Dissertation

The transfer of ownership of movables in the context of international contracts of sale with specific reference to reservation of title clauses: a comparative study

LL.M.

International Commercial Law

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Introduction

The law of property is of great importance in international commercial law. The aim of this dissertation is to work out the different preconditions for the transfer of ownership on the basis of a contract of sale in different legal systems. Both in national law, as well as in international relations and in international trade law, the right to property plays an important role. The focus of this dissertation is the comparison of German and South African law with regard to the transfer of ownership and the issue of retention of title. Both legal systems are influenced by Roman law, but by different developments today, they have different viewpoints. The German law is strongly characterized by its principle of abstraction. South African law, on the other hand, was heavily influenced by the English common law.

At the end of the paper we will take a look at the approaches of supranational and international instruments. Therefore the DCFR and the CISG are compared. The CISG was introduced as a uniform law for cross-border purchases of goods in the year 1980. Its scope covers only sales law. The Contracting States are spread over the whole world. By the universalisation and the long period of existence, it is a key instrument for international commercial transactions. The DCFR, which was designed as a draft, is intended to be used on a supranational level. Supranationality means that states shift some of their legal powers to a higher level, such as a supranational organization. The DCFR is only applicable if party choose it explicitly. Nevertheless, its aim is to provide a comprehensive civil law for all European countries.

Chapter 1

National Level

A) German law

I) Historical background of the BGB

The BGB regulates, as the central codification of German general private law, the main legal relationships between individuals. It forms the general private law of the Federal Republic of Germany.

The BGB entered into force on 1 January 1900 as the first codification of private law in Germany. Before the entry into force there was a strong legal fragmentation in Germany. Pioneers of the BGB were the *allgemeine Preußische Landrecht* of 1794 and the *österreichische Allgemeine Bürgerliche Gesetzbuch* of 1811.[1] The BGB had the task of finding a consistent solution from the existing Private Law in Germany. The codification was born by the convention of freedom and equality among all citizens. The authors paid attention to a technically abstract but accurate and precise language. The goal of the authors was to provide a comprehensive codification of contiguous fields of law. For this purpose, they dismantled the legal issues in general and special codes. The result is the Civil Code which is divided into five books:

1) General section, which contains essential principles for the four following books
2) Law of obligations, which contains rules to different kind of contracts
3) Property law, which contains provisions on ownership and possession
4) Family law
5) Right of inheritance

[1] See Honsell H. *Staudinger Kommentar zum BGB Band I Einleitung zum BGB §§ 1-14* (2013) Einleitung zum BGB par 48.

The thematic breakdown of the five books is modeled on the system of the Pandects.[2] The character of the codification is self-evident, including guiding principles which are not explicitly mentioned. For a better comprehensibility of the structure and character of the BGB, we must first take a look at guiding principles. Also the case law is marked by a series of fundamental principles.

In particular, property law is marked by a series of fundamental principles. The authors of the German Civil Code decided to apply the principle of tradition according to Roman law.[3] There *traditio* enabled the transfer of ownership by transfer of possession (*corpore et animo).*[4] Owing to a high level of theoretical abstraction, this system seems to be one of the most cumbersome forms of transfer of ownership. Nevertheless, Germany has an outstanding position in comparison to the other jurisdictions, which are in favour of a sole consensus principle.[5] Crucial to the interpretation and understanding of property law are the five indispensable principles.

II) Property law principles

The five principles are the separation principle, abstraction principle, principle of speciality, traditional or principle of public disclosure and *numerus clausus* or compulsion of types.[6]

1. Principle of separation (Trennungsprinzip)

The principle of separation determines, that there must be a strict distinction between the executory agreement (*Verpflichtungsgeschäft*) and the disposition

[2] See Wiegand W. „Die Entwicklung des Sachenrechts“ 1990 *Archiv für die civilistische Praxis (AcP) Bd. 190* 112, 114.
[3] See Ferrari F. „Vom Abstraktionsprinzip und Konsensualprinzip zum Traditionssprinzip“ *1993 Zeitschrift für Europäisches Privatrecht* 52, 54.
[4] See Oechsler *Münchener Kommentar zum BGB Band 6* (2013) § 929 par 2; *corpore et animo* means physical control and domination will.
[5] See Stadler A. „Die Vorschläge der Gemeinsamen Referenzramhens für ein europäisches Sachenrecht- Grundprinzipien und Eigentumserwerb“ 2010 *Juristenszeitung* 380ff.
[6] See Füller *Faber W. Rules for the Transfer of Movables* (2008) 198

(*Verfügungsgeschäft*).[7] On the other hand, there is the legal act which creates the obligation (*Verpflichtungsgeschäft*). This can, for example, be a sales contract. Beside that there is the legal act by which a right *in rem* is transferred to another party (*Verfügungsgeschäft*).[8]

2. Principle of abstraction (Abstraktionsprinzip)

According to the principle of abstraction, the validity of the *in rem* transaction is independent of any contractual legal obligation.[9] The abstraction of the executory agreement is one of the typical features of the German legal system and constitutes an essential element of property law of the BGB.[10] The principle of abstraction has the consequence that the buyer of goods can acquire the property in the goods, regardless of whether or not the shift of assets is covered by a valid executory agreement (e.g. a contract).[11] This phenomenon exists because the passing of ownership solely requires an agreement of passing and the physical handing over of the things in question. If need be, the seller may only claim damages (§ 812 BGB). This can have serious consequences for executions in the assets of the acquirer. The reason for this strict abstraction is the protection of transactions and parties whom subsequently acquire the property in question.[12]

3. Principle of speciality (Spezialitätsgrundsatz)

The principle of speciality, or certainty, determines that a right *in rem* has to refer to a concrete thing. Every separate thing is the subject of an own right *in rem*. This means that in the moment of an *in rem* agreement, it must be clear which things are to be

[7] See Wiegand *Staudingers Kommentar zum BGB Band III* (2011) Vorbemerkung zu §§ 929- 931 par 6; Schwab K./Prüttig H. *Sachenrecht* (2003) par 22.
[8] See *BGH* mar 1951, *BGHZ 1,* 294.
[9] n 7 above.
[10] See Jahr G. „Romanistische Beiträge zur modernen Zivilrechtswissenschaft“ 1968 *Archiv für die civilistische Praxis* Bd. 9,16f; Lüke W. *Sachenrecht* (2010) par 43.
[11] See Wieling H. *Sachenrecht* (2007) 12.
[12] See Wiegand (n 7) Vorbemerkung zu §§ 929- 931 par 17; Lüke (n 9) par 44.

transferred.[13] This must be recognized by a third party solely on the basis of the agreement between the parties, without having to regard other circumstances.[14]

4. Principle of tradition (Traditionsprinzip)

The principle of tradition is also called the publicity principle and forms the basic structure of the transfer of ownership in the German Civil Code.[15] It determines that the delivery of the thing is necessary to transfer ownership; thus, the legal transacting ought to be published externally.[16] The handing-over expresses the serious will that the *in rem* effect is intentional.[17] The handover is therefore also called the publicity act, because the process is perceptible by the general public. Exceptions to this principle can be found in the regulations §§ 929 s2 - 931 BGB. These exceptions occur when the publicity interest precludes a higher assessed interest by the legislature.[18]

5. Numerus clausus

The BGB assumes that rights *in rem* have an effect against each other. This principle calls for legal clarity.[19] On the one hand, there are only a closed number of rights *in rem*.[20] On the other hand, only the rights are recognized which are approved by the legal system.[21] Legal certainty, also conversely, causes a restriction of the freedom of contract.[22]

[13] See Schwab K./ Prüttig H. *Sachenrecht* (2003) par 20f.
[14] See *BGH* 31 january 1979 *BGHZ* 73, 253,254.
[15] See Wiegand (n 7) Vorbemerkung zu §§ 929- 931 par 21.
[16] See Schwab/ Prüttig (n 13) par 31.
[17] See Wiegand (n 7) Vorbemerkung zu §§ 929- 931 par 21; Oechsler (n 4) § 929 par 6.
[18] See Wiegand (n 7) Vorbemerkung zu §§ 929- 931 par 23.
[19] See Jauernig O. *Kommentar zum BGB* (2009) Vor § 854 par 3.
[20] See Baur F./ Stürner R. *Sachenrecht* (2009) 3.
[21] See Wieling (n 11) 8.
[22] See Füller (n 6) 206.

III) Contract of sale

First, we will have a brief look at the promissory side of the contract. The contract of sale can serve as a contractual basis for the transfer of ownership. The dissertation currently focuses on the transfer of ownership *qua* contract of sale. The contract of sale is governed by § 433 BGB. The norm contains the main obligations of the buyer and seller, which arises from a sales contract. A key element when the contract is concluded is that all *essentialia negotii* are present.[23] This refers to all the essential features of a contract of sale which are necessary to clearly know about which object, with which party, over what price a contract has been concluded. These include accordingly the identifiability of goods and the establishment of a purchase price.[24] The primary requirement of the seller is provided by § 433 Section 1 s.1 BGB, that the seller has to pass the thing to the buyer and also transfer ownership of the thing. Therefore the seller is obligated to make a declaration of intent; which, in turn, is required for the legal regulation of the disposition.[25] The disposition and thus the passing of ownership is governed by § 929 BGB which requires an agreement and a handing over of the goods.[26] The main obligation of the buyer, however, is to pay the purchase price,[27] and to take the goods.[28]

IV) Passing of ownership

1. Definition of property

The BGB regulates the concept of property in § 903. It should be noted that the BGB contains no legal definition for the concept of ownership.[29] The BGB merely lays down the content of entitlements of the owner.[30] This definition follows the mindset of

[23] See *RG* 08 april 1929 *RGZ* 124, 81,83f.
[24] See Beckmann *Staudingers Kommentar zum BGB Band II §§ 433-480* (2014) § 433 par 18.
[25] See Westermann *Münchener Kommentar zum BGB Band 3* (2012) § 433 par 52.
[26] See Wiegand (n 7) Vorbemerkungen zu §§ 929- 931 par 21.
[27] § 433 Section 2 BGB.
[28] See Weidenkaff *Palandts Kommentar zum BGB* (2012) § 433 par 43.
[29] See Bassenge (n 28) Überbl. v. § 903 par 1.
[30] See Lorenz *Erman Kommentar zum BGB* (2004) Vor § 903 par 1.

Roman law.[31] The property is determined as a comprehensive right to rule, which positively allows the owner to proceed freely with the things and negatively to exclude third parties from any action on the matter.[32] The term of things is governed by § 90 BGB, where it is defined as a physical thing. The property law concept of property is to be distinguished from the term in the Constitution. According to Art. 14 GG, property includes all private rights that are associated with the person and which allow the person to use the things for private and autonomous benefit.[33] Thus, the constitutional concept of property is more than the understanding of this term in property law.[34] As a summary one can capture, that the term of property in property law contains the totality or wholeness and abstractness of physical control authority and the absoluteness of the litigation protection.[35]

2. The passing of ownership in general

The basic case of property acquisition of movables is governed by § 929 s.1 BGB.[36] Accordingly, the property is acquired by agreement on the transfer of ownership as well as delivery of the thing.[37] It therefore is a combined abstract of record, which consists of a legal transaction and an actual element.[38] The base case of the transfer of ownership has three prerequisites:[39]

1) The transferor and the transferee must agree;
2) The transferor must act as authorized party;
3) The transferor must transfer the thing.

The reason for this lies in the tradition principle, which was chosen by the legislature. If the conditions are present, the ownership passes, regardless of whether a valid contractual basis exists or not.[40]

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[31] See Wieling (n 11) 87; Puchta GF. *Lehrbuch der Pandekten* (1838) § 123; Wieacker *A history of privat law in Europe* (1995) 341.
[32] See Eckert *Schulze R. Handkommentar zum BGB* (2002) Vor §§ 903-924 par 1.
[33] See *BVerfG* 09 january 1991 *Neue Juristische Woche* 1992, 36 u. 1807
[34] See Gaier (n 4) Vor § 903 par 1.
[35] See Säcker (n 4) § 903 par 4.
[36] See Oechsler (n 4) § 929 par 1.
[37] See Schuster E.J. *The Principles of German Civil Law* (1907) 396; Wieling (n 11) 93.
[38] See Wiegand (n 7) § 929 par 1.
[39] See Oechsler (n 4) § 929 par 1.
[40] n 8 above.

2.1. The agreement

The agreement represents the *in rem* legal transaction of transfer of ownership.[41] Existence and validity of the consent depend upon the general rules on legal transactions and on contracts.[42] Thus, an agreement can also be made by an agent.[43]

An agreement exists if the owner and the purchaser agree that the ownership shall pass.[44] For this purpose, no express declaration of intention is required. Implied behaviour is rather sufficient.[45] It is also crucial that the agreement and the handover do not have to occur simultaneously. Rather, the agreement may be preceded by time.[46] A peculiarity is that the agreement can be completed conditional or limited.[47] The limited condition is subdivided in a limitation which starts from a certain date or incident (*Anfangsbefristung*) and a limitation which ends on a certain date or incident (*Endbefristung*).[48] In the conditional transfer of ownership, a distinction is made between a resolutive condition (*auflösende Bedingung*) and a suspensive condition (*aufschiebende Bedingung*).[49] The suspensive condition realizes the independent legal institution of retention of title at the level of property law.[50]

2.2 The right of disposal

In order for the disposal to be in accordance with § 929 s.1 BGB, the transferor must have the right of disposal. He is empowered to transfer the ownership of the goods to another person.[51] The delegation of power arises from § 903 BGB, after which the owner in general has the right to proceed with his goods according to its will.[52] However, this fundamental right can be restricted by a number of relative or absolute

[41] See Wieling (n 11) 93.
[42] See Wiegand (n 7) § 929 par 8; Pikart *RGRK Kommentar zum BGB Band III* (1975) § 929 par 47.
[43] See Wieling (n 11) 93.
[44] See Wiegand (n 7) § 929 par 9.
[45] See Bassenge (n 28) § 929 par 3.
[46] See Wieling (n 11) 94.
[47] See Eckert (n 32) § 929 par 3.
[48] See Bassenge (n 28) § 929 par 5.
[49] See Bassenge (n 28) § 929 par 4.
[50] See Wiegand (n 7) § 929 par 33.
[51] See Oechsler (n 4) § 9292 par 43.
[52] See Bassenge (n 28) § 929 par 7.

prohibitions on disposal.[53] It covers *inter alia* restrictions on disposal of the debtor in bankruptcy,[54] or a spouse at the disposal of his/her assets as a whole.[55]

2.3. Delivery

The delivery is the actual element of the transfer of ownership. Only in the presence of the delivery, in conjunction with the agreement, can a transfer of ownership take place. According to the original understanding, the delivery designated the procuring of the direct ownership.[56] The formulation of the facts in § 929 s.1 BGB must not be taken literally. So it is not imperative that the owner hands over the things personally.[57] Rather, it is sufficient if the transfer takes place through intermediaries. This can be seen already from the existence of norms such as §§ 930 ff BGB.[58]

The delivery, which represents a real act,[59] requires the preparation of a possession position between the parties.[60] The delivery, here, is described as physical giving and taking.[61] Generally, one distinguishes between objective and subjective conditions for the delivery. This is because the BGB strictly differentiates between the possession of obtaining and handing over the transfer of ownership. This becomes clear through the recognition of different norms for obtaining possession (§ 854 BGB) and delivery for the transfer of ownership (§ 929 BGB).[62] The delivery follows the institute of *traditio*. It must therefore be accompanied by an actual consensus between buyer and seller, the subjective element of the delivery.[63]

First, we consider the objective conditions. Thess include the abandonment of immediate ownership on the side of the owner and obtaining of property on the side of the buyer.

[53] See Bassenge (n 28) § 929 par 7.
[54] § 80 Insolvenzordnung.
[55] § 1365 Section 1 S.1 BGB.
[56] See Oechsler (n 4) § 929 par 83
[57] See Baur/ Stürner (n 20) 640.
[58] see n 75 below.
[59] See Jauernig (n 19) § 929 par 8.
[60] See Oechsler (n 4) § 929 par 52.
[61] See Wiegand (n 7) § 929 par 46.
[62] See Oechsler (n 4) § 929 par 48.
[63] See Oechsler (n 4) § 929 par 48.

2.3.1. Dereliction

For transfer of ownership the owner side has to give up the immediate possession. The BGB defines the concept of possession in § 854 BGB. Accordingly, possession is the actual rule of a person over a thing.[64] The actual physical control is accepted if it is evident that the thing is in a relationship of domination to anyone.[65] It is not crucial that this act can be seen outwardly.[66] There are different forms of dereliction:

- The real dereliction: The transfer of ownership takes place by simple delivery. It is crucial that the serious intention to dispose can be recognized.[67] Ownership passes if the possessory will of the underpossessor (*Besitzdiener*) changes from the will to possess for another to the will to proprietary possession. Thus, the ownership passes if the underpossessor holds the goods now for another person. Decisive is only that no right of possession remains for the seller.[68]

- The improper dereliction: This includes situations where a direct possessor transfers the thing at the behest of the owner (*Geheißerwerb*).[69] Here, too, it is important that the seller retains no residual possessions.

2.3.2. Acquisition of possession

A possession purchase is when the acquirer obtains direct special rule on the thing.[70] Again, there are two types of acquisition, but only one is legally recognized as a unique acquisition.

- The real acquisition of possession: A real acquisition of possession is when the direct possession is obtained by the purchaser or his possession servant.[71]

[64] See Wieling (n 11) 41.
[65] See Jauernig (n 19) § 854 par 2.
[66] See Wiegand (n 7) § 929 par 66.
[67] See Baur/ Stürner (n 20) 640.
[68] See *BGH* 05 may 1971 *BGHZ* 56, 123,129.
[69] See Baur/ Stürner (n 20) 642.
[70] See Wieling (n 11) 94.
[71] n 67 above.

- The artificial acquisition of possession: A fake acquisition of possession is when the acquirer instructs the transferor to pass the things immediately to a third person. (*Streckengeschäft*).[72] The legal situation is not entirely clear in this situation, since it is not clear whether the acquirer actually obtains possession.

2.3.3. Demise will

Beside these objective conditions, there must also be conditions on the subjective side of the delivery. These conditions are the will to transfer the ownership on the side of the transferor and the consensus about the change in the proprietary possession.[73] This presupposes the abandonment of proprietary possession on the side of the transferor according to § 872 BGB. The purchaser, however, must justify such an intention of proprietary possession.

In summary, one can therefore say that delivery and passing of ownership, in accordance to § 929 s.1 BGB, takes place as soon as the possession is transferred to another person with the intention to pass ownership.[74]

3. Other transfer of ownership facts

Beside the general transfer of ownership facts, German law knows even a number of other transfer of ownership forms. These forms differ from the strict principle of tradition. The delivery is replaced by another legal act. We will deal with those legal acts very briefly, only for completeness.

3.1. *Brevi manu traditio*

In this legal act, according to § 929 S.1 BGB, the purchaser is already in possession of the thing. For transferring ownership a mere real agreement suffices.[75]

[72] n 67 above.
[73] See Oechsler (n 4) § 929 par 59.
[74] See Wiegand (n 7) § 929 par 60.

3.2. *Constitutum possessorium*

Custody remains in the same hands. Besides an *in rem* agreement, however, an agreement of constructive possession is necessary in order to transfer the ownership.[76] This is regulated by § 930 BGB.

3.3 Assignment of the claim for delivery

In this case, which is determines by § 931 BGB, the vendor is only the indirect holder of the thing. For transfer of ownership, the transferor transfers the indirect possession to the purchaser. Therefore, the transferor transfers his claim for restitution against the agent in possession to the purchaser. Through this transfer the seller loses every right on the thing. The purchaser, however, receives these rights.[77]

4. Transfer of ownership and the use of Incoterms

The Incoterms[78] are international rules for the uniform interpretation of the usual contractual terms in international trade contracts. As already shown above, German law distinguishes between the sales contract itself and the *in rem* transaction. That is why special terms like Incoterms do not directly influence the transfer of ownership. Nevertheless, the Incoterms determine the function of the carrier: they determine whether the carrier is an agent for the seller or the buyer. In so doing, they have an impact on determining the delivery point and thus they also influence the transfer of ownership. In FOB terms, for example, the delivery takes place when the carrier takes possession. In C-terms, however, delivery only happens by handing over the goods to the buyer.

[75] See Wieling (n 11) 96.
[76] See Oechsler (n 4) § 930 par 1.
[77] See Wiegand (n 7) § 931 par 1.
[78] Incoterms 2010: ICC Rules for the use of domestic and international trade terms [Incoterms]

5. Transfer of ownership through bills of lading or other transport documents

German commercial law knows six different types of mercantile papers. These are enumerated in § 363 HGB and are called as follows: mercantile order (*kaufmännische Anweisung*), mercantile promise (*kaufmännischer Verpflichtungsschein*), transport insurance policy (*Transportversichungspolice*), inland waterway bill of lading (*Ladeschein*), bill of lading (*Konnossement*) and warehouse warrant (*Lagerschein*). Three of those papers, namely the inland waterway bill of lading, the bill of lading and the warehouse warrant are negotiable documents of title.[79] In this case the ownership, embodied in the document passes with delivery of the documents. The bill of lading is one of the most important documents used in international trade to help guarantee that exporters receive payment and importers receive merchandise. Therefore we will have a closer look to the characteristics of a bill of lading. It is a document issued by a carrier which details a shipment of merchandise and gives title of that shipment to a specified party. One of the characteristics of the bill of lading is that one treats it as a document of title.[80] It operates as a symbolic delivery of the cargo. One has to distinguish between an order bill and a straight bill. The order bill enables the consignee to transfer or assign the bill on to any third party. A straight bill, however, is not transferable once it has been delivered to a notify party. Nevertheless it is accepted as a document of title.[81] In order to transfer ownership through a bill of lading, certain requirements must be met. First it requires the document of title by way of transfer agreement and endorsement. The property passes whenever it is the intention of the parties that it should pass. Furthermore, the document of title must be delivered to the acquirer and the goods must be taken over by the issuer/ drawer of the documents of title.[82] Although the bill of lading is useful for international transactions, the ownership can also still pass under the rules of the *Bürgerlichen Gesetzbuch*.

[79] See Thorn K. *Ziegler/ Debattista. Transfer of Ownership in International Trade* (2011) 212.
[80] See Thorn (n 79) 212.
[81] See Bridge MG. *The International sale of goods* (2013) par 8.41.
[82] See Thorn (n 79) 212.

V) Retention of title

1. Retention of title in general

Also of great importance to the law of contract is the retention of title. Retention of title is a means of collateral security and plays a role in the sale of movables, if the seller already surrendered the goods to the buyer without receiving the purchase price payment in return.[83] Under retention of title the seller and the buyer agree that ownership only passes under the condition of the full payment of the purchase price.[84] After fulfillment of the condition the transfer of ownership becomes effective automatically. Through the reservation clause, the seller should be protected against the risk that accompanies advance performance. The buyer, however, should be protected by the acquisition of an expectant right against the sale to third parties by the seller. Even after the reform of the law of obligations in 2004 (*Schuldrechtsmodernisierzungsreform*) the legal institution was retained. Since then, retention of title is governed by § 449 BGB. As the simplest form of security, it has evolved into the most important protection measure for the movement of goods for the seller who performs in advance.[85] It is generally accepted that the retention of title serves to protect the seller against unauthorized disposal of the buyer. It also secures the seller against access by creditors of the buyer and the claim for restitution itself.[86] On the other hand, the buyer obtains possession and acquires a beneficial right (*Anwartschaftsrecht*). Therefore the buyer is a lawful possessor. Consequently, this security right offers an advantage for both parties.

2. The stipulation

Typically, the retention of title is agreed in the contract of sale. A specific form is not required. However, most parties agree on the retention of title in writing for evidentiary purposes. The latest date for the agreement of retention of title is at the

[83] See Weidenkaff (n 28) § 449 par 3; Beckmann (n 24) § 449 par 1.
[84] See Bassenge (n 28) § 929 par 27.
[85] See Reinicke/ Tiedtke *Kaufrecht* (2004) 487; Weidenkaff (n 27) § 449 par 2; Weber H. „Reform der Mobiliarsicherheiten“ 1976 *Neue Juristische Wochenschrift* 1601,1605.
[86] See Reinicke/ Tiedtke (n 86) 487; BGHZ 54, 214, 219.

time of delivery.[87] There is also the possibility of an implied agreement or an agreement by enclosing of standard terms of business. But a subsequent unilateral declaration by the seller side is not sufficient. However, the retention of title can also be agreed subsequently. This is true even if absolute ownership has already been transferred.[88] For this purpose, however, the buyer must transfer the property back and continue to possess the goods with the will for possession for another. In order to correspond to the principle of speciality, the decisive factor is that the thing that applies the retention of title is concretized.[89]

The law itself has only the simple retention of title, as provided in § 449 BGB. However, this is at risk because of several facts of acquisition.[90] So the property may perish by acquisition in good faith by third parties, loss, connection, processing and consumption, despite agreement on retention of title.[91] In addition to the simple retention of title, which is enshrined in law, other forms of retention of title have developed.

3. Types of retention of title

3.1. The simple retention of title (*einfacher Eigentumsvorbehalt*)

The simple retention of title extends to things sold under an agreement of retention of title.[92] The effect of an agreement of retention of title expires through the payment of the purchase price, the acquisition of property by a third party or by a real act. A real act is a purely factual action that can cause legal consequences.[93]

[87] See Reinicke/ Tiedtke (n 86) 489.
[88] See Reinicke/ Tiedtke (n 86) 489.
[89] See Weidenkaff (n 28) § 449 par 3.
[90] See Weidenkaff (n 28) § 449 par 1.
[91] §§ 932, 946ff BGB.
[92] See Weidenkaff (n 28) § 449 par 12.
[93] See Weidenkaff (n 28) § 449 par 13 ff.

3.2. The expanded retention of title (*erweiterter Eigentumsvorbehalt*)

The expanded retention of title expands the suspensive condition in a way that other requirements must be fulfilled before the buyer acquires ownership.[94] Thus, the ownership remains with the seller, until the other agreed requirements have been met. The jurisprudence recognizes the expanded retention of title as long as it corresponds to the meaning of the purchase contract. This requires that the agreement contains no abuse of freedom of contract. Therefore the conditions and requirements shall be identified and remain economically realistic.[95]

3.3. The extended retention of title (*verlängerter Eigentumsvorbehalt*)

The extended retention of title occurs when the seller and the buyer agree that, if the retention of title expires, the security will arise on the economic surrogate instead.[96] The extended retention of title has great economic importance, because through it the full economic traffic is maintained.[97]

3.4. The forwarded retention of title (*weitergeleiteter Eigentumsvorbehalt*)

The forwarded retention of title occurs when the buyer resells the goods under disclosure of the retention of title and therefore the original seller retains ownership of title.[98] However, this form is not very important in practice.

3.5. The downstream retention of title (*nachgeschalteter Eigentumsvorbehalt*)

Here, the buyer sells the goods without disclosing the retention of title but under his own retention of title.[99] A prerequisite is that the initial seller agreed to the sell. This construction finds use mainly in the intermediate trade.

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[94] See Westermann (n 25) § 449 par 81.
[95] See *BGH* 20 march 1985, *BGHZ* 94, 105.
[96] See Weidenkaff (n 28) § 449 par 18.
[97] See Westermann (n 25) § 449 par 87.
[98] See Wilhelm J. *Sachenrecht* (2010) 953.
[99] See Weidenkaff (n 28) § 449 par 17.

4. Effects of retention of title

Retention of title, regardless in what form it is present, brings different contractual and real effects with it and hence gives various legal positions for the seller and the buyer.

4.1. The effect under the law of obligations

The contract of sale is concluded unconditionally, even with an agreement for a reservation of title. The contract of sale imposes rights and obligations on the parties. For the seller, firstly, this means that he has an obligation to supply the possession.[100] In addition to this, the seller also has the obligation to transfer the ownership.[101] Indeed, the transfer of ownership is initially limited at the moment of conclusion of the contract of sale, but the seller must not prevent the entry of this condition. In this respect, the transfer duty remains unaffected.[102] With the delivery, the buyer becomes a direct possessor as a bailee, while the seller keeps the indirect proprietary possession.[103] However, the sales contract has not been fulfilled with delivery. Fulfillment of the sales contract occurs, according to prevailing opinion, only upon acquisition of full ownership to the purchaser side.[104]

The seller has no claim for restitution, without previous cancellation. This results from § 449 Sec.2 BGB. This provision is intended to prevent the buyer losing possession, but also remain liable to pay.[105]

In contrast, the seller has the right to information and to forbearance (*Auskunfts- und Unterlassungsanspruch*) with respect to the thing.[106] This has practical significance especially in case of an extended retention of title.[107]

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[100] See Beckmann (n 24) § 449 par 56.
[101] See Beckmann (n 24) § 449 par 57.
[102] See Weidenkaff (n 28) § 449 par 8.
[103] See *BGH* 16 april 1969 *Juristenzeitung* 1969, 433.
[104] See *BGH* 13 july 1967 *Neue Juristische Wochenschrift* 1967, 2204; Serick R. *Eigentumsvorbehalt und Sicherungsübertragung Band 1* (1963) 121ff; Weidenkaff (n 28) § 449 par 8.
[105] See Wilhelm (n 99) 951f.
[106] See Westermann (n 25) § 449 par 36.
[107] See *OLG Köln* 12 july 1956 *Neure Juristische Wochenschrift* 1957, 1032.

The buyer, however, has custody obligations with regard to the thing. He must deal with it only as an administrator and must not violate the property rights of the seller.[108]

4.2. The effect under the law of property

With the suspensive conditional delivery the buyer acquires an (transferable) expectant right.[109] Only with fulfillment of the condition is the full ownership transferred to him. The expectant right is a subjective right. It merely represents a preliminary step in the acquisition of the property. This means, that the expectant right is a real right, which gives the purchaser a position like “an owner in waiting”.[110] Compared to the property it is an equal minus.[111] This designation is used, because the right occurs from an abstract of records with several conditions and the act for acquiring ownership has started and the seller alone is no longer able to stop the passing. The buyer has already acquired a secured legal position, because so many requirements are fulfilled that the right can not be destroyed by a unilateral declaration of the transferor.[112] This is the reason why the expectant right is considered predominantly as a right *in rem* and gives the buyer a right of possession.[113]

The seller, however, retains the ownership until the occurrence of the condition subsequent.[114]

5. Retention of title in foreclosure

The question is, what impact the retention of title has on the legal position of creditors.

[108] See Beckmann (n 24) § 449 par 72.
[109] See Weidenkaff (n 28) § 449 par 9.
[110] See Bassenge (n 28) § 929 par 41.
[111] See *BGH* 24 june 1958 *BGHZ* 28, 16, 21.
[112] See *BGH* 30 april 1982 *BGHZ* 83, 395, 399.
[113] See Bassenge (n 28) § 929 par 41.
[114] See Flume W. „Die Rechtsstellung des Vorbehaltskäufers“ *1962 Archiv für die civilistische Praxis Bd 161* 386, 389.

5.1. Enforcement by creditors of the seller

Because the seller is regularly not in possession of the thing, he/she has the possibility to let run a levy of execution (*Zwangsvollstreckung*) after § 809 ZOP or §§ 847 ff ZPO.[115] § 809 ZPO regulates the seizure of items that are in the custody of the creditor or in the custody of a third party, which is ready to surrender. §§ 847 ff ZPO determines, that by a levy of execution of a movable thing, the thing is to be surrendered to a court bailiff, who is commissioned by the creditor. When executing in a thing, it should be noted, that the expectant right of the acquirer establishes a right for third party action against execution pursuant to § 771 ZPO.[116]

Since the introduction of the Insolvency Act 1999, the conditional buyer has a right to fulfill the purchase contract by the insolvency administrator.[117] In this respect, the expectant right of the conditional purchaser is insolvency-proof.[118]

In a result the creditor of the seller has not access to the object, as long as the buyer fulfills its obligations under the purchase agreement.

5.2. Enforcement by creditors of the buyer

Creditors of the buyer may only enforce in the property of the debtor. Since the buyer merely acquires an expectant right, the creditors are only able to levy this. In general it is possible to seize an expectant right.[119] The seizure will be decided on the executing court.[120] In order to obtain rights on the thing, there will be simultaneously also a seizure of the thing itself.[121] One speaks here of the so-called double attachment (*Doppelpfändung*).[122] The double attachment has the following legal effects:

1) It prevents the disposal of the thing by the buyer;[123]

[115] See Beckmann (n 24) § 449 par 104.
[116] See *BGH* 11 november 1970 *BGHZ* 55, 20, 27.
[117] § 107 Insolvenzordnung.
[118] See Wilhelm (n 99) 954.
[119] See Reinicke/Tiedtke (n 81) 509.
[120] See *BGH* 24 may 1954 *Neue Juristische Wochenschrift* 1954, 1325.
[121] See Westermann (n 25) § 449 par 66.
[122] n 121 above.
[123] See Reinicke/Tiedtke (n 86) 509.

2) The seller loses the right to reject a final payment by the creditor pursuant to § 267 Section 2 BGB;[124]

3) The execution lien remains on the thing itself after the condition for the expectant right is fulfilled.[125]

Since the seller is still the owner of the thing, he/she has still rights on it. According to § 771 ZPO the seller has the possibility to bring a third party action against execution in case a creditor executes in his goods.[126] If the seizure only ensures that the execution lien on the expectant right transforms to an execution lien on the thing itself, the seller has no right to contradict.[127]

In summary, one can say that the seller initially remains bound by the contract and only in case of non-fulfillment of contract; the seller can resign and may exercise his/her ownership rights. However, as soon as the obligations arising from the purchase agreement are no longer met, the seller is entitled to be preferably satisfied.

[124] See Beckmann (n 24) § 449 par 106.
[125] See Westermann (n 25) § 449 par 100.
[126] See *BGH* 01 july 1970 *BGHZ* 54, 214, 218.
[127] See Reinicke/Tiedtke (n 86) 510.

B) South African law

I) Historical background on South African law

South African law is a mixed legal system, which is influenced by different legal traditions.[128] The history of modern South African law starts with the Dutch settlement at the Cape of Good Hope in 1652.[129] As the Dutch East Indian Company settled down at the Cape of Good Hope, they established the law of their province, which was the Roman- Dutch law.[130] Already in 1806 the Cape region has been taken over by the British as a colony. The British began to replace some of the Roman-Dutch law by the British Common law.[131] The subsequent period of racial segregation also took influences on today's legal system.[132] After the Constitution entered into force in 1994, the South African law system went a new direction. The Constitution promises a democracy with pursuit of equality and the rule of law.[133] South African contains both, African and European law as well as elements from the Civil Law and Common Law.[134] The system can be referred to as a hybrid or mixed system.[135]

The South African law of property, however, is mainly influenced by Roman-Dutch law.[136] This is especially noticeable in its closeness to the civil system. The main influence by the Roman law is the clear distinction between ownership and possession. Ownership is regarded as an indivisible right.[137] Furthermore, the Dutch law added a clear distinction between movables and immovables.[138] The Common law, however, only has a small influence in terms of attornment as a model of delivery.[139]

[128] See Zimmermann R. „Synthesis in South African Private Law“ 1986 *SALJ* 259ff.
[129] See van der Merwe C. *Wille's Principles of South African Law* (1991) 27.
[130] See Mostert H./ Pope A. *The Principles of the Law of Property in South Africa* (2010) 9.
[131] See Erasmus H. „Thoughts on Private Law in a future South Africa“ 1994 *Stellenbosch Law Review* 105.
[132] See Boone C. *Property and Political Order in Africa* (2014) 308.
[133] See van der Merwe C./ Du Plessis J. *Introduction to the law of South Africa* (2004) 2.
[134] See Zimmermann (n 129) 259ff.
[135] See Mostert/ Pope (n 131) 9.
[136] See van der Merwe/ Du Plessis (n 134) 201.
[137] See van der Merwe/ Du Plessis (n 134) 201.
[138] See van der Merwe/ Du Plessis (n 134) 201.
[139] See van der Merwe/ Du Plessis (n 134) 201.

II) Contract of sale

A sale is a mutual contract for the transfer of possession of a thing in exchange for a price.[140] As can be assumed because of that definition, an agreement on certain essential elements must be present. The *essentialia negotii* in a contract of sale are:[141]

1) The agreement;
2) The thing sold;
3) The price.

As one can see, neither delivery nor payment is necessary to create a contract.[142]

1. The agreement

Firstly, for the agreement, the general principles apply. Therefore, the agreement must not be tainted by mistake, misrepresentation, duress or undue influence, and the parties must act with the intention of contracting a sale. For a contract to 'qualify' as a contract of sale, the law requires that two key features exist in the contract. These are:[143]

a) the agreement, as to the thing sold, which contains the subject-matter of the sale and its essential characteristics and
b) the agreement, as to the price to be paid for the thing.

Important is only, that this agreement needs to be distinguished from the agreement for passing the ownership.[144]

2. The thing sold

Nearly everything can be sold. The thing may be movable or immovable, corporeal or incorporeal and it is even possible that the parties agree about a thing that doesn't

[140] See *Treasurer-General v Lippert* (1883) 2 SC 172.
[141] See Hackwill G. *Sale of Goods in South Africa* (1984) 1.
[142] See *Nimmo v Klinkenberg Estates Co Ltd* (1904) TH 310 at 314.
[143] See Hackwill (n 142) 5.
[144] See Bradfield G./ Lehmann K. *Principles of the Law of Sale& Lease* (2013) 15.

exist at the time of the conclusion. In this case, it is sufficient, that the parties expect the thing to come to fruition.[145]

3. The price

The High Court of South Africa established as a general rule "that there can be no valid contract of sale unless the parties have agreed, expressly or by implication, upon a purchase price."[146] An agreement as the price of the thing sold is thus an essential requirement for a contract of sale to be valid.

For a formation of a contract of sales there are no other requirements than these listed. Indeed, a contract of sales creates only personal rights and obligations and has no effect on the transfer of real rights.[147] The transfer of ownership needs a separate juristic act. The issue of ownership, however, is an important incidence of a sale even though a contract of sale does not automatically result in ownership being transferred to the buyer. This is due to the fact that ownership does in fact pass by virtue of most contracts of sale. But it is important to remember, that the transfer of ownership can be valid while the contract of sale is invalid.[148]

III) Passing of ownership

1. Definition of ownership

Section 25 of the Constitution of the Republic of South Africa protects all property rights. Therefore property rights must be considered as a constitutional principle. In general one can say that the term property includes all assets that form part of a person's estate.[149] Though, there is no simple definition of the concept of ownership.

[145] See Kerr A. *The law of sales and lease* (2004) 8.
[146] See *Westinghouse Brake & Equipment v Bilger Engineering (Pty) Ltd* 1986 2 SA 555 at 574B-C.
[147] See *Nimmo v Klinkenberg Estates Co Ltd* 1904 TH 310 at 314.
[148] See Bradfield/ Lehmann (n 145) 15.
[149] See Silberberg and Schoeman's *The Law of Property* (2003) 93.

The term is based on various aspects and depends on historical, philosophical, religious, economic, political, social and juridical factors.[150] We can find a description that most closely resembles a definition in the South African case law.[151] This description rises from the Common Law. The focus of this definition is on the view of property as the most complete real right.[152] In a leading decision the High Court of South Africa decided, that "ownership is the most complete real right a person can have with regard to a thing.[153]" Nevertheless, the right can be limited. To determine the scope of the term ownership, one has to take into consideration several aspects. First you have to consider the term ownership independently under each individual case.[154] Then one has to remember that usually the term can be divided into two aspects. The first one is the entitlements of the owner. The second one is the limitations on ownership.[155] One distinguishes between different kinds of entitlements:[156]

1) Entitlement to control, which gives the power of physical control;
2) Entitlement to use, which determines the right to use and benefit from a thing:
3) Entitlement to encumber, which is the entitlement to grant limited real rights to others in respect of the thing;
4) Entitlement to alienate, which entitles the owner to transfer the thing to someone else;
5) Entitlement to vindicate, which allows to claim the thing from another person.

Ownership is limited by objective law. This means that an owner of property can use his property as he wants, but in such a way that someone else is not burdened or prejudiced.

[150] See van der Walt A./ Pienaar G. *Introduction to the law of property* (2006) 40.
[151] See Mostert/ Pope (n 131) 91.
[152] See Silberberg and Schoeman's (n 150) 94.
[153] See *Gien v Gien* (1979) SA 1113 (T).
[154] See van der Walt/ Pienaar (n 151) 41.
[155] See Mostert/ Pope (n 131) 93.
[156] See Silberberg and Schoeman's (n 150) 94.

The limitation includes real rights of other persons, statutory measures and other objective law.[157]

In literature, there is controversy over whether all entitlements have to be cumulative in order for the right of ownership to exist. In the end one has to say, however, that ownership as an abstract concept is more than the mere sum of entitlements.[158] Therefore, the reasoning, that ownership only exists when all entitlements are cumulative, is not tenable.

As a summary we can say that ownership has an abstract nature, which refers to both the relationship between the owner and the thing, as well as the relationship between the owner and other legal subjects regarding that thing.[159]

2. Passing of ownership in general

South African law distinguishes between the original and the derivative method of acquiring of ownership.[160] In general the transfer of a real right is preceded by a contract. In the case of a transfer of movable goods, the contract can be a sales contract. Nevertheless, in Roman-Dutch law, the transfer of a real right must be seen as a separate legal transaction.[161] This is the case, because the contract creates only personal rights and obligations. The contractual relation underlying the intention to transfer ownership follows the principle of *tradition,* which means that the movable must be delivered to the transferee in a legally recognized way.[162] The transfer of ownership, however, requires its own agreement and has its own requirements. We have to strictly differentiate between these two legal acts.

[157] See Silberberg and Schoeman's (n 150) 96.
[158] See van der Walt/ Pienaar (n 151) 42.
[159] See van der Walt/ Pienaar (n 151) 42.
[160] See Clarke A./ Kohler P. *Property Law* (2005) 384.
[161] See Silberberg and Schoeman's (n 149) 79.
[162] See Scholtens J. „Justa causa traditionis" *1957 SALJ* 280.

2.1. Derivative acquisition

A derivative acquisition always requires a bilateral transaction. A bilateral transaction is given if the current owner transfers the ownership to the purchaser and the latter accepts the transmission.[163] As a result, the acquired title contains not only all the rights that the previous owner had, but also the obligations or limitations relating to the property.

2.1.1. Essential element for the transfer of real rights

In the transfer of real rights we have to follow certain essential elements. In order to transfer ownership, these essential elements must be present.

a) *Res in commercio*

The thing must be negotiable, which means that it must be a thing in respect of which real rights can be acquired and transferred.[164]

b) Contractual capacity of transferor and transferee

The transferor must be legally competent to transfer ownership;[165] the transferee must have the contractual capacity to accept ownership.[166]

c) Permission to transfer

The transfer must be effected by the owner or by his authorized agent.[167]

d) Acceptance of the transfer

The transferee must accept the transfer of ownership.[168]

e) Delivery

In order to transfer ownership, the thing has to be delivered to the transferee.

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[163] See van der Walt/ Pienaar (n 151) 125.
[164] See Silberberg and Schoeman's (n 150) 80.
[165] See *Mvusi v. Mvusi* 1995 *(4) SA 994 (TkSC) 999 D-E.*
[166] See van der Walt/ Pienaar (n 151) 125.
[167] See *Concor Constructino (Cape) (Pty) Ltd v Santambank Ltd* 1993 (3) SA 930 (A) 933B.
[168] See Silberberg and Schoeman's (n 150) 80.

f) Intention to transfer and to acquire ownership

The physical delivery must be accompanied by the intention of the transferor to transfer ownership and of the transferee to acquire ownership.[169]

g) Cash and credit sales

For contract of sales the transfer of ownership will only happen when the purchase price is paid or if credit has been given.[170]

2.1.2. Real agreement

The real agreement is the agreement about the intention to transfer and the acceptance to acquire ownership. It is the mental or subjective element in the contract.[171] The intention to transfer ownership has to be absolute.[172] There must be a legal cause for the transfer of ownership.[173] Although an agreement that creates the obligation is deemed important in establishing the transferor and transferee's intentions in such a transfer of ownership, the invalidity of such an agreement does not invalidate the transfer of ownership. This is based on the abstract system of transfer of ownership, where other circumstances at the time of transfer are taken into consideration in establishing the legal cause of transfer. The real agreement has to be present at the time when delivery takes place (meeting of minds at delivery).

2.1.3. The system of transfer of ownership

In the transfer of ownership one distinguishes between the causal and the abstract theory. The causal theory assumes that a real right can only pass if the cause for the transfer, namely the contract, is valid.[174] In contrast, according to the abstract theory,

[169] See *Klerck NO v van Zyland Maritz NNO and Related Cases* 1989 *(4) SA 263 (SE) 274C-D 273J-274A*.
[170] See Feenstra R. "Eigendomsovergang bij koop en terugvorderingsrecht van de onbetaalde verkoper: Romeins recht en Middeleeuws handelsrecht" 1987 *THRHR* 127; *Concor Constructino (Cape) (Pty) Ltd v Santambank Ltd* 1993 *(3) SA 930 (A) 933B-C; Crockett v Lezard* 1903 *TS 590, 593.*
[171] See Silberberg and Schoeman's (n 150) 81.
[172] See Silberberg and Schoeman's (n 150) 168.
[173] See van der Merwe (n 130) 522.
[174] See *Rasi v Madaza* (2001) 1 All SA 498 (Tk) 511e.

the real right passes if the agreement to transfer is valid, notwithstanding that the cause may be defective.[175]

Originally South African law followed the causal theory, which can be seen in the case *Kleudgen & Co v Trustees in Insolvent Estate of Rabie*.[176] But case law developed and today the abstract theory is widely accepted.[177] Therefore a transfer will take place as long as the real agreement is valid. Validity of the transfer of ownership and validity of the underlying contract are totally independent from each other.

2.1.4. Delivery

In order to transfer ownership of movables delivery is required in addition to the real agreement. Traditionally, delivery as an element of transfer of ownership is the physical act of the handover in order to receive possession of a thing.[178] This handover has to be in a way that the purchaser can exercise control as the owner. The transfer of ownership of a corporeal movable always requires delivery.[179] Ownership may also pass through a constructive delivery. Then the movable asset is not physically handed over due to its size or any other circumstance that prevents actual delivery. But the manner in which control is exercised indicates the intention of the transferee to be the owner. We know various forms of delivery which have been recognized in Roman-Dutch law.

a) Physical or actual delivery (*traditio vera*)

In this case the movable is handed over by the transferor to the transferee in an actually manner.[180] The purchaser must be able to control the thing physically and he must have the intention to become owner.

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[175] See *Krapohl v Oranje Koöperasie Bpk* 1990 (3) SA 848 (A) 864E-G.
[176] (1880) Foord 63.
[177] See *Trust Bank van Afrika Bpk v Western Bank Bpk* 1978 (4) Sa 281 (A); *Air-Kel h/a Merkel Motors v Bodenstein* 1980 (3) SA 917 (A).
[178] See Silberberg and Schoeman's (n 150) 167.
[179] See *Info Plus v Scheelke* 1998 (3) SA 184 (SCA) 189 E.
[180] See van der Walt/ Pienaar (n 151) 129.

b) Symbolic delivery (*clavium traditio*)

This way of delivery indicates that the thing itself cannot be handed over, but only the means which will enable the transferee to exercise physical control over the property[181] (e.g. delivery of the keys to a house).

c) Delivery with the long hand (*traditio longa manu*)

Because of the natural composition of big things, it is not always possible to move them easily. That is why it is possible for the transferor to merely place the things in sight of the acquirer. Literally, the thing should be pointed out to the transferee, so that he can exercise physical control over it. [182]

d) Delivery with the short hand (*tradition brevi manu*)

In the case of delivery with the short hand the transferee is already in possession of the thing in respect of which he will acquire ownership, but he is not owner yet. The ownership passes as soon as the parties agree on the transfer.[183]

e) Constitutum possessorium

Passing of ownership in the case of *constitutum possessorium* takes place without an actual delivery. The transfer will happen by means of a change of intention of the parties in respect of ownership. Only the mental attitude towards the thing changes.[184]

f) Attornment

The thing in question is held by another person in terms of a valid legal cause. Ownership passes in which the parties of the transfer agree about that the person who has physical control over the thing will exercise this control in the future for the transferee in terms of his intention to be owner.[185]

[181] See Silberberg and Schoeman's (n 150) 172.
[182] See *Eskom v Rollomatic Engineering (Edms) Bpk* 1992 (2) SA 725 (A).
[183] See *Consolidated Factors of SA (Pty) Ltd v National Cash Register Co SA (Pty) Ltd* 1973 (4) SA 486 (T).
[184] See van der Walt/ Pienaar (n 150) 133.
[185] See Silberberg and Schoeman's (n 149) 183.

In conclusion it may be stated that South African law distinguishes between the contract underlying the transfer of ownership and the agreement for the transfer of ownership itself. A real agreement and a delivery is required for the transfer of ownership. As seen above, South African law knows several exceptions from the strict execution of delivery as a physical handover. Beside the acquisition of ownership as a result of a contract, we also find other possibilities to gain ownership. These facts are summarized under the name “original acquisition”.

2.2. Original acquisition

An original acquisition of real rights takes place, if an unowned thing becomes a holder in the first time or if such an unowned thing gets irrevocably connected to another thing.[186] The original acquisition requires merely a unilateral act.

2.2.1. Accession

Accession takes place when two independent things are joined together. It is crucial, that one thing loses its independent identity. The owner of the smaller thing loses his ownership in this moment when the thing is attached to the less valuable but bigger thing.

2.2.2. Specification

An acquisition of ownership via specification occurs, if a thing gets processed in such a manner that a new product arises. The property on the new thing will pass to the manufacturer.[187]

2.2.3. Mingling and mixing

Mingling and mixing means that two or more things get connected irrevocably. Mixing refers to solids and mingling to liquids. The requirement is that the different materials

[186] See Clarke/ Kohler (n 161) 384.
[187] See *Aldine Timber Co v Hlatwayo* 1932 TPO 337, 341.

should not be divisible anymore, the mixed or mingled materials shouldn't have been attached to anything else, and the mixing or mingling should have happened without the owner's consent. In case of mixing, each party may vindicate a portion of the mixture.[188] In the case of mingling without consent between the parties, the mixture becomes the common property of the original owners.[189]

3. Transfer of ownership and the use of Incoterms

Also under the use of Incoterms, the ownership passes with delivery. The Incoterms merely indicate when delivery takes place and determines whether the carrier is an agent of the buyer or the seller. The delivery varies, dependent on the used Incoterm. In the most cases passing of ownership is performed by a negotiable bill of lading.

4. Transfer of ownership through bills of lading or other transport documents

The delivery of a bill of lading is seen as the symbolic delivery of the goods in question.[190] Ownership passes through endorsement and delivery of a negotiable bill of lading. Therefore bills of lading are characterized as a document of title. In contrast, the delivery of a non-negotiable bill of lading will not transfer ownership. The intention of the parties for a non-negotiable bill of lading is not passing of ownership. In such an instance, the parties agree about the moment in which the transfer should take place. However, it is mandatory for the carrier to deliver the goods to the named person in the bill of lading.

[188] See Silberberg and Schoeman's (n 150) 153.
[189] See *Terminus Compania Naviera SA and Grinrod Marine (Pty) Ltd: In re the Aretil L* 1986 (2) SA 446 (C) 452F-G.
[190] See *Lendalease Finance Ltd v Corp. De Mercadeo Agricola* 1976 (4) SA 464 (A) at 492C.

IV) Retention of title

1. Retention of title in general

Where goods are sold under deferred payment of the purchase price, the parties often agree on retention of title. The ownership will be reserved for the seller until the condition is fulfilled. In South African law a conclusion on such a condition is fully acknowledged.[191] It is left to the parties to agree on the conditions for the execution of contractual obligations.[192] One has to distinguish between credit and cash sales. With cash sales, transfer is only passed when the purchase price has been paid in full. The retention of title is therefore mostly relevant for credit sales of movables, when the purchase price will be paid periodically.[193] An explicit agreement should state that transfer of ownership will take place only after the final instalment has been paid.

2. Effect of retention of title

After conclusion of retention of title, the seller can vindicate the movables easily. He will have the right to claim the goods back from the buyer with, the so called, *rei vindication.*[194] The seller merely has to cancel the contract.

3. Retention of title in foreclosure

The retention of title brings the seller in the position to claim the goods themselves. As long as the movables are still in the possession of the buyer, the seller can recover them.[195] In this manner, the seller is in a better position than a normal creditor. The goods do not fall into the bankruptcy estate and therefore no other creditor is able to make claims.

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[191] See Fletcher I. *The Law of Insolvency* (2009) 258.
[192] See Sale of Goods Act 1979 ss.17, 19.
[193] See Bradfield/ Lehmann (n 145) 22.
[194] See Burger L. *Transfer of Ownership in International Trade* (1999) 334.
[195] See Fletcher (n 192) 258.

C) Comparison between German and South African law

For the transfer of ownership, both German and South African law follow an abstract system. Both systems are based on Roman law. While you find a complete codification in German law, South African law is an uncodified civil law system. South African law was heavily influenced by English law. The framework of the German law is codified in the *Bürgerlichen Gesetzbuch*. The law is greatly enhanced by the jurisprudence and confirmed and approved by case law. The development of the South African law, on the other hand, takes place largely through case law. Under German law, a strict separation between the contractual legal obligation and the legal transaction *in rem* takes place. Consequently, a distinction is made between at least two agreements, namely, the contract after which the disposal is due and the agreement through which the property passes. Because of the strict separation, ownership may pass without a valid contract. Also South African law assumes the existence of two separate agreements and is thus comparable to the German rules. In German law, ownership passes when the parties agree on the delivery and the goods are handed over. In South African law, the parties must also be in agreement and the goods must be handed over. But if it is a cash purchase, the property will only pass if the purchase price has been paid. Since in Germany the property may pass without payment, the German legal system requires institutions such as the retention of title by the seller to secure his or her property and rights. In South African law, the retention of title plays a role only in credit sales.

As a result, one sees that the two legal systems have the same base, but have then developed by different influences in different directions.

Chapter 2

Supranational and international level

A) Supranational level/DCFR

I) Historical background of the DCFR

On supranational levels, such as the European Union, there have arisen common legal institutions. Some legal areas for the Member States are governed by European law. Therefore applies for the member states both, European law and national law.
It is controversial whether a European Civil Code is necessary beside the existing European law. With publishing of instruments like the Principles of European Contract Law (PECL) in 1982[196] and the Draft Common Frame of Reference (DCFR) in 2009[197] one tried to create a common European contract law. The DCFR has the aim to be a complete codification for contract law. Therefore it discusses different fields of law such as the law of obligations[198] and the law of property.[199] The structure of the DCFR is adapted to the common law. Definitions are prefixed in the chapters.[200]

[196] See Bar C./ Clive E. *Principles, Definitions and Model Rules of European Private Law Vol. 1* (2009) 1.
[197] **http://wirtschaftslexikon.gabler.de/Archiv/86497/europaeisches-privatrecht-v4.html**
[198] See Bar C./ Clive E. *Principles, Definitions and Model Rules of European Private Law Vol. 2 (2009)* vi, 2025 ff.
[199] See Bar C./ Clive E. *Principles, Definitions and Model Rules of European Private Law Vol. 5 (2009)* vii, 4205 ff.
[200] See Stadler (n 5) 380,381.

II) Contract of sale

The DCFR defines a contract for the sale of goods or other assets in IV.A.-1: 202. A contract for the sale of goods is a contract, in which one party, the seller, committed to transfer ownership of goods to the buyer and the buyer is obliged to pay the price.[201] The main obligations of the parties are listed in the norm. We will have a closer look to the transfer of ownership under the DCFR.

III) Passing of ownership

1. Definition of ownership

The eighth book of the DCFR regulates the acquisition, the loss and the protection of ownership of movables. Under the concept of movable property falls each physically movable thing.[202] Ownership, in VIII 1: 202 is defined as "the most comprehensive right a person, the owner, can have over property." Thus, the DCFR follows a definition which is widely used in continental European jurisdictions.[203] The understanding of these laws is that the property is a right *in rem*, which means a right of a person directly related to an asset (as opposed to a right of a person against another person, which has an obligation to do something or to refrain) and thus is an absolute right that is enforceable against everyone (*erga omnes*). This concept as such, has no comparable roots in the tradition of the common law, where the title is viewed more as a relative, rather than as absolute matter.[204]

2. Transfer of ownership

The second chapter is devoted to the conditions for a transfer of ownership. Here, the DCFR tries to find a middle ground from various practiced law systems in Europe. The DCFR defines property as not divisible from the owner and it assumes that

[201] See Bar/ Clive (n 200) 1234.
[202] VIII-1: 201 DCFR.
[203] See Sagaert V. *The Draft Common Frame of Reference* (2012) 267 f.
[204] See Mostert/ Pope (n 131) 91.

property is generally transferable.[205] From VIII.-2:101 Sec.1 lit.a sec.3 DCFR follows that a transfer of ownership can take place only on concretized objects. In this respect, the DCFR follows the principle of legal certainty. For the transfer of ownership, the DCFR follows neither the traditional principle nor the principle of consensus. The parties shall determine by agreement when the property should pass. The delivery of the goods is just not critical. A handover as a mandatory element is not required.[206] Thus, not only the principle of tradition was clearly rejected, but also the principle of publicity, which is known in many European countries, is not followed.[207] The handover is used only for specifying the transfer of ownership, if neither an explicit nor an implied agreement on the transition came about.[208] However, the DCFR also does not follow a pure principle of consensus, because it grants the principle of party autonomy and party disposition as a clear priority.[209] The DCFR does not provide for a real agreement on the transfer of ownership.[210] It dispenses with the principle of separation and abstraction,[211] as well as with the obligation for a separate legal agreement for the transaction *in rem*.[212]

As a result, the time of transfer of ownership by the DCFR is solely dependent on the agreement reached by the parties.

VI) Retention of title

1. Effect of retention of title

IX.-1:103 DCFR governs the retention of title. VIII.-2:203 DCFR determines the *in rem* effect of a *condition subsequent* and of a suspensive condition. The conditions for the emergence of retention of title arising from IX.-2: 202 DCFR. Section 1 lit. b determine that the subject on which the property will be reserved, must be accurately

[205] VIII.-1:202 DCFR.
[206] VIII.-2:101 DCFR.
[207] See Bar/ Clive (n 200) 4439 ff.(e.g.: Germany, Estonia, Greece, Netherlands, Norwey, Austria, Sweden).
[208] See Bar/ Clive (n 200) 4383.
[209] See Stadler (n 5) 380, 384.
[210] VIII.-2: 201 DCFR.
[211] See Bar/ Clive (n 200) 4381 f.
[212] See Stadler (n 5) 380, 385.

determined. It is characteristic that the seller loses possession of the goods, while the seller obtains the possession. Nevertheless, due to the agreement, the ownership retains with the seller, until the condition is fulfilled.

2. The retention of title in the foreclosure

The retention of title gives the seller the possibility to demand the object in question in insolvency, in case the condition precedent, which is mostly the payment of the purchase price, has not been fulfilled by the buyer.[213]

Thus, the DCFR defines, by the recognition of retention of title, the possibility of security for the seller.

[213] See Bar C./ Clive E. *Principles, Definitions and Model Rules of European Private Law Vol.6 (2009)* 5397.

B) International Level/CISG

I) Historical background on the CISG

The Convention of the United Nations on Contracts for the International Sale of Goods, the CISG Convention, has been prepared after a decision of the General Assembly by 12.16.1978 by a diplomatic conference and came into force on the 1.1.1988.[214]

Nevertheless, the CISG was not the first the first uniform law on the sale of goods. Already in 1964 a uniform purchase law was developed. However, this law only came into force in nine States and never gained great importance outside of Western Europe.[215]

1966 UNCITRAL began to develop a uniform international sales law in annual conferences.[216] Sixty-two nations were involved in the last conference. The final draft was discussed and decided in a final conference in Vienna in 1980.[217]

II) Contract of sale

Art. 1 paragraph 1 CISG stipulates that this Convention shall apply to contracts of sale of goods between parties whose places of business are in different States when the States are Contracting States or when the rules of private international law leads to the applicability of the law of a Contracting State.[218] The CISG dispenses on an explicit definition of a sales contract.[219] However, a definition can be derived from

[214] See Magnus *Staudinger Kommentar zum BGB Wiener UN-Kaufrecht* (2013) Einleitung zum CISG par 27.
[215] See Westermann (n 215) Vor Art. 1 CISG par 8.
[216] See Magnus (n 215) Einleitung zum CISG par 24.
[217] See Magnus (n 215) Einleitung zum CISG par 26.
[218] See Westermann (n 215) Art. 1 CISG par 1.
[219] See Ferrari Schlechtriem/ Schwenzer *Kommentar zum Einheitlichen UN-Kaufrecht - CISG-* (2004) Art.1 par 12.

Articles 30 and 53.[220] After this, a purchase agreement for the purposes of the CISG is a contract by which one party, the seller, has to deliver the goods and has to transfer the ownership and the other party is obliged to accept the goods and to pay the purchase price.[221] Accordingly, the CISG establishes the main duties for the parties, which arise from the conclusion of a sales contract. It is questionable whether the CISG contains provisions for carrying out the principal obligations, or whether it is left to national law.

III) Passing of ownership

Article 30 CISG provides that the seller must transfer ownership of the goods. However, the *in rem* implementation of this requirement within the CISG is not regulated expressly.[222] This is clear from Article 4 (2) CISG, which states, that the CISG does not specify the effects which the contract can have on the ownership of the sold goods. This exclusion also covers other *in rem* effects such as the retention of title.[223] The *in rem* effect of the contract on the ownership situation is left to the applicable national law.

C) Comparison between supranational and international level

The CISG does not aim to be a complete codification and therefore makes no provision regarding transfer of ownership and security interests. The authors of the DCFR have tried to formulate rules for these *in rem* problems. An attempt was made to follow the broadly applicable property law principles in Continental Europe. However, some problems arise because of the mixing of the principle of consensus and tradition and the absence of a consistent implementation of the principle of publicity. Since a handover is not necessary, uncertainties regarding the specific

[220] See Piltz *Internationales Kaufrecht* (1993) §2 par 20.
[221] See Thiele „Das UN-Kaufrecht vor US- amerikanischen Gerichten“ 2002 IHR, 8,10.
[222] See Saenger *Internationales Vertragsrecht Kommentar* (2012) Art.30 CISG par 4; Gruber (n 23) Art.30 CISG par 6.
[223] See Saenger (n 223) Art. 4 CISG par 8; Achilles *Kommentar zum UN-Kaufrechtsübereinkommen (CISG)* (2000) Art. 4 par 8.

moment of the transmission arise. Because ownership only passes with agreement, the possibility to agree on retention of title is not urgently necessary to secure property. The DCFR waived the *in rem* agreement and leaves it to the parties to agree on the moment when ownership should pass.

As a result, one can say that the DCFR tries to present a comprehensive codification, but it still needs development before it can become operational.

Conclusion

The two compared national legal systems have, as already stated, the same origin. Both follow an abstract system for the transfer of ownership. In the German law system, the transfer of ownership is regulated by § 292 BGB. The transfer of ownership in South African law is strongly influenced by Roman-Dutch law and its development by case law. Although both systems have the same origin, the differences nowadays are substantial. The German system is very complex and follows an integral framework in the strict codification in the *Bürgerlichen Gesetzbuch*. It is noteworthy that the property law norms were hardly changed in this codification since its initiation into practice in 1900. Through the further development of the law by legal doctrine, the German legal system guarantees schemes and solutions to current problems. In contrast, the South African law is developed by case law. This method is wonderfully suited to respond to recent developments.

It is questionable whether such complex rules, such as those found in the BGB, should continue to apply. The strict separation between contractual legal obligation and *in rem* legal transactions is a very complex system. It will be interesting to see how far this system can survive in an international comparison. It can be stated that the most characteristic feature of German property law, is the existence of abstract principles in a comprehensive codified form. Nevertheless, German law achieves fair results for the parties in trade and commerce. Interestingly, the provisions of the *Bürgerlichen Gesetzbuch* are often considered in the development of new legal systems. Thus, the definition of property in the DCFR shows similarities with the BGB.

The DCFR is a draft for a European civil law which still contains many inconsistencies and ambiguities. Although the DCFR is not yet ready to be applied as a civil law, one must adhere that a generally applicable European civil law can be a huge benefit in order to replace all the different national legal systems in cross-boarder contracts. The CISG, however, stays a powerful instrument in international commerce, although it excludes many problems from its scope (e.g. the transfer of property) and leaves it to the control by national legal systems. In this respect, it can

be stated that the CISG remains excellent for international contracts. Nevertheless, a supranational instrument may be useful.

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