proper law of the contract is the law of the country which the parties have agreed or intended."*[56] While in England, the

[53] Thomas PhJ, van Meerwe CG, Stoop BC., 'Historical Foundations of South African Private Law', p. 182
[54] Prof. R.H. Christie, Handout: International Trade Law, The law governing an international contract, S. 1
[55] Koppenon-Laforce Marielle, International Contracts, S 1
[56] 1961 (4) SA 21 31 A

Rome Convention is decisive which was adopted by the UK Contracts (Applicable Law) Act 1990. Article 3.1 of the Rome Convention states that: *"[a] contract shall be governed by the law chosen by the parties. […]."*

- the law of a neutral country: In Switzerland it follows as well out of Article 116 (1) PIL that the parties are entitled to choose the law of a neutral country. Article 3.3. of the Rome Convention states that: *"[t]he fact that the parties have chosen a foreign law […] shall not […] prejudice the application of rules of the law of that country which cannot be derogated from by contract, hereinafter called 'mandatory rules'"*. This provision makes sure that the choice of law cannot be used to avoid mandatory rules. For South Africa an English case is decisive. In Vita Food Products Inc v Unus Shipping Co Ltd a contract was concluded between a Canadian and a US Company. The parties chose English Law to govern their contract. It was decided that: *"[t]here is, in their Lordships' opinion, no ground for refusing to give effect to the express selection of English law as the proper law*".[57]

- the law not connected to any country: This law is often called "lex mercatoria" or transnational law. In Deutsche Schachtbau- und Tiefbohrgesellschaft v Ras al Khaimah National Oil Co the parties agreed that transnational law will govern their contract. The court stated to this clause: *"I do not believe that the presence of such a clause makes the whole contract void or a nullity. […] If there is anything wrong with the provision, it can only be on the ground that it is contrary to public policy […]."*[58]

It is important to stress that the choice of law might have consequences which should not be underestimated. However, before choosing a certain law some considerations about the direct and indirect consequences of the choice have to be made, especially about the interpretation of the contract, the performance and the consequences of the breach of rule and the transfer of ownership.

While common law countries exclude the previous negotiations of the parties and their declarations of subjective intent, civil law countries usually refer in some kind

[57] Vita Food Products Inc v Unus Shipping Co Ltd [1939] AC 277 (PC)
[58] Deutsche Schachtbau- und Tiefbohrgesellschaft v Ras al Khaimah National Oil Co [1987] 2 All ER 769 (CA) 778 - 779

to the previous negotiations. In addition, it is important to take into account how the law governing the contract deals with incomplete performance of a contract. Is it a so-called "all or nothing contract" or the party who has to perform will get paid also for an incomplete performance. England is a common law country with precedents of the all or nothing contract. This means that the party who has not completely performed will not be paid in principle. There are exceptions. However, one should not count on them. In civil law countries the party which fails to perform completely will usually get paid for the performance done, less the costs the other party has paid in order to complete the work. Finally, one has to think about the consequences of breach of rule. In South African law it is clear that the plaintiff is always entitled to claim specific performance. However, in English or Swiss law damages are the primary remedy for breach of contract. Therefore, the party which has to perform has the possibility to stop performing at any time and paying damages in order to withdraw from the contract.[59]

In order to complete this section it is important to clarify what happens if the parties do not choose the law governing the contract. If the parties do not choose a law, the choice might be implied[60] from their use of a standard form known to be governed by the law of that country,[61] from an express choice in previous or related transactions between them,[62] from their choice of the courts of that country[63] or from references in the contract to particular provisions of the law of that country.[64]/[65]

Finally, it has to be stressed that the law governing the contract does not always and not necessarily governs the transfer of ownership as well. This will be explained below.

[59] International Trade Law 2005: The Consequences of Deciding the Law Governing the Contract, Handout of Prof. Christie
[60] Article 3.1. of the Rome Convention / Giuliano-Lagarde Report OJ 1980 No C282/1 / Art. 117 of the Swiss International Private Law
[61] Amin Rasheed Shipping Corp v Kuwait Insurance Co [1984] AC 50
[62] The Njegos [1936] P 90
[63] NV Kwik Hoo Tong Handel Maatschappij v James Findlay & Co Ltd [1927] AC 604
[64] Georg C Anspach Co Ltd v CNR [1950] 3 DLR 26 37
[65] International Trade Law, 2005: The Law Governing an International Contract, Handout of Prof. Christie

1. "Lex Mercatoria"

The above mentioned parties are free to choose a law not connected to any country, the Law Merchant. Originally, the Law Merchant was rules laid down by merchants themselves to regulate their conduct. It derived out of usage and customs common to merchants and traders because the existing regulations were not responsive enough to the growing demands of commerce. The guiding spirit of the Law Merchant was to evolve a law which responds to the needs of the merchants and was comprehensible and acceptable to the merchants who submitted to it.[66] Today, there are several institutions which are developing and codifying the Law Merchant in order to provide trades with suitable regulations for their business. However, these rules are in general not regulating matters concerning transfer of ownership (see 1.1. -1.5., below). This matter is regulated by the national law which is determined by International Private Law or other rules (see 2. – 4., below).

1.1. Center for Transnational Law (Central)[67]

The Center for Transnational Law has published an updated list with principles, rules and standards of "lex mercatoria". However, the Central List does not provide regulations concerning the transfer of ownership. Therefore, parties which are choosing the Central List to govern their sales contract have to pay attention to what national law is applying to the transfer of ownership. Since delivery is in some national legal system an important part of transferring ownership provisions concerning delivery might have implications for the transfer of ownership. However, the Central List does not provide regulations concerning delivery.

1.2. International Institute for the Unification Private Law (UNIDROIT)[68]

UNIDROIT is an institute for the unification of private law. Its purpose is to study the needs and methods for modernising, harmonising and

[66] http://www.answers.com/topic/law-merchant (25//11/2006)
[67] http://www.central.uni-koeln.de/content/index_ger.html (28/11/2006)
[68] http://www.unidroit.org/ (28/11/2006)

coordinating private commercial law between states and groups of states.[69] UNIDROIT acknowledges that: *"… international trade needs its own ordinary law with its own particular role and full range of functions."*[70] Therefore, UNIDROIT codified principles for international commercial contracts which can be applied when the parties have agreed that their contract shall be governed by general principles of law, the "lex mercatoria" or the like.[71] However, since the UNIDROIT principles do not regulate the transfer of ownership of the goods to be sold this matter has to be referred to a national law. The UNIDROIT principles do not even contain provisions concerning the delivery of the goods.

1.3. Principles of European Contract Law (PECL)

These principles have been created by an independent body of experts from all EU Member states. The principles cover the core rules of contract formation, authority of agents, validity, interpretation, contents, performance, non-performance (breach) and remedies.[72] Like the UNIDROIT principles the PECL do not regulate transfer of ownership. The PECL does not contain provisions concerning the delivery of the goods.

1.4. United Nations Convention on Contracts for the International Sale of Goods (CISG)[73]

On the initiative of the UNCITRAL the Convention on the International Sale of Goods was concluded and came into force on 1 January 1988. Today there are 68 states members to the convention, including Switzerland but not England or South Africa.[74] Article 1 of the convention states that the convention applies to the contract of sale of goods between parties whose

[69] http://www.unidroit.org/english/presentation/main.htm (25/11/2006)
[70] Berger K. P., 'The New Law Merchant and the Global Market Place', p. 3 (http://tldb.uni-koeln.de/php/pup_sh ow_document.php?page=pub_show_document.php)
[71] Preamble of the UNIDROIT Principles of International Commercial Contracts 2004
[72] http://frontpage.cbs.dk/law/commission_on_european_contract_law/survey_pecl.htm (25/11/2006)
[73] http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html (28/11/2006)
[74] http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (27/11/06): In Switzerland the CISG came into force at 01/03/1991

places are in different States, when the States are Contracting States (a); or when the rules of private international law lead to the application of the law of a Contracting State (b). However, even if parties are located in states which are not member states to the convention, these parties are still entitled to choose the CISG as the law governing their contract. The task of the CISG is to provide uniform rules for the international sale of goods.[75] However, the CISG does not apply to all kinds of sales. It does not apply to the sale of personal goods, to auctions, to executions, to the sale of stocks and shares and to the sale of ships and electricity (Article 2 CISG).

South Africa and England are not Contracting States to the CISG. However, parties and lawyers involved in an international sale contract must be familiar with the CISG anyways. As mentioned above the parties are free to choose the law governing their contract. The parties therefore are entitled to choose the CISG as the law applicable. Furthermore, Article 1 (1) (b) CISG states that: *"The Convention applies to contracts of sale of goods between parties whose places of business are in different states when the rules of private international law lead to the application of the law of a Contracting State."* If in an international sale contract between the South African party and the other party, the South African private law or the private law of the other state leads to the application of the law of the contracting state, the CISG will therefore be applicable.[76] The same rules apply if one party is English and the other party is from a contracting state to the CISG.

The CISG has no provisions concerning the transfer of ownership. It governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising out of the contract. This is explicitly stated in Article 4 (b) of the CISG that: *"… this Convention is not concerned with the effect which the contract may have on the property in the goods sold."* However, the CISG contains in Section 31 – 34 CISG provisions concerning the method of delivery the goods. Since delivery is a part of transfer of ownership, it can be stated that the CISG does not contain provisions concerning the transfer of ownership but provisions which are

[75] Schlechtriem P., 'Commentary on the UN Convention on the International Sale of Goods (CISG)', p. 5
[76] Ohrendorf J., 'Application of the United Nations Convention for the international sale of goods in South Africa although South Africa is not a party to this Convention', p. 15

related to property rights. Furthermore, Article 71 (2) CISG states that the seller has the right in certain circumstances to refuse delivery: *"… he may prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them"*. However, that provision allows the seller to frustrate the buyer's right to the physical delivery but does not resolve the question of the legal ownership in the goods.[77]

1.5. INCOTERMS 2000

The INCOTERMS 2000 are a set of international rules for the interpretation of common trade terms in international trade. INCOTERMS 2000 deal only with the rights and obligations of the parties to a sales contract with respect to the delivery of goods. Despite these rules, a great number of obstacles that may occur in such a contract are not dealt with, including transfer of ownership and other property rights. In general, INCOTERMS 2000 are used where goods are sold for delivery across national boundaries.[78] However, INCOTERMS 2000 do not interfere with the rules of transfer of ownership. INCOTERMS 2000 defines when delivery takes place but not when ownership passes. For example a sale of goods FOB (free on board) indicates that the risk in the goods transfers from the seller to the buyer at the time the goods are delivered on board.[79] However, since in Swiss Law and South African Law physical delivery is one part of transferring ownership, INCOTERMS 2000 are playing an important role in international trade. The INCOTERMS 2000 might also play a role if the transfer of ownership is governed by English Law. Section 17 (1) of Part III of the Sale of Goods Act states that: *"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."* If the parties intend to transfer the property on the delivery of the goods, then the INCOTERMS 2000 are playing an important role in transferring ownership.

[77] Schlechtriem P., 'Commentary on the UN Convention on the International Sale of Goods (CISG)', p. 529
[78] http://www.iccwbo.org/incoterms/id3040/index.html (25/11/2006)
[79] http://www.uncitral.org/pdf/english/texts_endorsed/INCOTERMS 2000_e.pdf (27/11/2006)

2. Switzerland

As seen above the "Lex Mercatoria" does not regulate the transfer of ownership. Transfer of ownership is therefore regulated by national law. This law was either chosen by the parties or it was determined by the appropriate PIL. Article 1 (1) (b) PIL states that: *"This act regulates in an international context the governing law."* As it will be shown below, the PIL regulates the law governing the contract as well as the law governing ownership.

In general terms the Swiss Law is following the rule of the "Traditio" (2.2.3.). Ownership passes if a thing will be transferred from the seller to the buyer based on an "iusta causa". Therefore, a strict distinction between the act creating an obligation to hand over the good (causa) and the act of actually handing over the good must be made. The obligation to hand over the good is created by concluding a contract of sale. Article 184 of the Swiss Code of Obligations states that: *"A contract of purchase is a contract whereby the seller obligates himself to deliver to the buyer the object of the purchase and to transfer title thereto to the buyer […]"* The delivery of the good finally completes the transfer. This basic distinction is influenced by the substantive law as well as the conflict of law rules.[80]

Finally, one crucial point has to be stressed at this stage. As described above, the ownership passes with the physical delivery of the goods. However, it is important to note that: *"… benefit and risk with regard to the object of purchase pass to the buyer upon conclusion of the contract,"* (Article 185 (1) Swiss Code of Obligations). It has always been essential to take into account the benefit and risk that might pass before ownership is passing. It might be a risk for the buyer to leave the good with the seller after concluding the contract. Therefore, the parties are well advised to conclude an agreement that deviates from Article 185 of the Swiss Code of Obligations. The Swiss legislation does not forbid such an agreement. Another solution might be to implement INCOTERMS 2000 into the contract in order to determine exactly when the risk is passing. If the parties for

[80] Ziegler A., 'Transfer of Ownership in International Trade', p. 395

example choose the FAS term (free alongside ship) it is determined in A5 that: *" […] that the seller bears all risks of loss or damage to the goods until such time as they have been delivered in accordance with A4."* A4 concerning delivery states: *"The seller must place the goods alongside the vessel nominated by the buyer at the loading place named by the buyer at the named port of shipment on the date or within the agreed period and in the manner customary at the port."*

2.1 Conflict of Laws in Connection with Transfer of Ownership

2.1.1 Parties have not chosen the applicable Law

As mentioned above, situations arise where the parties to an international sale contract have not chosen the law governing their contract. If the parties have not chosen the law, the basic distinction between the "Verpflichtungsgeschäft" (causa) and the "Verfügungsgeschäft" (handing over of the goods) causes two different rules for determining the applicable law concerning the "Verpflichtungsgeschäft" and "Verfügungsgeschäft". The Swiss Private International Law, the conflict of law rules, provides rules for this situation.

As the dispute concerns the "causa" of the contract, Article 117 PIL will apply:

"(1) In the absence of a choice of law, the contract is subject to the law of the state with which it is most closely connected.

(2) It is presumed that the closest connection is with the state in which the party called upon to provide the characteristic performance has its ordinary residence or, where it concluded the contract in the exercise of a professional or commercial activity, with the state in which its business establishment is located.

(3) The characteristic performance is deemed to be, in particular:

(a) in the case of contracts for transfer of title the performance of the transferor;

Concerning the handing over of the goods, and thus the transfer of ownership, Articles 100, 101 and 102 PIL are authoritative. Article 100 PIL follows the principle of the "lex rei sitae": *"The acquisition and loss of rights in rem to movable property shall be subject to the law of the state in which the property is located at the time of the events from which the acquisition or loss is derived. Content and exercise of rights in rem to movable property shall be subject to the law at the situs."*

However, there is a special provision for goods which are imported into Switzerland. If these goods arrive in Switzerland and if the acquisition or the loss of a right "in rem" thereto was not already affected abroad, the event that has occurred abroad is regarded as having occurred in Switzerland (Article 102 (1) PIL). Swiss Law regards those events as if they had taken place in Switzerland and had been subject to Swiss Law.

Finally, there is another special provision for goods in transit through Switzerland ("res in transitu"). Once a specific good has left the country of shipment it is hard to determine in which country the good was located when the legal transaction occurred.[81] Article 101 PIL states that acquisition and loss of rights "in rem" to property in transit are deemed to be subject to the law of the state of destination. This provision concerns the cross border transport of goods by sea, air or rail and road transport.[82] However, the provisions of Article 101 PIL are one possible solution. Another possibility would be that property in transit is deemed to be subject to the law of the state of origin. This solution is provided in the Hague Convention of 15 April 1958, Article 6.

2.1.2 Parties have chosen the applicable Law

The parties to an international sales contract are entitled to choose the law governing the contract (causa) (Article 117 PIL). However,

[81] Ziegler A., 'Transfer of Ownership in International Trade', p. 396
[82] 'Explanatory material concerning the draft for the Swiss Federal Act on International Private Law', BBl 1983 (I) p. 133

according to Article 104 (1) PIL the parties are also entitled to choose the law governing the transfer of ownership. They are entitled to choose either the law of the state of shipment, the law of the state of destination or the law to which the underlying legal transaction is to be subjected. However, it has to be stressed that this choice of law cannot be asserted against a third party (Article 104 (2) PIL). This means that third parties are not bound by the choice of law made between the parties. However, they are also not allowed to rely on the choice of law made between the parties.[83]

The parties to an international sales contract are entitled to choose the law governing the transfer of ownership because it is usually very difficult to determine the location of the goods at a particular time.

The choice of law clause governing the contract is usually not considered to be the choice of law governing the transfer of ownership as well. The choice of law clause, therefore, must explicitly state that the choice of law will also affect the matter of transfer of ownership and is not limited to the sales contract itself.[84] It is, therefore, wise to choose the same law for governing the contract and the transfer of ownership. This ensures that the entire transaction is united under one law and the danger is avoided that the law governing the contract contradicts the law governing transfer of ownership. Furthermore, a dispute can be avoided.

2.2. Swiss Substantive Law

2.21 Basis of the Law of Ownership

The law of ownership is guaranteed in Article 26 of the Federal Constitution. Ownership is also guaranteed in the Cantonal Constitutions. This is one of the fundamental rights of people living in Switzerland or having movable or immovable property there. A formal and creeping expropriation is only possible if the justification of the expropriation is stated in a law. This law must be passed by a referendum. Furthermore,

[83] Ziegler A., 'Transfer of Ownership in International Trade', p. 396
[84] Ziegler A., 'Transfer of Ownership in International Trade', p. 396

an expropriation can only take place if it is in the public interest and no other measure would have the same effect.[85]

2.22 Substantive Law as to Transfer of Ownership

As described above the transfer of ownership according to Swiss Law needs two steps: there has to be a "causa" based on which a good is transferred to the buyer (Article 184 of the Swiss Code of Obligations). Art. 714 (1) of the Swiss Civil Code states that: *"Delivery of possession is necessary for the transfer of ownership in movable goods."* However, Swiss Law accepts, as Roman Law, several substitutions for direct delivery:

- in order to complete delivery the good can also be handed over to an authorized agent (Art. 923 Swiss Civil Code).

- like the "brevi manu traditio" ownership can also be acquired without physical delivery. Art. 924 (1) Swiss Civil Code states that: *"Possession of a thing can also be acquired without delivery, where a third person […] continues in possession of it under a distinct title by virtue of some legal transaction."* In international trade it is important to consider whether the goods are stored somewhere or carried by a third person.[86]

- similar to the "constitutum possessorium" it is also possible to acquire ownership when the person who owns the good continues to be in possession of that good under a distinct title, by virtue of some legal transaction. Art. 924 (1) Swiss Civil Code states that: "*Possession can also be acquired without delivery […] the person himself who is alienating continues in possession of it under a distinct title by virtue of some legal transaction."*

[85] http://www.rwi.unizh.ch/keller/PDFs/Vorlesung/WS06_Lehramt_Foliensatz_3.pdf (29/11/2006)
[86] Ziegler A., 'Transfer of Ownership in International Trade', p. 397

- similar to the "longa manu traditio" ownership can also pass by handing over certain documents such as a bill of lading. Art. 925 (1) of the Swiss Civil Law states that: *"Where bills have been drawn to represent goods which have been delivered to a carrier or placed in a repository, the delivery of these bills has the same effect as the delivery of the goods themselves."*

2.3. Mixing and Joining of Goods Shipped in Bulk

In international trade frequently situations arise when products are mixed together while transporting them. One can compare this to oil or grain of different producers mixed together in order to ship them from one place to another place.

Mixing together is a way to acquire ownership ("Accessio"). "Accessio" means that two or more movable objects are joined together. Art. 727 (1) Swiss Civil Code states that: *"Where material belonging to different owners have been intermixed or joined together in such a way that they cannot be separated without material damage or excessive labour and expense, the parties interested in them become co-owners of the new product, their shares in it being proportionate to the value of the different materials at the time of mixing."* The mixing is a factual act and is, therefore, independent of any good or bad faith of the parties involved.[87]

However, if one good is the principle thing then the owner of the principal good will be regarded as the owner of the whole product (Art. 727 (2) Swiss Civil Code). This is similar to the "specification" in Roman Law.

Once co-ownership exists every single co-owner has the right to dispose of his share. Swiss Law states that: *"In respect of his share each co-owner has the right and is under the obligations of an owner; he can alienate or pledge it and it can be seized by his creditors for debts",* (Art. 646 (3) Swiss Civil Code). Ownership in such a share is transferred as described above. If there is a lien or pledge or a right of retention of title concerning a part of

[87] Ziegler A., 'Transfer of Ownership in International Trade', p. 398

the mixed goods, then this belongs to the co-owned share. When there is the situation of Article 727 (2) of the Swiss Civil Code that a good is determined to be the principal thing then the lien or pledge of the accessory good expires, while the lien or pledge relating to the main good is extended to the whole thing.[88]

As seen above the mixing and joining together of goods has created a legal relationship between the owners of the products - a co-ownership. There are also rules necessary to separate this co-ownership. Article 651 (2) Swiss Civil Code states that: *"Where the owners cannot agree on the method of division, the court will order the distribution of the property among them, or, where this cannot be done without serious loss, its sale by public auction or by private auction confined to the owners themselves."* Furthermore, Article 484 (2) and (3) of the Swiss Code of Obligations states that: *"[e]very bailor may claim out of mixed goods such quantity as corresponds to his part". "The warehouseman may effect the segregation thus requested without the cooperation of the other bailors."*

In international trade such a division of goods is usually not difficult to handle since the exact quantity and quality should follow out of the transport documentation.

2.4. Special Terms in the Contract of Sales: INCOTERMS 2000 and Transfer of Ownership

According to Swiss Law, ownership is transferred by delivery based on an "iusta causa". However, Article 104 PIL states that the parties to an international sales contract are entitled to choose the law governing the transfer of ownership. Thus, the contract of sale often contains provisions determining when delivery will take place in order to avoid confusion about the moment of transferring possession and therefore ownership.

[88] Ziegler A., 'Transfer of Ownership in International Trade', p. 398

In international trade it is common to determine the moment of delivery by incorporating the delivery rules of the INCOTERMS 2000. The INCOTERMS 2000 determine the place where the goods are physically handed over to the buyer or his agent. Since delivery is one of the conditions to acquire ownership under Swiss Law INCOTERMS 2000 are helpful to determine the time of transferring ownership.

- Under the term EWX (ex works) the parties name the place where shipment is available to the buyer. The goods are not loaded at that time. The buyer or his agent has to take over the goods as soon as they have been deposited at the place agreed upon. However, it is important to note that if the buyer or his agent is failing to comply with their obligation, the ownership will remain with the seller until such time as possession is finally transferred.[89]

- If the parties are choosing FAS (free alongside ship) or for example DDU (delivered duty unpaid) or DDP (delivered duty paid) the seller has to place to goods at the disposal of the buyer or his representative. In this case, delivery as trigger of transferring ownership will only take place when the buyer is taking over the deposit goods.

- By applying FCA (free carrier) or FOB (free on board) terms the seller has to deliver the goods to the carrier named by the buyer. By doing so the seller delivers to an authorized agent of the buyer according to Article 923 Swiss Civil Code. As mentioned above this is a substitution of direct delivery and causes therefore transfer of ownership.

- Under all C-terms such as CPT (carriage paid to) or CIP (carriage insurance paid to) the seller is obliged to deliver the goods to an agreed point of destination. Therefore, the carrier acts not as agent of the buyer and, therefore, the lack of delivery can not cause transfer of ownership by handing over the goods to the carrier. Only by delivery to the place agreed upon, ownership will transfer to the buyer.

[89] Ziegler A., 'Transfer of Ownership in International Trade', p. 400

2.5. Transfer of Ownership and the United Nations Convention on Contracts for the International Sale of Goods (CISG)

As mentioned above the CISG does not provide provisions concerning the transfer of ownership (Article 4 (a) CISG). However, the CISG provides provisions concerning the delivery of the goods. Since delivery is one of the essential steps of transferring of ownership, the provisions of the CISG have greater importance in this situation. These provisions are especially important if the parties have not agreed on the INCOTERMS 2000 trade terms governing delivery. Article 31 CISG provides several possibilities of delivering goods if the seller is not bound by agreement to deliver to a specific place. The possibilities are:

- *"[a] if the contract of sale involves carriage of the goods--in handing the goods over to the first carrier for transmission to the buyer,*

- *[b] if, in cases not within the preceding subparagraph, the contract relates to specific goods, or unidentified goods to be drawn from a specific stock or to be manufactured or produced, and at the time of the conclusion of the contract the parties knew that the goods were at, or were to be manufactured or produced at, a particular place--in placing the goods at the buyer's disposal at that place (b),*

- *[c] in other cases - in placing the goods at the buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract."*

It can be concluded that the CISG does not govern the transfer of ownership but gives guidance when delivery will take place.

2.6. Legal Occurrences affecting the General Rule of Transfer of Ownership

While handling legal transactions some occurrences might affect the general rule of transferring ownership. This might happen when goods were sold to

two different purchasers, that a creditor of the seller is interfering into the transaction or that a seller is selling despite the fact that he is not entitled to do so.

2.6.1 Goods were sold to two different Purchasers

Situations arise on occasions where the seller is selling a good to two different purchasers. In this situation it is important to emphasize that the Swiss legal system concerning the transfer of ownership is based on the act creating an obligation ("iusta causa") and the act of disposing of the goods to sell. Ownership passes if the good is being transferred to the buyer based on an "iusta causa". Therefore, the seller can conclude sale contracts with two or even more buyers without transferring ownership. The seller has now the obligation to deliver the good to two different persons. Of course, he is naturally not able to fulfil this obligation. However, it is the sellers' choice to decide which obligation he wants to fulfil. The buyer who will receive the good will acquire ownership. The seller then has to face a claim from the rejected buyer based on breach of contract.[90] If the contract is governed by the CISG the behaviour of the seller is certainly a fundamental breach of contract (Article 25 CISG). The buyer then has the remedies of Articles 45 ff CISG. If the contract is governed by Swiss Law Article 191 Swiss Code of Obligations states that: *"If the seller does not perform his contractual obligations, he must compensate the buyer for damages resulting therefrom."*

As discussed previously, Ziegler[91] suggests that it is the seller's choice to decide whether he will deliver to the first or the second buyer. However, it is important to note that in the case where the good has not been delivered yet, the second buyer has the better right and is entitled to claim delivery. It is argued that the second and, therefore, the later contract is the real contract because it is the latest declaration of the seller.[92]

[90] Ziegler A., 'Transfer of Ownership in International Trade', p. 404
[91] Ziegler A., 'Transfer of Ownership in International Trade', p. 404
[92] http://www.wolfgangwiegand.ch/publikationen/_28_a_recht%2083_Die%20Leistungsst%F6rungen/1_insegesamt.pdf (07/12/2006)

2.6.2 "Actio Pauliana"

The "actio Pauliana" is a remedy on behalf of a third person. With this remedy a third person, including the creditor, is able to interfere into a transaction between seller and buyer. If an obligation of a creditor is not satisfied by the seller, the creditor is under certain circumstances entitled to claim avoidance of the sale agreement. In order not to interfere into business activities and to avoid uncertainty, the remedy cannot often be used. According to Article 287 of the Swiss Debt Enforcement and Bankruptcy Law, the creditor is allowed to claim if the debtor acted within the last six months before seizure or adjudication of bankruptcy in favour of a single debtor. Furthermore, certain actions will need to take place if the debtor carried out transactions with the intention of disadvantaging his creditors or favouring certain of his creditors to the disadvantage of others (Article 288 of the Swiss Debt Enforcement and Bankruptcy Law).

A claim, as described above, has to be brought into court within five years since one of the described actions happened (Article 292 Swiss Debt Enforcement and Bankruptcy Law).

2.6.3. A seller is selling goods despite the fact he is not entitled to do so

It is possible that a buyer is acquiring ownership despite the fact that the seller was not entitled to sell the good to the buyer. Article 714 (2) Swiss Civil Code states that: *"Where a person is put in possession of a movable as owner and himself takes it bona fide, he is held to acquire the ownership in it as soon as his rights are protected by the law of possession, even if the transferor had no right to transfer the ownership of it."* The law of possession is protecting the person if this person takes possession in good faith (Article 933 Swiss Civil Code). However, note that this does not apply if the good was stolen or lost. The owner can demand the return of the good within a period of five years from any person who is in possession of the good (Article 934 (1) Swiss Civil Code). However, if a person bought a

stolen or lost good at a public auction or in market overt the good cannot be recovered from this person or any subsequent bona fide purchaser, unless the person is compensated for the purchase money paid (Article 934 (2) Swiss Civil Code). Finally, it is important to stress that an acquirer who acts in bad faith is never able to acquire ownership (Article 936 Swiss Civil Code).

2.7. Transfer of Ownership through Transport Documents

Roman Law referred to delivery by the long hand (“longa manu traditio”). This concept is still used in international trade. Moreover, it is very important, since seller and buyer of an international sale are usually located in great distance and therefore, the direct physical handover from seller to buyer is not possible.

2.71. Bill of Lading and Law Applicable to it

One of the above mentioned instruments is the bill of lading. The bill of lading is designed to represent the goods. According to Article 925 Swiss Civil Law, the delivery of such a bill has the same effect as the delivery of the goods themselves. This effect occurs only where the bill has been drawn to represent the goods. The described regulation is the regulation according to Swiss Law. However, whether or not the document represents the goods is determined by the law referred to in the document of title to goods. If the document fails to designate a governing law, the law of the state in which the issuer has its business shall govern it (Article 106 (1) PIL).

2.72. Air Waybill, Forwarder’s Certificates of Receipt (FCR), CMR Waybills, CIM/COTIF-Rail Waybill

The above mentioned terms are transport documents. These documents do not represent the goods. Therefore, the delivery of such document is

not regarded as a delivery that is part of the transfer of ownership. The documents might be used as a proof of the physical handing over of the goods to the buyer.[93]

However, the documents might be used as proof of a "brevi manu traditio". This means that the buyer was already in the possession of the goods. The document is proof that the fictitious delivery took place. That is regulated in Article 924 (1) Swiss Civil Code: *"Possession of a thing can be acquired without delivery, where a third party or the person himself who is alienating continues in possession of it under a distinct title by virtue of some legal transaction."*

2.8. Retention of Title Clauses

Often parties agree that ownership shall remain with the seller despite the fact that the goods were delivered. Such provision is usually made to avoid transfer of ownership before the buyer has paid the purchase price. It is important to remember that ownership transfers when the goods were delivered based on an "iusta causa". Whether or not the buyer has paid the purchase price does not affect the transfer of ownership. According to Swiss Law such a provision is only valid and is operative when it has been entered in the public register of the transferee's domicile which is kept for this purpose by the bankruptcy office. Otherwise such a clause is null and void (Article 715 (1) Swiss Civil Law).

In an international context, Article 102 (2) and (3) PIL are decisive for goods that are arriving in Switzerland. If the retention of title established abroad does not satisfy the above mentioned requirement of Swiss Law, the foreign retention of title shall remain effective in Switzerland for three months. During this time the seller can register such retention of title into the respective register (Article 715 (1) Swiss Civil Law).

[93] Ziegler A., 'Transfer of Ownership in International Trade', p. 405

Retention of title for goods destined for export shall be subject to the law of the state of destination (Article 103 PIL).

2.9. Stoppage in Transit

Many countries recognize the principle of stoppage in transit. The principle was for example codified in the English (1979) Sale of Goods Act and even in the Bangladesh (1930) Sales of Goods Act. Section 50 of the Bangladesh Act is stating that: *"[…] when the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transit, that is to say, he may resume possession of the goods as long as they are in the course of transit, and may retain them until the payment or tender of the price."*[94] It is also stated in Article 71 (2) of the CISG.

However, Swiss Law has not embodied this principle in contract law. Swiss Law recognizes a similar principle in its Swiss Debt Enforcement and Bankruptcy Law (DEBL). Article 203 (1) DEBL states that: *"If an object which the debtor has bought but not yet paid for has at the time of the opening of the bankruptcy proceeding been despatched, but is not yet in the debtor's possession, the seller may revoke the sale unless the bankruptcy administration pays the purchase price."* However, this provision is only applicable if the buyer has his seat or domicile in Switzerland. Article 50 DEBL determines that debt enforcement takes place at the debtor's domicile or seat. That means that the DEBL can only be enforced in Switzerland. It cannot be applied in an international relation when the buyer has his domicile outside Switzerland; this applies whether or not goods still are located in Switzerland. It can be applied from a foreign seller who is selling goods to a buyer domiciled in Switzerland.[95] However, the sale cannot be revoked if prior to the publication of the bankruptcy proceeding a third party in good faith has acquired ownership of the object of sale or a security interest therein through a consignment note, bill of lading or shipping note (Article 203 (2) DEBL).

[94] http://www.vakilno1.com/saarclaw/bangladesh/saleofgoodsact/chapter5.htm (04/12/2006)
[95] Ziegler A., 'Transfer of Ownership in International Trade', p. 406

To avoid the described problems it is recommended to rely on the CISG. Switzerland is a member country to the CISG. The CISG knows the principle of stoppage in transit. Article 71 (2) CISG states that: *"If the seller has already dispatched the goods before the grounds described in the preceding paragraph become evident, he may prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them. The present paragraph relates only to the rights in the goods as between the buyer and the seller."* Therefore, where a sale contract is governed by the CISG the seller will enjoy the right to stop the goods in transit. The non-performance can be the result of a deficiency in the ability to perform, the credit-worthiness, the conduct in preparing to perform, or in performing the contract. However, the right to stop terminates when the goods are handed over.[96] However, it is important to remember that everything that is literally in transit can not be stopped. Since the carrier is often the agent of the buyer a stoppage might not have an effect on the goods in the possession of the carrier. Furthermore, as soon as the bill of lading is handed over the ownership passes and the goods are not in "transit" anymore.

2.10. Proprietary Interest Held by Third Party

The buyer of a good always needs to be careful that a third party's right does not prevent the transfer of ownership from seller to buyer, including liens or pledges. A lien or pledge might be an obstacle in order to enforce the sale contract.

2.10.1. Liens

If the claim of a creditor is not satisfied he is entitled to have a lien. If a lien exists under Swiss Law, the creditor is entitled to retain possession of the good which is in his possession until his claim is satisfied. In order to retain the possession the creditor's claim has to

[96] Ziegler A., 'Transfer of Ownership in International Trade', p. 407

be enforceable and by its nature closely connected with the good retained (Article 895 (1) Swiss Civil Code). Therefore, a potential buyer has to be careful whether or not a lien exists. The instrument of lien is even more delicate if one realizes that a lien can also exist on goods that are not owned by the debtor. However, the creditor can only acquire a lien on these goods if he took possession of them in good faith (Article 895 (3) Swiss Civil Code).

The acquisition of a lien as a right "in rem" to movable property is subject to the law of the state in which the property it located (Article 100 (1) PIL). The acquisition of a lien to goods in transit is subject to the law of the state of destination (Article 101 PIL).

Furthermore, there are liens in favour of the carrier according to Swiss Law. Article 415 Code of Obligations states that: *"Should the consignee contest claims encumbering the freight, he may demand delivery only if he deposits the disputed amount in court."* This kind of instrument is usually also provided in specific transport modes such as transport by rail (Article 28 of the Uniform Rules concerning the Contract for international Carriage of Goods by Rail [CIM]), transport by sea (Article 110 and 87 of the Swiss Maritime Code which is referring to Article 451 Swiss Code of Obligations and Art. 895 of the Swiss Civil Code) and transport by air (Article 79 of the Swiss Aviation Code is referring to Article 451 Swiss Code of Obligations and Article 895 of the Swiss Civil Code).

2.10.2 Pledge

It is not only a lien that might prevent the transfer of ownership. Goods can be given in pledge only by delivery of possession to the creditor (Article 884 (1) Swiss Civil Code). The delivery has to be based on a valid pledge agreement (causa). Furthermore, there has to be a valid claim to be secured. Concerning the delivery it has to be stated that a pledge cannot be constituted as long as the pledgor

retains exclusive control over the good to be pledged (Article 884 (3) Swiss Civil Code). Note that if documents of title such as a bill of lading are involved, the pledge over the documents will constitute a pledge over the goods.[97] The good, therefore, does not have to be in the physical possession of the creditor in this case. The creditor has to give back the pledge not before his claim is fully satisfied (Article 889 (2) Swiss Civil Code).

Acquisition and founding of a pledge is governed by the law of the country where the goods are located at the time of the acquisition or founding (Article 100 (1) PIL). If the goods are in transit, the law of the country of destination is applicable (Article 101 PIL) unless the parties have not chosen the law of the state of shipment or of destination, or the law to which the underlying legal transaction is subject (Article 104 (1) PIL).

3. South Africa

The principles of transferring ownership in South Africa are quite similar to the principles governing Swiss Law (see 2.). However, the principles of South African Law were never codified.[98] In Concor Construction (Cape) (Plc) Ltd v Stantambank Ltd the principles of transferring ownership are summarized: *"The derivative mode of acquisition of ownership on which the plaintiff relies is delivery. The requirements for the passing of ownership by delivery, inter alia, (a) that the transferor must be capable of transferring ownership; (b) delivery must be effected by the transferor with the intention of transferring ownership and taken by the transferee with the intention of accepting ownership; and (c) payment where the sale is a cash sale."*[99] In Lendalease Finance (Pty) Ltd v Corporacion de Mercadeo Agricola and Others it was held that: *" […] ownership cannot pass by virtue of the contract of sale alone: there must, in addition, be at least a proper delivery to the purchaser of the contract goods […]."*[100]

[97] Ziegler A., 'Transfer of Ownership in International Trade', p. 410
[98] Burger L., 'Transfer of Ownership in International Trade', p. 329
[99] Concor Construction (Cape) (Plc) Ltd v Santambank Ltd 1993 (3) SA 933 A - B
[100] Lendalease Finance (Pty) Ltd v Corporacion de Mercadeo Agricola and Others 1976 (4) SA 489 H

Despite the similar principles between Swiss Law and South African Law there are differences that are important to bear in mind. According to Swiss Law, ownership transfers if there is a contract and delivery based in the contract. According to South African Law, payment of the purchase price is also a requirement for the transfer of ownership if it is a cash sale. Ownership is only transferred if the purchase price has been paid in full, except in cases where the parties agreed on a credit agreement. However, parties might also agree that in the case of a credit transaction, ownership will not be transferred until the purchase price has been paid in full. [101]

3.1. Conflict of Laws as to the Transfer of Ownership

3.1.1. Parties have not chosen the applicable Law

If the parties to an international sale contract have not chosen the law governing the transfer of ownership then the law of the place where the movable object is physically located applies. In Marcard Stein & Co v Port Marine Contractors (Pty) Ltd it was held that: *"[…] should in general apply the principle of the lex situs in determining the passing of ownership in movable property when the case involves a foreign element and there is a potential conflict of laws."*[102] It might happen that it is not possible to determine where the goods were located at the time of the transaction. In these cases the principle of "lex situs" cannot be applied. A court then might use the principle of "lex domicilii" of the owner; like in Swiss Law the place of destination. Finally, if it is not possible to determine where the owner is, it is possible to apply the law governing the contract of sale ("lex causae"). [103]

[101] Van der Walt A.J., 'Introduction to the Law of Property', p. 145
[102] Marcard Stein & Co v Port Marine Contractors (Pty) Ltd 1995 (3) SA 671 H - I
[103] Burger L., 'Transfer of Ownership in International Trade', p. 329

3.1.2. Parties have chosen the applicable Law

As mentioned above (C.) the parties are free to choose the law governing their contract. However, in South Africa it was obviously not yet decided how far parties can go in choosing the law applicable to the transfer of ownership. Burger states that, in principle, nothing withstands such a choice. He argues that such a choice was upheld in many cases concerning the choice of law governing the contract. Therefore, it should also be possible concerning the law governing the transfer of ownership. Furthermore, he suggests that public policy may prevent the court from giving effect to such a choice, especially where it affects the rights of a third party.[104]

3.2. Substantive Law

3.2.1 Basis of the Law of Ownership

In South Africa the right of ownership is guaranteed in the Constitution of the Republic of South Africa. Section 25 states that: *"1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property. (2) Property may be expropriated only in terms of law of general application*

a. for public purposes or in the public interest; and
b. subject to compensation, the amount, timing, and manner of payment, of which must be agreed, or decided or approved by a court."

A public purpose might be seen in measures to overcome the injustices of the former political system in South Africa. The preamble of the constitution recognises the injustices of the past. However, the constitution does not provide other provisions concerning this matter. Yet, the preamble of the Competition Act 89 of 1998 states that: *"[…] the economy*

[104] Burger L., 'Transfer of Ownership in International Trade', p. 330

has to be open for greater ownership by a greater number of South Africans." This declaration of intent has not yet served as a basis for expropriation. However, it might be used sometime in the future.

3.2.2. Substantive Law as to Transfer of Ownership

As described above the transfer of ownership according to South African Law needs two steps: there has to be a "causa" based on which a good is transferred to the buyer. However in South Africa, in contrast to Switzerland, a court will conclude that no intention of passing ownership is intended if the underlying contract is a cash contract and the purchase price is not paid. If the underlying contract is a credit contract the ownership will pass as long as here is no contrary agreement concluded by he parties.[105]/[106]

However, South African Law is similar to Roman Law in that it recognises different ways of delivery and substitutions of delivery. Since the below described ways of delivery were already described above, this section will review these details again.

- Actual delivery to the buyer or to a representative of the buyer, like a carrier as agent.

- Like the "brevi manu traditio" the buyer is already in the possession of the goods. One can compare this to a person renting a car and taking action later to buy it. To avoid handing the good back to the seller and then deliver it back to the buyer a fictitious delivery is used.

- Like the "longa manu traditio" delivery takes place by pointing out the item or by handing over documents representing the goods.

[105] Burger L., 'Transfer of Ownership in International Trade', p. 331
[106] Credit Sales are governed by the Credit Act 75 of 1980

- Like the "constitutum possessorium" the seller retains possession of the good. There has to be an agreement on this.[107]

3.3. Mixing and Joining of Goods Shipped in Bulk

Not only is it Roman Law and Swiss Law, it is also South African Law that recognizes the acquisition of ownership by mixing goods together. It is an example of the way of transporting bulk commodities that are mixed together. Mixing is given if two or more separate elements haven been brought together to form a single entity. The mixed thing must be indivisible in the sense that it is no longer possible to determine which elements belong to which owner.[108] One can compare this to oil or grain mixed together in a ship's hold. However, if the thing is divisible like a flock of sheep, acquisition of ownership through mixing does not take place.[109] According to Miller, the only relevant case in South Africa concerns the mixing together of ostrich feathers.[110] In Andrews v Rosenbaum & Co.: *"It was contended that, in all the cases which have hitherto been decided by our superior courts, the articles reclaimed could be identified, but that is not so in the present instance, and hence the plaintiff is not entitled to succeed."*[111] However, it has to be distinguished whether or not the goods were mixed together with the permission of the owners or without it. In Andrews v Rosenbaum it was stated: *" […] that if the wheat of two persons is mixed with their consent, the mixed wheat becomes their common property; if the wheat of two persons becomes mixed together by accident, or by one of them without the consent of the other, then the mixed wheat is not common property. […] If under such circumstances one of the two persons retains the whole of the mixed wheat, the other will have a real action for the recovery of the amount of wheat belonging to him."*[112]

[107] Burger L., 'Transfer of Ownership in International Trade', p. 331
[108] Miller C., 'The Acquisition and Protection of Ownership', p. 47
[109] Van der Walt AJ., 'Introduction to the Law of Property', p. 125
[110] Miller C., 'The Acquisition and Protection of Ownership', p. 47
[111] Andrews v Rosenbaum & Co. 1908 EDC 425
[112] Andrews v Rosenbaum & Co. 1908 EDC 425

3.4. Special Terms in the Contract of Sales: INCOTERMS 2000 and transfer of ownership

INCOTERMS 2000 does not regulate the transfer of ownership (see C. 1.5.). It sets out the duties of the seller and the buyer in considerable detail concerning the delivery of the goods.[113] INCOTERMS are concerned with the aspect of which party is bearing the costs of delivery, which party bears the risk of delivery and finally which party carries the responsibility for ensuring that the goods are delivered.[114]

3.5. Transfer of Ownership and the United Nations Convention on Contracts for the International Sale of Goods (CISG)

South Africa is not a member state to the United Nations Convention on Contracts for the International Sale of Goods (CISG). South African parties are free to choose the law applicable to their contract in addition to their freedom to choose the CISG as law governing their contract. However, the significance of the CISG for South Africa is explained in more details above in C. 1.4. According to Burger, there is no indication that South Africa will join the convention in the future.[115] However, the Homepage of University of South Africa states that South Africa is considering adopting the CISG.[116] Finally, Coutsoudis suggests that it is rumoured that the Department of Trade and Industry is currently considering recommending the CISG to the Law Commission for further investigation towards ratification by South Africa.[117] The advantages of South Africa ratifying the CISG might be:

"- the CISG is widely accepted internationally,
- a substantial portion of South Africa's trade partners have ratified the CISG,

[113] Todd P. 'Cases and Materials on International Trade Law', p. 56
[114] http://www.mbendi.co.za/import/sa/incoterms.htm (06/12/2006)
[115] Burger L., 'Transfer of Ownership in International Trade', p. 332
[116] http://www.unisa.ac.za/Default.asp?Cmd=ViewContent&ContentID=658 (06/12/2006)
[117] Coutsoudis B., 'UNCITRAL Instruments in Southern Africa', (http://www.law-online.co.za/IntTradeLaw/UNCITRAL%20Instruments.htm) (06/12/2006)

- that the CISG is experiencing a tremendous growth in the rate of acceptance in recent years,
- that the range of countries having ratified the CISG represent all regions, all political persuasions, countries at various stages of economic development, and various divergent legal backgrounds.
- the CISG already applies to the large proportion of South Africa's trade."[118]

3.6. Legal Occurrences affecting the General Rule of Transfer of Ownership

3.6.1 Goods were sold to two different Purchasers

As previously mentioned, not only did South Africa adopt the principles of Roman Law, Switzerland adopted these rules as well. By following the principles described in Roman Law one can ascertain that a seller in South Africa can conclude a valid sale contract with two buyers concerning the same good. The buyer that acquires ownership is the one who actually receives the good by delivery. The buyer who did not receive the good will not have a claim against the buyer who received the good. He will have a claim against the seller. He cannot claim delivery of the good (specific performance), because delivery is impossible. He has to claim damages against the seller for breach of contract. However, the question arises as to what happens if the seller sold a good to two buyers but has not delivered it yet. The approach adopted by the courts of South Africa is the following: [119] *"[…] I have to decide is which of two competing and irreconcilable claims for specific performance by innocent parties should be enforced, and in so doing decide which of two innocent parties should be left with a claim for damages […] I believe that in the exercise of my discretion the rule qui prior est tempore potior est jure, as applied to the law of double sales, should be applied."*[120]

[118] http://www.law-online.co.za/IntTradeLaw/UNCITRAL%20Instruments.htm (06/12/2006)
[119] Christie RH., 'The Law of Contract', p. 610
[120] Croatia Meat CC v Millennium Properties (Pty) Ltd 1998 (4) SA 988 B - F

3.6.2 "Actio Pauliana"

In De Villiers Appellant v Estate Hunt Respondent it was held that: "*The actio pauliana still exists […].*"[121] The actio pauliana is a remedy against fraudulent alienation by the debtor. This obviously includes, beside the sale of goods, wrongful payment of one or some of them in full, when the debtor was aware of his insolvency.[122] In Wiener v Estate Mckenzie,[123] the court refers to a case were the transfer of slaves were set aside because: *" […] it had been proved that Burgher was insolvent in October 1825 and knew himself to be so […] that it was proved that the value of the slaves was much greater than the amount of debt […].*"[124] There are also more actual cases which still refer to the principle of the action pauliana.[125] However, the aim of the actio pauliana is to reclaim the goods from the transferee even if the transferee is not party to the fraud.[126]

3.7. Transfer of Ownership through Transport Documents

The bill of lading is a transport document which represents the goods. Ownership in the goods passes by presenting a bill of lading. This was held in Lendalease Finance Ltd. v Corp. De Mercadeo Agricola 1976 (4) SA 464 (A) p. 492. Yet, it should be noted that one has to be careful whether or not he actually becomes owner of the goods by passing the bill of lading. In Duyn v Shangming International (Pty) Ltd it was held that there: *" […] are usually three original signed bills of lading. They are described as the first, second and third original bills of lading. The holder of any one of the bills of lading, who presents it first to the agent of the shippers, is entitled to the*

[121] De Villiers Appellant v Estate Hunt Respondent 1939 AD 532
[122] Wiener v Estate Mckenzie 1923 CPD 579
[123] Wiener v Estate Mckenzie 1923 CPD 580
[124] Breda and Others, Trustee of Burgher v De Leeuw 1825 1 M p. 515
[125] Barend Peterson and Others v Karin Elizabeth Claassen and Others (http://law.sun.ac.za/data/Barend%20Peterson%20and%20Another%20v%20Karen%20Claassen%20and%20Others.doc) (07/12/2006)
[126] Burger L., 'Transfer of Ownership in International Sale', p. 333

delivery of the goods described therein. In such event the remaining two bills of lading become void."[127]

However, in South Africa there is obviously no case law which determines which law is governing the bill of lading. The law governing the bill of lading is, therefore, important to know because this law decides whether or not the bill of lading is representing the goods. Burger states that the most likely approach of the courts relating to the interpretation of the bill of lading would be to refer to the law governing the contract of sale. Other issues, like the transfer of the bill of lading would probably be decided by the place where the bill of lading is located.[128]

As already described above other transport documents like waybills are not intended to be a document of title and, therefore, handing over of this document does not transfer ownership. The goods, therefore, have to be delivered to the buyer or his agent in order to transfer ownership.[129]

3.8. Retention of Title Clauses

Unless otherwise agreed ownership does not pass unless or until the price is paid or credit is given. Note that this rule applies irrespective of whether possession is given or not. In South Africa it is acknowledged that the parties are free to agree on retention of title clause. Such a clause states that the ownership in the goods does not pass to the buyer until the conditions imposed for the transfer of ownership have been fulfilled.[130] The seller/owner will have the right to claim the goods back from the buyer with the so called "rei vindicatio".[131] However, since according to South African law ownership does not pass until the price is paid, concerning a cash sale, retention of title clause might be necessary only concerning a credit sale or by imposing other conditions. It furthermore makes no sense to agree on such a clause if the goods are mingling or mixed together. Ownership will

[127] Duyn v Shangming International (Pty) Ltd (2003) 1 All SA p. 177
[128] Burger L., 'Transfer of Ownership in International Sale', p. 333
[129] Burger L., 'Transfer of Ownership in International Sale', p. 333
[130] Walker D., 'Commodities and Trade Law 2006', p. 4
[131] Burger L., 'Transfer of Ownership in International Sale', p. 334

pass because of this act and cannot be prevented by a retention of title clause.[132]

Concerning the law applicable to the retention of title clause, Burger states that there is no case law dealing with the issue of retention of title. Although the right is not clear on this point, courts would first determine whether the reservation is effective under the "lex situs" at the time of sale, and second define whether the retention clause is effective under the "lex situs" at the time when the issue arises.[133]

3.9. Stoppage in Transit

As it was acknowledged in Gruney & Moore v Union Government, South African Law does know the right of stoppage in transit. In transit means that the goods are on its way to the buyer or his agent but are not delivered to them.[134] Therefore, concerning goods which are in transit the seller may give instructions to the carrier not to deliver the goods to a buyer which is unwilling to pay or is insolvent. The instruction can be given as long as the ownership has not passed to the buyer or his agent.[135] However, since South African Law dictates that the ownership passes not before the price is paid in a cash sale (see 3.2.2), the instruction might be given, in contrast to Swiss Law, also when the goods were handed over to the buyer. Although there are no clear references on this conclusion, it was acknowledged in Daniels v Cooper (1880 – 1881) 1 EDC pp. 186 and 187 that the principle of stoppage in transit exists and it was held that: *" […] the mere sale and delivery of movables does not pass the property therein, unless either the price be paid, security found, or credit has been given."*

The above remarks explain the South African Law. However, in an international sale contract where one party is in South Africa and the other party is abroad, South African Law will not apply in all instances. Therefore, the applicable law has to be determined. In Marcard Stein & Co

[132] Walker D., 'Commodities and Trade Law 2006', p. 7
[133] Burger L., 'Transfer of Ownership in International Sale', p. 334
[134] Gruney & Moore v Union Government (1913) 3 NPD 324
[135] Burger L., 'Transfer of Ownership in International Sale', p. 334

v Port Marine Contractors (Pty) Ltd it was held: *"[…] should in general apply the principle of the lex situs in determining the passing of ownership in movable property when the case involves a foreign element and there is a potential conflict of laws."*[136] Therefore, the question whether the seller is still the owner of the goods is determined by the law of the place where the goods were situated at the time of concluding the contract.

Finally, if the parties choose the CISG to govern their contract Article 71 (2) CISG applies which gives the right to stop delivery of the goods.

4. England

The main rules as to the transfer of ownership are codified in the Sale of Goods Act 1979. The crucial provisions are in Part III of the Act. Section 17 (1) of Part III of the Act states that: *"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."* If the agreement does not determine when the ownership passes Section 18 of the Sale of Goods Act is applicable:

"Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

- *(Rule 1) Where there is an unconditional contract for the sale of specific goods in a deliverable state the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.*

- *(Rule 2) Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until the thing is done and the buyer has notice that it has been done.*

[136] Marcard Stein & Co v Port Marine Contractors (Pty) Ltd 1995 (3) SA 671 H - I

- *(Rule 3) Where there is a contract for the sale of specific goods in a deliverable state but the seller is bound to weigh, measure, test or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until the act or thing is done and the buyer has notice that it has been done.*

- *(Rule 4) When goods are delivered to the buyer on approval or on sale or return or other similar terms the property in the goods passes to the buyer:*
  (a) when he signifies his approval or acceptance to the seller or does any other act adopting the transaction;
  (b) if he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods on the expiration of that time, and if no time has been fixed, on the expiration of a reasonable time.

- *(Rule 5) Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods then passes to the buyer; and the assent may be express or implied, and may be given either before or after the appropriation is made.*

  Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee or custodier (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is to be taken to have unconditionally appropriated the goods to the contract."

The rules of the Sale of Goods Act are applying to contract of sales within the domestic market as well as to export sales.[137] Later it will be established whether

[137] Debattista C., 'Transfer of Ownership in International Trade', p. 131

or not English Law also applies to the transfer of ownership if the underlying sale contract is governed by English Law.

4.1. Conflict of Laws as to the Transfer of Ownership

England is member to the Rome Convention on the Law Applicable to Contractual Obligations 1980.[138] The Rome Convention provides provisions concerning the law applicable to the sale contract. However, the transfer of ownership is not covered by the provisions of the Rome Convention. Below it will be established which law is governing the transfer of ownership

4.1.1. Parties have not chosen the applicable Law

Most parties to an international sale contract are able to choose the law applicable to the contract but not to the transfer of ownership. If this situation occurs, does the law governing the contract govern the transfer of ownership as well? In Macmillan Inc v Bishopsgate Investment Trust plc and others concerning the transfer of ownership of shares it was held: *"I conclude that an issue as to who has title to shares in a company should be decided by the law of the place where the shares are situated (lex situs) […] that is the law of the place where the company is incorporated."*[139] In Trade Credit Finance No (1) Ltd and another v Bilgin and others it was stated: *" […] that the lex situs under the English conflicts of laws principles governs the question of transfer of corporeal movable properties."*[140] "Lex situs" means that the law of the place is governing the transfer of ownership where the goods are situated at the time of concluding the contract. In Hardwick Game Farm v Suffolk Agricultural and Poultry Producers Association Ltd a contract of sale was concluded in England but the goods were in Germany at the time of concluding the contract. Therefore, German Law was governing

[138] www.rome-convention .org (08/12/2006)
[139] [1996] 1 All ER 585, [1996] 1 WLR 387, [1996] BCC 453
[140] Queens Bench Division (Commercial Court) [2004] All ER (D) 47 (NOV)

the transfer of ownership.[141] Collier states as well that the proprietary issues are governed by the "lex situs" of the property.[142]

4.1.2. Parties have chosen the applicable Law

As seen above, if the parties have not chosen the law governing the transfer of ownership, the "lex rei situs" will apply. Since it might be difficult to establish where the "situs" of the goods was, it is recommended explicitly to choose the law governing the transfer of ownership. According to Debattista the parties are entitled to choose the law governing the transfer of ownership.[143] However, it is unlikely that the "lex situs" causes major problems if Section 18 (1) of the Sales of Goods Act 1979 applies. If this provision applies the ownership passes at the time the contract is made and not at the time of delivery or payment or both.[144] By concluding the contract it should be clear where the goods are at the moment.

It is important to ask whether a choice of law concerning the law governing the contract might be an implied choice of law concerning the law governing the transfer of ownership. In my opinion this situation depends on the experience of the parties. If the contract was edited by a lawyer, the choice of law governing the contract cannot be seen as an implied choice of law concerning the transfer of ownership. A lawyer should know the distinction. However, contracts made by lay persons or not very experienced business men might be assessed differently. Since they are probably not aware of the mentioned problem. To determine which law shall govern the contract, all the circumstances and the behaviour of the parties have to be taken into consideration in order to find out whether they made an implied choice or not.

[141] Court of Appeal [1966] 1 All ER 309
[142] Collier J.G., Conflict of Laws', p. 245
[143] Debattiasta C., 'Transfer of Ownership in International Trade', p. 134
[144] Collier J.G., 'Conflict of Laws', p. 25

4.2. Substantive Law

4.2.1 Basis of the Law of Ownership

It is apparent that the United Kingdom has not a codified constitution. However, as seen in B.1., the rights to property are guaranteed on a constitutional level.

4.2.2. Substantive Law as to Transfer of Ownership

If the transfer of ownership is governed by English Law, then the Sale of Goods Act 1979 is applicable. The principle is that the ownership passes to the buyer when the contract is made (Section 18 Rule 1 Sale of Goods Act) if the parties have not agreed on a certain intention to pass ownership (Section 17 Sale of Goods Act). It has to be stated that in contrast to Swiss Law the risk is transferred to the buyer when the property is transferred unless otherwise agreed (Section 20 (1) Sale of Goods Act).

According to Debattista the following Sections are relevant to international sale contracts: Section 16; Section 18, Rule 1;[145] Section 19[146] and Sections 20, 20A and 20B.[147] Section 16 states in principle that the property cannot pass unless the goods to sell are ascertained. If for example 10 tonnes of grain are stored in bulk and the seller agrees to sell 5 tonnes to a buyer then ownership cannot pass before the 5 tonnes

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[145] "*Where there is an unconditional contract for the sale of specific goods in a deliverable state the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed."* (Section 18 Rule 1)

[146] "*(1) Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled; and in such a case, notwithstanding the delivery of the goods to the buyer, or to the carrier or other bailee or custodier for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.*

(2) Where goods are shipped and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is prima facie to be taken to reserve the right of disposal.

(3) Where the seller of goods draws on the buyer for the price and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him." (Section 19)

[147] Debattista C., 'Transfer of Ownership in International Trade', p. 136

have been separated.[148] However, Section 20A is an exception to the principle of Section 16. Property in an undivided share in a bulk is transferred to the buyer if the goods or some of them form part of a bulk which is identified either in the contract or by subsequent agreement between the parties; and the buyer has paid the price for some or all of the goods which are the subject of the contract and which form part of the bulk. The buyer becomes co-owner of the bulk (Section 20A (1 + 2) Sale of Goods Act). Section 20A is an amendment to the original Sale of Goods Act. It protects the buyer of unascertained goods who already paid the price if the seller becomes insolvent before the goods were divided.[149]

4.3 Mixing and Joining of Goods Shipped in Bulk

English Law recognizes the principle of acquiring ownership by "confusion" and "commixtio" as well. The principle is stated in Indian Oil Corporation Ltd v Greenstone Shipping SA (Panama): *"Confusio is the Latin word for the mixing of goods belonging to two different owners, so that they cannot be separated. Where they can be separated it is commixtio. […] But the identity of fungibles may become easily lost by their becoming mixed with other fungibles. Consequently if grain has become mixed in a ship or in a warehouse, the common law applies the special rules, akin to those developed in Roman law, of commixtio and confusio. Where A's property has become inseparably mixed with B's, the resultant mass will belong, in proportion to their contributions, to A and B as tenants in common. But if the mixing has been due to the wrongful act of either A or B, then English law appears to make a significant and punitive departure from the Roman doctrine and to give the property in the whole mass to the innocent party."*[150]

[148] Debattista C., 'Transfer of Ownership in International Trade', p. 136
[149] Debattista C., 'Transfer of Ownership in International Trade', p. 136
[150] Indian Oil Corporation Ltd v Greenstone Shipping S.A. (Panama); [Queens Bench Division] [1988] QB 345

The rights of the buyer of such things are described in 4.2., above. Furthermore, the Carriage of Goods by Sea Act 1992 which replaces the Bills of Lading Act 1855 is stating in its Section 5 (4) that nothing shall preclude the operation of the bill of lading in relation to a case where the goods to which a document relates cannot be identified (whether because they are mixed with other goods or for any other reasons). That means the buyer can separate its goods like it is also provided in Section 20A of the Sale of Goods Act 1979.

4.4. Special Terms in the Contract of Sales: INCOTERMS 2000 and transfer of ownership

As discussed earlier, INCOTERMS 2000 do not regulate the transfer of ownership. INCOTERMS 2000 establish the contractual duties of the seller and the buyer concerning the delivery of the good.[151] INCOTERMS 2000 have an implication of the transfer of ownership if the parties according to Section 17 of the Sale of Goods Act agreed that the ownership shall be transferred by delivery.

4.5. Transfer of Ownership and the United Nations Convention on Contracts for the International Sale of Goods (CISG)

The United Kingdom has not adopted the CISG. Therefore the CISG has the same significance concerning the transfer of ownership that it has in South Africa (see 3.5.).

4.6. Transfer of Ownership through Transport Documents

As mentioned before there are several kinds of transport documents such as airway bills or bills of ladings. The difference between the mentioned airway bills and the bill of lading is the fact that a bill of lading is representing the goods but not the other transport documents. Therefore, the

[151] Debattista C., 'Transfer of Ownership in International Trade', p. 139

transfer of the bill of lading from the seller to the buyer appears as the handing over of the goods itself and might cause the transfer of ownership. The other transport documents are proving the fact of delivery.

However, if the bill of lading is governed by English Law the handing over does not necessarily transfer the ownership since ownership does not transfer in any case by delivery but by the intention of the parties or by concluding the contract. Therefore, if goods are carried under a bill of lading either the bill of lading should indicate the intention of the parties regarding the transfer of ownership, or the contract itself. If both indications are not given the Sale of Goods Act 1979 makes specific indications.[152] The starting point is Section 19 (2) of the Act: *"Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is prima facie to be taken to reserve the right of disposal."* Taking Section 19 (2) into account, the presumption is natural that the property does not pass on delivery but on payment. If on the other hand the bill of lading is made out to the order of the buyer it is following from Section 19 (2) of the 1979 Act that leads to the presumption that the parties intended to pass the property on shipment.[153] In The Kronprinsessan Margareta, The Parana, and other Ships it was held: *"[…] that, if the bill of lading is taken in the buyer's name this necessarily proves […] the passing of the property to the buyer on shipment."*[154]

Note that the above mentioned presumptions can be overruled if the facts as a whole are leading to another result.

[152] Debattista C., 'Transfer of Ownership in International Trade', p. 140
[153] Debattista C., 'Transfer of Ownership in International Trade', p. 141
[154] [1921] 1 AC 486

4.7. Retention of Title Clauses

Retention of title clauses protects a seller from non-payment by the buyer. In 4.2.2., it was described that ownership can pass on the intention of the parties. In order to secure the deal the seller might insist on a contractual clause stipulating that the ownership passes not before the price was paid in full.

In England, clauses like those described previously are called "Romalpa" clauses.[155] Again it is important to identify which law governs the retention clause. If English Law is governing the clause, a registration like in Switzerland might be necessary. Section 396 (1) of the Companies Act 1985 for example states that a charge to secure any debenture must be registered.[156] Debattista supports the view that retention clauses concern the transfer of property and, therefore, should be governed by the "lex situs".

If English Law is applicable then the unpaid seller has additional rights to secure his payment. Section 38 (1) of the Sale of Goods Act 1979 defines an unpaid seller. The seller is unpaid when the whole of the price has not been paid or tendered or when a bill of exchange or other negotiable instrument has been received as conditional payment and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise. If the property has not passed to the buyer, the seller has the right to withhold the goods. If the property already passed to the buyer but the seller is still in possession of it, the seller has a right to place a lien on the goods. If the buyer is insolvent the seller has the right to stop the goods in transit (Section 39 (1) Sale of Goods Act).

4.8. Stoppage in Transit

Stoppage in transit is regulated in Sections 44 and 46 of the Sale of Goods Act 1979. As also described above, the contract of sale and the transfer of

[155] Aluminium Industrie Vaassen B.V. v Romalpa Aluminium Ltd [1976] W.L.R. 676
[156] http://www.companieshouse.gov.uk/about/gbhtml/gba8.shtml (12/12/2006)

ownership do not have to be governed by the same law. Therefore, the question arises as to which law governs the stoppage in transit.

The stoppage in transit gives the unpaid seller the right to stop the goods in transit if the buyer becomes insolvent (Section 44 Sale of Goods Act 1979).[157] The unpaid seller may exercise his right either by taking actual possession of the goods or by giving notice of his claim to the carrier or another bailee or custodier in whose possession the goods are held (Section 46 (1) Sale of Goods Act). The right of stoppage exists independent of whether the property has already passed or not (Section 39 (1) of the Sale of Goods Act 1979.

With regards to the previous question regarding which law is applicable to the transfer of ownership, if the buyer has become insolvent he cannot fulfil his obligation to pay the price. This issue represents a contractual problem. Therefore, transfer of ownership is governed by the law applicable to the contract. The argument of Debattista for the above mentioned solution is that the right of stoppage does not in itself affect the transfer of property.[158]

[157] Debattista C., 'Transfer of Ownership in International Trade', p. 147
[158] Debattista C., 'Transfer of Ownership in International Trade', p. 146

D. Conclusion

It arises out of the text above that the principles of Roman Law are still the principles which are governing the transfer of ownership in contemporary legal systems. Of course there were some adaptations made, to meet the today's needs and some peculiarities were abolished, like the "Mancipatio" and the "In Iure Cessio".

In the introduction it was written that this paper shall point out what stumbling blocks might be avoided by observing peculiarities of the Swiss, South African and English law concerning the transfer of ownership. At the end of the paper it can be stated that it has to be kept in mind that ownership passes in English Law on the intention of the parties or by concluding the contract, in Swiss Law on delivery of the goods, based on an "iusta causa" and in South African Law on delivery of the goods, based on a "iusta causa" and, in a cash sale, when the price is paid.

However, the most important consequence of the transfer of ownership is still actual: The ownership protects against the bankruptcy of the other party. It is to think that the buyer has already paid for the goods but not yet received them at the time of the seller's bankruptcy. Or on the other hand the seller has at the time of the buyer's bankruptcy already delivered the goods. In such a situation it is important which law is governing the transfer of ownership. If the ownership has not passed, at the time of the bankruptcy, to the buyer or the seller, the other party is entitled to withhold the goods or to sort it out of the bankruptcy estate. Article 242 (1) DEPL states in this connection: *"The bankruptcy administration issues directions with regard to the handing over of items claimed by third parties."* However, there are limitations on the efficacy of the mentioned rights. If the bankrupt (whether the seller or the buyer) has resold the goods to a third party, the property of the other party may not avail him, because there are a number of circumstance where the good title can be passed to a third party even by someone who has no title himself.[159] Furthermore, ownership protects as well against a buyer who is unwilling to pay the price.

As above mentioned in the case of bankruptcy of one of the parties to an international sale contract or if the buyer does not pay the price, the law governing the transfer of

[159] Todd P., 'International Trade Law', p. 194

ownership is playing a crucial role. If the transfer of ownership is governed by Swiss Law the ownership passes as soon as the goods were delivered while according to South African Law the ownership passes on delivery when credit is granted or when the price is paid. Finally, English Law states that the ownership passes on the intention of the parties or by concluding the contract. Therefore, if the transfer of ownership is governed by Swiss Law it is important to agree on retention of title clause. If the transfer of ownership is governed by English Law it is crucial that the parties agree on a clause stating that the ownership does not pass before the price is paid. Such provisions are not necessary if the transfer of ownership is governed by South African Law because the ownership passes not before the price is paid. The last statement is only correct as long as it is a cash sale. If the parties agreed on a credit sale, retention of title clause must be added to the contract.

In this connection it has to be stressed that the law which governs the sale contract does not necessarily governs the transfer of ownership as well. This distinction has to be in mind while drafting a contract. In order to avoid difficulties one should explicitly agree as well on the law governing the contract as on the law governing the transfer of ownership. It is to think for example at a deal where a party is buying a shipload of oil and while the ship is heading towards, lets say, Europe, the party is looking for a buyer. In a case like this it is very important to make clear which law does govern the transfer of ownership. It might be not possible to apply the “lex rei sitae” because it is difficult to determine where the goods were at the time of concluding the contract. Therefore, it is to recommend choosing the law governing the transfer of ownership. However, one should keep in mind that the parties are not totally free while choosing the law governing the transfer of ownership. They may choose either the law of the state of shipment, the law of the state of destination or the law to which the underlying legal transaction is to be subjected.

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