

TRANSFER OF OWNERSHIP IN INTERNATIONAL TRADE

SECOND EDITION

EDITED BY

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Wolters Kluwer
Law & Business



International Chamber of Commerce
The world business organization

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Introduction to the First Edition

Every day, thousands of consignments, goods and shipments are sold, packed, consolidated, shipped, stored and delivered. Since ancient times, this movement of goods has been the cornerstone of human wealth and even human development. What began as simple trade among neighbouring tribes has developed into a highly complex pattern of international trade. Considering the fact that every single trade transaction is, by its nature, affected by many different legal systems and involves a multitude of legal relations, it is surprising that international trade is regulated only to a very limited extent by international conventions. While in the early years of trade the law was, in many ways, harmonized in the form of a common understanding of trade custom often referred to as *lex mercatoria*, a number of national codes of law, famous since the turn of the eighteenth century, have, step by step, destroyed that harmony among the trading nations and substituted national rules often drafted from a very domestic perspective.

In the course of this development, the International Chamber of Commerce has, since the 1930s, been compiling a number of trade terms customarily used in international trade. This body of trade terms, Incoterms, supplements domestic principles and laws applicable to contracts of sale and, more recently, international sales conventions like the 1980 Vienna Convention. It is fair to say that today, thanks to both Incoterms and the Vienna Convention, a great number of legal issues relating to the international sales contracts have been satisfactory solved. However, both Incoterms and the Vienna Convention have expressly excluded any consideration of issues of ownership from their scope of application. One reason for this is that both the International Chamber of Commerce and the United Nations realized that issues of ownership, title, possession and other proprietary rights were far too complicated, and that national reservations regarding these issues were likely to prove too difficult an obstacle to the adoption of both sets of rules.

In the current legal environment, all traders, bankers and carriers involved in international shipping are, therefore, left with sometimes very complicated issues of conflict of laws and of substantive law principles in their search for a possible answer to questions related to ownership, possession or proprietary rights. International trade practitioners frequently need to identify when ownership passes from the seller to the buyer under a particular domestic law, particularly where insolvency strikes either the seller or the buyer.

The first extremely difficult question is to determine the *law applicable* to questions of ownership (conflict of law). Is it the law of the place of jurisdiction (the forum)? Is it the law of the contract governing the contract of sales? Is it the law in effect where the goods are situated? If the goods are moved, what then is the relevant place?

Once the applicable law has been determined, an equally difficult task is to establish the applicable principles of ownership provided for by the *substantive law*. In the absence of clear guidance by conventions and legal or practical publications covering this subject, the parties are often left either to guess the answer to questions of transfer of ownership or invest a substantial sum of money and effort in determining the applicable rules for the problem at stake.

In this context, it is worth noting that the United Nations Commission on International Trade Law (UNCITRAL), when working on the model law on electronic commerce, clearly recognized this obstacle:

Existing national laws and international conventions left significant gaps regarding issues such as the functioning of the bills of lading and seaway bills, the relation of those transport documents to the rights and obligations between the seller and the buyer of the goods and to the legal position of the entities that provided financing to a party to the contract of carriage. Some States had provisions on those issues, but the fact that those provisions were disparate and that many States lacked them constituted an obstacle to the free flow of goods and increased the cost of transactions. The growing use of electronic means of communication in the carriage of goods further aggravated the consequences of those fragmentary and disparate laws and also created the need for uniform provisions addressing the issues particular to the use of new technologies.

UNCITRAL meanwhile, along with the Comité Maritime International, has begun an extensive study on those issues, which hopefully will produce a set of principles possibly to be included in a harmonizing instrument of UNCITRAL. Until that time, however, and until those universal principles are effectively adopted and applied, the parties are left with the difficult task of determining both the applicable law and the substantive law for each particular question affected by ownership and possession of the goods sold in international trade transactions.

That is exactly where this book starts. A small group of members of the Commission on Commercial Practices of the International Chamber of Commerce has initiated research and established a detailed list of issues. This list of issues was designed to cover both the question of conflict of law and that of substantive law

for each issue. While the study starts out with the basic question of the transfer of ownership from the seller to the buyer, it then covers a number of ancillary issues, such as the role of transport documents, retention of title clauses, the right to stop the goods in transit, proprietary interests (e.g., liens) held by third parties, as well as other issues affected by the question of title. The study consists of nineteen contributions written by practitioners and scholars from countries representing the major trading nations around the world. The nineteen countries represent, of course, only a small part of the global picture, but it is hoped that further contributions will be added in the future to those covered in the current edition of this work. Each chapter has been structured in the same way, so that the reader can easily compare national solutions to the same question, and can thus proceed effectively to research a practical answer applicable to their own case.

The journey from the inception of the work by the Steering Committee to the completion of the manuscript has proven to be a long and sometimes arduous task for the Editorial Board (composed of Alexander von Ziegler as Chairman, Jette Ronøe, Charles Debattista, Odile Plégat-Kerrault), as well as for the authors of the various chapters. Labours by the Board were both shared jointly and divided severally. The structure of the chapters was thoroughly discussed and carefully designed collectively, as was the selection of jurisdictions and contributors. Each member of the Board then wrote the contribution for their own jurisdiction, namely the Swiss, Dutch, English and French chapters. These chapters were then used as models by contributors from allied jurisdictions, for which each member of the editorial board took editorial responsibility.

It is hoped that readers will find the enormous effort invested in this project in terms of preparation, authorship, editorship and harmonization of approach worthwhile. This book is the first comprehensive compilation on the subject of transfer of ownership in international trade, and will hopefully prove to be an efficient and practical tool for international trade practitioners in determining the applicable substantive answer to questions of ownership, possession and proprietary interests in international trade.

Dr Alexander von Ziegler (Chairman)
Jette Ronøe
Charles Debattista
Audile B.K.Plegat
February 1999

Introduction to the Second Edition

When the editors and publishers of the first edition of this book had completed the work in February 1999 they knew that, while they had achieved a major task in collecting nineteen chapters covering nineteen different jurisdictions on the legal aspects of Transfer of Ownership in International Trade, the real value of such a book would be in the reliability of the information contained in it. Law does develop over time and consequently books that are aimed at a practical use as the one at hand need regular update. Furthermore, already in the introduction to the first edition the editors noted that the intention was to amend the collection of jurisdiction over time and to add new chapters in future editions.

This led to the decision at Kluwer and within the group of editors to start the exercise of revising the existing chapters while seizing the chance to add new chapters to this book, covering new reports on national laws from new countries.

Sometimes it is easier to draft new chapters and new pieces of work than to review a text that has been written a decade ago. Therefore, much appreciation must be shown for all the contributors of the first edition who undertook to revise their chapters and update the references they made in the first edition. Some of the contributors of the first edition were unfortunately not able to undergo the process of the revision and, therefore, new contributors kindly have taken over this work in order to safeguard a full revision of all texts. Last but not least, the editors were able to convince an impressive number of new contributors to cover new jurisdictions (Chile, Finland, Brazil, India and Korea).

All those who have had the pleasure to be editor of a book that needed revision know that this exercise demands no less involvement and work than for the initial edition of a book. This is why the editorial board (composed of Alexander von Ziegler as chairman, Charles Debattista, Audile B.K.Plegat, Jesper Windahl) would like to thank all individuals who have made this possible: first of all, the many authors who showed a lot of enthusiasm and patience during this journey, as

Introduction to the Second Edition

well as Flavia Widmer and Jennifer Lavelle who assisted the editors in collecting and editing all contributions in time. The board of editors and the authors reiterate the hope expressed in the first edition, namely that the readers will find the enormous effort invested in this second edition worthwhile. All of us are very proud that this book has become a very successful tool in International Trade and will again offer a comprehensive report on the subject of Transfer of Ownership in International Trade.

Alexander von Ziegler (Chairman)
Charles Debattista
Audile B.K.Plegat
Jesper Windahl
April 2010

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