CHAPTER 37

Sales of Goods: Scope of Rule

I. CONTRACT AND PROPERTY

1. Translative Effect of Contract

CLEAVAGE of municipal systems.¹ As is well known, in the group of laws following the Roman model the sales contract creates obligations only. Title is transferred by a distinguishable act of conveyance, which, in its more refined form, is also considered a “contract,” but one restricted to the declarations of giving and accepting ownership. If the Roman pattern is strictly observed, such transfer needs, in addition to this specific consent, the surrender and acquisition of physical possession (traditio), or at least a substitute therefor, such as brevi manu traditio (the buyer, tenant of possession for the seller, becomes possessor), constitutum possessorium (the seller makes himself the buyer’s tenant of possession), cessio vindicationis (the seller assigns his claim to possession). When a chattel is bought

in a shop and taken home, the two contracts, obligatory and translatory, are simultaneous.

The last-mentioned type of transaction is called "sale" in the still-maintained terminology of the common law, recalling ancient Germanic law (sala). In the Anglo-American sales acts as well as in many codes of the Latin group, this appears as the basic kind of sales contract. The sales acts and many civil codes even continue to make it appear as though in principle any sales contract concerning a movable, would transfer ownership to the buyer. Within this group of conservative formulas, there is, however, a certain division. The American Uniform Sales Act, section 19, rule 1, presumes that the parties intend the property to pass to the buyer when the contract is made. The Code Napoléon, article 1138, makes the buyer of the chattel the owner "at the moment when it ought to have been delivered," which was commonly, against occasional protest, construed as meaning only the time of contracting; the text has been taken more seriously in recent comment. Yet, en fait de meubles, la possession vaut titre, Civil Code, article 2279; the prevailing doctrine, therefore, restricts the translative effect of a sale without transfer of possession so as to give the buyer title only as between the parties. Some modern French scholars seem inclined to recognize that such property, not effective against third parties, is no property at all.²

In daily application to modern life, all these contrasts are not nearly so acute as they seem in theory. There is no difficulty in dividing, whether in common law³ or French-Italian law,⁴ an executed sale into an executory contract and its performance by transfer of money and property.

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² This was the view of Henri Capitant, as orally told to the writer. He preferred the Roman system. The interpretation of C. C. arts. 1138 and 1583 with respect to the transfer of property will be discussed in more detail in Vol. IV, Ch. 54.
³ Cf., for instance, Benjamin, On Sale 315.
⁴ See Gokla, La Compravendita 5-10. A practical argument sometimes used in civil law for distinguishing the sale of movables from an executory con-
Even the cash-and-carry transactions, with which the over-aged concept of "sale" continues to agree and which are of course still frequent in daily retail commerce, can thus be analyzed as double acts. In all important commercial dealings, the dualistic approach is indispensable. In fact, it has been followed in this country with slowly increasing awareness through the Uniform Sales Act to the most recent American Uniform Commercial Code. The French doctrine has cumulated exceptions to article 1138, until the principle that the sales contract passes title has been hollowed out. And for the great majority of commercial sales, business practice has largely overcome the differences in the legal systems.

Classification. Therefore the municipal divergencies mentioned above really cause only limited conflicts. Nevertheless, the question remains what law should determine whether the contract transfers title. Some answers suffer from the traditional undue influence of the municipal systems themselves. Under the one-sided impulse of the French and Italian codes, the law governing the contract, which is by another mistake usually identified with the law of the place of contracting, decides also whether title passes by contracting.\(^5\) Others have restricted the application of the law of the contract to the so-called passing of title between the parties; effects in relation to third persons would depend on the law governing title.\(^6\) Fortunately, on the Continent a third view has come into ascendance, namely, that obligation and title are to be thoroughly segregated with the

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\(^5\) VELLA, Obbligazioni 1095, cited by FEDOZZI-CERETI 741 n. 1.

understanding that the law of the situs also covers the relationship of the parties with each other respecting the title. The same view prevails in England. The *lex situs* remains predominant whether the transfer of property is to be accomplished by contract or "*traditio."" This proposition has been confirmed by the Institute of International Law and by the Hague Convention 1955, which by virtue of article 5, number 3, does not apply to the transfer of ownership.

In the United States, the bewildering confusion of contract and title doctrines in the sales acts for a long time obscured the problem, and still seems to create great uncertainty. Prevailing courts have erred in the direction of extending the law of the place of contracting to the transfer of title. Minor even approved the theory that a conveyance, assignment, or sale, if valid where made, should be upheld in every jurisdiction as between the parties. Beale disputed this approach. He explained the fact that most cases apply the law of the place of contracting to the

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7 For instance, Valéry § 395; Raape, IPR. (ed. 5) 590 f.; 2 Armijnion 63 § 28; Niboyet 633 § 506; Kegel, IPR. 229.
8 Falconbridge (ed. 2) 440 ff., Dicey (ed. 7) 539 ff., and M. Wolff, Priv. Int. Law (ed. 2) 532 ff., who should be consulted against the recent theories of Schmitthoff (ed. 3) 158 and Cheshire (ed. 6) 474 ff. These theories have also met with profound criticism in the books of Lalive, supra n. 1, at 74-83, 133 ff., and of Zaphiriou, supra n. 1, at 31-38.
9 Art. 2 par. 3 of the decisions of Madrid, 24 Annuaire (1911) 368, 394, cf. the article by the reporter, Diena, in Revue 1911, 561-586, at 564.
9a The Eighth Hague Conference, held from Oct. 3 to 24, 1956, adopted a Draft Convention on the Law Applicable to the Transfer of Ownership in International Sales of Goods; see Acts de la huitième session pp. 340 ff. and the English translation in 5 Am. J. Comp. Law (1956) 650 ff. To date this Convention has been signed by Greece and ratified by Italy; see Revue Crit. 1964, 164. For comments, see Paschoud, supra n. 1, Frédéricq, supra n. 1, and Petersen, "Die 8. Haager Konferenz," 24 RabelsZ. (1959) 1, 12 ff. as well as the other reports on the Eighth Hague Conference which are mentioned in the bibliography in Conférence de la Haye, Actes et documents de la neuvième session, Vol. 1, pp. 321 ff.
10 See Parmele in 1 Wharton 681 § 311 a; Stumberg (ed. 2) 400, cf. infra n. 22.
11 Minor 293 § 128 and n. 1.
title question, by the coincidence that in the particular cases the movables were situated in the state of contracting and in this state "the transfer of the title depended on the validity of the contract." To the same effect, Goodrich describes as typical a case where "the court stressed the law of the place of contract, quoted approvingly a statement that the domiciliary law governed, and rendered a decision which applied in fact the law of the situs of the property." At present, the Restatement has made it clear, and the point seems undisputed that in sales no less than in other contracts, the validity of the transfer of title and the nature of the interests created by the "contract" are exclusively governed by the law of the place where the chattel is at the time of contracting. (§ § 257, 258)

Consequences. This universally and rightly accepted opinion needs comment where the obligatory contract is governed by a law other than that of the situs. Attention is drawn in this respect to a paragraph in Beale's treatise:

"The question whether a sale can be avoided because of the insolvency of the buyer depends on the law of the state of situs at the time of sale, though the goods have been taken into another state. By that law must be determined the validity of the consideration, whether a parol sale passes title, and whether a sale is voidable for fraud."

Since § 257 of the Restatement, on which this paragraph is based, exclusively deals with the validity of conveyances, including legality of the transfer and transfer in fraud of third persons, a reader might think that rescission on the

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12 Beale 978 § 255.1.
13 Goodrich 408 § 150 n. 84.
13a Furthermore, the Restatement (Second), Tent. Draft No. 5 (1959) § 254a submits "the effect of the occurrence upon interests" in chattels to the law of the situs.
14 Beale 982 § 257.1.

In Continental law, the complications in case of insolvency and bankruptcy were discussed as early as 1913 by De Boeck, Revue 1913, 289 ff., 793 ff.
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ground of insolvency of the buyer, invalidity of consideration and voidability for fraud are always considered incidents of the conveyance rather than of the contract. However, this cannot be the meaning, since it would not be borne out by the cases alleged in support. Apart from some decisions cited but which are not in point, the cases concern the rescission of the sales contract on the ground of initial insolvency of the buyer, and are prompted by the particular statute of Pennsylvania allowing rescission by seller only when a trick, artifice, or deception has been practiced by the buyer, whereas other laws are more favorable to the seller. The decisions are clearly based on the ordinary contractual tests and not on the situs of the chattel. The courts, thus, do not disregard the contractual element but, on the contrary, neglect the possible significance of property law.

15 Bulkley v. Honold (1856) 19 How. 390, deals with breach of warranty in the sale of a vessel the situation of which is only one of several elements, see infra Ch. 37 p. 95 n. 68. Arnold v. Shade (1858) 3 Phila. 82, applies the law indicated by contracting, performance, and seller's domicil to the transfer of title to an insolvent buyer. Madry v. Young (1831) 3 La. 160, applies Mississippi law as lex situs to the title in a slave, but the same law to the contract, because not only were the slaves there but also the contract was made there.

16 This is also true of the case cited by Beale, supra n. 14, for validity of consideration.

The difference in the systems was sensed in the Mixed Arbitral Tribunals when they had to decide which party was affected by the seizure or loss of goods that had been sold before World War I and were in transportation between countries having different rules for the transfer of title. Thus, goods sold by a German to a Belgian buyer and requisitioned by the German government while still on German soil, were in the seller's ownership, according to the principle of traditio (BGB. § 929); therefore, it was not the Belgian buyer who was expropriated by the war measure. In other instances, these tribunals shared in the confusion so frequent in English and Latin doctrines, by applying to the transfer of ownership the law intended by the parties as though title questions were included in party autonomy. Section 18 of the English Sales Act and section 19 of the Uniform Sales Act allow the intention of the parties to determine at what time the title shall pass, but this is only a municipal law governing goods in its own territory. The parties have no power to choose this law of situs, although they may choose the law for the obligatory contract. In case of goods sold and sent from Germany to England and which arrived in English territory, the Tribunal correctly stated that property had not passed in Germany under the German law of property, but held that the goods although in England were not transferred because a German seller accustomed to his own law was not sup-

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18 Germano-Belgian Mixed Arb. Trib. (April 30, 1923) 3 Recueil trib. arb. mixtes 274. The Anglo-German Mixed Arb. Trib. (June 11, 1926) Charles Semon & Co. v. German Government, 6 Recueil trib. arb. mixtes 75, Clunet 1926, 1033, may also have applied the English Sales Act, s. 17, as lex situs in shipping the goods to the claimants' agents in Germany.

19 Germano-Rumanian Mixed Arb. Trib. (June 16, 1925) 5 Recueil trib. arb. mixtes 200, Revue 1927, 97; contra: Niboyet, ibid. at 108. But see Ehrenzweig, Conflict 620 § 236 n. 1, who advocates party autonomy even with regard to transfer of title; contra: Kecel, IPR. 228, 232.

19a Under the Uniform Commercial Code, § 2-401, the parties' intention is less significant in this respect.

19b Cf. Dicey (ed. 7) 820.
posed to have intended to transfer until the buyer acquired possession.\textsuperscript{20} This fiction amounted to an extension of the German property law to England; it was also out of place because the question of risk was in issue and should have been solved irrespective of all these problems.

2. "Conditional Sales" (Sales with Transfer of Title on Condition of Payment)\textsuperscript{20a}

The difficulty of distinguishing transfer of title and promise of transfer again has been felt in common law and Latin countries in sales retaining full title in the seller until payment. In Germany, under romanistic legislation, the statement is obvious that in a sale with reservation of title the contract is absolute, and merely the title is conditional.\textsuperscript{21}

In conflicts cases, American courts, treating conditional sales as a unit, have applied the \textit{lex loci contractus} to the questions affecting the title (at least as between the parties)\textsuperscript{22} or, sometimes, the \textit{lex situs} to certain obligations, instead of separating obligation from the domain of \textit{lex situs}. The result, however, has been harmless to the extent that in many cases where the \textit{lex loci contractus} was applied, the chattel was in the state of contracting, and that the \textit{lex loci solutionis} was resorted to when the seller promised to deliver the chattel in a certain state. In both cases, the law applied was identical with the law of the situs, either at

\begin{itemize}
\item \textsuperscript{20} Anglo-German Mixed Arb. Trib. (April 7, 1927) 7 Recueil trib. arb. mixtes 345, criticized by RABEL and RAISER, 3 Z. ausl. PR. (1929) 62, 67.
\item \textsuperscript{20a} For a detailed discussion, see LALIVE, supra \textit{n. r}, at 150 ff. and ZAPHIRIOU, \textit{supra} \textit{n. r}, at 186 ff.
\item \textsuperscript{21} BGB. § 455, and commentaries, for instance, KUHN in 2 RGR. Kom. (ed. 10) § 455 II; PALANDT (ed. 20) § 455, 3.
\item \textsuperscript{22} STUMBERG (ed. 2) 399; 2 BEALE \textit{tomo} § 272.3; LEE, "Conflict of Laws Relating to Installment Sales," 41 Mich. L. Rev. (1943) 445; Restatement §§ 273, 277, and WILLISTON, 2 Sales § 339 only refer to "transfer of title."
\end{itemize}

In Louisiana, where the seller's privilege takes the place of conditional sale, \textit{lex loci contractus} is applied to foreign-concluded conditional sales, excepting evasion. Overland Texarkana Co. v. Bickley (1922) 152 La. 622, 94 So. 138.
the time of the contract, or at the critical time of delivery into the power of the buyer.28

More recently, a vivid discussion has been devoted to the treatment of the seller's right to repossess and the buyer's right of redemption. Again, the courts have qualified these rights either as contractual or as interests subject to the law of the situs.24 In the Massachusetts case arousing most of the debate,25 the question whether the buyer had a right of redemption when the seller failed to give him notice of foreclosure, was regarded by the majority of the court as an incident of the contract and subjected to the law of the place of contracting (Massachusetts). The dissenting vote, on the contrary, emphasized the buyer's interest in the chattel, created at the situs and governed by the lex situs (New Hampshire). The latter view has been widely indorsed26 and adopted in the Restatement, § 281. It needs a sounder motivating force. Although the right to retake and the right to redeem are fair matters of property, there are corresponding rights and duties within the "contract." Yet, since it would be unsound to recognize two laws for the two sides of the same matter, the lex situs must be estab-


26 Thus in all Notes cited supra n. 25; LORENZEN, Cases 643; 2 BEALE 1001 n. 6; GooDRICH 418 § 153 and n. 120. However, in Shanahan v. George B. Landers Construction Co. [(C. C. A. 1st 1959) 266 F. (2d) 400] the court accepted the contract characterization of a conditional buyer's right to redemption; but unlike the court in the Jewett case it applied the law of the buyer's state rather than the lex loci contractus; the fact that the chattel sold had been delivered in a third state was considered "immaterial." For an analysis, see CAVERS, "The Conditional Seller's Remedies and the Choice-of-Law Process—Some Notes on Shanahan," 35 N. Y. U. L. Rev. (1960) 1126.
lished as a special subsidiary law to cover the problems of repossession.27

This suggestion extends to a series of problems not included in the current American discussion. For instance, the municipal laws vary with respect to the relation of repossession by the vendor to rescission. In the United States, despite some peculiar doctrines,28 the tendency is to allow the conditional seller in case of nonpayment to retake possession in order either to collect the price from the proceeds or to rescind the contract; apart from statute and agreement, reclaiming the goods is deemed to be an election to rescind the contract, which frees the buyer.29 German prevailing opinion assumes that retaking without attaching the chattel does not necessarily mean rescission, although it may, and some writers have stressed the unfairness of repossession without cancelling the contract.30 The Austrian Supreme Court, in fact, has rejected this right.31 The Swiss Code eliminates both remedies involved in conditional sales, if not stipulated.32 It would be entirely impractical to decide this question under any other law than that of the situs, which determines the right of retaking.

Therefore, although the questions concerning rescission and the effect of conditions upon the existence of the contract are legal incidents of the contract, those obligatory problems closely connected with the property in the chattel,

27 I understand GOODRICH ibid. to the same effect.
28 The Supreme Court of Michigan, in a series of cases, has assumed that it is "inconsistent" for a seller to stipulate in the agreement reservation of title and recovery of the price; he may base his claim of price only on an absolute sale with reservation of a mere security interest which amounts to a mortgage or a lien. See Atkinson v. Japink (1915) 186 Mich. 335, 152 N. W. 1079; Peter Schuttler Co. v. Gunther (1923) 222 Mich. 430, 192 N. W. 661. For a more exact expression, see GEORGE BOGERT, 2A U. L. A. § 8 § 8, 169 § 124, 172 § 126.
29 Uniform Conditional Sales Act, §§ 21, 23; WILLISTON, 3 Sales § 579b.
30 See GüNTER STULZ, Der Eigentumsvorbehalt im in- und ausländischen Recht (ed. 3), and Law on Installment Contracts, of May 16, 1894, § 5.
31 Austria: OGH., GIU. N. F. Nos. 2656, 280r (installment payments).
32 C. Obl. arts. 226, 227 par. 2, cf. 214 par. 3.
in the absence of a party agreement, are decidedly influenced by this connection, and thus indirectly governed by the law of the particular situs. In the prevailing view, this law is that of the state in which the property was delivered rather than that in which the vendor retakes the chattel or which regulates procedure and subsequent events.\textsuperscript{33} It seems confusing that many conditional sales contracts include the vague clause that "the terms shall be in conformity with the laws of any state wherein it may be sought to be enforced."\textsuperscript{34}

3. Unpaid Seller’s Privilege

The existence and extent of a lien or security title for the vendor’s claims as regards price and damages are determined in the Restatement by the law of the place “where the chattel is at the time when the pledge or lien is created.”\textsuperscript{35} Since, however, the nature of a lien as a pure right in rem is not settled in all instances, the law of the contract has not been generally excluded.\textsuperscript{36}

In particular, does the French privilège du vendeur really depend only on the lex situ? Beale seems inclined to favor this view.\textsuperscript{37} In a comparable gesture, the authors of the Hague Convention 1955, article 6, excluded from its scope


\textsuperscript{34} See, for instance, Stevenson v. Lima Locomotive Works (1943) 180 Tenn. 137, 172 S. W. (2d) 812, 148 A. L. R. 370, 375.

\textsuperscript{35} Restatement § 279, practically unchanged in Restatement (Second), Tent. Draft No. 5 (1959) 137.

\textsuperscript{36} Falconbridge, Conflict of Laws (ed. 2) 470 and n. (i) citing Note, 64 L. R. A. (1904) 831 f.

\textsuperscript{37} 2 Beale 1008 § 279.3; definitely so, Niboyet, 4 Traité 463.
not only rights in rem and creditor actions for fraudulent alienation but also the seller's privilege.\textsuperscript{37a} The nature of this legal prerogative accompanying the sales contract is very controversial in France, and the problems have been inherited by Louisiana.\textsuperscript{38} Rights of third persons protected by the law of the place where the goods are at a given time, of course restrict the effect of the privilege, if this law so decides.\textsuperscript{39} But which law creates the privilege?

The Supreme Court of Louisiana has developed a doctrine in which it restricts the privilege granted in the Civil Code to sales contracts executed in the state.\textsuperscript{40} But some local "completion" of a foreign-negotiated contract has been held a sufficient basis for applying the domestic law including the privilege.\textsuperscript{41} The gist of the doctrine\textsuperscript{42} seems to be that the privilege attaches to contracts governed by Louisiana law, the test being fixed by the \textit{lex loci contractus}. "A common law contract cannot claim the vendor's privilege given by the Civil Code of Louisiana."\textsuperscript{43} The drawbacks of this theory are climaxed by the curious application of Louisiana law even though the goods may be in a foreign state at the time of contracting. A Dutch court has recognized the unlimited application of the law of the contract so as to recognize the Belgian court's refusal of priority for the seller's claim in Dutch bankruptcy proceedings.\textsuperscript{44}

\textsuperscript{37a} The supplementary Hague Convention on the Law Applicable to the Transfer of Ownership, \textit{supra} n. 9a, provides in art. 4 (1) that the applicable law is the internal law of the country where the goods sold were situated at the time of the first claim or attachment concerning such goods.

\textsuperscript{38} Louisiana C. C. (1870) art. 3227 par. 1; B. MARGOLIN, "Vendor's Privilege," \textit{4 Tul. L. Rev.} (1930) 239. In Quebec the institution has been refused adoption, C. C. art. 1012.

\textsuperscript{39} 7 LAURENT 267 § 212; ROLIN, 3 Principes 477 § 1446, 490 § 1457.

\textsuperscript{40} H. B. Cladin \& Co. v. D. A. Mayer (1889) 41 La. Ann. 1048, 7 So. 139.

\textsuperscript{41} McIlvaine and Speigel v. Legaré (1884) 36 La. Ann. 359.

\textsuperscript{42} See the cases cited by 2 BEALE 1008 § 279.3.


\textsuperscript{44} App. Hertogenbusch (June 22, 1909) Heijmans v. Bolsius, Clunet 1912, 601.
However, neither the *lex situs* alone nor the law of the contract alone can be decisive. The correct view was laid down by the Institute of International Law in 1910: the *lex situs* has the power “to limit or exclude...the effects of privileges established by the law governing the legal relationship to which the privilege is attached.”

There is a third law to be considered in an analogous manner: the law governing bankruptcy proceedings involving assets of the buyer. It is neither to be ignored nor exclusively to be observed. Conflicts have been caused in the three neighboring states, France, Belgium, and the Netherlands, through different rules on the treatment of the prerogative in bankruptcy. Public policy has been unnecessarily invoked, and the Dutch Supreme Court has rendered a most erroneous decision by resorting to the exclusive use of the *lex fori*. The court went so far as to grant the vendor a preference under Dutch law which he would not have enjoyed under the Belgian laws of the contract.

The effect of rescission on third persons and their status in bankruptcy proceedings are questions which require reference to very different connections.

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45 Madrid 1910, 24 Annuaire (1911) 394 art. 3.

46 Effect in bankruptcy is denied in France, C. Com. art. 550 par. 6, allowed in the case of certain machines in Belgium, C. Com. art. 546 and Law of Dec. 16, 1857, art. 20, and generally granted in the Netherlands, BW. arts. 1180, 1185(3), 1190.

47 In a case of a bankrupt buyer where the apparatus sold was in Belgium, Trib. com. Seine (Sept. 6, 1906) Clunet 1907, 366, Revue 1909, 582 applied French law as that of the place of contracting and at the same time as prescribed by public order. The Belgian Trib. civ. Liège (Nov. 14, 1907) Revue 1909, 961 denied exequatur to this French judgment on the theory of *lex situs* and on the ground of Belgian public order. Cf. Note, LACHAU, Revue 1909, 588; 2 FRANKENSTEIN 91 n. 187; 8 LYON-CAEN et RENAULT § 1287.

48 Rb. Amsterdam (Oct. 29, 1915) W. 9935 applied the Belgian law of the contract but was reversed, Hof Amsterdam (Nov. 3, 1916) W. 10069, and H. R. (June 15, 1917) W. 10139, I VAN HASSELT 137. See the criticism by TRAVERS, 7 Droit Com. Int. I 423 § 11432.

4. Risk of Loss

The buyer bears the "risk of loss," when he has to pay the price despite destruction, seizure, theft, or deterioration of the goods occurring without the fault of either party. In the old doctrine, which still appears in the English and American sales acts as a principle, though susceptible of exceptions, risk of loss passes with the title. Many writers still naively repeat the slogan of the doctrine of liability for tort, casum sentit dominus, as if it indicated the doctrine of risk.

Based on this tradition, reputed French writers have thought that since in French municipal law risk is bound together with property, its transfer must be governed in French courts by the statute real, whereas German courts, according to their different characterization, would have to apply the law governing the contract. Such characterization, in this case, would not be determined by the law of the forum but by the law governing the contract. However, the premise is wrong in all respects. Neither in France nor anywhere else, despite traditional pronouncements, is it true that risk passes necessarily with the title. In the case where the seller has to ship the goods and his obligation ends with the shipment (sale for shipment), which is the great rule of all sales not confined to one town, risk passes with the shipment in all laws and systems. In overseas commerce, the risk is regularly shifted to the buyer through delivery to the vessel, although ownership is, with the exception of the United States, ordinarily transferred through the arrival of the documents of title. The distribution of risk of loss


51 Desbois, id. 296 n. 17 par. 2.
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is felt to be an essential part of the contract; it is the most conspicuous item in commercial offers and forms. Property, on the other hand, is a legal matter, practically always left by the parties to subsequent consideration by the lawyers in cases of divergence.

There was unanimity in the Committee on the International Sales Act that risk and title can and must be separated; the same view was held by all but three governments answering the Dutch questionnaire for the Sixth Hague Conference and by the Committee of 1931 which established the draft that with only a few changes became the Convention of 1955 on the conflicts rules for sales. Scarcely worth mentioning are other suggestions of special laws for the problem of risk.

If we neatly isolate the question of who bears the risk of casual events after the seller surrenders the goods, or what casual events burden the buyer, we have no doubt that the question belongs to the law governing the contract. This solution has been expressly adopted by the Hague Convention 1955 and appears indispensable, because the passage


52 Only Hungary, Japan, and Spain wanted to have risk of loss excluded from the convention because of its connection with property. Inclusion was approved by Austria, Belgium, Denmark, France, Germany, Italy, Luxembourg, the Netherlands, Norway, Poland, Rumania, Sweden, and Switzerland. Cf. JULLIOT DE LA MORANDIÈRE, supra Ch. 36 n. 1.

53 For the application of the law of the defendant party, 2 BAR 16, 107; ALMÉN, 1 Skandinav. Kaufrecht 55. Contra: DIENA, 2 Dir. Com. Int. 42 § 107. Another strange proposal by 2 FRANKENSTEIN 299 has had no appeal.

54 To the same effect, e.g., BAGGE, Recueil 1928 V 201; FEDOZZI-CERETI 741; LALIVE, supra n. 1, at 97 ff.

55 Art. 5 No. 3 provides: "The present Convention does not apply... to the transfer of ownership, it being understood nevertheless that the various obligations of the parties, and especially those which relate to risks, are subject to the law applicable to the sale pursuant to the present convention."
of risk, the duties of delivery, the duty of taking delivery, and certain collateral duties are essentially interwoven.

The unhappy German method of attributing the duties of either party to the law of his domicil requires determination of the question whose obligation is concerned in the passing of the risk. One decision declared it an obligation of an English merchant who had sold f. o. b. Hamburg to bear the risk so long as it did not pass to the buyer under his own, viz. English, law. But other cases have shifted the emphasis to the question whether the buyer owes the price, so as to call for the buyer's law. The first argument is evidently wrong, although the result is desirable. The second produces strange results, when the law of the buyer's domicil has more exigent conditions for the passage of risk than the law of the seller. If, for instance, a Frenchman by correspondence sells a specific lot of silk to a German who is to take delivery in Lyons, risk passes in France at the time of contracting, whereas under German law it would not yet pass. If the silk is burned in the meantime by accidental fire, should the buyer be liberated from his debt, although French law entitles the seller to the price? This is a queer solution in view of the fact that German law is not considered to govern the entire contract. Only one law can conveniently govern both parties.

Again, the variety of substantive rules concerning the transfer of risk is by far less conspicuous in international

56 Infra II, 2, p. 100.
58 OLG. Kiel (July 2, 1918) Schleswig-Holsteinische Anzeigen 1919, 27, cited by Lewald, 10 Répért. 81 No. 47.
59 Such a case was construed as between Germany and England, RABEL-RAISER, 3 Z. ausl.P.R. (1929) 77, 78; I should consider it, however, certain that present English courts ought to recognize the passing of the risk by shipping (as suggested at p. 80 n. 1 ibid.) irrespective of reception or proof of arrival of the goods.
60 See RABEL-RAISER, id. 80; approved by RAAPE, IPR. (ed. 5) 521 against HAUDEK 84. Cf. NEUNER, 2 Z. ausl.P.R. (1928) 123 ff.
trade than in the civil codes. There is an impressive bulk of uniform usages and rules beyond any national law. In addition, modern insurance largely diminishes the burden of risk. Yet some differences remain. An example is presented by the English principle that, if goods, shipped in the time prescribed by the contract, perish on the voyage overseas, the seller may nevertheless tender the bill of lading to the buyer with full effect. The seller may do this even knowing that the goods are lost. French courts do not allow such tender except when the seller is "in good faith." German courts require transmission of the documents or notice of shipment of the goods appropriated to the contract, before risk can pass, thus excluding retroactive effect of the tender of documents upon the risk. It would seem self-evident that the choice of law among these solutions can only be made for any individual type of contract, irrespective of the passing of the title which depends on valid tender and acceptance of the documents or is accomplished by shipment, according to the theory adopted.

II. VARIOUS INCIDENTS

1. Warranty of Quality

(a) American decisions. Stumberg has reviewed the cases which for the most part antedate the time when the Uniform Sales Act unified the law of warranty. He finds that the courts applied the law of the state where the contract was made, or made and performed. But he wisely

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62 Manbre Saccharine Co. v. Corn Products Co., Ltd. [1919] 1 K. B. 198: S. S. Algonquin, carrying starch and syrup c. i. f. London, was sunk by submarine or mine. Cf. Kennedy, C. I. F. Contracts (ed. 3) 117. Williston, 2 Sales 106 n. 13; Vold, Sales (ed. 2) 245 f.
63 See Note, Aubrun, to App. Paris (Jan. 21, 1920) D. 1921.2.101 and Heenen, Vente et commerce maritime (1952) 149 f.
64 88 RGZ. 389; 92 id. 128; 93 id. 166.
65 Stumberg (ed. 2) 404-408.
SALES OF GOODS: SCOPE OF RULE

warns against such "metaphysical arguments" and recom-
mends referring all questions concerning the undertaking
of the vendor to the state into which the goods are sent.

The real impulses behind the decisions collected by Stum-
berg, however, seem exactly to follow the recognition of
the place of "delivery" usual in commerce and emphasized
here. Thus, the standard of quality was determined for
branded potatoes, delivered by the seller who was in Mary-
land to the carrier f. o. b. Maryland, according to the
standard of that state.66 The trade terms and usages of
South Carolina were held to control a shipment of sheep
manure from Chicago to South Carolina, because delivery
had to be made at arrival against payment of the draft
accompanying the bill of lading.67 The option between
rescission and price reduction, adopted in Louisiana from
the civil law model, was accorded to a buyer of New Or-
leans when a New York vendor sold a ship, then in port
at New Orleans, and delivered it there to a buyer there
residing.68 Merchantable quality of two pianos was required
under the law of Pennsylvania where the selling manu-
facturer resided and where he delivered the objects, as
Stumberg adds, apparently to a carrier.69 Finally, in the
case of strawberries shipped from Arkansas to Massa-
chusetts, Arkansas law was applied to the effect that accep-
tance of the goods by the buyer was not a bar to an action
for breach of an express warranty,70 which was correct if
the sale was for shipment in the ordinary manner.

However, these decisions, applying the law of the con-
tact and determining correctly this law, all deal with prob-
lems certainly belonging to its general scope. No special

68 Bulkley v. Honold (1856) 19 How. 390.
conflicts rule, hence, is noticeable. But some rule of such kind may be suggested by the European discussion to which we now turn.

(b) Civil law doctrines. Agreement has been reached that the law of the contract determines, on one hand, the extent of the buyer's examination of the goods as to quantity, weight, and quality, and on the other hand, the remedies for breach of warranty of quality, such as rescission, recoupment, damages, and substitute delivery. Considerable doubts, however, have been caused by certain particulars of the law of warranty. What law should decide on the activity necessary for the buyer to avail himself of the remedies for breach of warranty? This concerns in the first place the form and time of an examination of the goods, the duty of giving notice of defects, and the period in which action must be brought. In the second place, the discussion involves the effects of omissions in these regards as well as the duty of the buyer to take care of goods rejected by him.

The buyer has no duty of examining the goods, but only a "burden": his failure of examination leaves him ignorant of defects discoverable and therefore subject to notice. For this activity the agreement of the parties or the usages look to a certain place according to the circumstances, such as consignment to the buyer, to his agent or subpurchaser, or to the buyer for immediate transshipment to a purchaser without inspection, et cetera.

The Hague Convention of 1955, article 4, answers the question in the most satisfactory manner as follows:

70a The Restatement (Second), Tent. Draft No. 6 (1960) § 346, comment at 67 f. therefore subjects the question of whether there is a warranty by a vendor of movables to the law which governs the contract, i.e., in the case of a sales contract, to the law of the place of delivery (§ 346g, as amended at the 37th Annual Meeting of the American Law Institute; see supra Ch. 36 n. 47a). Contra: EHRENZWEIG, Conflict 497, 587 ff., who takes the view that breaches of implied warranties should be treated in analogy to tort claims for negligence.
In the absence of an express clause to the contrary, the internal law of the country where inspection of goods delivered pursuant to a sale is to take place, applies as respects the form and the periods within which inspection must take place and the notifications concerning the inspection, as well as the measures to be taken in case of refusal of the goods.  

(c) Duty of giving notice. The imposition on the buyer placed by § 49 of the Uniform Sales Act that he should give notice of a breach of promise or warranty within a reasonable time after the buyer's knowledge of breach has unified the once greatly varying state laws. Correspondingly, no cases affecting the problem seem to exist.

The situation abroad is very different. In most countries having separate codes for civil and commercial laws, non-mercantile buyers have generally been under no duty of giving notice but must only observe the period of limitation of actions for breach of warranty, commonly six months after delivery. In the United States, a somewhat related discrimination against merchant buyers has recently been included in the Uniform Commercial Code.

Three opinions have been advanced, suggesting (1) the law of the contract; (2) the law of the place where the buyer has to perform his duty of taking delivery against payment; and (3) the law of the place where he has to

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71 See 1 Am. J. Comp. Law (1952) 276; for a comment see von Sprecher, supra Ch. 36 n. 1, at 86 ff. To the same effect, Benelux Draft art. 19 (2).

72 The assertion by Herzfeld, Kauf und Darlehen 98, that this duty is known in all countries in the same manner, is very wrong. See Fikentscher, Die Mängelrüge im deutschen, ausländischen und internationalen Recht (1956) and Rabel, 2 Recht des Warenkaufs (1958) 206 § 94.

73 See, e.g., German BGB. §§ 459 ff. in contrast to HGB. § 377.

74 Uniform Commercial Code §§ 2-603 and 2-605 (1) (b).

75 Former German decisions cited by Lewald 254, also Herzfeld, Kauf und Darlehen 98 ff.; the German government wanted this rule, contrary to the views of all other Notes of governments at the Sixth Hague Conference.

Switzerland: BG. (Mar. 5, 1923) 49 BGE. II 70 (buyer's domicil as locus solutionis); BG. (Dec. 5, 1946) 72 BGE. II 405, 411 (lex loci solutionis for delivery, examination, and acceptance).

76 Germany: 46 RGZ. 193; 73 id. 379 (rescission); 81 id. 273 (damages);
provide for examination of the goods. The second test was adopted by the German Supreme Court in abandoning former attempts to enforce its theory of splitting the contract. The court felt that a unified and special approach was needed. But its stand is too much influenced by the doctrine of locus solutionis. The place where the goods are tendered to the buyer is not necessarily the place where he is supposed to inspect them. Therefore, the third opinion, which has been literally accepted by the Hague Convention 1955, quoted above, is preferable.

Fairness, in fact, seems to demand that a buyer should not be compelled to study the rules of a distant country for his own proceeding, provided that the contract does not explicitly prescribe the conditions of his claim, which it does very frequently.

(d) Method of examination. If goods are to be examined in France, obviously the judicial expertise prescribed there must be carried out. In Eastern Asia, where certain practices of “survey” are usual for certain kinds of goods, expert merchants or a consulate officer intervening, these forms are contemplated by the parties, or by the usages binding them, even though they are in Europe. Generally, it is considered that if different formalities are prescribed at the various places, the law of the place where the goods

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see also LEWALD 254, 255 (aa) and (bb); BGH. (Jan. 10, 1958) Lind.-Möhring Nr. 2 zu § 480 BGB.; BGH. (Feb. 14, 1958) Lind.-Möhring Nr. 3 zu Art. 27 EGB. BGB.; FIKENTSCHER, supra n. 72, at 29.

Switzerland: BG. (Dec. 3, 1946) 72 BGE. II 405, 413 (form and time for examination and notice of defects; place where the goods are at the time of examination). To the same effect: BG. (March 22, 1951) 77 BGE. II 83, 85; BG. (Feb. 12, 1952) 78 BGE. II 74, 80.

77 BAGGE, Recueil 1928 V at 167; FEDOZZI-CERETI 741 n. 3; ALLEN in Sixth Hague Conference, Actes 327.

Switzerland: BG. (Jan. 16, 1939) 56 BGE. II 38, Clunet 1939, 1168.

78 RG. (Feb. 4, 1913) 81 RGZ. 273; dictum (April 21, 1925) 17 Warn. Rspr. (1925) 240; HEINICHEN in 3 Staub (ed. 14) 551, Anhang zu § 372 n. 9.

79 See LEWALD 254 f.

79a To the same effect: VON CAEMMERER, Note, JZ. 1959, 362, 363, and RAAPPE, IPR. (ed. 5) 519. The drafts of an International Sales Act also have adopted this solution; cf. RABEL, 2 Recht des Warenkaufs (1958) 206.
are to be inspected is preferable to the law of the contract; this is recommended in the interest of the buyer, but sometimes also that of the seller, for instance, where he turns to a lawyer of the place prescribed for examination, who knows only the local law. It is, hence, a settled rule that the methods and proceedings of the place in which the examination is to occur must be observed. This might be expected to be recognized under any law, but the above provision of the Hague Convention, which assures the same result through a special conflicts rule, may be advisable.

(e) *Time for notice of defects.* An attempt to have the law of the forum determine the time in which the seller must be notified of a defect in quality or quantity,\(^8\) has been commonly rejected. Another controversy concerns the question whether such provisions pertain to the form or the substance of the matter. But whatever the answer, provisions regarding notice are so closely connected with those requiring examination that it has been declared impracticable to choose them from different laws.\(^9\) This seems justified, if we have in mind an agent of the buyer at a remote place (but, of course, a place within the contemplation of the parties). The law of this place should determine for all practical purposes the diligence that the buyer owes to the seller.

(f) *Custody of rejected goods.* To the described scope of the local law the Hague Convention of 1955 has added only the buyer's duty to preserve goods that he has rejected. The Convention has not extended the local law to the legal consequences of the buyer's failure to give notice, not even insofar as such omission is deemed to deprive the buyer of certain or all remedies, by presumed waiver or by force of law. The silence of the Convention is too prudent;

\(^8\) App. Amiens (Feb. 11, 1905) Revue 1907, 216, approved by Valéry 991 § 687.

\(^9\) Rolin, 3 Principes 200 § 1186, referring to numerous Belgian decisions.
it is intended to empower a judge to resort to the local law, should he find a necessary tie between the legal effects of omitting the notice and the prescribed time of notice. 82 An express conflicts rule would be preferable.

2. Collateral Duties

Although most collateral duties are, as a matter of course, controlled by the law of the contract, 83 doubt may arise about the classification of the seller’s obligation to tender the documents and of the buyer’s obligation to furnish a letter of credit.

(a) Tender of documents. The vendor’s liability with respect to the dispatch and arrival of the bill of lading, invoice, insurance policy, and other documents required by custom or the terms of the contract has been neglected. Of course, what documents are required, is in the last resort answered under the law of the contract.

Is the same true, for instance, with respect to the question mentioned before, 84 whether the seller may tender the documents after destruction of the goods, or even when he knows of their loss, and yet fulfill thereby his obligation, so as to transfer the risk retroactively? And if the documents are regularly dispatched, may they reach the buyer after the arrival of the vessel in the port of destination and after unloading is commenced, as agreed in common law, 85 or not, as in France? 86 An English writer has presumed that the documents ought to be tendered at the buyer’s place of business or residence. 87 Another English lawyer has, indeed,

82 Report of Julliot de la Morandière, supra Ch. 36 n. 1, at 28.
83 Swiss BG. (March 8, 1913) 39 BGE. II 161, 166.
84 See supra p. 94.
postulated that the law of the buyer's domicil should apply to the entire sales contract because of the duty of getting the documents to the buyer. 88

It does not appear in the English cases applying English law as a matter of course, that the buyer must presumably receive the documents at his domicil; still less is that a universal rule. At any rate, the choice of law is better directed toward the law of the contract, which is usually the seller's law and which must consider the usage at the port of arrival.

(b) Furnishing letter of credit. The problem is illustrated by a case decided by a court in Geneva. The contract was made in Calcutta where the seller was domiciled, and where the bags of jute sold were to be delivered c. i. f. Piraeus, Greece. The buyer, seemingly in Athens, had to furnish a letter of credit, and offered a credit letter issued by a London city bank. The court held in effect that the seller could expect exchange of the documents against payment in Calcutta without the delay required by transmitting the documents to London, and that by application of Indian law, as law of conclusion and performance, the buyer was in default. 89 The holding is right but the argument is wrong. In this case, Calcutta, in addition to being the place for the buyer's performance, was the place of the seller's domicil and of shipment. Hence, the contract was fully centered there. On the other hand, if the contract had been satisfied with a credit by the London bank not made payable at a bank in Calcutta, there would nevertheless be no reason why English law should enter into the picture.

The lex contractus suffices in all these cases.

The Warsaw-Oxford Rules, Rule 16, in an otherwise complete statement, fails to indicate the place at which the documents should be "presented" (présentés) to the buyer. Int. Law Ass'n, 37th Report (1933) 429.

88 CLAUGHTON SCOTT in Sixth Hague Conference, Actes 288. See supra Ch. 36 p. 57 n. 25.

89 App. Genève (March 4, 1932) Sem. Jud. 1932, 523, 527. An arbitration clause for the Bengal Chamber of Commerce was found ineffective.
3. Measure of Damages

Excluding the law of the forum, the law of the contract governs damages. This is the present view of the American courts, and the Restatement confirms it, although it identifies this law with the law of the place of performance.

The same is true with respect to the right and duty of a party to ascertain the measure of general damages through resale or repurchase, and with respect to analogous transactions for the purpose of minimizing the damage. Only the forms of procedure and the intervention of officials in such cases depend on the law of the place where the transactions occur.

4. Specific Performance

In an old decision the German Supreme Court argued that the disability of a seller of goods at common law and under the English Sale of Goods Act to sue the buyer for payment of the price before the passage of the title was a

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90 Vol. II (ed. 2) p. 544. See recently, State of Delaware, for Use of General Crushed Stone Co. v. Massachusetts Bonding & Ins. Co. (D. C. Del. 1943) 49 F. Supp. 467 (interest); Pennsylvania law was correctly applied not because the entire contract was performed in that state, as the headline (13) falsely asserts, but because the responsibility of the selling company ceased with the delivery of stone to the carrier in Pennsylvania.

91 Restatement § 413, adopted by a few decisions and WILLISTON, 3 Sales 275 § 589d. Restatement (Second), Tent. Draft No. 6 (1960) §§ 346c, 346d, declares applicable "the law selected by application of the rules of §§ 332-332b"; in the case of a sales contract, the law referred to is the law of the place of delivery (§§ 332b (a), 346g, as amended at the 37th Annual Meeting of the American Law Institute, see supra Ch. 36 n. 47a). For criticism, see EHRENZWEIG, Conflict 504-511 §§ 192-195.

92 Italy: Cass. civ. (June 20, 1938) Foro Ital. Rep. 1938, 2080 No. 457, Giur. Ital. Rep. 1938, 789 No. 130: as it seems, the Italian buyer bought goods in Germany, then sued in Italy for rescission and damages for breach, which were allowed in principle. In a separate suit he demanded the balance after resale by him of the defective goods; in accordance with German law. Held that Italian law applied for competence and forms of the resale.

Switzerland: BG. (March 8, 1913) 39 BGE. II 161, 167; Cologne was the place of performance for delivery and payment, expressly stipulated. Hence, German law governed the resale made in Cologne.
part of English procedural law and therefore not applicable in a German court. 93

This result may be questioned, insofar as English law, if applicable to a sales contract, in principle should be applied as a whole, including the so-called "remedies." But since judicial discretion under the equitable jurisdiction of specific performance, not to mention the sanction of imprisonment for contempt, can scarcely be reproduced in a civil law court, the procedural part of the English institution may be considered important by a foreign court. This is the more acceptable, because in the inverse case an English or American court can not help but resort to its customary practice, although it may be inclined to favor specific performance when an applicable foreign law grants an action for satisfaction in kind. 94

5. Special Kinds of Sales

A painting was sold in England and delivered there. Therefore English law applied to the contract. As the seller reserved his right to repurchase under certain circumstances and the painting was brought to Pennsylvania, he would have had to pay the repurchase price in that state. The New York Court of Appeals, however, declared that the law governing the main contract also applied to the repurchase agreement. 95 This decision is obviously correct and a memento against the splitting of contract stipulations. The same may be said, for instance, of a sale on approval and of a sale with a condition for return or approval, distinguished in civil law as sales under suspensive condition of approval and under resolutive condition of disapproval.

93 RG. (April 28, 1900) 46 RGZ. 193, 199; cf. OLG. Hamburg (Oct. 31, 1924) 34 Z.int.R. (1925) at 450 f.
95 Youssouppoff v. Widener (1927) 246 N. Y. 174, 158 N. E. 64.
There is no reason why the ordinary tests should not extend to the accessory agreement. 86

III. PARTY AUTONOMY AND PUBLIC POLICY

In the discussions of the international committees working on the conflicts rules concerning sales of goods, the problem of public policy has had a very big place. Finally, the many objections raised against party agreements on the applicable law, violating the various “imperative” rules, were overcome with the result that clauses designating the applicable law, either express or undoubtedly implied, are valid, and this law includes the conditions of the consent of the parties. 87 It is, then, left to each participant state to deny “for reason of public order” application of the law determined by the Convention, that is, either that agreed upon or in the absence of agreement, that directly prescribed by the Convention. 88

If the courts would accept these simple rules and restrict the public policy of the forum to the limits earlier advocated, 89 all desires would be fulfilled.

An illustration of fundamental conceptions of the forum justifiably intervening is afforded by a German case of a conditional sale on the installment plan, supposedly governed by Dutch law. A stipulation for the forfeiture of the paid installments in case of default, allegedly valid under Dutch law, was refused enforcement as offending the purpose of a German provision prohibiting such clauses. 100

86 Otherwise, HERZFELD, Kauf und Darlehen 99 and n. 118 who stresses the precarious situation of the seller.
87 Cf. Hague Convention 1955, art. 2. The requirement that the choice of law must “unambiguously result from the provisions of the contract” is awkward. See the above mentioned observations of the German Council for Private International Law, supra Ch. 36 n. 28b, at 152-155.
88 Hague Convention 1955, art. 6.
89 Vol. II (ed. 2) Ch. 33 pp. 582-585.
100 RG. (March 28, 1931) 85 Seuff. Arch. 200, Clunet 1933, 162. Cf. German Law of May 16, 1894, §§ 1, 6, concerning sales on installment payments. This decision has been approved in Italy by FEDELZER-CEBRETTI 740 n. 1 and in Brazil by ESPINOLA, 8 Tratado 613.