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DIFFERENCES OF PROPERTY TRANSFER SYSTEMS IN EUROPE – THE CHALLENGE OF SUBSTANTIVE UNIFICATION OF CONTRACT LAW IN THE 21st CENTURY

Abstract: *Although there is a tendency towards substantive unification of contract law, the conflict-of-law approach still proves to be necessary. Tendencies in Europe in the late 20th and early 21st century show a continuance of the commitment to build a unique European legal area, which includes a substantive unification of contract law. A significant obstacle, or rather a challenge is in the existence of differences between national legal systems in terms of property right transfer methods. This situation is a logical consequence of national legal traditions and of the development of rules regarding this issue in Europe, where there are still two different basic systems of passing of property: the French system, by which the final preferred purpose and effects of a legal transaction are achieved by the conclusion of the contract itself and, on the other hand, the German system, which implies that by concluding the contract, the contracting parties accept the obligation to transfer ownership rights in the next step. The authors have conducted research on whether these two systems are irreconcilable. The paper further analyses whether it is possible and necessary to reach a unique solution by which this question would be universally regulated in the European legal area. Upon finding reasons for the fact that leading countries are still not prepared to relinquish their legal traditions on this issue, the authors examine the practical legal importance and consequences of the described differences. Going a step further, the paper concludes that the described differences are concerning legal theory and history, and that the practical legal importance of the issue is not of fundamental significance. The legal analysis shows that the central question is not always about the moment of the transfer of rights. The crucial issue is the moment of risk transfer, which usually is the issue of higher legal importance and of practical legal consequences. This is further accentuated by the fact that the moments of property transfer and risk transfer do not necessarily coincide. In this way, the practical legal importance of the primary differences is relativized and reduced.*

Keywords: transfer of property rights, German system, French system, risk transfer, sales contract

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1. INTRODUCTION

The transfer of ownership is one of the conditions for the functioning of the transfer of goods, and such transactions are being performed every day, both at the national and international level. Their number as well as their value have positive influence on economic growth and the overall wellbeing of a society. Thus, within the national legal systems, the transfer of ownership has been regulated with special care.

The ownership may pass by legal instruments *inter vivos* and by legal instruments *mortis causa*. In the first case, legal effects appear during the lifetime of the parties involved, whereas in the second case, effects appear upon the death of one of them. In this paper, we have limited our research to the transfer of ownership by means of legal instruments *inter vivos*, which are undertaken voluntarily. Additionally, we have limited the subject of the research to the transfer of ownership of corporeal movables, since the problem of conflict of law[1] which is a complicated issue and demands special knowledge and skills to be solved, occurs with this type of movables.

The contract serves as the basic legal instrument for transfer of ownership of movables. Most often it is the sales contract, but the ownership may pass by an exchange or gift contract as well, or by means of other specific contracts, envisaged in a certain legal system, that are capable of producing the said legal effect, such as lease contracts[2] etc. The ownership passes under a special regime typical of those contracts. In Serbian law, and this also applies to the majority of other legal systems, ownership cannot be transferred by a contract that is not fit to produce this legal effect in the legal system.

In comparative law, the transfer of ownership on movables by means of legal instruments *inter vivos* is not regulated by the same rules. This can be partly explained by the historical circumstances, and in the scope of this issue one can also start from the point of differentiating between continental and common law legal systems. Continental systems mainly accept the concept of transfer of ownership in two steps, which is based on Roman law, while English law, and other systems under its influence, followed their own development path that was shaped over time according to rules that were confirmed as efficient and just by the practice and appropriate regulations of those systems.[3]

1 With the transfer of the right of ownership on immovables, as a rule, there are no significant problems as with movables, owing to the exclusive jurisdiction of the authorities of the state on whose territory the immovables are located and due to a worldwide generally acceptable solution that the law of the state where the immovables are located applies (*lex rei sitae*).

2 About the specifics and common types of real estate leasing contracts see: Dobrić, V., Jovičić, K., 2019, Pravna (ne)sigurnost ugovora o lizingu nepokretnosti u savremenom srpskom pravu, *Anali Pravnog fakulteta u Beogradu*, 2, pp. 129–131.

3 In the area of contractual law, the difference between continental and Anglo-Saxon legal systems is reflected in relation to contractual liability, i.e. the fact that it is subjective (based on fault) or is objective (the debtor's fault is irrelevant). See: Jovičić, K., Vukadinović, S., 2018, Contractual liability – legal regimes in comparative law, *Teme*, 2, pp. 650–656; Jovičić, K.,

However, the division in the systems of passing ownership according to the division into continental and common law legal systems is one that is too general and does not reflect the specific criterion regarding this issue. In relation to this, one should start from the fact that the rules for the transfer of ownership were formulated very early. Namely, there was always a clear difference between laws according to which ownership is transferred onto the transferee by means of simple consent of the wills (*solo consensu*) and those in which that legal effect is expressed only when the transferor, on the basis of consent of will, hands over the object to the transferee with the intention of transferring the ownership (*traditio* – transfer).[4]

This division was preserved in civil codes of the 19th century, which took over the rules from existing customs and other sources, which were, at that time, elaborated and organized into a complete and rounded system.[5] Contemporary legal rules governing the transfer of ownership also regulate the contracts which are apt to produce that legal effect. Besides that, they give answer to the question in which moment the ownership passed from the transferor to the transferee.[6]

Even today, we classify the legal systems of the transfer of ownership according to the same criterion into two basic groups: consensual and traditional. The representatives of the first group are French,[7] Italian,[8] Belgian[9] and English law,[10] whereas the traditional system is typical of German law,[11] and it is applied

2013, Contractual Liability in the Contract for the Sale of Goods in French Law, in: Nikolić, O., Petrov, V., (eds.) *Introduction to French Law*, pp. 262–265.

4 Van Vilet, L., Transfer of movable property, in: Smit, J, 2012, *Elgar Encyclopedia of Comparative Law*, Second edt., Edward Elgar Publishing Ltd., p. 886.

5 Legal theory makes difference between legal acts of dispositions (with immediate legal imapct) and obligatory legal acts (with immediate impact). In that sense, Vodinelić emphasizes that legal affairs of disposition are all those by means of which direct impact is made onto already existing rights or obligations, changing them, limiting them, trasferring them or terminating them. The very change is also the final aim of the affair, and it is achieved by the act (the act achieves its own purpose). Contrary to that, obligatory legal acts create the obligation, and when the obligation is accomplished, the final purpose of the acts is achieved. In more detail: Vodinelić, V., 2014, *Civil law: introduction into civil law and the general part of civil law*, Union University Faculty of Law and Public Company Official Gazette, Belgrade, pp. 459–460.

6 Van Vilet, L., 2012, p. 886. See also: Zimmermann, R., 1996, *The Law of Obligations, Roman Foundations of the Civilian Tradition*, Oxford University Press, pp. 271–272.

7 Article 1583, Code Civil (CC – French Civil Code).

8 Article 1376, Codice Civile (Italian Civil Code).

9 Article 1583, Belgian Civil Code.

10 Article 18(1) Sale of Goods Act. American Law is under the influence of English Law as well, also providing that the transfer of ownership occurs at the moment when the contracting parties determine so, and, as for individually determined movables, that legal effect occurs even at the moment of conclusion of a legally valid contract if the parties did not agree otherwise. See UCC – Article 2–401(1). However, the specific notion regarding Anglo-American law is that the buyer at the time of conclusion of the contract does not acquire the right of the item being transferred to him as the owner, until the moment he expresses his will to pay the price or upon fulfilling that obligation. In more detail: Draškić, M., Stanivuković, M., 2005, *Contracting Law of international trade*, Belgrade, pp. 282–283.

11 § 433 Bürgerliches Gesetzbuch (BGB).

by numerous continental law systems, such as, the Austrian,[12] Swiss,[13] Russian,[14] Spanish,[15] in Serbian Law,[16] etc.

2. CONSENSUAL SYSTEMS

Consensual systems are characterized by the transfer of ownership in one step – on the basis of the fact that a valid contract has been concluded. The transfer is realized at the time when the contract is concluded, notwithstanding the fact whether the object of the contract, at that very moment, is with the transferor or with a third entity, or whether it is, on any basis, in the possession of the transferee. Thus, it is deemed that the contract which has capacity to transfer the ownership in these systems has a legal effect.

Alongside ownership, the risk of accidental loss or damage of the object is transferred to the new owner, according to the rule that the thing perishes to the owner (*res perit domino*).[17] Furthermore, the creditors of the new owner may from the moment of conclusion of the legally valid contract settle on the debtor's (transferee's) property, regardless of whether the object is in his possession at that moment or not.

This systematic rule, however, is not applicable to all situations. Thus, for example, when the object of the contract does not exist at the time of its conclusion but is going to be produced later, the earliest time when ownership may be transferred is when this item has been produced. A similar situation occurs with the transfer of ownership of generic things that are within the mass from which they should be separated. In this situation, ownership can be transferred onto the transferee only after the transferor, in conformity with the contract, separates the items from the mass for the new owner (i.e., performs individualization).[18]

English Law, which can be placed within this very group, furthermore has certain specific characteristics which make it distinct. The ownership is transferred at such time as the parties to the contract intend it to be transferred,[19] therefore, this system is also called voluntary. If the parties do not agree on this particular issue, ownership is transferred onto the transferee in conformity with the dispositive legal rule (default rule) at the moment of conclusion of the legally valid contract.[20]

12 §§ 424–426 Allgemeines Bürgerliches Gesetzbuch (ABGB).

13 Art. 184 of the Swiss Code of Obligation (CO).

14 Art. 454 of the Civil Code of the Russian Federation (Гражданский кодекс Российской Федерации) of 1996.

15 Art. 1445 Código Civil.

16 Art 454 of the Serbian Law on Obligations.

17 There are exceptions to this rule where provided by the relevant regulations.

18 Draškić, M., Stanivuković, M., 2005, p. 285.

19 Article 17. Sale of Goods Act. In legal literature the English system is also designated as the voluntaristical system. See also: Krulj, V., 1972, *Impacts of the Sales Contracts – ownership, transfer, risk, price*, Belgrade, p. 45.

20 Art. 18. para. 1. Sale of Goods Act.

The will of contracting parties in relation to the moment of transfer of ownership is dominant in Nordic laws as well (this applies to Norway, Denmark, Finland and Sweden), so those laws may be defined as consensual, according to the presented criterion for classification. However, the Nordic law regime for the transfer of ownership is even more specific and it is characterized by the absence of the default rule that determines in a unique (unitary) manner the moment when the ownership passes. That means that these jurisdictions do not accept that all legal consequences – such as possession, the right of protection of possession,[21] the right to claim ownership, the right of the creditor (of the new owner) to settle on the thing acquired by the contract, etc. – take effect at the same time. In Nordic (Scandinavian) law, the basic starting point is that different powers of ownership are seen as independent of each other, not as a unique concept. In practice, this means that protection against the various claims that are made regarding the transfer of property rights can arise at different moments in time.[22]

The basic starting point of this system is that the answers to all contentious questions that arise in practice regarding the transfer of ownership are more related to the specific circumstances of the case and not to the unique legal concept of the right of ownership. The central concept of these systems is not the right of ownership as an individual civil right, but the legal protection of the owner of things when a third party disturbs the owner in using those things, or takes them away from him,[23] i.e., violates his rights. In order for protection to be effective, the facts of the specific case need to be duly considered, and for each individual legal consequence of the transfer, the moment when it comes to effect is separately determined. In other words, ownership is transferred to the transferee in fragments, and according to the time occurrence of the legal aftereffects, caused by the transfer onto the contracting parties. The reason for such a factual position is explained by the need for pragmatism, which is given priority over the need for the creation of a unique legal concept of the right of ownership and its transfer. This point of view is designated as a functional system and is not result of any legislative technique, or any theoretical concept; it is instead a depiction of the judicial practice, customs and principles of contractual law.[24] Thus, for

21 On the subject of protection in possessory proceedings: Vodinelić, V, 2013, What is Protected in the Proceedings in Disputes for Disturbance of Possession? On the Notion and Legal Nature of Possession, *Zbornik Pravnog fakulteta u Zagrebu*, 63 (3–4), pp. 763–798 and another part of this work: Vodinelić, V., 2014, What is the purpose of possessory proceedings? On the reasons for possessory protection of mere possession, *Pravni zapisi*, 1, pp. 5–65.

22 Rakneberg Haug, K., *The historical development of the Scandinavian functional approach to transfer of ownership: a tale of change and continuity*, Center for the Study of European Contract Law Working Paper No. 2017/07, Amsterdam Law School Legal Studies Research Paper No. 2017–39, pp. 1, 3–5. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3043131.

23 Lilja, M., National Report on the Transfer of Movables in Sweden, in: Faber, W., Lurger, B., (eds.), 2011, *National Reports on the Transfer of Movables in Europe*, vol. 5: Sweden, Norway and Denmark, Finland, Spain, Salier, pp. 29–30.

24 Rakneberg Haug, K., 2017, p. 5. See also: Lilja, M., 2011, pp. 27–30; Kuusinen, M., National Report on the Transfer of Movables in Finland, in: Faber, W., Lurger, B., (eds.), 2011, *Na-*

example, the transfer of ownership on the basis of a deed of gift may sometimes be of significance for the establishment of the moment of transfer of ownership (occurrence of a certain legal effect of the right of ownership), and this moment does not have to be the same as the moment when the ownership is transferred by means of a sales contract. Bearing in mind that the deed of gift is a contract of will as well, the principle of conscientiousness and honesty, effective in contractual law, has more significance in sales contracts, which create obligations for both parties and are onerous. Similarly, one same fact – for example, the fact that the transferee paid or failed to pay for the item that he acquires – may in some cases (most cases) have the biggest significance for the acquirement of the right of ownership, while in some cases, the very same fact has no significance.[25]

3. TRADITIONAL SYSTEMS

In traditional systems, two steps are clearly distinguished when discussing the transfer of the right of ownership: first, a contract is concluded which is apt to produce the needed legal effect (*iustus titulus*) and on the basis of which the transferor is obligated to transfer the object of the contract in a suitable manner to the transferee (*modus acquirendi*) and to transfer the ownership in such a manner. These two steps are mutually interrelated, and the transfer which is not based on a legally valid contract that is apt to transfer the ownership will not cause the change of the legal owner of that right. The transfer itself is, as a rule, a factual action which is the principal contractual obligation of the transferor and based on which the time of transfer of ownership is determined. The conclusion of the contract and the handover may be performed at the same time or at different times.

The purpose of the transfer is to provide the publicity of the change in the right of ownership, with the aim of providing better legal protection for the legal owner of that very right.[26] Such arrangement of the transfer of ownership is based on regulations concerning the sales contract in Roman law (*emptio venditio*).[27] The characteristic of the system is that the contract on the transfer of ownership does not have a legal effect on property but an obligational one as it creates a contractual obligation for the transferee to transfer the ownership by an

tional Reports on the Transfer of Movables in Europe, vol. 5: Sweden, Norway and Denmark, Finland, Spain, Salier, pp. 316–318 and 320–323.

25 Faerstad, J., Lilja, M., National Report on the Transfer of Movables in Norway and Denmark, in: Faber, W., Lurger, B., (eds.), 2011, *National Reports on the Transfer of Movables in Europe*, vol. 5: Sweden, Norway and Denmark, Finland, Spain, Salier, pp. 233–234.

26 Popov, D., 2012, The Delivery of Goods as (*modus acquirendi*) of Property, *Zbornik radova Pravnog fakulteta u Novom Sadu*, pp. 169–185.

27 The transfer of ownership in two steps is the system which is based on Roman law and in which ownership is transfered by means of the contract on sale (*emptio venditio*). The contract was legally concluded by simple conformity of the wills, however, by itself, did not produce the legal effect of the transfer of ownership from the seller to the buyer. In order to achieve that, it was necessary that the seller deliver the item to the buyer (*traditio*), which is a separate action in relation to the concluded contract.

action of handing it over (*traditio*). Transfer is the basic legal obligation of the transferor and if he fails to perform it, the transferee has the right to demand the complete fulfillment of the contract by means of enforcement.[28]

Traditional legal systems may be further divided into two subgroups: the causal and the abstract, depending on whether the transfer of ownership requires the existence of a legally valid contract which is apt to transfer the ownership, or not.[29]

3.1. TRADITIONAL CAUSAL SYSTEMS

Most legal systems are placed in this sub-group, the characteristics of which have been described within the presentation of the systems of traditional transfer of ownership. This means that the transfer of ownership is only possible under the condition that the obligational contract by means of which the ownership is being transferred has been concluded in a valid manner. If that condition has not been met, the transfer of items performed on the basis of such contract will not result in the transfer of the ownership onto the transferee. Moreover, if the contract agreement has been cancelled afterwards, then by the force of law (*ex lege*) the transfer of the ownership that happened as a legal effect of this very contract is cancelled. This is due to the fact that without legal base (*iustus titulus*) there exists no cause which could provoke the transfer of the ownership. The act of transfer cannot cause this legal effect without the contract agreement that has been concluded in a valid manner.[30]

3.2. TRADITIONAL ABSTRACT SYSTEMS

This system is related to German law and is (still) present in Scottish law.[31] The contract which transfers the ownership is viewed as a special legal act of an obligational attribution and as such, it produces legal effects toward the parties who concluded it (*separation theory – Trennungsprinzip*). On the basis of the contract agreement, the transferor undertakes the obligation to transfer the right of ownership onto the other contracting party, as a rule, by transferring items in a suitable manner.

The action of transfer within this legal construction represents an independent legal action in relation to the contract in question[32], and its validity

28 The transferor is obliged to transfer the items within the stipulated term and in a suitable manner. The manner of transfer, as a rule, depends on the type of the item that is being sold, for example: physical transfer for movables; symbolic transfer on the basis of physical transfer of the documents for e.g. CMR, warehouse, etc., individualization for items determined by the origin, etc.

29 This division is not apllied on consensual systems where the aim of the contract is to transfer the ownership, thus, the issue of the transfer is not questionable.

30 Van Vliet, L., 2003, Iusta Causa Traditionis and its History in European Private Law, *European Review of Private Law*, vol. 3, pp. 343–344.

31 Carey Miller, D., Combe, M., Steven, A., Wortley, S., National Report on the Transfer of Movables in Scotland, in: Faber, W., Lurger, B., (eds.), 2011, *National Reports on the Transfer of Movables in Europe*, Vol. 2: England and Wales, Ireland, Scotland, Cyprus, Salier, pp. 349–351.

32 Van Vliet, L., 2012, p. 734.

is estimated independently, without taking into consideration the validity of the contract agreement.[33] Ownership is thus transferred onto the conscientious transferee even if the contract agreement has never been concluded, for example, due to the non-existence of the agreement of wills, or, in the meantime, the contract in question has been cancelled.[34] Therefore, the described affair is an abstract legal action, but, at the same time, it is a legal act of property nature, due to the fact that the transfer of items is one of the prerogatives for its validity.[35] Moreover, it is important that the transferor has transferred the item with the purpose to transfer, in that very manner, the ownership onto the transferee, as well as that the transferee took over that item with the purpose to establish the right of ownership over it.[36]

4. SPECIFIC CHARACTERISTICS OF THE TRANSFER OF THE RIGHT OF OWNERSHIP IN TRANSACTIONS INVOLVING A FOREIGN DIMENSION

The issue of transfer of ownership, as a rule, is not the subject of international conventions, which is a clear indicator that the states are not yet ready to overcome mutual differences by acceptancing a uniform rule. It is also not the common subject of regulation in the new, formally non-binding international uniform law instruments, such as UNIDROIT Principles of International Commercial Contracts or The Principles of European Contract Law. The exception is the Draft Common Frame of References, which opted for the traditional system.[37]

33 Legal aftereffects of dividing the obligational and the property nature of the action may be numerous. For example, the seller becomes the owner of the items until the ownership is transfered onto the buyer, therefore, he can validly transfer the item onto a third entity, which means that the buyer could not demand the very item from that third party. Also, the seller's creditors may, in the bankruptcy procedure, for example, obtain the payment from the item that is being sold, however, only on the item regarding which the seller had not transferred the right of ownership onto the buyer – i.e., the buyer could not demand the separation of that item from the bankruptcy mass. Furthermore, the seller may, by unilateral declaration, and despite the concluded contract on sale, preserve the ownership of the items and condition its transfer onto the buyer by the complete payment of the price, due to the fact that for the transfer of property it is necessary that conformity of both parties exists at the time of transfer of items. More about that: Krulj, V., 1972, pp. 58–63.

34 The seller or the transferor of ownership in this very situation may demand the return of the ownership by turning to the notion of the unjustified enrichment. See § 812 BGB and further on.

35 This principle of abstractness, which is based on the theory elaborated by von Savigny in the 19th century, is characteristical for German law, and among other European countries is still present in Scottish law. About this issue, one may see in more detail: Karsten, T., Germany (paragraph dedicated to the German law), in: von Ziegler, A., Debattista, C., Plegat, A., Windahl, J., (eds.), 2011, *Transfer of ownership in International Trade*, Kluwer Law International, p. 203–223.

36 Schutte, F., 2012, The Characteristics of an Abstract System for the Transfer of Property in South African Law as Distinguished from a Causal System, *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad*, 3, pp. 123–124.

37 See: DCFR, Art. VIII-2:101(1)(e).

Because of the stated circumstances, the transfer of ownership in legal acts in which a foreign dimension is present is performed in a traditional manner, by applying rules of international private law. Those rules are formulated as collision norms, which instead of stipulating how to behave meritoriously in a certain situation, direct to the national law whose rules should be applied in that case.

It is usually thought that the collision method is the least desired method in international business operations because at the moment of their conclusion it is difficult to foresee with confidence which law is going to be applicable for solving a possible dispute, since applicable law may be different depending on the issue which might later become contentious. To overcome this problem, the parties entering into an agreement with a foreign dimension simply define the law that would be applicable for the agreement, which they, as a rule, are entitled to do when entering the contract suitable for transferring ownership over movable property.

In legal theory, the question has already been asked whether tradition, deeply rooted in the rules of national laws governing the manner of transfer of ownership, is sufficient to explain the cause of the problem.[38] We hold that it is not sufficient, and that it is necessary to examine in more detail other factors that have impact on this very notion.

Primarily, it is necessary to consider whether the collision method, beside the existence of the aforementioned drawback, has certain advantages in regulating the issue of the manner of transfer of the right of ownership. In doing so, it is logical to start from the specific characteristics of the collision rule, i.e. from its aim which is to point out to the national law/laws whose application is possible in a specific situation. Which rule it is going to be depends on the circumstances of the case and their connection with the certain state. In the European legal system, the prevailing opinion is that for property rights over movables one should apply the laws of the place where the item is located (*lex rei sitae*).[39] Alternative binding points are also allowed in some legal systems, but they do not call into question the dominance of the *lex rei sitae* principle.[40] There is a significant exception to this rule, for items in transit (*res in transitu*), which, on the way from their departure (dispatch) to the final point of destination, cross the territory of different countries, making their connection with the territory in which they were located at the time of the conclusion the contract which transferred the ownership, as a rule, not significant. For items in transit, collision norms most

38 Good, R., Kronke, H., McKendrick, E., 2015, *Transnational Commercial Law – Text, Cases and Materials*, Oxford University Press, Oxford, p. 611.

39 Varadi, T., 1990, *International Private Law*, Forum, Novi Sad, pp. 226–227; Kitić, D., 2019, *International private law*, Union University Faculty of Law, Belgrade, p. 194; Pak, M., 1986, *International Private law*, Naučna knjiga, Belgrade, pp. 887–890; Čolović, V., 2018, Qualification of collision rule, *Strani pravni život*, 3, pp. 10–12.

40 Varadi states that, alternatively as a binding point, even in the Middle Ages, there appeared to be a principle of personal law of the owner of the items; however, it was not widely present in comparative law. There were suggestions that the binding point formulated as being a framework in the sense that it directs the Law of the closest connection, which the judge will determine in each specific case bearing in mind its specific circumstances. More: Varadi, T., 1990, pp. 226–227.

frequently direct to the application of the law of the place (state) of the final destination (*lex loci destinationis*).[41]

The aforementioned solutions are applied to all issues that relate to the applicable law for property law relations. However, as the subject of this paper is the transfer of ownership on movables by means of legal acts *inter vivos*, it is necessary to mention the collision rules for legal acts *inter vivos* i.e., contracts that are apt to produce that legal effect. The basic principle in comparative international private law is that for these contracts the applicable law would be the law of the country where the party who is to effect the performance which is characteristic of the contract (which relates to the obligation of the contracting party to whom another contracting party is owing money) has, at the time of conclusion of the contract, his residence, providing that the contracting parties did not agree otherwise. The law that is applicable for the contract, as a rule, is applied for the issues of its existence and material validity. However, it does not necessarily have to be applicable for the issue of the transfer of ownership, even if the parties agree on the applicable law as to the contract.[42] In order to achieve that for certain, it is necessary that the contracting parties explicitly provide for the law that is applicable for the transfer of ownership, as it is the only guarantee that the same law will be applicable not only for the main business, but also for the transfer of the right of ownership, minimizing the risk that the law applicable for the contract and the law applicable for the transfer of ownership will have different, and possibly even conflicting rules.[43]

Furthermore, the procedure for determining the applicable law in a specific case requires the court to apply a suitable collision norm. To fulfill this task, the court must classify the factual scope of the case under a certain legal category which is the subject of the collision norm. This is a specific challenge in international private law because the law applied by the court and the foreign law, which the relation in question is connected with, even when they do have the same legal categories, do not always have the same interpretation.[44] It is precisely with the division of items into movable and immovable[45] that this

41 Items in transit change place and this creates a void that causes the problem of application of the governing point of connecting *lex rei sitae* onto the legal acts which are concluded at the time when the items are in transit (outside the point of dispatch and the point of destination), regarding the fact that the venue where they are located at the time of the contract's conclusion does not have special significance in order to be a relevant point of connection.

42 Gourion, P., Peyrard, G., 2001, *Droit du commerce international*, 3è éd., Paris, L.G.D.J., p. 117, stated according to: Kayibanda, R., Passing of Property in Goods in Contracts of International Sale of Goods, *Estey Centre Journal of International Law and Trade Policy*, p. 79., available at: https://law.usask.ca/documents/research/estey-journal/kayibanda14–2.pdf.

43 Laemmli, T., 2007, *Transfer of Ownership in International Sales of Goods*, (Essay) Schaffhausen, 2007, p. 1 and Art. 1 (1) of United Nations Convention on the Contracts for the International Sale of Goods (CISG), p. 27., available at: https://open.uct.ac.za/bitstream/handle/11427/4434/thesis_law_lmmtho001.pdf?sequence=1.

44 Besides, the problem of qualification in international private law appears due to the existence of legal gaps in domestic law (a specific business operation regulated by a legal institution which is not known in domestic law) i.e. when domestic law is not familiar with the legal institution of a foreign law.

45 Apart from the movable items according to its nature, other items are classified as movables on the basis of the Law.

problem becomes clearly evident in practice, and is described as a dispute of qualifications.[46]

A generally accepted rule in comparative international private law is that the court starts from domestic law (*lex fori*) when applying collision norms. This is justifiable not only since the court is most familiar with the domestic law, but also because that way the solutions contained in one system, which are mutually harmonized, are applied.[47] The court, thus, commences from the domestic law also when qualifying factual statements, legal relations and legal institutions, and on the basis of that chooses the domestic collision norm which directs to the national law applicable for the whole relationship.[48] However, by this approach, it is possible that the legal category i.e. the subject of the collision norm differs from the legal category of the applicable law; for example, on the basis of the domestic law, the matter concerns a movable item whereas the same item within the foreign law is qualified as immovable (e.g. it is discussed whether a boat mooring is a movable or immovable item, whether a raft where people live is a movable or immovable item, whether a trailer for dwelling is a movable or immovable item, and similar).[49] Such differences cause different aftereffects not only within the substance of property law, the contractual[50] and international private laws, but within taxation law as well – i.e.,[51] they cause differences in the taxation treatment of these items and of transactions by means of which the right of ownership on them is transferred. Apart from the aforementioned, subsequent qualification of the legal category (the subject of the collision norm) according to the law applicable for the legal relation in question (*lex causae*) might have, as a result, a referral to some other foreign law, or even, a referral back to the domestic

46 Lorenzen, E., 1941, Qualification, Classification or Characterization Problem in the Conflict of Laws, *The Yale Law Journal*, vol. 50, pp. 744–745. Wheeler Cook, W., 1941/2, Characterization in the Conflict of Laws, *The Yale Law Journal*, vol. 51, pp. 194–195.

47 In court practice of many countries this solution has been adopted, for example in Belgium and in France. This is explicitly pointed out by the Article 3078 para. 1 OG of Quebec, Art. 12.1. of the Spanish OG, Art. 10 Egyptian OG. (cited according to: Kitić, D., 2019, p. 129.) English courts also apply the rule that classification is performed according to the *lex fori*.

48 Legal theory has alternatively offered a viewpoint that the qualification, apart form *lex fori*, should be performed according to the law applicable for the basic legal act (*lex causae*); however, this suggestion could not be applied in practice due to illogical occurences: the law which should be established by application of the collision rule being applied in order for the collision rule that is going to be applied to be determined.

49 Although at first sight it seemed simple, the practice of the European Court shows that the division of items into movable and immovable is a complex issue. On the matter, see: Ramaekers, E., 2014, Classification of Objects by the European Court of Justice: Movable Immovables and Tangible Intangibles, *European Law Review*, 39 (4), pp. 447–469, available at: https://ssrn.com/abstract=2471677.

50 For analysis of contractual liability in comparative law, see: Jovičić, K., Vukadinović, S., 2018, Contractual liability – legal regimes in comparative law, *Teme*, 2, pp. 647–660.

51 In addition to the above mentioned, a whole set of other laws, such as: Law on planning and construction, Law on transfer of usage rights to property rights on construction land with compensation, Law on investments, Law on execution and ensuring, etc. See: Knežević Bojović, A., Vukadinović, S., 2016, Analysis of the results of public-private dialogue – the case of Economic caucus of the Serbian National Assembly, *Srpska politička misao*, 3, pp. 294–295.

law, which might significantly complicate the solving of a disputable relation. Therefore, double qualification of the subject of the collision norm within the comparative practice is very rare and is more on the level of exception.[52]

However, this principle is not an imperative in cases dealing with property laws. In the moment when the object of the contract should be qualified as a movable or immovable item, as a rule, it is known which law is applicable for that very issue, because the starting point for the collision norms of most legal systems is that the question is to be solved based on the law of the place where the item is located (*lex rei sitae*).[53] Bearing that in mind, in cases of transfer of the rights of ownership over movables, the classification of the nature of the items as movable or immovable is done according to the same law that is applicable even for the disputable issue, which represents an advantage – the decisions of the court in these cases are made easily enforceable since the enforcement on the item, as a rule, will be demanded in the state where that item is located. This means that although the collision norms of most legal systems direct to the application of the law of the place where the item is located, the court's task to rule on the applicable law is not so simple, and it is an even greater challenge to correctly apply the foreign law determined that way. It presupposes that the process of qualification should be initiated in order to identify the legal institution which is defined by the collision norm. To achieve this, the court first has to establish the content of the relevant foreign law (or several laws), but also by-laws, customs, the jurisprudence and other sources of the national law in question.[54]

The application of a uniform solution causes the same, or even bigger difficulties for judges. First of all, the uniform solutions of the international sources of law, which regulate an issue, including the issue of transfer of ownership, are formulated in a substantial rather than in a collisional manner with the aim to achieve, if possible, a compromise between the applicable, and sometimes conflicting solutions of national laws. Those compromising solutions might be unacceptable for states, and risky as well, since the judges in the respective states might not have experience in the application of these solutions. Moreover, in civil law systems where there are no precedents, i.e., where the decisions of the courts do not have the same binding impact as in the Anglo-Saxon system, the risk of different application of the same rule is greater than in a common law system, and there is a lot of room for discretionary action by the judges, which may lead to legal insecurity.[55]

5. FINAL CONSIDERATIONS

The legal instrument that facilitates the transfer of ownership by means of legal acts *inter vivos* is a contract, and a legally binding contract which is able to produce that legal effect is a mandatory condition for the transfer of ownership

52 Kitić, D., 2019, pp. 130–131.

53 *Ibid.*, p. 129.

54 Belović, J., 2019, Unification of law as a legal transplant model – the closest connection principle and Rome I Regulation, *Harmonius*, Belgrade, p. 52.

55 More detailed: Good, R., Kronke, H., McKendrick, E., 2015, pp. 609–612.

in all legal systems in comparative law. In consensual legal systems, the contract is not only obligatory but also a sufficient condition for the transfer of ownership, whereas in legal systems which opted for the traditional concept, it is also necessary that the transferor performs the activity of transferring the items in order for the ownership to be transferred onto the transferee.

The analysis and comparison of the mentioned systems show that the consensual system is easier for application than the traditional one. This is confirmed not only by the fact that the transfer of ownership occurs on the basis of just one condition, but also by the fact that this condition – i.e., legally binding conclusion of the contract, is relatively easy to prove in practice. The traditional system is, in contrast to the consensual, more complex, above all because instead of one it requires two conditions, and also, because the transfer of items represents one factual activity which is not always easy to prove in practice.

Bearing in mind that the time of conclusion of the contract in consensual, i.e., the time of transfer of items on the basis of concluded contracts in traditional legal systems, is the moment of the transfer of ownership, it can be concluded that the consensual system is more convenient because it leaves less room for contentious situations between the transferor and transferee regarding the transfer of ownership. However, in those systems, there is a risk that the transferor is late with the transfer of items to the transferee or that he fails to fulfill that obligation altogether. In relation to that, the question that appears crucial is whether the situation in which the previous owner does not transfer the item to the new (current) owner renders the whole action unsuccessful. In other words, is this the reason why in most cases the transferee of ownership would terminate the contract? We hold that the answer to this question is negative because the transferee, i.e. the new owner has at his disposal more than one legal remedy for solving that situation. Those legal remedies comprise not only the requests which the legal system recognizes for the party which remains loyal to the contract against the party which fails to honor the contract, but also the legal means the law recognizes for the legal owner within the scope of property protection, which the transferee possesses as the legal holder of the right of ownership.

Additionally, the consensual and traditional systems can also be compared in view of the legal security of the transferee of the right of ownership from the disturbances of third parties, since the right of ownership belongs within the group of property rights and, as such, has absolute impact (*erga omnes*, *contra omnes*). In this context, the issue of securing the publicity of the change of ownership plays the most significant role in a system of the transfer of ownership. In traditional systems, the requirement of publicity is observed through the necessity of the action of transfer of items, and through linking the transfer of ownership with the time of the transfer. In consensual systems, this requirement is not a legal condition for the transfer of ownership and the new owner can, as a result, be exposed to a greater risk of disturbances. However, even more importantly, the new owner is in a situation where he has to assume the risk of accidental loss or destruction of items for the period between the conclusion of the contract and the transfer, during which he does not have control over the condition of the item. Considering the above, the traditional system might be viewed as more convenient.

In legal transfer of goods, which cannot be performed without the transfer of the right of ownership, disputes between the transferor and the transferee most frequently relate to the distribution of risks for the accidental damage or distortion of the object of the contract. The general rule says that the thing perishes with the owner (*res permit domino*), giving elevated significance to the issue of the moment of transfer of ownership in practice. However, practice shows that there is still no consensus regarding a uniform solution to this issue.

The problem of establishing the moment of transfer of ownership in international business operations has been present for a long period of time and the traders understood for long that the failure to solve it has been to their detriment. By using the freedom of contracting, which they have thanks to the autonomy of will in contractual law, the traders formed and started to apply special rules for the transfer of risk, which proved to be successful in practice. These rules became an integral part of INCOTERMS clauses and as such they have been successfully applied in international trade for almost one hundred years.

Bearing in mind everything that has been mentioned, it can be concluded that the difference between the consensual and the traditional legal systems has more to do with legal theory and history, and that the practical legal significance is not of fundamental importance, since the legal analysis has shown that the central, and sometimes a legally more important issue concerns the moment of transfer of risk – and not only the moment of transfer of the right of ownership. This is even more important because the transfer of the right of ownership and the moment of transfer of risk do not necessarily have to coincide.

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