Case 8: Contracts and the transfer of ownership of property in European private law

"§V. [...] Grotius soutient, que, selon le Droit Naturel, les Conventions toutes seules suffisent pour transférer la Propriété [...], & que la Délivrance de la chose n'est nécessaire qu'en vertu du Droit Civil purement Positif [...] Les Interprètes du Droit Romain prétendent, au contraire, que la Délivrance est absolument nécessaire & que, sans cela, les Conventions les plus expresses ne font pas changer de maître à une chose."[1]

"Nemo plus iuris ad alium transferre potest, quam ipse haberet"?[2]

Scenario

As part of a large-scale project, two businesses (hereafter: the seller and the first purchaser) plan, *inter alia*, the sale of two machines. However, without the parties' knowledge, the contractual relationship, including the contract for the sale of the machines, is void.[3] Unaware of the fact that the contract is void, the seller delivers the machines to the first purchaser in order to fulfil his contractual obligation. The parties believe that there is a binding contract and agree that the machines now belong to the purchaser.

The first purchaser then sells and transfers the machines to two subsequent purchasers. One of these subsequent purchasers is not aware that the contract between the seller and the first purchaser is void (the *bona fide* purchaser). The other subsequent purchaser, on the other hand, knows that the contract between the seller and first purchaser is void (the purchaser in bad faith[4]).

When the seller realises that his contract with the first purchaser is void, he demands the return of the machines from the subsequent purchasers. They refuse to give the machines back.

[1] Translation: §V. [...] Grotius maintains that, according to natural law, agreements alone are sufficient for the transfer of ownership of property [...] & that the delivery of the thing is only necessary by virtue of purely statutory civil law [...] Scholars of Roman law claim, however, that delivery is absolutely necessary & that, without that, the clearest of agreements do not change who has control of a thing. SAMUEL VON PUFENDORF, *Le droit de la Nature et des Gens, ou Système Général des Principes les plus importants de la Morale, de la Jurisprudence, et de la Politique*, 1706, with a Latin to French translation by Jean Barbeyrac, Basle: E. & J. R. Thourneisen, Freres, 1732, livre IV, chapitre IX, p. 559.

[2] ULPIANUS, *Digesta* 50, 17, 54, translation: No person can transfer a better title than he has.

[3] For the purposes of this case it is presumed that the contract is *void*. The case does *not* deal with the issue of whether a contract is void or merely *voidable*. On this issue in English law, see, EWAN MCKENDRICK, *Contract Law*, 7th edn, Basingstoke: Palgrave Macmillan, 2007, paras 4.6, 14.3 ff., 17.2.

[4] This purchaser is hereafter referred to as the "purchaser in bad faith" even though knowledge of the invalidity of the contract between the seller and first purchaser on the part of the subsequent purchaser renders the purchaser a bad faith purchaser in some legal orders but not in others.

Questions

(1) The question of the effect of a contract on the transfer of ownership is entirely left to the different national legal orders. This is the case even in situations in which the contract is governed by the Vienna Convention on the International Sale of Goods (or CISG) (see Art. 4(b) of the Vienna Convention).

What are the conditions for the valid transfer of ownership of property from an owner to a purchaser under the different legal orders below? Did the first purchaser acquire ownership of the machine in the case scenario above? Did the two subsequent purchasers acquire ownership of the property? If so, by virtue of which legal rules?

(2) Systemise and compare the different solutions concerning:
(a) the transfer of ownership of property;
(b) acquisition of property in good faith.
How many different groups of solutions are there?

(3) What rules governing the transfer of ownership of property and acquisition of property in good faith do you find the most convincing? Give reasons for your answer.

Table of contents

I. Vienna Sales Convention

United Nations Convention on Contracts for the International Sale of Goods (CISG)

Art. 30
The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention.

Art. 4
This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:
(a) the validity of the contract or of any of its provisions or of any usage;
(b) the effect which the contract may have on the property in the goods sold.

II. England

1. Sale of Goods Act 1979

2. Contract of sale.
(1) A contract of sale of goods is a contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price.

[...]

(4) Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale.
(5) Where under a contract of sale the transfer of the property in the goods is to take place at a future time or subject to some condition later to be fulfilled the contract is called an agreement to sell.
(6) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

27. Duties of seller and buyer.
It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them in accordance with the terms of the contract for sale.

17. Property passes when intended to pass.
(1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.
(2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

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

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

[...]

21. Sale by person not the owner.
(1) Subject to this Act, where goods are sold by a person who is not their owner, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had [...]

[...]

23. Sale under voidable title.
When the seller of goods has a voidable title to them, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title.

25. Buyer in possession after sale.
(1) Where a person *having bought or agreed to buy*[5] goods obtains, with the consent of the seller, possession of the goods [...], the delivery or transfer by that person [...], of the goods [...], under any sale [...], to any person receiving the same in good faith and without notice of any [...] right of the original seller in respect of the goods, has the same effect as if the person making the delivery or transfer were a mercantile agent[6] in possession of the goods [...] with the consent of the owner.

[...]

2. High Court (QB): *Feuer Leather Corporation* v. *Frank Johnston & Sons Ltd* [1981] Com LR 251

NEILL J: [...] The burden of proving a bona fide purchase for value without notice rests on the person who asserts it. Such a rule seems to me to be logical [...]

3. A. G. GUEST, *Benjamin's Sale of Goods*, 7th edn

1. IN GENERAL

7-001 *Nemo dat quod non habet.* The general rule in English law is that no one can transfer a better title to goods than he himself possesses. This rule is often expressed in terms of the Latin maxim *nemo dat quod non habet.* It is partially set out in section 21(1) of the Sale of Goods Act 1979 [...] At one time, the only effective exception to this rule was that of a sale in market overt. But, in response to commercial and social demands, further exceptions to the rule have been progressively introduced both by the common law and by statute. As Denning L.J. has remarked: "In the development of our law, two principles have striven for mastery. The first is for the protection of property: no one can give a better title than he himself possesses. The second is for the protection of commercial transactions: the person who takes in good faith and for value without notice should get a good title. The first principle has held sway for a long time, but it has been modified by the common law itself and by statute so as to meet the needs of our own times." The second principle is fairly precisely delineated by a finite number of exceptions to the *nemo dat* rule. These are discussed in the sections which follow.

[...]

7. BUYER IN POSSESSION

7-069 **Buyer in possession.** [...] [S]ection 25(1) of the Sale of Goods Act 1979 [...] re-enacts in substance section 9 of the Factors Act 1889, to which Act reference may be made for the interpretation of its wording. At common law, a disposition by a buyer in possession was subject to the ordinary rule that *nemo dat quod non habet.* A limited exception was established by section 4 of the Factors Act 1877 and this was extended and reformulated in the Act of 1889.

7-070 **"Bought or agreed to buy."** In order to claim the protection of this subsection the person to whom the buyer has delivered or transferred the goods [...] must show that the buyer has "bought or agreed to buy" the goods. In most cases, the subsection will be invoked where there has been merely an agreement to sell, that is to say, where there is a contract of sale, but the transfer of the property in the goods to the buyer is to take place at a future time or subject to some condition later to be fulfilled. The buyer must, however, be contractually bound to purchase the goods under a contract of sale. [...] It has been held to be immaterial that the agreement is unenforceable [...] or that it is voidable at the election of the seller on the ground of fraud. But if the agreement is absolutely void, *e.g.* for mistake as to the person or even possibly for illegality, there will have been no agreement to buy the goods.

7-071 At first sight it seems curious that a disposition by a person who has *bought* the goods should also have been included, since, as a normal rule, a buyer to whom the property in goods has passed under a contract of sale will be able to confer a good title by virtue of his property in them. In such a case no question will arise as to the good faith of the person receiving them, nor will the other limitations imposed by this subsection be of any relevance. But there may be some situations where the property in the goods sold will have passed to the buyer, and he will have obtained possession of them, but subject to some right or interest still vested in the seller. For example, it seems that an unpaid seller might still retain his lien over the goods notwithstanding that they are in the buyer's possession if such possession has been given to the buyer temporarily and for a limited purpose; or special rights may have been reserved by agreement to the seller under which he retains an interest in the goods. In these situations, a disponee of the goods from the buyer might not obtain a good title except by relying on section 25(1) of the Act. However, the most important application of the word "bought" in this subsection is where the buyer has obtained both property in and possession of the goods under the contract of sale, but his title has subsequently been avoided by the seller. In this case, it would seem that, having obtained possession of the goods with the consent of the seller, the buyer may be able to pass a good title to a disponee.

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5 Emphasis added.

6 In such a situation, the agent can validly transfer ownership of the goods.

4. EWAN MCKENDRICK, *Contract Law*, 8th edn, pp. 53–55

4.6 Mistake negativing consent

[...]

[...] The identity of the person with whom one is contracting or proposing to contract is often immaterial. A simple example is provided by the sale of goods in a shop. The owner of the shop will often be indifferent as to the identity of the person purchasing the goods. What matters is not the identity of the customer as such, but his willingness and ability to pay for the goods. But let us suppose that the customer wishes to pay for the goods by cheque or by credit card. This may change matters because, if the customer is not who he says he is, the shop may find that its demand for payment on the cheque or its demand for payment from the credit card company will be rejected and it must then look to the defaulting customer for redress. Even here, however, the identity of the customer does not generally give rise to legal difficulties as between the shop and the customer [...] The customer, whoever he is, is liable to pay for the goods he has acquired. The legal difficulties tend to arise in the case where the customer sells the goods which he has purchased to a third party who pays for the goods in all good faith (that is to say, he is unaware of the circumstances which surround the earlier transaction).

In such cases the defaulting customer is usually a rogue [...]: he had no intention of paying for the goods at the time of their acquisition from the original owner and sold them on to an innocent third party almost immediately after acquiring them. In the typical case, by the time that the owner discovers the true situation (that is, he will not be paid by his customer), the goods have already been transferred by the rogue into the possession of the third party. Given that a claim against the rogue is unlikely to be fruitful (either because he cannot be found or because he has been found and is not worth suing), the original seller is likely to wish to bring a claim against the third party in possession of the goods. In essence, the claim of the original seller is that he remains the owner of the goods and is entitled to have them back (or their financial value). The innocent third party purchaser will generally respond to the effect that he is the owner of the goods, having bought them in all good faith. Thus the core of the dispute relates to the location of the ownership of the goods. English law, rather unusually, does not deal with such claims through the law of property. Rather, it employs the law of tort in order to protect property rights. The original seller will therefore typically bring a claim in tort (usually a claim in the tort of conversion) against the innocent third party purchaser in which he will assert that the purchaser is dealing with the goods in such a way as to interfere with his rights as owner of the goods. The third party purchaser will deny the claim on the ground that he is the owner of the goods and so it cannot be said that he has in any way interfered with the claimant's rights. How does this dispute relate to the law of contract? The answer is that the rogue can only pass on to the purchaser such rights as he himself possesses. English law recognises a general principle entitled *nemo dat quod non habet* (you cannot give what you do not have). The effect of the rule is to require an examination of the rights acquired by the rogue under the initial transaction with the original seller and this is where the law of contract has a vital role to play. If the contract validly transfers ownership in the goods to the rogue then the rogue can in turn confer rights of ownership on the third party purchaser: conversely, if the initial contract is ineffective to confer rights of ownership on the third party then the rogue will not be able to confer rights of ownership on the rogue purchaser (unless one of the exceptions to the *nemo dat* rule is found to be applicable). In this way the rights as between the original owner and the rogue will determine whether the claim of the original owner or the third party purchaser will prevail.

Turning to the contract between the original seller and the rogue, there is clearly something wrong with it. The rogue has assumed a false identity and will generally be guilty of fraud: in many cases he will have induced the seller to enter into the contract by a fraudulent misrepresentation as to his identity. The important point to note here is that fraudulent misrepresentation renders a contract voidable; that is to say, the contract remains valid and can operate to transfer ownership in the goods until such time as the contract has been set aside. This does not present an attractive option for a seller because the rogue will, in all probability, have transferred the goods to an innocent third party purchaser before he has had the opportunity to discover the truth and set aside the transaction with the rogue. On this basis the innocent third party purchaser will win because he will acquire ownership of the goods from the rogue. A more attractive option from the perspective of the seller is to assert that the contract with the rogue was void on the ground that it had been entered into under a mistake. Mistake can operate to render a contract void and a contract which is void is set aside for all purposes and generally produces no legal effects whatsoever. So, if the contract was void for mistake, the rogue could not have obtained property in the goods from the original seller and therefore has no property rights to pass on to the innocent third party purchaser. On this basis the original seller will win and will be entitled to recover the goods (or, more likely, their financial value) from the third party purchaser.

Two further [...] points ought to be made [...] The first is that there are policy issues at stake here in determining the outcome of the competition between the original owner and the third party purchaser. [...] The point to be made here is that the judges do not have a free hand to decide these policy issues. In the case of contracts for the sale of goods Parliament has enshrined the *nemo dat* rule in legislation (see section 21(1) of the Sale of Goods Act 1979) and so it is not open to the courts to question the appropriateness of that general rule. The court can obviously consider whether or not the case falls within one of the existing exceptions to the *nemo dat* rule but it cannot seek to displace the general rule in favour of a principle which favours the protection of the innocent third party purchaser. The second point is that it might seem odd that the original seller can improve his position by relying on mistake rather than fraud. Fraud appears to be the more serious vitiating factor [...] Yet it only renders a contract voidable. Mistake, by contrast, [...] can and does render a contract void. Some judges have recoiled from the proposition that a claimant can improve his position by relying on mistake rather than fraud (see, for example, the speech of Lord Nicholls in *Shogun Finance Ltd* v. *Hudson* [2003] UKHL 62; [2004] 1 AC 919) but the proposition that mistake can render a contract void, whereas fraud only renders a contract voidable, is probably too firmly entrenched in the law to be uprooted judicially. [...]

III. France

1. Code civil français (*French Civil Code*)

Art. 711
La propriété des biens s'acquiert et se transmet par succession, par donation entre vifs ou testamentaire, et par l'effet des obligations.

Art. 711
Ownership of property is acquired and transmitted by succession, by gift inter vivos or will, and by the effect of obligations.

Art. 1138
(1) L'obligation de livrer la chose est parfaite par le seul consentement des parties contractantes.
(2) Elle rend le créancier propriétaire et met la chose à ses risques dès l'instant où elle a dû être livrée, encore que la tradition n'en ait point été faite, à moins que le débiteur ne soit en demeure de la livrer; auquel cas la chose reste aux risques de ce dernier.

Art. 1138
(1) An obligation to deliver a thing is completed by the sole consent of the contracting parties.
(2) [The obligation] makes the creditor the owner and places the thing at his own risk from the moment when it should have been delivered, even if the delivery has not been made, unless the debtor is in default of delivery; in which case, the thing remains at the risk of the latter.

Art. 1141
Si la chose qu'on s'est obligé de donner ou de livrer à deux personnes successivement, est purement mobilière, celle des deux qui en a été mise en possession réelle est préférée et en demeure propriétaire, encore que son titre soit postérieure en date pourvu toutefois que la possession soit de bonne foi.

Art. 1141
Where a thing which one is bound to deliver to two persons successively is a chattel, the one of the two who has been put in actual possession is preferred and remains owner of it, even though his title is subsequent as to date, provided however that the possession is in good faith.

Art. 1582
(1) La vente est une convention par laquelle l'un s'oblige à livrer une chose, et l'autre à la payer.

[...]

Art. 1582
(1) A sale is an agreement by which one person binds himself to deliver a thing, and another to pay for it.

[...]

Art. 1583
Elle est parfaite entre les parties, et la propriété est acquise de droit à l'acheteur à l'égard du vendeur, dès qu'on est convenu de la chose et du prix, quoique la chose n'ait pas encore été livrée ni le prix payé.

Art. 1583
[The sale] is completed between the parties, and ownership of the property passes from the seller to the buyer, as soon as the thing and the price have been agreed upon, even though the thing has not yet been delivered nor the price paid.

Art. 2276
(1) En fait de meubles, la possession vaut titre.
(2) Néanmoins, celui qui a perdu ou auquel il a été volé une chose peut la revendiquer pendant trois ans à compter du jour de la perte ou du vol, contre celui dans les mains duquel il la trouve; sauf à celui-ci son recours contre celui duquel il la tient.

Art. 2276
(1) With regard to chattels, possession is equivalent to a title.
(2) Nevertheless, someone who has lost something or had something stolen can claim it back from the person who has it for the three years from the day of the loss or theft; subject to the remedy of the latter against the person he obtained it from.

2. Cour de cassation, 20 février 1996, Bull. civ. 1996 I n° 96 p. 66

«[L]'art. [2276] du Code civil [...] suppose que le propriétaire véritable revendique le meuble dont il a perdu possession entre les mains *d'un tiers*,[7] défendeur au procès en revendication [...] »

Translation

"Art. [2276] of the French Civil code [...] presumes that the true owner is claiming the chattel of which he lost possession to a *third party*,[8] the defendant in the claim [...]"

3. Cour d'appel de Paris, 15 février 1961 (*Dame Morel d'Arleux* c. *Desourtheau et autres*), D. 1961, sommaires p. 43

«Pour pouvoir invoquer l'art. [2276] c. civ., [l'acquéreur] doit être de bonne foi, c'est-à-dire avoir pu croire que l'objet lui a été remis par son légitime propriétaire, de sorte que la possession ne puisse être considérée d'origine obscure.»

7 Emphasis added by the author.
8 Emphasis added by the author. I.e. the owner is claiming it from a third party other than the party with whom he contracted.

Translation

"To be able to invoke Art. [2276] of the *Code civil*, [the acquirer] must have acted in good faith, that is to say believed that the object was transferred to him by its legitimate owner, so that the possession cannot be considered as being from an unknown origin."

4. Code civil français (*French Civil Code*)

Art. 2274
La bonne foi est toujours présumée, et c'est à celui qui allègue la mauvaise foi à la prouver.

Art. 2274
Good faith is always presumed, and it is for the person who alleges bad faith to prove it.

5. François Terré and Philippe Simler, *Droit civil: Les biens*, 7th edn (translation of the French original)

§ 2 Possession of movable property in good faith

[...]

426 ***The two meanings of the rule: method of acquisition and presumption of title.*** ◊ The rule set out in Article [2276] has two meanings, two functions: depending on the case, possession constitutes a method of acquisition or fulfils an evidentiary function.

1) A person who acquires a chattel *a non domino* in good faith, that is to say from someone who is not the owner, does not acquire the property by the effect of the contract, because the alienator cannot transfer a right that does not belong to him. However, if the acquirer is put in possession, this fact makes him the owner. From which it results that the owner to which the chattel previously belonged can no longer claim it back from the possessor (unless the chattel was lost or stolen). And, in addition, if the right transferred to the acquirer is terminable or voidable, these defects are wiped out by the fact of the vesting in possession. It can therefore be said that a claim for recovery is excluded when the chattel has been acquired by a possessor in good faith, possession creating a new abstract title in favour of the possessor, that is to say independent of his transferred title.

As such, the rule is justified by commercial needs. Chattels are destined to circulate between people; for the most part, it is impossible for an acquirer to verify the rights of the seller and to reconstruct the chain of previous owners, transactions involving movable property not normally being evidenced in writing and chattels being transferred, very simply, from person to person. The acquirer would have no security if he could be subject to a claim for recovery or an action for annulment because of previous transactions. Justice demands protection of someone who came into possession of a chattel under normal conditions and who has done nothing wrong [...]

2) Secondly, the rule set out in Article [2276] has an *evidentiary function*: possession presupposes, in the absence of proof to the contrary, that the possessor gained title to the property legitimately. It is presumed that a possessor who claims to have acquired a chattel did so by a contract made with the true owner. [...] Article [2276] [...] grants [the possessor an exemption from proving that he acquired the chattel by a contract made with the true owner], and that is the second meaning of the rule: possession is equivalent to title; the law assumes therefore that the possessor was vested in possession by virtue of a valid transfer of title [...], and it is for the claimant to rebut this presumption. [...]

IV. Italy and Poland

1. Codice civile (*Italian Civil Code*)

Art. 922. Modi di acquisto [della proprietà].
La proprietà si acquista per occupazione, per invenzione, per accessione, per specificazione, per unione o commistione, per usucapione, per effetto di contratti, per successione a causa di morte e negli altri modi stabiliti dalla legge.

Art. 922. Modes of acquisition [of property].
Ownership is acquired by occupation, invention, accession, specification, union or commixtion, usucaption, as a result of contract, by succession at death, and in the other ways established by law.

Art. 1376. Contratto con effetti reali.
Nei contratti che hanno per oggetto il trasferimento della proprietà di una cosa determinata, la costituzione o il trasferimento di un diritto reale ovvero il trasferimento di un altro diritto, la proprietà o il diritto si trasmettono e si acquistano per effetto del consenso delle parti legittimamente manifestato.

Art. 1376. Contracts with real effects.
In contracts having as their object the transfer of ownership of a specific thing, the constitution or transfer of a real right or the transfer of another right, such as ownership or right is transferred and acquired by virtue of the lawfully expressed agreement of the parties.

Art. 1378. Trasferimento di cosa determinata solo nel genere.
Nei contratti che hanno per oggetto il trasferimento di cosa determinata solo nel genere, la proprietà si trasmette con l'individuazione fatto d'accordo tra le parti o nei modi da esse stabiliti. Trattandosi di cose che devono essere trasportate da un luogo a un altro, l'individuazione avviene anche mediante la consegna al vettore o allo spedizioniere.

Art. 1378. Transfer of thing specified only as to its kind [i.e. unidentified goods].
In contracts having as their object the transfer of things specified only as to their kind, ownership passes on specification of the goods by the parties or in the manner established by them. In the case of things which must be carried from one place to another, specification also takes place by delivery to the carrier or to the forwarding agent.

Art. 1153. Effetti dell'acquisto del possesso.
(1) Colui al quale sono alienati beni mobili da parte di chi non è proprietario, ne acquista la proprietà mediante il possesso, purché sia in buona fede al momento della consegna e sussista un titolo idoneo al trasferimento della proprietà.

[...]

Art. 1153. Effects of acquisition of possession.
(1) He to whom movable property is conveyed by one who is not the owner acquires ownership of it through possession, provided that he be in good faith at the moment of consignment and there be an instrument or transaction capable of transferring ownership [e.g. a contract of sale].

[...]

Art. 1154. Conoscenza dell'illegittima provenienza della cosa.
A colui che ha acquistato conoscendo l'illegittima provenienza della cosa non giova l'erronea credenza che il suo autore o un precedente possessore ne sia divenuto proprietario.

Art. 1154. Knowledge of illegitimate provenance of thing.
The erroneous belief that his transferor or a prior possessor had become owner does not justify one who acquires knowing the illegitimate provenance of the thing.

Art. 1147. Possesso di buona fede.
(1) È possessore di buona fede chi possiede ignorando di lèdere l'altrui diritto.
(2) La buona fede non giova se l'ignoranza dipende da colpa grave.
(3) La buona fede è presunta e basta che che vi sia stato al tempo dell'acqisito.

Art. 1147. Possession in good faith.
(1) One who possesses without knowledge that he prejudices another's right is a possessor in good faith.
(2) Good faith does not apply if the ignorance is the result of gross negligence.
(3) Good faith is presumed and it is sufficient that it existed at the time of acquisition.

2. Kodeks cywilny (*Polish Civil Code*)[9]

Art. 535
(1) Przez umowę sprzedaży sprzedawca zobowiązuje się przenieść na kupującego własność rzeczy i wydać mu rzecz, a kupujący zobowiązuje się rzecz odebrać i zapłacić sprzedawcy cenę.

[...]

Art. 535. [Definition].
(1) Under a contract of sale the seller binds himself to transfer ownership of the thing to the buyer and to deliver it to him, and the buyer binds himself to take delivery of the thing and pay the seller the purchase price.

[...]

Art. 155
(1) Umowa sprzedaży, zamiany, darowizny lub inna umowa zobowiązująca do przeniesienia własności rzeczy co do tożsamości oznaczonej przenosi własność na nabywcę, chyba że przepis szczególny stanowi inaczej albo że strony inaczej postanowiły.

[...]

[9] For a brief introduction to Polish law, see, e.g., MICHAL GONDEK, "Poland"', in Jan M. Smits (ed.), *Elgar Encyclopedia of Comparative Law*, Cheltenham: Edward Elgar Publishing, 2006, pp. 548–53.

Art. 155. [Transfer of title by contract].
(1) A contract of sale, of exchange, of donation or any other contract that obliges one party to transfer ownership of specified goods, transfers ownership to the acquirer unless a special rule stipulates otherwise or the parties have agreed to something else.

[...]

Art. 169
(1) Jeżeli osoba nie uprawniona do rozporządzania rzeczą ruchomą zbywa rzecz i wydaje ją nabywcy, nabywca uzyskuje wlasność z chwilą objęcia rzeczy w posiadanie, chyba że dziala w zlej wierze.

[...]

Art. 169. [Acquisition from an unauthorised person].
(1) If a person not entitled to dispose of a thing sells and delivers it to the acquirer, ownership passes to the acquirer when he gets possession unless he was acting in bad faith.

[...]

V. Germany

1. Bürgerliches Gesetzbuch (BGB) (*German Civil Code*)

§ 433. Vertragstypische Pflichten beim Kaufvertrag .
(1) Durch den Kaufvertrag wird der Verkäufer einer Sache verpflichtet, dem Käufer die Sache zu übergeben und das Eigentum an der Sache zu verschaffen. Der Verkäufer hat dem Käufer die Sache frei von Sach- und Rechtsmängeln zu verschaffen.
(2) Der Käufer ist verpflichtet, dem Verkäufer den vereinbarten Kaufpreis zu zahlen und die gekaufte Sache abzunehmen.

§ 433. Typical duties in a contract of sale.
(1) By a contract of sale, the seller of a thing is bound to deliver the thing to the buyer and to transfer ownership of the thing to the buyer. The seller must procure the thing for the buyer free from material and legal defects.
(2) The buyer is bound to pay the seller the agreed purchase price and to take delivery of the thing.

§ 929. Einigung und Übergabe.
Zur Übertragung des Eigentums an einer beweglichen Sache ist erforderlich, dass der Eigentümer die Sache dem Erwerber übergibt und beide darüber einig sind, dass das Eigentum übergehen soll. Ist der Erwerber im Besitz der Sache, so genügt die Einigung über den Übergang des Eigentums.

§ 929. Agreement and Transfer.
For the transfer of ownership of a chattel it is necessary for the owner to deliver the thing to the acquirer and that both agree that the ownership be transferred ["real" contract]. If the acquirer is already in possession of the thing, the agreement on transfer of ownership is sufficient.

2. Reichsgericht (*Supreme Court of the Former German Empire*), 21.4.1906, RGZ 63, 179

"Die sachenrechtlichen Erfüllungsgeschäfte (z.B. Übergabe, [...]) sind nach dem Systeme des Bürgerlichen Gesetzbuches als Rechtsgeschäfte konstruiert, die die Macht, eine sachenrechtliche Wirkung hervorzubringen (z.B. Eigentum zu übertragen), in sich selbst tragen. [...] Man nennt die sachenrechtlichen Erfüllungsgeschäfte daher auch abstrakte Rechtsgeschäfte, abstrakt insofern, als sie auf sich selbst gestellt sind, und in dem Kausalgeschäfte, das ihnen zugrunde liegt, [...] keinen ihre Wirksamkeit bedingenden Faktor herübernehmen."

Translation

"Acts directed to fulfil the obligation to transfer title (e.g. the delivery of goods [...]) are, according to the German Civil Code, considered to be legal transactions which are

empowered to have the effect of transferring title (e.g. the transfer of property) *in their own right*.[10] [...] These acts are therefore also referred to as abstract legal acts. Abstract in the sense that they are independent of the validity of the obligation they intend to fulfil [i.e. they are valid even if a contract creating the obligation to transfer the title, e.g. a sales contract, is void]."

3. HUGH BEALE *et al.* (eds), *Cases, Materials and Text on Contract Law*, pp. 20–21, 28–29 (text by DENIS TALLON)

1.1.3.C. CONTRACTS GIVING RISE TO OBLIGATIONS AND CONTRACTS TRANSFERRING OR CREATING PROPERTY RIGHTS

[...]

[...] [U]nder German law and the systems which follow that model, the contract merely creates the obligation [e.g. to transfer property]. Property is transferred or rights *in rem* created by means of another act, separate from the contract, pursuant to the principle of separability (*Abstraktionsprinzip*). Under that principle the former [e.g. the contract of sale] may be null and void without affecting the validity of the latter [i.e. the act transferring property]. [...]

[...]

1.1.4. A GERMAN LAW: THE PRINCIPLE OF SEPARABILITY (*ABSTRAKTIONSPRINZIP*)

[...] [German law makes a] distinction between contracts transferring property and contracts creating obligations [...] The principle of separability proclaimed by German law, and by certain other systems of law, asserts that the transfer of property is effected by [...] [a transaction] completely separate [from the contract creating the obligation to transfer the property] [...] This is how Zweigert and Kötz expound this principle:

Zweigert and Kötz[11]

Now if a legal system not only makes this distinction between the contract of sale and the real contract [...], but also makes the validity of each independent of the validity of the other, it accepts the doctrine of the "abstract real contract". By virtue of this doctrine, once a purchaser has made a "real" contract with his vendor and has received delivery of the purchased property from him, in principle he obtains ownership in the thing even if the contract of sale was void from the beginning, or is subsequently rescinded or is invalid in any other way: the "real" agreement [i.e. the agreement under § 929 BGB that the

10 Emphasis added.

11 K. ZWEIGERT AND H. KÖTZ, *Introduction to Comparative Law*, 2nd edn, Oxford: Clarendon Press, 1987, at 178–79.

property shall be transferred] is thus "abstract" because, given delivery [...], it transfers the property even if no valid contract of sale [between the seller and the acquirer] was concluded or if the contract of sale was originally valid but has subsequently lapsed. Of course in such a case the purchaser[12] is not entitled to retain the property; he has become owner, but has done so in the absence of a valid contract of sale, that is, "without legal cause", and is therefore bound to retransfer the property to the vendor as an "unjust enrichment" pursuant to § 812 BGB.

These rules apply in German law not only when property is sold but also when it is donated or given in exchange, or when it is transferred to a creditor as security for a loan [...]: in all these cases a distinction is drawn between the "basic transaction" or "causal transaction" (namely the contract of sale [§ 433 BGB], or the declaration of gift or security [...]) and the "completion transaction" or "performance transaction", namely the transfer of property [§ 929 BGB]; the abstract completion agreement may be valid notwithstanding the invalidity of the basic transaction and thus the purchaser, the donee, the creditor [...] will have become owner.

4. Bürgerliches Gesetzbuch (BGB) (*German Civil Code*)

§ 932. Gutgläubiger Erwerb vom Nichtberechtigten.
(1) Durch eine nach § 929 erfolgte Veräußerung wird der Erwerber auch dann Eigentümer, wenn die Sache nicht dem Veräußerer gehört, es sei denn, dass er zu der Zeit, zu der er nach diesen Vorschriften das Eigentum erwerben würde, nicht in gutem Glauben ist. [...]
(2) Der Erwerber ist nicht in gutem Glauben, wenn ihm bekannt oder infolge grober Fahrlässigkeit unbekannt ist, dass die Sache nicht dem Veräußerer gehört.

§ 932. Acquisition in good faith from an unauthorised person
(1) A disposal made in accordance with § 929 makes the acquirer the owner even if the thing does not belong to the seller, unless he is in bad faith at the time at which, according to these provisions, he would acquire ownership. [...]
(2) An acquirer acts in bad faith if it is known to him, or unknown to him because of gross negligence, that the thing does not belong to the seller.

12 I.e. the person to whom the property was transferred by the owner although the contract of sale the parties intended to conclude was void or avoided (note by the author).

VI. Greece

Αστικός Κώδικας (*Greek Civil Code*)

Άρθρο 513. Εννοια της πώλησης.
Με τη σύμβαση της πώλησης ο πωλητής έχει την υποχρέωση να πεταβιβάσει την κυριότητα του πράγματος ή το δικαίωμα, που αποτελούν το αντικείμενο της πώλησης και να παραδώσει το πράγμα και ι αγοραστής έχει την υποχρέωση να πληρώσει το τίμημα που συμφωνήθηκε

Art. 513. Meaning of sale.
By a contract of sale the seller binds himself to transfer the ownership of the thing or the right that constitute the subject-matter of the sale and the purchaser binds himself to pay the price agreed.

Άρθρο 1034. Κτήση κινητού με σύπβαση.
Για τη πεταβίβαση τφς κυριότητας κινητού απαιτείται παράδιση της νοπής του από τον κυ΄ριο σ΄ αυτόν που την αποκτά και συμφωνία των δύο ότι μετατίθεται η κυριότητα.

Art. 1034. Acquisition of movable by contract.
The transfer of ownership of a movable requires that possession thereof shall be passed from the owner to the acquirer and that both agree to the effect that ownership be transmitted.

Άρθρο 1036. Κτήση κινητού από μη κύριο.

(1) Με την εκποίηση κινητού κατά το άρθρο 1034 εκείνος που αποκτά γίνεται κύριος και αν ακόμη η κυριότηρα του πράγματος δεν αντήκει σ΄ αυτόν που εκποιεί, εκτός αν κατά το χρόνο της παράδοσης της νοπής εκείνος που αποκτά βρίσκεται σε κακή πίστν.

[...]

Art. 1036. Acquisition of movable from a person who is not the owner.
(1) Following the alienation of a movable pursuant to the provisions of Article 1034 the acquirer shall become the owner thereof even if the ownership of the thing did not belong to the alienator except if at the time of the delivery of possession the acquirer acted in bad faith.

[...]

Άρθρο 1037

Στην περίπτωση του προηγούπενου άρθρου εκείνος που αποκτά βρίσκεται σε κακή πίστν, αν γνωρίζει ή αγνοεί από βαριά αμέλεια ότι το κινητό πρα΄γμα δεν ανη΄κει κατα΄ κυριο΄τητα σ΄ αυτο΄υ που εκποιει΄.

Art. 1037
An acquirer acted in bad faith in the case provided for in the preceding article if he knew or ignored due to gross negligence imputable to him that the alienator did not have ownership of the movable thing alienated.

VII. Switzerland

1. Schweizerisches Obligationenrecht (*Swiss Code of Obligations*)

Art. 184. Rechte und Pflichten im Allgemeinen.
(1) Durch den Kaufvertrag verpflichten sich der Verkäufer, dem Käufer den Kaufgegenstand zu übergeben und ihm das Eigentum daran zu verschaffen, und der Käufer, dem Verkäufer den Kaufpreis zu bezahlen.

[...]

Art. 184. Rights and obligations in general.
(1) A contract of purchase is a contract whereby the seller binds himself to deliver to the buyer the object of the purchase and to transfer title thereto to the buyer and the buyer binds himself to pay the purchase price to the seller.

[...]

2. Schweizerisches Zivilgesetzbuch (*Swiss Civil Code*)

Art. 714. Erwerbsarten. Übertragung. Besitzübergang.
(1) Zur Übertragung des Fahrniseigentums bedarf es des Überganges des Besitzes auf den Erwerber.
(2) Wer in gutem Glauben eine bewegliche Sache zu Eigentum übertragen erhält, wird, auch wenn der Veräußerer zur Eigentumsübertragung nicht befugt ist, deren Eigentümer, sobald er nach den Besitzesregeln im Besitze der Sache geschützt ist.

Art. 714. Methods of acquisition. Transfer. Transfer of possession.
(1) Transfer of ownership in chattels requires transfer of possession to the acquirer.
(2) Whoever, in good faith, obtains a chattel for the purpose of acquiring ownership becomes the owner as soon as he is protected under the rules of possession, even if the alienator was not entitled to transfer the ownership[13].

Art. 933. Verfügungs- und Rückforderungsrecht. Bei anvertrauten Sachen.
Wer eine bewegliche Sache in gutem Glauben zu Eigentum [...] übertragen erhält, ist in seinem Erwerbe auch dann zu schützen, wenn sie dem Veräußerer ohne jede Ermächtigung zur Übertragung anvertraut worden war.

13 Art. 714 refers to *inter alia* Art. 933 (author's note).

Art. 933. Right to dispose and right to restitution. Things entrusted.
Whoever acquires a chattel in good faith in order to become its owner [...] is protected in his acquisition, provided the thing was entrusted to the transferor even if he had no authority to make such transfer.

Art. 3. Guter Glaube.
(1) Wo das Gesetz eine Rechtswirkung an den guten Glauben einer Person geknüpft hat, ist dessen Dasein zu vermuten.

[...]

Art. 3. Good faith.
(1) If the law makes the existence or effect of a right conditional on good faith, such good faith will be presumed.

[...]

3. Schweizerisches Bundesgericht (*Swiss Federal Court*), 29.11.1929 i.S. Grimm gegen Konkursmasse Näf, BGE 55 II 302

Das Bundesgericht zieht in Erwägung:

[...] 2. Allein selbst wenn die Kontrahenten im massgeblichen Zeitpunkt über den Eigentumsübergang einig gewesen wären, so könnte doch wegen Fehlens eines gültigen Rechtsgrundgeschäfts dem Kläger nicht zugestanden werden, dass er Eigentümer der streitigen Sachen geworden sei. Freilich hat sich das Bundesgericht unter der Herrschaft des [alten Obligationenrechts] im Anschluss an das Gemeine Recht gegen die Abhängigkeit der Gültigkeit der Übertragung des Eigentums an Mobilien von der Gültigkeit des Kausalgeschäftes ausgesprochen. [...] Nachdem nun aber das ZGB durch Art. 974 die Frage für Grundstücke positiv anders geordnet, dagegen für bewegliche Sachen neuerdings offen gelassen hat, drängt sich eine neue Prüfung auf, und diese muss zur Aufgabe der früheren Rechtsprechung führen. Grundlage der früheren Rechtsprechung war ein Dogma des Gemeinen Rechts, das sich zwar in seiner Allgemeinheit nicht auf eindeutige Quellen zu stützen vermochte, aber jedenfalls den Bedürfnissen des Rechtsverkehres Rechnung trug, namentlich nach der Richtung, dass es auf den Schutz des gutgläubigen Dritterwerbers hinauslief, der dem Gemeinen Rechte sonst fremd war (vgl. hierüber IHERING, Geist des römischen Rechtes (2. Auflage) III 1 S. 207; GIRARD-SENN, Droit romain S. 318; KRIEGSMANN, Rechtsgrund der Eigentumsübertragung S. 117). Die Übernahme dieses "großen Grundsatzes" der Unabhängigkeit des sog. dinglichen Rechtsgeschäftes von der obligatorischen causa in das deutsche BGB – das doch den Schutz des gutgläubigen Dritterwerbers in weitem Umfang einführte –, wofür in erster Linie doktrinäre Gründe und nicht etwa die Einsicht in dessen Zweckmäßigkeit im Rechtsverkehr angeführt wurden (Motive zum Entwurf des BGB II S. 3, III S. 6 ff.), wurde denn auch scharf bekämpft [...]. Indessen konnte an dem

ursprünglichen (in den Motiven zum BGB) ausgesprochenen Satz, der dingliche Vertrag sei notwendig dem Begriffe nach abstrakt, nicht festgehalten werden. Im Gegenteil wird in Theorie und Praxis, wenn irgendwie möglich, die Abhängigkeit des dinglichen Geschäfts vom obligatorischen dadurch zu erzielen gesucht, dass den Parteien eine diesbezügliche Bedingung untergeschoben wird, auch wenn sie sich darüber ausgeschwiegen haben; ja diese Bedingung wird geradezu als verkehrsüblich bezeichnet [...] Vielfach wird denn überhaupt die Abstraktion des dinglichen Geschäfts von der Kausalvereinbarung als eine künstliche Konstruktion bezeichnet [...] Und das österreichische Recht, das den Eigentumswechsel bei beweglichen Sachen ebenfalls von der Tradition abhängig macht, vermag ohne jene Konstruktion auszukommen [...] Nichts zwingt dazu, ihr auf das schweizerische Mobiliarsachenrecht noch einen Einfluss zuzugestehen, zumal nachdem das Immobiliarsachenrecht sich ihr entzogen hat. [...] Endlich wird die Annahme der Konstruktion von der abstrakten Natur des dinglichen Vertrages über bewegliche Sachen auch nicht durch dringende Bedürfnisse des Rechtsverkehrs gefordert [...] Ob diesem Ziel nach der Einführung weitgehenden Schutzes des gutgläubigen Dritterwerbers und der Rechtsvermutungen zugunsten des Besitzers noch weitergehend nachzustreben sei, ist übrigens eine Frage. Wieso aber der Erwerber selbst, dessen bösgläubige Rechtsnachfolger – bösgläubig in dem Sinne, dass ihnen die Ungültigkeit des Kausalgeschäftes nicht verborgen geblieben sein kann – und schließlich im Konkurs des Erwerbers dessen Konkursgläubiger vor dem Veräußerer Schutz verdienen sollten, ist nicht einzusehen. [...]

Translation (extracts)

"4th operative part of the judgment: the transfer of ownership of property is not an abstract act.[14] Consequently, the validity of the transfer of property depends on the validity of the legal transaction generating the obligations which are the reason for the transfer [e.g. a sales contract][15] (change to the previous case-law)."

"Under the old Code of obligations – and in conformity with the Germanic interpretation of the continental common law of Roman origin – the Federal Tribunal ruled that the validity of a transfer of property is not dependent on the act which is the reason for the transfer [e.g. the underlying contract of sale] [...] However the Swiss Civil code now sets out, in Art. 974, an opposing solution, but only for land, leaving the question of chattels open. In these circumstances, it is important to re-examine this question, which should lead to a reversal of former case-law. This case-law was based on a dogma traditionally adopted in Germanic law that [...] contributed notably to the protection of a third party purchaser in good faith, which was something that was, in principle, not of much concern in the continental common law of Roman origin (v. Ihering, *Geist des römischen Rechts*, 2nd ed., III 1 p. 207; Girard-Senn, *Droit romain*, p. 318

14 In German law (see V.2 above), the transfer of property is an abstract act in the sense that it is independent of an agreement to transfer property, e.g. a sales contract. This is no longer the case in Switzerland.

15 This is known as the *causa*. The *principle of causality* (as opposed to the principle of abstraction) requires every conveyance of a property right to have a valid *causa* which serves as the basis for the conveyance (e.g. acquisition, transfer). This means that disposal of property alone is not sufficient to establish ownership, there must also be such an underlying *causa*.

2e; Kriegsmann, *Rechtsgrund der Eigentumsübertragung*, p. 117). This "important principle" of the independence of the [validity of the] legal transaction referred to as "real" ("dinglich", [i.e. the transaction concerning exclusively the transfer of property and not the underlying obligation it is meant to fulfil] from any underlying personal link between the parties [such as a contract of sale], was taken up by the BGB which however established protection of the bona fide third party on a large scale. [...] [However, the] adoption of a system based on an abstract nature of the transfer with regard to chattels does not meet pressing practical needs. [...] [Th]e aim of the system was to simplify and facilitate property transactions [...] One might [...] wonder if there is still any reason to strive for this goal since the Swiss civil code introduced [...] an extensive system of protection with regard to bona fide purchasers. In other words, why should we show more concern for a [subsequent] purchaser in bad faith, i.e. a purchaser who was aware that the personal link between the parties to a prior contract [e.g. a contract of sale between the owner/seller and a first purchaser] was void, than for the owner/seller?

4. Heinz Rey, *Grundriss des schweizerischen Sachenrecht, Band I. Die Grundlagen des Sachenrechts und das Eigentum*, 3rd rev. edn (translation of the German original)

Chapter 7: Movable property

§ 23 Acquisition of movable property from the owner

[...]

I. Conditions

1688 For a valid transfer of movable property, two *cumulative* conditions must be fulfilled: the conclusion of a valid underlying transaction [e.g. a sales contract] and the transfer of possession of the property from the alienator to the acquirer.

1688a The third condition, required by some authors [Schwander, Tuor/Schnyder/Schmid, Steinauer], of a "real" contract is discussed below [1705, 1707].

1. A valid underlying transaction

1689 For a valid transfer of movable property (in addition to the transfer of possession [...]) a valid legal transaction creating an obligation [...], also referred to as the underlying transaction [e.g. a sales contract], is required.

1690 This condition results from the principle of causality[16] that governs Swiss property law [...] [since the Swiss Federal Tribunal's decision of 1929 (*supra*)].

1691 The underlying transaction is an obligations-contract.[17] Ownership is not

16 The *principle of causality* requires every conveyance of a property right to have a valid *causa* (e.g. a sales contract) which serves as the basis for the conveyance. This means that disposal of property alone is not sufficient to establish ownership, there must also be such an underlying *causa* (note by the author).

17 That is to say, a contract that creates an obligation, such as a sales contract, and not a "real" contract as discussed below (note by the author).

transferred to the acquirer upon the valid formation of the obligations-contract; this contract only creates an obligation on the alienator to transfer ownership to the acquirer. Accordingly, the acquirer does not gain ownership from the alienator through the valid conclusion of such an underlying transaction but only the right to demand the transfer of property.

[...]

2. "Die Tradition"

a) The importance of *Tradition* in the transfer of movable property

1693 In relation to the valid transfer of movable property, *Tradition* undertaken by the alienator is a disposal [...], by which the ownership of the movable property is transferred to the acquirer. By transferring possession, the alienator fulfils his obligation, arising from the underlying transaction, to transfer ownership to the acquirer [...]

1694 In respect to third parties, *Tradition* is a *means of public disclosure* used to publicise the transfer of ownership vis-à-vis these third parties[18] [...]

[...]

cc) Excursus: *Tradition* as a "contract"

[...]

bbb) Tradition as a "real" contract

1705 In Swiss academic writing, *tradition* is occasionally referred to as a "real" contract – that is to say, a performance-contract [Liver, Schwander, Merz]. These authors say that during the transfer, a certain state of mind must be present: At the moment of the actual handing over of the thing, there must be an intention to transfer and acquire property respectively.

[...]

1707 There is, however, no need for a real contract under the Swiss concept of the transfer of property by authorised persons, as, according to § 929 of the BGB, such contracts consist solely of the mutual consent as to the transfer of property (strongly rejected by Piotet, Transferts, Nr. 42 ff.). The agreement on the transfer of property is already included in the underlying transaction (see Haab/Simonius, ZGB 714 N 40). So, for example, in the law governing the sale of goods it is "essential" that contracts include the necessary agreement on the object and at the same time, an agreement that the goods must be transferred from one party to the other (Keller/Siehr, p. 8); [...]

18 Under Swiss law, the transfer of property needs, in principle, a certain act of publicity vis-à-vis third parties in order to take effect. With respect to land, publicity is done by way of registration. However, as there is no register for personal property, possession fulfils the requirement of publicity. Therefore, with regard to movable property, the transfer of possession is a condition for the transfer of ownership (note added by the author).

VIII. The Netherlands

1. Burgerlijk Wetboek (*Dutch Civil Code*)

Art. 3:84
(1) Voor overdracht van een goed wordt vereist een levering krachtens geldige titel, verricht door hem die bevoegd is over het goed te beschikken.

[...]

Art. 3:84
(1) Transfer of property requires delivery pursuant to a valid title by the person who has the right to dispose of the property.

[...]

Art. 3:90
(1) De levering vereist voor de overdracht van roerende zaken, niet-registergoederen, die in de macht van de vervreemder zijn, geschiedt door aan de verkrijger het bezit der zaak te verschaffen.

[...]

Art. 3:90
(1) Delivery, required for the transfer of movables which are unregistered property and which are under the control of the alienator, is made by giving possession of the thing to the acquirer.

[...]

Art. 3:86
(1) Ondanks onbevoegdheid van de vervreemder is een overdracht overeenkomstig artikel 90 [...] van een roerende zaak, niet-registergoed, [...] geldig, indien de overdracht anders dan om niet geschiedt en de verkrijger te goeder trouw is.

[...]

Art. 3:86
(1) Even if an alienator is not entitled to dispose of property, a transfer made in accordance with article 90 [...] of unregistered movable property [...] is valid, if the transfer is not gratuitous and the acquirer is acting in good faith.

[...]

Art. 3:118
(1) Een bezitter is te goeder trouw, wanneer hij zich als rechthebbende beschouwt en zich ook redelijkerwijze als zodanig mocht beschouwen.
(2) Is een bezitter eenmaal te goeder trouw, dan wordt hij geacht dit te blijven.
(3) Goede trouw wordt vermoed aanwezig te zijn; het ontbreken van goede trouw moet worden bewezen.

Art. 3:118
(1) A possessor who believes himself to be the title-holder and is reasonably justified in that belief, is a possessor in good faith.
(2) Once a possessor is in good faith, he is considered to remain so.
(3) Good faith is presumed; absence of good faith must be proven.

Art. 3:119
(1) De bezitter van een goed wordt vermoed rechthebbende te zijn.

[...]

Art. 3:119
(1) The possessor of property is presumed to be the title-holder.

[...]

2. Jeroen M. J. Chorus *et al.*, *Introduction to Dutch Law*, 4th rev. edn, pp. 114–116

§ 3. Acquisition of Ownership and of Other Property

[...]

17. Requirements for the transfer of title

In order to achieve *overdracht* (transfer of title), *levering* (*traditio*, delivery, conveyance) must be effected by a person who has the right to dispose of the property and it must be effected by virtue of a valid *titel van eigendomsverkrijging*; (*causa*) (*BW* 3:84 para. 1).

18. Titel van eigendomsverkrijging (causa)

By the expression 'a valid *titel* (*causa*)' in this context a legal relationship intended to transfer a title, and justifying such transfer, is meant; in most cases it is an obligation entailing the transfer of title. This legal relationship may ensue from statute, as in the case of tort, from contracts, like sale [...] It has been much debated, especially during the first half of the 20th century, whether [...] the requirement of a valid *causa* should indeed be imposed. The adherents of the so-called '*causa* doctrine' answered this question affirmatively, the champions of the 'abstract doctrine' negatively. The *Hoge Raad* in 1950 preferred the views of the causa doctrine supporters [HR 5 May 1950, NJ 1951 1]. This *causa* doctrine was adopted by the *BW*[19] of 1992.

According to the *causa* doctrine a transfer of title is void if the *traditio* lacks a valid *causa*. The *causa* is invalid *e.g.* if it arises from a contract which is null *ab initio*, such as a sale which by its content is contrary to public order. A *causa* which was valid at the time of the transfer of title, may retroactively cease to exist and thereby annul the transfer, *e.g.* if a sale is annulled on account of a vice of consent.

[19] Burgerlijk Wetboek, i.e. the Dutch Civil Code (note by the author).

The disadvantage inherent in this system is, of course, that it may affect the position of third parties who become successors in title. If A sells and transfers without valid *causa* to B and B sells and transfers again, to C, then C has become successor in title to someone who could not lawfully dispose of the property since B had not become the owner. 'Third party successors', such as C in this example, are protected in certain situations. In order to be protected the third party successor, at any rate, must have acted in good faith, which means that he did not know the *causa* was defective nor ought to have known that it was. The *BW* of 1992 has considerably expanded the protection granted to third party successors in good faith.

[...]

19. Beschikkingsbevoegdheid *(right to dispose of property)*

The main rule concerning the right to dispose of property is laid down is the maxim *nemo plus iuris transferre potest quam ipse habet*, nobody is able to transfer more right than he himself has. Among those having the right to dispose of property are the owner [...]. [I]mportant exceptions are made to the requirement that the transferor has a right to dispose. They are meant to protect third parties relying on an apparent right to dispose.

[...]

2. In respect of movables [...] the third party may usually rely on possession in order to ascertain who has the right to dispose, the 'procedural function' of possession (*BW* 3:119).

20. Levering (traditio, *delivery, conveyancing)*

Dutch law differs from French law in that it requires *levering* (*traditio*, delivery, conveyancing), a special juridical act of conveyancing, for an effective transfer of title to be achieved. This *traditio* is realized [...] in respect of non-registered movable property [...] by providing the acquirer with possession of the movable [...]

IX. Systematic Overviews

1. Transfer of property by the owner to the first purchaser

Group 1	Group 2	Group 3
The principle of consent and causality = the contract transfers ownership directly	**The principle of separation and causality** = the transfer of property requires the acquisition of actual possession, agreement on the transfer of ownership and a valid underlying obligations contract	**The principle of separation and abstraction** = the transfer of property requires the acquisition of actual possession and agreement on the transfer of ownership (the validity of the underlying obligations contract is not important)
– **French Law** (Arts 711, 1138(2), 1583 Code civil) – **Italian Law** (Arts 922, 1376 Codice civile) – **Polish Law** (Arts 155(1) Polish Civil Code) – **English Law** (Sale of Goods Act 1979, s. 17, s. 18 Rule 1)	– **Swiss Law** (Art. 714(1) Swiss Civil Code; Swiss Federal Court decision of 1929; Rey) – **Dutch Law** (Arts 3:84, 3:90 BW; Chorus et al. n° 15 ff.; Mincke, n° 139 ff.)	– **German Law** (§ 929 BGB, 1st sentence) – **Greek Law** (Art. 1034 Greek Civil Code)
Solution of Case 8: The seller remains the owner, the first purchaser does not acquire ownership.	**Solution of Case 8:** The seller remains the owner, the first purchaser does not acquire ownership.	**Solution of Case 8:** The first purchaser becomes the owner

2. Acquisition of property in good faith from an unauthorised person

Group 1	Group 2	Group 3
For the subsequent purchaser to acquire ownership, the following conditions must be fulfilled: – The subsequent purchaser must have obtained possession from the alienator. – He must be acting in good faith (with regard to the property). Good faith is presumed.	**For the subsequent purchaser to acquire ownership, the following conditions must be fulfilled:** – The subsequent purchaser must have obtained possession from the alienator. – He must be acting in good faith (with regard to the property) – He must establish that he was acting in good faith (it is not presumed). – The contract between the seller and the first purchaser must, in principle, be valid (it cannot be void, but it may be voidable).	**No good faith acquisition**
– **French law** (Arts 2276, 2274 Code civil; TERRÉ AND SIMLER, n° 426) – **Italian law** (Arts 1153(1), 1147(3)) – **Polish law** (Art. 169 § 1 Polish Civil Code) – **Swiss law** (Art. 714 II, 933, 3 I Swiss Civil code) – **Dutch law** (Art. 3:86, 3:90 and 3:118 of the Dutch Civil code) – **German law** (§ 932 BGB) – **Greek law** (Arts 1036, 1037 Greek Civil Code) In German and Greek law, the rules on acquisition in good faith are, however, not applicable in Case 8 since the first purcher acquired ownership (see overview no. 1) and could transfer property to the subsequent purchas	**English law** (Sale of Goods Act 1979, ss. 21, 23 and especially 25(1); BENJAMIN'S SALE OF GOODS n° 7-069 ff.; MCKENDRICK 4.6; High Court 1981)	**Roman law** (Dig. 50, 17, 54: *nemo potest*) **English law** (if the contract between the seller and the first purchaser was void, second purchasers cannot acquire ownership in good faith, Sale of Goods Act 1979, s. 25; BENJAMIN'S SALE OF GOODS n° 7-068

Group 1	Group 2	Group 3
Solution of Case 8: Under French, Italian, Polish, Swiss, and Dutch Law, the subsequent bona fide purchaser acquires ownership, the subsequent purchaser in bad faith does not. Under German and Greek law, the subsequent purchasers gain ownership from the title-holder, so both the bona fide purchaser and the purchaser in "bad faith" become the owner.	**Solution of Case 8:** As the contract between the seller and first purchaser is void, none of the subsequent purchasers can acquire ownership.	**Solution of Case 8:** The seller remains the owner.

X. Further reading

1. Books and articles written in English

HUGH BEALE, ARTHUR HARTKAMP, HEIN KÖTZ AND DENIS TALLON (eds), *Cases, Materials and Text on Contract Law*, Oxford: Hart Publishing, 2002, Ch. 1.1.3.C, 20–21; Ch. 1.1.4., Ch. 1.1.4.A. 28–31.

PETER BENSON, "Law and Morality: Contract Law: Contract as a Transfer of Ownership", 48 (2007) *Wm and Mary L. Rev.* 1673–1731.

ULRICH DROBNIG, "Transfer of property", in Arthur Hartkamp *et al.* (eds), *Towards a European Civil Code*, 3rd edn, Nijmegen: Kluwer Law International, 2004, Ch. 40, 725–40.

LARS VAN VLIET, "Transfer of movable property", in Jan M. Smits (ed.), *Elgar Encyclopedia of Comparative Law*, Cheltenham: Edward Elgar Publishing Ltd, 2006, 730–37.

LARS VAN VLIET, "Iusta causa traditionis and its history in European private law", *ERPL* 2003, 342–78.

LARS VAN VLIET, *Transfer of movables in German, French, English and Dutch law*, Nijmegen: Ars Aequi Libri, 2000.

2. Books and articles written in German

ULRICH EISENHARDT, "Die Entwicklung des Abstraktionsprinzips im 20. Jahrhundert", in Gerhard Köbler and Hermann Nehlsen, *Wirkungen europäischer Rechtskultur, Festschrift für Karl Kroeschell zum 70. Geburtstag*, München: Beck, 1997, 215–32.

FRANCO FERRARI, "Vom Abstraktionsprinzip zum Konsensualprinzip zum Traditionsprinzip – Zu den Möglichkeiten der Rechtsangleichung im Mobiliarsachenrecht", *ZEuP* 1993, 52–78.

FILIPPO RANIERI, *Europäisches Obligationenrecht*, Wien/New York: Springer, 379–431.

ANDREAS ROTH, "Abstraktions- und Konsensprinzip und ihre Auswirkungen auf die Rechtsstellung der Kaufvertragsparteien", *ZVglRWiss* 92 (1993), 371–94.

KURT SIEHR, "Der gutgläubige Erwerb beweglicher Sachen – Neue Entwicklungen zu einem alten Problem", *ZVglRWiss* 80 (1981), 273–92.

KARSTEN THORN, "Mobiliarerwerb vom Nichtberechtigten, Neue Entwicklungen in rechtsvergleichender Perspektive", *ZEuP* 1997, 442–74.

ANDREAS WACKE, "Eigentumserwerb des Käufers durch schlichten Konsens oder erst mit Übergabe? Unterschiede im Rezeptionsprozess und ihre mögliche Überwindung", *ZEuP* 2000, 254–62.

HANS WIELING, "Das Abstraktionsprinzip für Europe!", *ZEuP* 2001, 301–07.

Chapter III

The law applicable to cross-border contracts and the future of European contract law

Case 9: The law applicable to cross-border contracts (introduction)

"Si l'Europe doit être un vrai marché unique, ne faudrait-il pas qu'une opération contractuelle entre deux entreprises de part et d'autre de la frontière soit aussi bien balisée qu'un contrat conclu entre deux entreprises au sein d'un même Etat?"[1]

Scenario

An English car dealer sends an order for 15 sports cars to a German manufacturer. The German manufacturer receives the order and makes a note of it. Before he is able to send an acceptance, the English car dealer revokes his order by fax.

Nevertheless, the German manufacturer sends a message accepting the order, relying on § 145 of the German Civil Code (BGB), according to which an offeror is bound by his offer. The English car dealer relies on the general rule that offers are revocable, which is set out in English case law, and also on the "postal rule", according to which an offer can be revoked at any time up until the acceptance is dispatched.[2]

A variation on the above

An English jeweller orders a batch of watch mechanisms from a Swiss manufacturer. The Swiss manufacturer receives the order. Before he can send his acceptance, the English jeweller cancels his order. The manufacturer nevertheless gives the jeweller notice that he accepts the order, relying on Article 5 of the Swiss Code of Obligations, according to which an offeror is bound by his offer up until the moment that he could expect to receive a reply dispatched properly and in a timely fashion.[3]

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1 CLAUDE WITZ, "Plaidoyer pour un code européen des obligations", *Recueil Dalloz* 2000, Chroniques, p. 79 (81). Translation: If Europe is to be a real single market, should it not be the case that a contractual transaction between two companies on different sides of a border be as well marked out as a contract concluded between two companies in the same State?

2 For further discussion of § 145 BGB and the "postal rule", see above **Case 3**.

3 On Art. 5 of the Swiss Code of Obligations, see above, **Case 3**.