CHAPTER 31

Transfer of Property

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1 Introductory Remarks

In the context of the present book, the topic must be limited to contractual transfers of property, thus excluding statutory transfers (such as succession or merger). The economic importance and legal complexity of the contractual transfer of property are obvious: usually (although not always) it changes the attribution of an economic asset from one person or enterprise to another. Market economies depend upon such changes of attribution to facilitate the optimal use of assets by consumers and especially professional market participants.

In a market economy such transfers are effectuated voluntarily by both parties to the transaction; legally speaking, they are based upon a contract. Contractual transfers of property, therefore, are located at the cross-roads of contract and property, and this feature creates, as we will see, one of the major challenges for legal regulation.

A lawyer familiar only with the legal system of his home country may regard the contractual transfer of property as a relatively straight forward, if not simplistic topic; its central rules must be mastered by any first-year law student. A comparative survey, however, quickly reveals unanticipated difficulties: Not only do the basic rules differ profoundly between the various European countries, but it also becomes apparent that a considerable number of subsidiary rules have to be taken into account in order to obtain a true and complete picture.

These legal complexities justify one further limitation of this study: It will be restricted to the transfer of property in corporeal movables, thus excluding transfers of immovables as well as transfers of intangibles, such as the assignment of monetary claims (or debts). While in these areas essentially the same issues arise, the answers differ due to the different subject matters involved.

2 Three Issues

A brief comparative survey of the basic rules on the transfer of property reveals a disquieting variety of diverging basic principles in most European countries. An exception must be made for the four Scandinavian countries where, perhaps due to the lack of relevant legislation, writers and courts limit themselves to discuss only specific practical issues.[1] The weight and practical relevance of the different principles is best exposed if they are examined in the light of the three basic issues involved in the transfer of property.[2]

The first and most basic dichotomy exists as to the fundamental requirements that must be fulfilled in order to transfer property. Does property pass from the transferor to the transferee by mere consent of the parties; or is, in addition to such consent, delivery of the object of the transfer required? This basic alternative is usually reduced to a choice between two basic legal principles, that of consent and that of delivery. Many authors regard this dichotomy as the only issue in the field.[3] However, the dichotomy is neither correctly stated nor is it exhaustive.

The second issue is whether the necessary consent resides in, or is to be derived from, the primary contractual relationship between the parties, for example a contract of sale. The alternative is an additional, or secondary, agreement between the parties for the sole purpose of determining whether a delivery transfers title or merely possession (or any other limited right) to the transferee. The first solution may be called the principle of unity, the second the principle of separation. Since the requirement of an additional agreement relates to proprietary aspects of the transaction, it may be called a 'real agreement'.[4] Whether such an additional agreement is required, depends upon the applicable law. This may provide that already the underlying agreement, e.g. a contract of sale ex *lege* transfers property to the buyer. Conversely, it may merely establish an obligation of the seller to transfer property. In this case, a second agreement may be necessary to ensure the performance of the seller's obligation.

A third issue arises in the countries which separate the underlying contract and the transfer of property: What is the relationship between the two contracts? In particular, does the invalidity of the underlying contract automatically invalidate the agreement to transfer property? Or does the latter, in general, stand on its own feet? The first solution is designated as the principle of causality, while the second expresses a principle of abstraction.

It would be treacherous and misleading if comparison was confined only to the exposition, juxtaposition and evaluation of these lofty principles. Rather, a sober analysis and appreciation of the basic three principles requires that for each of them a certain number of subsidiary and complementary rules be taken into account.

In dealing with these issues, the legal systems of the member states of the EU – as far as they are linguistically accessible – and, above all, the rules laid down in the DCFR Book VIII on the Acquisition (and loss) of ownership of goods (2009) will be duly taken into account.

3 Consent or Consent and Delivery

3.1 The Principle of Consent

3. 1. 1 The Principle

According to the original version of the principle of consent, property passes from the transferor to the transferee automatically upon the conclusion of any contract between those parties implying such transfer of property, especially a contract of sale.

This solution originates in the French Civil Code of 1804. Here it is still today spelt out expressly and consistently in various provisions, both in the law of property (Art. 711 *Code civil:* 'La propriété des biens s'acquiert et se transmet ... par l'effet des obligations') and in the law of contracts: for contracts to give in general (Art. 1138 *Code civil)*[5] as well as for

[1] Cf. Martinson, How Swedish Lawyers Think about 'Ownership' and 'Transfer of Ownership' - ….: Faber/Lurger (ed.), *Rules* 69 – 95.

[2] A similar exposition of the issues is offered by Sacco (1981), pp. 252, 258.

[3] Cf., e.g., Waelbroeck (1961), p. 15; the Swiss thesis by Röthlisberger (1982) is expressly devoted to a discussion of these two principles.

[4] *Dingliche* Einigung in German.

[5] L'obligation de livrer la chose est parfaite par le seul consentement des parties contractantes. - Elle rend le créancier propriétaire et.... encore que la tradition n'en ait point été faite, …'

contracts of sale (Art. 1583 *Code civil*)[6] and an accepted promise of a gift (Art. 938 *Code civil).*[7] These last three provisions expressly state that the passing of property occurs even if the asset has not been delivered.

Belgium and Luxembourg, having preserved the French Civil Code, retain the French solution. Italy and – following it – Portugal have adopted the same approach.[8]

The codification of sales in English law has taken – in deviation from the common law – the same course, although in a more differentiated way. The English Sale of Goods Act of 1979[7] distinguishes between absolute and conditional contracts of sale (s. 2 (3)). An absolute contract of sale is a 'sale' 'by which the seller transfers ... the property in goods to the buyer' (s. 2 (4) and (1)). By contrast, a conditional contract of sale is an agreement to sell by which the seller 'agrees to transfer the property in goods to the buyer' at a future time or subject to some condition.[9] The decisive criterion is the intention of the parties (s. 17). Where the intention of the parties is lacking a number of presumptions fill the gap. The most important is that laid down in section 18 Rule 1 under which, in an unconditional contract, the property passes at the time the contract is made!

This new, second branch of the basic rule had already in 1935 in France been anticipated by the Cour de cassation when it recognised a retention of ownership-clause in a sales contract.[10] Also Italy and Portugal adopted this extension of the basic rule.[11]

These developments demonstrate that the original French rule had been restricted to a very limited phenomenon, i.e. the present sale of a specific good.

3.1.2 Qualifications

The transfer of property *solo consensu* is subject to some restrictions and qualifications. These must be taken into account in assessing the true scope of the principle of consent.

a. Generic and future goods

As mentioned before, transfer of property by consent is effective only with respect to specific, presently existing goods.[12] Property in generic goods passes to the transferee only after they have been appropriated to the contract.[13] Where in contracts of sale the goods are transported to the buyer by an independent carrier, appropriation usually takes place upon delivery to the carrier;[14] this is usually regarded as delivery of possession to the buyer. Similar rules have been developed for the transfer of property in future goods.[15]

b. Effects inter partes

The transfer of property by mere consent has full effects between the parties. This is clearly stated for French sales law[16] and results indirectly from the text of the English SGA 1979.[17] However, the situation is quite different with respect to third parties.

c. Effects vis-a-vis third persons

The provisions and rules which govern the transfer of property by mere consent and without delivery in the relationship between seller and buyer[18] obviously imply that such transfer of property may not have to be fully effective *vis-à-vis* third persons. And this indeed is the case, as will be demonstrated. Today, all French writers distinguish between the effects of the transfer of property between the parties and its effects *(opposabilité) vis-à-vis* third persons.[19] We shall discuss seriatim dispositions by the seller in possession of sold goods and by the

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6 '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 convenue de la chose et du prix, quoique la chose n'ait pas encore été livrée ni le prix payé.'

7 'La donation dûment acceptée sera parfaite par le seul consentement des parties; et la propriété des objets données sera transférée au donataire, sans qu'il soit besoin d'autre tradition.'

8 Italian CC art. 1376; Portuguese CC artt. 1317 lit. a), 408 (1).

9 Statutes 1979 c. 54, as amended by Amendment Acts of 1994 (c. 32) and 1995 (c. 28).

10 Cass.civ. 28 June 1935, D.H. 1935, 414.

11 Italian CC art. 1523 ss.; Portuguese CC art. 409 (1).

12 Supra 3.1.1.

13 Elaborate provisions in English Sale of Goods Act 1979 s. 16 and 18 Rule 5; Art. 1378 first sentence Italian CC; Art. 408 (2) first half-sentence Portuguese CC. For France, Ghestin/Desché (1990), no. 544.

14 English Sale of Goods Act 1979 s. 18 Rule 5 (2) and Italian CC Art. 1378 sent. 2. For France, see Ghestin/Desché (2006), no. 547.

15 Benjamin (Guest) (1997), no. 5-090; Ghestin/Desché (1990), no. 550; cf. Art. 1472 Italian CC and Art. 408 (2) second half-sentence Portuguese CC.

16 Art. 1583 Cc, quoted supra n. 5. Cf. Ghestin/Desché (1990), no. 530-531.

17 Sale of Goods Act ss. 16-20 are placed under the title 'Transfer of Property as between Seller and Buyer'.

18 Supra 3.1.1.

19 Cf. Ghestin/Desché (1990), no. 530-542; references in no. 531 n. 21.

non-possessing buyer as well as the effects of the transfer of property in the event of the seller's or the buyer's insolvency.

1. Dispositions by seller in possession

Both in England and in France dispositions by the seller in possession to a second buyer are under certain circumstances regarded as effective although the seller is no longer the owner. The second buyer prevails if two conditions are met: firstly, the asset must have been delivered to him, and secondly, he must have been 'in good faith and without notice of the previous sale'.[20] The same rule prevails in Italy.[21]

2. Dispositions by non-possessing buyer

The non-possessing buyer disposes as owner and can therefore transfer property to his sub-buyer but, of course, not possession. Consequently, the original seller's rights visà-vis the first buyer remain effective also vis-à-vis the second buyer. The original seller remains entitled to possession according to the terms of the original contract.

In addition, both English and French law grant to an unpaid seller a right of retention - a lien - and a right of stoppage.[22] These rights are not affected by the first buyer's dispositions.[23] In England, the seller may in the exercise of his rights resell the goods; the second buyer will acquire 'a good title to them as against the original buyer.'[24]

3. Seller's insolvency

Both in England and France, the non-possessing buyer, as the owner, may claim his purchased goods in the seller's insolvency.[25] However, if the seller is still unpaid at the time of insolvency, his right of retention prevails.[26]

4. Buyer's insolvency

English and French sales law again agree. Against a buyer's claim for delivery of goods, based upon his ownership, an unpaid seller in possession may invoke his lien or right of retention and even resell the goods. The second buyer will acquire property in them, even as against the first buyer.[27]

3.1.3 Summary

The non-possessing buyer's position is inferior in case of dispositions by a possessing seller, unless the second buyer is mala fide. In the seller's insolvency the buyer cannot claim the goods if he has not yet paid the seller; the latter may then effectively sell the unpaid asset to a second buyer. The same is true if the buyer disposes of his property to a sub-buyer. In the buyer's insolvency, the unpaid seller may resist a claim for delivery by invoking his right of retention and effectively transfer the buyer's goods to a second buyer.

The buyer's position is markedly improved only after the goods are delivered to him. Effective dispositions by the seller/transferor are then precluded, so that the buyer/transferee is no longer exposed to the risk of losing his property by such transactions.

In essence, under the original version of the principle of consent, transfer of property takes place in two stages: by mere consent, without delivery, a right of property with limited effects *vis-à-vis* third persons is transferred. This diminished right of property becomes fully effective only upon delivery of the assets to the transferee. These complications and risks can largely be avoided if the parties delay the passing of property until delivery of the bought assets to the buyer.

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[20] For sales English Sale of Goods Act 1979 s. 24; the provision explains the result by a fictitious authorisation of the seller 'by the owner of the goods'. In France the general rule of Art. 1141 CC applies; cf. for a clarifying interpretation Ghestin/Desché (1990), no. 540.

[21] Art. 1155 Italian CC.

[22] English Sale of Goods Act 1979 s. 39-44. In France, the seller in possession has, until payment, a right to retain the goods sold, Art. 1612 Cc.

[23] Sale of Goods Act 1979 s. 47 (1).

[24] Sale of Goods Act 1979 s. 48 (2).

[25] England: Atiyah/Adams/MacQueen (2001), p. 311; Benjamin (Guest) (2006), no. 5-005. France: Derruppé (1988), no. 251 -323. This rule is in keeping with the rule set out supra no. 1.

[26] The holder of a lien is a 'secured creditor', see Insolvency Act 1986 (c. 45), s. 383 (2).

[27] England: Sale of Goods Act 1979 s. 41 (1) (c) and 48 (2) ; cf. Benjamin (Guest) (2006), no. 5-005 and Atiyah/Adams/MacQueen (2001), p. 310; France: cf. Law no. 85-98 on reorganisation and judicial liquidation of enterprises (Loi *no. 85-98 relative au redressement et à la liquidation judiciaire des entreprises)* of 25 January 1985 (JO 26 January, p. 1097) Arts. 116, 118-119.

English and French authors have criticized this two-step system on theoretical grounds since the idea of mere *inter-partes* effects of property contravenes the basic general notion of property as being effective against everybody.[28] In its practical operation it is rather complicated in contrast to the simpler Roman law system of consent and delivery.[29] In France, but not in England, the parties' consent is of relatively small importance.[30] In fact, property passes *ex lege,* not *ex contractu;* in this respect, the principle of consent is a misnomer (cf. infra 4). Probably the most devastating criticism has been expressed by a leading Belgian author; De Page summarizes his critique in the recommendation: 'On renoncera à l'effet translatif des contrats, qui n'est qu'un non-sens, un nid à difficultés, et que la plupart des législations contemporaines eurent la sagesse de ne pas emprunter au Code civil français.'[31]

3.2 The Principle of Delivery and Consent

3.2.1 The Principle

The second main principle for transferring property seems to build upon the principle of consent by adding a second requirement, that of delivery or transfer of possession. In fact, however, the principle of delivery emphasizes delivery of the asset to the transferee which must be accompanied by consent of the parties as to the transfer of property.

This principle originates from Roman law which demanded titulus and modus. Several European countries still follow this system, especially Austria[32] (where even the Latin terms titulus and modus (adquirendi) are still current), Germany and Greece,[33] the Netherlands,[34] Spain[35] and Scotland.[36] In the first four countries the code provisions are in very similar terms. They all mention first delivery (or transfer) to the transferee and only thereafter some of them deal with consent of the parties as to the passing of property.

This sequence is not accidental. Delivery has indeed primary importance. But delivery (or transfer of possession) is in itself ambiguous since the parties may pursue varying purposes; in particular, it may or may not coincide with an intention of the parties to transfer property. Recourse to the intention of the parties therefore is necessary to determine the purpose of a delivery.

3.2.2 Refinements and Qualifications

The principle of delivery and consent is, like its antipode, subject to certain exceptions and qualifications regarding the requirement of delivery. Some of these are more in the nature of refinements, others are genuine qualifications.

a. Asset held by transferee
A refinement is involved where the asset to be delivered is already held by the transferee. Since in this case delivery is superfluous all codes agree that the parties' consent as to the passing of property suffices (brevi manu traditio).[37]

b. Asset held by third person
Somewhat more complicated rules have been developed for situations in which the asset to be transferred is in the custody of a third person, e.g. a warehouseman. Formally, two different techniques are used, either an assignment of the transferor's claim for return of the asset or an agreement between transferor and transferee.

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28 Atiyah /Adams/MacQueen (2001), p. 309.
29 Ghestin/Desché (1990), no. 542.
30 For France Ghestin/Desché (1990), no. 542.
31 De Page (1942), p. 86. References supporting the three main objections are omitted.
32 Austrian Civil Code §§ 425-427; broad explication by Faber, *Austria* in Faber/Lurger, *National Reports* 72 ss.
33 § 428 sent. 2 Austrian Civil Code; § 929 sent. 1 BGB provides: The transfer of property in a movable thing requires that the owner transfers the thing to the transferee and that both agree that property is to pass. Art. 1034 Greek Civil Code adopts this German provision almost literally.
34 In the Dutch New Civil Code book 3 which entered into force on 1 January 1992, Art. 3:84 par. 1 consecrates the principle of delivery as follows: 'Transfer of property of an asset requires delivery pursuant to a valid title by the person who has the right to dispose of the asset.' The term 'asset' *(goed)* comprises both things and patrimonial rights (Art. 3:1). Cf. also Art. 3:90.
35 Cf. Spanish Civil Code art. 1473 par. 1.
36 Walker (1989), pp. 418 ff. Scots law basically still follows Roman law, except insofar as English statutes are applicable. This exception is true with respect to sales law since the English Sale of Goods Acts extend to Scotland.
37 § 929 sent. 2 BGB; Art. 976 sent. 2 Greek Civil Code; Art. 3:115 lett. b Dutch Civil Code.

German law takes recourse to assignment: the transferor must assign his claim against the third party possessor for return of the asset.[38] The claim to be assigned is the contractual claim for return of the asset which arises from the contractual relationshiop between the transferor and, for example, his warehouseman.[39]

Dutch law adopts a different approach. In the Netherlands, transferor and transferee must agree that the holder of the asset shall henceforth hold it for the transferee and the holder must be notified accordingly or, alternatively, he must acknowledge the transfer.[40]

In essence, the two solutions coincide. An agreement between transferor and transferee that the third person shall henceforth hold the asset for the transferee would in Germany be regarded as an implied assignment.[41] In Germany the validity of an assignment does not depend upon notification of the debtor.[42] Notification is, however, advisable for the protection of the transferee since otherwise the holder may be discharged by returning the assets to the transferor.

c. Seller in possession

Frequently, the seller remains the holder of the assets even though he has transferred property in them; this is especially so if a security transfer of property is involved.[43]

Germany and the Netherlands essentially agree that in this situation physical delivery should be replaced by a legal act, i.e. an agreement between transferor and transferee (*constitutum possessorium*). However, the contents of this agreement is in dispute. Germany and Greece require that the transferor's continued holding of the assets must be based upon a specific legal relationship.[44] In practice, usually a gratutious loan for use is concluded.[45] However, this requirement has degenerated into an empty formality. Therefore, the Dutch solution requiring merely a contractual clause acknowledging that the transferor holds in future for the transferee[46] is a sensible improvement.

'Constructive' delivery by agreement between a seller remaining in possession (or becoming a holder) and the non-possessing buyer creates a situation which resembles that existing under the system of consent when the seller remains in possession:[47] Property and possession (or retention) of the assets are separated, the buyer being a 'naked' owner and the seller still holding the assets.

Austria, Germany and the Netherlands restrict the protection of the buyer's property. In the first place, a third person to whom the seller transfers may acquire property, provided factual delivery has been made to the third person and the latter, in good faith, regards his transferor as the owner.[48] This corresponds to the rule laid down for the same situation by the countries following the principle of consent.[49] A similar rule applies in the Netherlands to a double transfer of future assets.[50]

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3.3 Evaluation

Having presented the two competing principles of transfer of property by mere agreement on the one hand, and by delivery plus agreement on the other, an evaluation of, and choice between them remains to be made. This evaluation can be short since the merits and demerits of both principles have already become reasonably clear.

1. A first major disadvantage of the principle of consent in its original narrow version is that it cannot be directly applied to the greater part of modern commercial transactions

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38 § 931 BGB.

39 Baur/Stürner (2009), pp. 654–656. A somewhat different solution results where the present holder of the asset is unknown, e.g. upon theft, ibidem at pp. 655-656.

40 Art. 3:115 litt. c Dutch Civil Code (1992).

41 Baur/Stürner (2009), p. 656.

42 § 398 BGB, Art. 455 Greek Civil Code.

43 Cf. infra ch. 32 sub 3.5.2. Art. 3:84 par. 3 Dutch Civil Code now expressly declares such security transfers to be invalid. In the present context, the security aspects of such transfers are not discussed.

44 § 930 BGB, Art. 977 Greek Civil Code.

45 Cf. Baur/Stürner (2009), p. 646.

46 Art. 3:115 litt. a Dutch Civil Code.

47 See supra 3.1.2 sub 1.

48 § 430 Austrian Civil Code; §§ 930, 933 BGB; Arts. 3:86 par. 1, 3:90 par. 2 Dutch Civil Code.

49 Cf. supra 3.1.2 sub c 1.

50 Art. 3:97 par. 2 Dutch Civil Code.

involving transfer of property. Subsidiary rules are needed to apply the principle to transfers of generic goods and of future goods.[51]

2. Its limited effects create a second major disadvantage. Primarily, the principle of consent governs the legal situation between transferor and transferee. *Inter partes*, however, the terms of their underlying contract and the supplementary general rules of contract law provide the relevant regulation.
   By contrast, the relationship vis-à-vis third persons, be they transferees from, or creditors of one of the parties, is influenced by several rules which negate the transfer of property effected by virtue of the contract. In this respect, the principle of consent is a treacherous rule since it 'promises' more than it can fulfill.
3. From a dogmatic point of view, to differentiate between a contract's proprietary effects *inter partes* and as against third persons is not only complicated; it also conflicts with the basic principle of property law that real rights have effects *erga omnes*.
4. The scepticism against the principle of consent is confirmed by highly critical voices from countries that have adopted this system and have worked with it.
5. On all the foregoing three substantive aspects, the competing principle of delivery and consent furnishes solutions which can be derived directly from the principle, except where substitute forms of delivery are being used. The principle of delivery is therefore, on the whole, clearer and much less subject to exceptions. It preserves the unitary concept of property since it need not distinguish between the effects of a transfer of property *inter partes* and *erga omnes*.
6. For these practical and theoretical reasons, a European Civil Code should make the transfer of property subject to delivery of the asset to the transferee and to an accompanying agreement of the parties on the passing of property.[52]
7. If a uniform provision on passing of property upon delivery and consent would be adopted, the countries currently applying the principle of consent will have to examine whether adaptations of subsidiary rules which are based upon the consent principle become necessary.[53]

4 A Special Agreement on the Transfer of Property?

The second aspect of transfer of property by virtue of or according to a contract is also controversial between the European countries. In some countries, the law itself expressly provides for the passing of property upon the conclusion of a contract implying such transfer, such as a contract of sale, for work or of gift, etc. Other countries demand an additional term or agreement providing for the transfer of property, i.e. a 'real' agreement.[54] The alternative approaches may be epitomized by the catchwords of unitary or double consent.

This issue seems to be closely related to the preceding dichotomy with respect to the transfer of property by mere consent or by delivery accompanied by consent (supra 3). This link provides a convenient scheme for the following survey.

4.1 Delivery and Consent

Austria, Germany and the Netherlands, the three major representatives of the principle of delivery plus consent, clearly separate the contractual agreement providing for the transfer of property from the 'real agreement' which is necessary (in addition to delivery) to effectuate the transfer. The major reason justifying this separation is the fact that under neither of the three legal systems does a contract of sale ex *lege* pass property to the buyer - as under Anglo-French law - not even upon delivery of the purchased goods. Rather, the seller is expressly obliged to transfer property[55] and he must act in order to fulfil this obligation.

In Germany, the 'real agreement' of the parties is required for any disposition of proprietary rights and is therefore regulated in Book 3 of the Civil Code governing property.[56] The required content of the 'real agreement' for the transfer of property in movables is fixed by §

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[51] This objection is regarded as decisive by von Caemmerer (1938/39), pp. 689-693.
[52] The same conclusion was reached earlier by Waelbroeck (l961), pp. 166-172; and more recently by Ferrari (1993), pp. 77, 78.
[53] Some considerations in Waelbroeck (1961), pp. 172-181.
[54] On this term, cf. supra 2 at n. 4.
[55] § 1053 Austrian Civil Code; § 433 par. 1 BGB; Art. 7:9 par. 1 first sentence Dutch Civil Code.
[56] §§ 873, 877 BGB in general, § 925 BGB for transfer of property in immovables, § 929 BGB for that in movables; cf. also in Book 2 on obligations, § 398 BGB for assignment of claims and other rights.

929 BGB (first sentence): The transferor as owner must agree with the transferee 'that property is to pass'. This agreement is regarded by the relevant rules as an appendix to the necessary delivery. In fact, the 'real agreement' must exist at the time of delivery.[57]

Notionally, the 'real agreement' is separate from the underlying contract of the parties which provides for transfer of property, although in fact it may be contained in one of the terms of that contract. But the contract as such (merely) creates obligations of the parties; insofar as the transferor obliges himself to transfer property to the transferee, this promise must be performed by delivering the promised asset with the intention of transferring property to the transferee and the latter must accept this intention.

Three elements of the 'real agreement' clearly indicate that it is distinct from the parties' underlying contractual agreement. Firstly, the Civil Code differentiates between the terms 'real agreement' *(Einigung)* and contract *(Vertrag).* Secondly, the 'real agreement' is regulated in Book 3 on property. Thirdly, until delivery the 'real agreement' is revocable by either party.[58] An illustration: the courts have held and most writers agree, that a seller who has contracted to sell and transfer property unconditionally may upon delivery reserve his property, that is to say that he may make his transfer of property to the buyer subject to the condition of being paid by the latter.[59]

Dutch law is much less explicit than the German Civil Code. The Dutch New Civil Code merely requires 'delivery pursuant to a valid title' (Art. 3:84 par. 1 BW). 'Title' is understood as being the legal ground for a delivery which is usually an obligation of the transferor.[60] Although not expressly mentioned in the New Civil Code, important writers regard a ‘real agreement’ as the central element of 'delivery'.[61] However, there are also strong opponents to this idea.[62]

4.2 ‘Consent’ Only

In England and France, the idea of a special 'real agreement' is virtually unknown;[63] this is easily explicable. Both countries expressly provide that, as a rule and unless otherwise agreed, property passes to the buyer by virtue of the conclusion of a contract of sale.[64] An additional 'real agreement', therefore, is usually unnecessary. Nor is, in this context, the consent which has been raised to the rank of a principle specifically directed at the passing of property. It merely refers in a general way to the underlying contract of sale.

Within that Anglo-French approach, agreements of the parties as to the passing of property are, however, necessary if the parties wish to deviate from the legal scheme. The most important situation is, of course, to defer the transfer of property until payment of the purchase price (or other claims of the seller). The English Sale of Goods Act 1979 distinguishes between present sales and conditional contracts of sale where the seller 'agrees to transfer the property in goods to the buyer' at a future time or subject to a condition.[65] In substance, such clauses could be regarded as 'real agreements'.

4.3 Preliminary Conclusion

This brief comparative overview shows primarily that the ‘real’ agreement is recognised in those countries which require for the passing of property delivery in addition to consent (supra 4.1). While normally the ‘real’ agreement accompanies and specifies delivery, it may replace the latter where, exceptionally, physical transfer is not required (supra 3.2.2 sub a). Conversely, in those countries in which property passes by mere consent the latter is found

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57 Baur/Stürner (2009), pp. 638–640.

58 Baur/Stürner (2009), *ibidem*.

59 BGH 9 July 1975, *BGHZ* 64, 395, 397 with references; cf. also BGH 14 November 1977, NJW 1978, 696. The courts demand, however, an unambiguous declaration at the latest at the time of delivery; in the two cases these requirements were not met.

60 Asser(-Mijnssen/de Haan) (2001), no. 239.

61 See, inter alia, Asser (-Mijnssen/de Haan) (2006), no.s 206-207 and Snijders/Rank-Berenschot (2007) no.s 325-328, both with extensive discussion of other views; Hartkamp (1990), no. 91 who reasons that the necessity of separate delivery implies that of a 'real agreement'.

62 See especially Vriesendorp (1985), pp. 9-31; Den Dulk (1979); skeptical Pitlo (Reehuis/Heisterkamp) (2006), no.s 131-134.

63 Atiyah/Adams/MacQueen (2001), p. 35 remark on a sale, invoking English Sale of Goods Act 1979 s. 2 (1), that the contract suffices to transfer the property in the goods, i.e. it may 'operate both as a conveyance and a contract'. But this observation is not further pursued.

64 Cf. supra 3.1.1.

65 Sale of Goods Act s. 2 (4) and (1) on the one hand and s. 2 (3), (5) and (1) on the other; cf. supra 3. 1.1 *in fine.*

exclusively in the underlying contract (supra 4.2). While this fully explains the present sale of specific goods, the contractual basis for appropriating generic and future goods to the contract is open. A final and difficult point is the relationship between the ‘real’ agreement and the underlying contract (infra 5).

5 Relationship Between Contract and 'Real Agreement'

5.1 The Issue

For those countries which - like Austria, Germany and the Netherlands - distinguish between the underlying (e.g., sales) contract and an additional 'real agreement' transferring property to the buyer (*supra* 4), a further issue arises: what is the relationship between the underlying contract and the 'real agreement'? In particular: Does any initial or subsequent invalidity of one of the agreements also affect the other?

The answer is obvious for an invalidity which affects the 'real agreement' only. Such a defect prevents the purported performance of the seller's obligation to pass property to the buyer. But his obligation as such arising from the underlying contract of sale is not affected. The seller remains obliged to perform the contract and must make a new attempt at transferring property or else he will be charged with the consequences of his non-performance.

The matter is quite controversial in the reverse situation where only the underlying contract is affected by an initial or a subsequent invalidity. Does such an invalidity extend to the 'real agreement' which, after all, is but a collateral contract? On this point, Austrian and Dutch law, on the one hand, and German law, on the other hand, adopt two opposite solutions. Under the first, the validity of the 'real' agreement is made dependent upon the legal fate of the underlying contract as its causa (doctrine of causality); under the second, the validity of the 'real agreement' is determined independently (doctrine of abstraction).

5.2 The 'Causal' Real Agreement

In Austria and the Netherlands, the validity of the transfer and therefore also of the 'real agreement' accompanying it, depend upon the validity of the underlying contract. In the Netherlands, this is clearly spelt out by the relevant provision which demands 'delivery pursuant to a valid title'.[66] This 'causal' nature of the 'real' agreement is also unanimously accepted in Dutch literature.

The 'real' agreement has mainly a supplementary function. It is meant to execute that term of the underlying contract which fixes the proprietary effects agreed upon, e.g. whether a transfer of property should be unconditional or subject to a specific condition. It only differs as to its effects, since these are proprietary and not contractual. While the ‘real’ agreement usuallly is implied, except where the Civil Code expressly provides for it,[67] deviations are possible, although they will be rare.[68]

5.3 The 'Abstract' Real Agreement

In contrast, the German 'real agreement' is, in principle, independent of the underlying contract. Its existence and validity, and therefore also the validity of the transfer to the transferee, do not depend upon the prior or continuing existence of an underlying contract or its validity. This is not expressly spelt out by the Civil Code but is implied and is the unanimous view of both writers and the courts.[69]

The principle of abstraction may well be regarded as a general feature of German law since it permeates several fields of law. It applies to all transfers of full or limited rights in things, claims and rights. Also, the rules on representation clearly separate an agent's authority vis-a-vis third persons from the contract of agency which determines his relationship with the principal. The general idea which inspires all rules distinguishing between two related legal relationships and insulating one from the other is the desire to protect third persons from the impact of possible defects existing in an underlying primary relationship.

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66 *Levering krachtens geldige titel*, Art. 3:4 par. 1 BW. Full quotation of English version supra n. 34.

67 Thus, immovables are transferred by a notarial deed of the parties aiming at transfer which must be registered, Art. 3:89 par. 1 BW.

68 On the practical relevance, cf. Snijders/Rank-Berenschot (2007), no. 328.

69 Baur/Stürner (2009), pp. 55-59 with many references.

This purpose of the idea of abstraction can be discerned in its historical development. The German *jus commune* adopted the old Roman law principle of *Nemo dat quod non habet.* In order to mitigate the negative effects of this rule on legal transactions involving the transfer of goods, the theory of the 'real' agreement was developed by von Savigny in the middle of the 19th century.

Its function was to insulate the transfer of a proprietary right to the transferee from possible defects (such as illegality, avoidance for mistake or non-observance of a formal requirement) affecting the underlying transaction. True, as between the parties the transferee would be obliged to re-transfer the asset received since he was unjustly enriched. But with respect to third persons (especially sub-transferees and creditors) the first transferee retained the property until re-transfer to the original transferor. Consequently, he was able to pass good title to a sub-transferee and his creditors could satisfy themselves from these assets.

On the other hand, the protection of the interest of transferees and sub-transferees is unavoidably at the expense of the transferor. Therefore, in order to achieve a proper balancing of the interests of all parties involved, in practice certain rules were developed which in effect limit the scope of the principle of abstraction. Firstly, a defect (an illegality or immorality, a deceit or threat) may affect not only the underlying contract but also its performance; secondly, the parties may make the validity of the proprietary transfer dependent upon the validity of the underlying contract; or perhaps thirdly, the invalidity of the underlying contract may indirectly affect the proprietary transfer if the latter cannot survive separately.[70] However, these three doctrines are applied with circumspection since the principle of abstraction must not be overturned.

5.4 Equivalent Protection Against Contractual Defects?

How do legal systems that do not have a counterpart to the German ‘abstract’ real agreement protect transferees from defects of a contractual transfer of property? This issue arises not only for the Netherlands which expressly demand ‘delivery pursuant to a *valid* title’ (supra 5.2) but also for France and England where transfer of property is based solely upon consent (supra 3.1) which also implies valid consent.

In all three countries, the most important remedy is the protection granted to good faith transferees. However, the details of this protection differ very considerably. Only the more important traits can be mentioned in the present context.

Strangely, England has embraced the Roman law principle of *Nemo dat quod non habet* more strictly than most of the Continental countries.[71] Apart from consent of or estoppel by the owner with respect to a sale conducted by another person, only sales by a mercantile agent acting for the owner convey a good title.[72]

The French Civil Code’s art. 2279 (1) establishes a very broad general principle: ‘For movables, possessionn means title.’[73] Case law understands this provision as meaning that a person who is full possessor must have believed in good faith to have acquired these assets from the true owner.[74] Both the English and the French provision apply only to tangible movables since the transferor’s possession of the sold goods justifies the good faith belief of the transferor being the owner.

The Dutch rules are most recent, far-reaching and differentiated. They apply primarily to tangible assets if these have been acquired for consideration; if the assets had been lost or stolen, the owner may in general reclaim the goods during three years.[75] Another provision extends protection of good faith acquisition to some other tangible assets and even claims.[76]

If one compares these various provisions on the protection of the good faith transferee with the German abstract ‘real’ agreement, it is obvious that the protection afforded by the latter goes further: First, since the abstract ‘real’ agreement protects sub-transferees even in the absence of good faith. Secondly, the abstract 'real' contract in effect provides general protection to the transferee's (and the sub-transferee's) creditors - an advantage not available under the general rules.[77] On the other hand, the abstract ‘real’ agreement is subject to certain

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[70] Baur/Stürner (2009), pp. 59-62 with examples from case law.
[71] Sale of Goods Act 1979 s. 21 (1).
[72] For details, cf. Atiyah/Adams/MacQueen (2001), pp. 368-414.
[73] En fait de meubles, possession vaut titre.
[74] Cass.civ. 23 March 1965, *Bull.civ*. 1965 part I no. 206; Cass.civ. 4 Jan. 1972, *ibidem* 1972 part I no. 4.
[75] Dutch Civil Code art. 3:86; the goods cannot be reclaimed from a consumer who had purchased the goods in business premises.
[76] Dutch Civil Code art. 3:88.
[77] See especially Kegel (1977), pp. 57-86, cf. also Ferrari (1993), pp. 65-66.

exceptions, the precise contours of which are not yet entirely clear.[78] Some prominent German writers conclude that the abstract 'real' agreement should be abandoned as a general principle of property law.[79] On the other hand, a recent comparative monography has strongly defended the principle of abstraction.[80]

5.5 Conclusions

1. Most European countries do not know the intricate institution of an 'abstract' real agreement. Undoubtedly, however this ‘institution’ fulfills the useful practical function of insulating a disposition of property rights from defects of the underlying contractual relationship. It is true that this protection of the transferee (and of subsequent transferors and transferees) is achieved at the expense of the original transferor. However, in the context of a European internal market the transferor must be regarded as the person who generally is, or at least ought to be, more familiar with the legal situation and risks of a disposition over his assets than the transferee. Moreover, the basic idea of insulating certain transactions, such as negotiable instruments, from objections derived from an underlying contract, is familiar to all European legal systems. Therefore, serious consideration should be given to adopting the idea of insulating the validity of proprietary dispositions from defects of the underlying contractual relationship between transferor and transferee, unless the parties otherwise agree or a defect affects also the proprietary disposition.

Such a solution also appears to be more adequate for a common market with a multitude of national legal systems and commercial actors (persons and companies) that are subject to differing national legal systems. In such a market, the legal security of transactions requires to insulate their validity from differing personal or corporate restrictions of transferors potentially located in distant, physically, linguistically or at least hardly accessible rules on incapacities or restrictions.

2. An alternative avenue would be recourse to the familiar institution of protecting acquisitions made in good faith, as demonstrated by the rules prevailing in England, France and the Netherlands. However, these rules, in their present form, would only partially be equivalent to the more general protection achieved by the principle of abstraction. First, the scope of application of these rules varies considerably. It is very narrow in England, though broader in France; in both countries, however, it is limited to dispositions over tangible property. Broader and more sophisticated are the Dutch provisions of 1992; in particular, they extend to dispositions over accounts receivables, an asset of growing commercial importance for which a high degree of negotiability is desirable.
3. In the light of the preceding considerations it does not yet seem to be possible to submit a definitive proposal for a rule to be adopted by a future European Civil Code. In the light of the presently existing national provisions and rules, the present author has a preference for the solution sketched sub 1) since it most effectively protects the first transferee and successive transferors and transferees.

6. Common Frame of Reference Book VIII

6.1. Introduction

In view of the very considerable split of opinion and practice between the European countries, as exposed in preceding sections 2 – 5, the treatment of the issue in the Common Frame of Reference (CFR) is of particular interest. Therefore the proposals of Book VIII CFR dealing with “Transfer of ownership” deserve careful attention. While at the time of this writing, the full text with Comments and National Notes is not yet available, the publication of certain by-products of the preliminary research is witness of the great circumspection and enormous preparatory work undertaken by the authors of Book VIII.[81] Since it is not possible to deal with all the proposals, those relating specifically to the points discussed in *supra* Sections 2 –

[78] Supra 5.3 at n. 69.
[79] Kegel (1977), pp. 85-86; Larenz (1986), pp. 20121. For similar considerations of the Dutch legislator cf. *Parlementaire Geschiedenis van het Nieuwe Burgerlijk Wetboek. Boek 3: Vermogensrecht in het algemeen* (1981) p. 317.
[80] Stadler (1996), especially the conclusions at pp. 717-740.
[81] Faber/Lurger, *Rules*; idem, *National Reports*.

5 should at least be summarized. The relevant core rules are to be found in Chapter 2 (Requirements for transfer under this chapter) of Book VIII. General prerequisites for a transfer of ownership are the existence and transferability of the goods as well as the transferor's right or authority for the disposition.[82] The transfer of ownership as such consists of two elements, entitlement and transfer.

6.2 Summary of proposed rules

6.2.1 Entitlement to transfer

According to VIII.-2:102 (1) (d), 'the transferee must be entitled as against the transferor to the transfer of ownership'. The first two sources of such entitlement are a contract or another juridical act. Obvious examples are a contract of sale or of gift.

6.2.2 Transfer of ownership

The central rule for the transfer of ownership is spelt out by VIII.-2:102 (1) (e) and deserves to be quoted:

'(e) there is an agreement as to the time ownership is to pass and the conditions of this agreement are met, or in the absence of such agreement, delivery or an equivalent of delivery'. A separate paragraph establishes the connection to the preceding main rule: The '…. delivery or equivalent to delivery must be based on, or referable to, the entitlement under the contract or other juridical act'. … (VIII.-2:102 (2)).

Delivery and equivalents to delivery are defined separately in Artt. VIII.-2:104 and VIII.-2:105; these rules are highly technical. Worthy of note are paragraphs 3 and 4 of Article VIII.-2:105. According to these provisions, the same effect as delivery is achieved when the transferor transfers to the transferee means to obtain possession; and the transfer of a document containing an undertaking to deliver the goods to the holder of the document is regarded as a delivery.

6.2.3 Transfer of ownership excluded

Article VIII.-2:101 (3) mentions one situation where, not unsurprisingly, a transfer of ownership is excluded: in respect of goods that are defined 'in generic terms'; in this case ownership can pass only when the goods "are identified" to the contract.

Interestingly, this rule in effect is narrower than usual; it is narrowed by a rule on transfers of goods forming part of a 'bulk' (VIII-2:305). 'Bulk' is defined as a 'mass or mixture of fungible goods that are contained in a defined space or area'. The transfer of a specified quantitiy of a bulk conveys a corresponding share of co-ownership in the bulk to the transferee. In the present context we need not go into further details of this rule.

6.3. Comment

As compared to the present state of the laws in Europe, as sketched *supra* ss. 2 – 5, the proposed rules are based upon the principles of consent and delivery (in this sequence) and dispense with any real agreement.

The primary role of consent for an agreed transfer of ownership is in keeping with present-day practical demands and conceptions. In this contrext, delivery is irrelevant. However, the Comments to article 2:201 assert that 'the consensual approach has a more limited potential scope of application than a delivery approach.'[83]

Delivery of the assets to be transferred to the person entitled to the assets is to be relevant only if the parties had not agreed upon the time or upon the conditions for the passing of ownership. It is doubtful whether this radical simplification reflects present-day economic reality. In practice, and not only in commercial practice, there is frequently a clear time difference between the conclusion of a binding sales contract and the time of performance, especially when major goods are involved that have to be ordered from the manufacturer or its warehouse. Then the issue of delivery may arise (much) later after conclusion of the contract of sale and very often only then the details of delivery can be agreed by the parties. It is not clear whether these not infrequent cases are covered by VIII.-2:101 paragraphs (1) (e) or (2) or

[82] CFR VIII.-2:101 (1) (a) – (c).
[83] Art. 2:101, Comment C (b) first paragraph.

whether they are covered at all. The difficulty appears to be due to the fact that the rules intentionally reject the idea of a separate "real agreement".[84]

The rejection of this instrument may be regretted for an additional reason. The rules of the CFR are intended to be applicable in all member states of the European Union. Especially in border-crossing contracts, not only the rules of private law, but also those of public law may contain absolute or conditional prohibitions affecting a contract of sale or the transfer of property. Should the buyer bear the risk of prohibitions enacted and enforced in the seller's country? Should it even bear the risk and expense of finding out whether such prohibitions exist and are applicable to the contract in hand? It is true, CFR art. II.-7:301 establishes a rule dealing with *contracts* infringing mandatory rules; however, does this rule also apply to the transfer of ownership of movables? The issue appears to be open.

7 Final Conclusions

For the contractual transfer of property in corporeal movables, a future European instrument should be guided by the following two rules:

1. The transfer of property in tangible assets should, unless otherwise agreed, be subject to agreement about transfer of property to the transferee and delivery.
2. The validity of the transfer of property should, unless otherwise agreed, be insulated from defects of the underlying contractual relationship between transferor and transferee, except if the defect affects also the proprietary disposition.

These two rules would reverse the existing legal situation in the countries of the consent principle (such as England and France) on the one hand. The second rule would affect also the legal situation in Austria and the Netherlands. Both groups of countries will have to investigate any undesired indirect effects which may result from the new uniform rules on the transfer of property.

[84] Art. 2:101, Comment B last paragraph.