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## A Study on the Seller's Liability regarding Property in Goods on the International Sale of Goods

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### I. Introduction

The seller gets paid for delivering goods and transferring the property. In domestic sale, as goods will be delivered in its own country and contracting parties will choose their domestic law as their governing law relative to the property, there are rarely any problems and misunderstanding regarding the

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transfer of property. However, in international sale, each party tries to choose his domestic law and the other party would be at a disadvantage. To solve problems which could be caused by the difference between domestic laws, The United Nations Convention on Contracts for the International Sale of Goods(here-in-after CISG) has taken effect. CISG has played important roles as a uniform law on the international sale of goods but does not deal with the effect which the contract may have on the property in goods. The issues concerning the property will be settled by the applicable domestic law. Thus, if contracting parties choose CISG as the governing law, the *lex rei sitae* to regulate the property of goods also exists.

In fact, even though there are important issues of the passing of property, they has been treated lightly so far.<sup>1)</sup> In particular, without studying the matter in relation to the choice of the governing law, the *lex rei sitae*, the passing of property was handled. Thus, this study will discuss the choice of law as the governing law, the *lex rei sitae* and the general rules under Sale of Goods Act(here-in-after SGA) and Korean Civil Code(here-in-after KCC). The issues in relation to the property is also considered. In addition, although CISG is not concerned with the effect in regard to the transfer of property in goods, some provisions about the property are provided in it. The seller's liability to transfer the property under CISG is considered and then the practical advice is suggested.

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1) Scholars who studied the passing of property considered the general rules under SGA and Trade terms. They did not describe the reason why the matter relating to the choice of law is generated. Thus previous studies did not say the difference of the requirements for the passing of property according to domestic laws.

## II. The seller's liability for the passing of property

### 1. The choice of law

Contracting parties can choose the governing law which stipulates parties' rights and obligations arising from the contract of sale explicitly or implicitly.<sup>2)</sup> Suppose that contracting parties choose CISG as the governing law for their contract. The problem is that CISG says that the seller must transfer the property in the goods,<sup>3)</sup> but is not concerned with when property should be transferred to the buyer. Instead, CISG suggests that questions in relation to the passing of property are settled in conformity with the governing law by virtue of the rules of private international law.<sup>4)</sup> That is, two governing laws exist, which means one to regulate contractual rights and obligations and the other, the *lex rei sitae*, to regulate issues relating the property of goods.

According to Korean private international act, it is not permitted for contracting parties to have the right to choose the applicable law that deals with problems concerning the transfer of property. The property on goods should be governed by the *lex situs* of the subject matter<sup>5)</sup> and the property on goods in transit should be governed by the law of the destination of the subject matter.<sup>6)</sup> Therefore, if goods are in Korea, matters concerning the property in goods are governed by KCC while if goods are in UK, English law is the applicable law. However, the problem is that the place where goods are kept is changed from an exporting country to an importing country. And requirements to pass property differ

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2) Korean Private International Act Art 25(1).

3) CISG Art. 30.

4) CISG Art. 7(2).

5) Korean Private International Act Art 19(1).

6) Korean Private International Act Art 22.

with countries. Then, is the governing law changed? Yes. As goods are delivered into an importing country, requirements to transfer property on goods should be governed not by the domestic law in an exporting country but by that in an importing country. Nevertheless, under Korean private international act, if requirements to pass property from the seller to the buyer are met in an exporting country, there is no need to satisfy requirements under Korean Civil Code because *fait accompli* under the domestic law in an exporting country is acknowledged.<sup>7)</sup>

## 2. The general rules

As I mentioned above, if contracting parties choose CISG to regulate contractual rights and obligations, another governing law for the passing of property in goods should exist. Among a lot of domestic laws to deal with the passing of property, I will discuss the general rules for the transfer of property under SGA and KCC.

### (1) The general rules under SGA

SGA stipulates the time of the passing of property in specific goods and unascertained goods respectively. First of all, in the case of a contract for the sale of specific goods, the most important factor is the intention of parties.<sup>8)</sup> If the parties intend to transfer the property when they enter into the contract, the property is transferred to the buyer at such time.

On the other hand, in the case of a contract for sale of unascertained goods, the property is not transferred to the buyer unless and until the goods are ascertained.<sup>9)</sup> Once goods are ascertained, then the property will

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7) Suk, Kwanghyun, The New Conflict of Laws Act of the Republic of Korea, The International Commerce & Law Review, Vol. 20, 2003, p. 13.

8) SGA s. 17(1).

9) SGA s. 16.

be transferred in conformity with the rules applied to specific goods. Especially SGA sets out requirements for the passing of property in unascertained goods by appropriation. In the case of a contract for the sale of unascertained or future goods by description, once goods of that description and in a deliverable state<sup>10)</sup> are unconditionally appropriate to the contract with the consent of the other party, then the property passes to the buyer.<sup>11)</sup> The meaning of "unconditional" is that the appropriation is not subject to any condition, express or implied, upon the fulfillment of which the passing of property depends.<sup>12)</sup> That is, if the seller is in breach of an implied condition of which may give rise to a right on the part of the buyer to treat the contract as repudiated and his breach prevents the passing of property, there is no unconditional appropriation.<sup>13)</sup>

Moreover, where the seller delivers the goods to the buyer or to a carrier or other bailee or custodian for the purpose of transmission to the buyer, he is to be taken to have unconditionally appropriated the goods to the contract.<sup>14)</sup> It is consistent with the presumption in that delivery of goods to a carrier is treated as delivery of goods to the buyer for the purposes of passing of property.<sup>15)</sup> By such delivery, the seller is to be taken to have unconditionally appropriated the goods to the contract so that the property will then pass.<sup>16)</sup> But unless the goods have become before or by virtue of the delivery, they will not be deemed to have been unconditionally

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10) A "deliverable state" depends on the actual state of the goods at the date of the contract and the state in which they are to be delivered by the terms of the contract. The goods must therefore be in a physical condition in which the buyer can take delivery and in which it has been agreed that he shall take delivery under the contract: *Kulkarni v Manor Credit Ltd* [2010] EWCA Civ 69.

11) SGA s. 18 r. 5(1).

12) M Bridge, *Benjamin's Sale of Goods*, Sweet & Maxwell, 2010, p. 240.

13) *Ibid*; *Ollett v Jordan* [1918] 2 K.B. 41.

14) SGA s. 18 r. 5(2).

15) M Bridge, *op.*, *cit.*, p.254.

16) *Scottish & Newcastle International Ltd v Othan Ghalanos Ltd* [2008] UKHL 11.

appropriated to the contract.<sup>17)</sup> Mere delivery of a quantity of unascertained goods will not pass the property.<sup>18)</sup>

However, if the seller reserve the right of disposal of goods, the property will not pass to the buyer until certain conditions are fulfilled.<sup>19)</sup> In the contract for the sale of specific goods, the seller can reserve the right of disposal by the terms of the contract. In the contract for the sale of unascertained goods, the parties may agree the retention of disposal either by the terms of the contract or by appropriation. For example, if the terms of the contract or appropriation expressly provide that delivery of the goods or of a document is to be made against payment of the price, the seller may reserve the right of disposal and retain ownership of the goods until payment has been made.<sup>20)</sup> Another method of reserving disposal is that the seller takes a bill of lading the goods are deliverable to the order of the seller or his agent.<sup>21)</sup> It shows the seller's intention that the property will not pass to the buyer until certain conditions are fulfilled.

## (2) The general rules under KCC

Under KCC, the delivery of goods is a prerequisite for the transfer of property.<sup>22)</sup> The delivery of goods means the transfer of possession from the seller to the buyer.<sup>23)</sup> That is, once the buyer possesses directly the

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17) Re Wait [1927] 1 Ch. 606.

18) M Bridge, *op.*, *cit.*, p. 255.

19) SGA s. 19(1); CISG provides the seller with the right of the retention of title under Art. 58(2). If the contract involves carriage of the goods, the seller may dispatch the goods on terms whereby the goods, or documents controlling their disposition, will not be handed over to the buyer except against payment of the price.

20) M Bridge, *op.*, *cit.*, p. 276.

21) SGA s. 19(2).

22) KCC Art. 188(1).

23) Where CISG and KCC are chosen as the governing law, under CISG Art 67(1), the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer. But as the buyer does not possess the goods, the property cannot pass to him under KCC.

goods, the property will pass to him.<sup>24)</sup> Where contracting parties agree expressly when the property will be transferred but the time comes before the buyer possesses goods, such an agreement will be regarded as not valid.<sup>25)</sup>

When it comes to the retention of title, contracting parties can also agree that the seller reserves the title until certain conditions are fulfilled under KCC. In general, the typical method is that the seller passes the property to the buyer against payment of the price. It means that the property is retained by the seller until the price is paid.

### **3. The need of considering the passing of property**

First of all, where goods are damaged or destroyed and such loss or damage of goods is not due to one party's breach of contract but due to the third party's act or omission, the owner has the right to sue the third party. Thus, even though the buyer takes over goods and bears the risk of loss of goods, if the seller reserves the property until payment, the buyer cannot have the right to sue the third party for damages.

The passing of property was important in determining whether a buyer could sue a carrier under a contract concluded by the seller for damages in transit.<sup>26)</sup> However, Where goods are transported by sea, Carriage of Goods by Sea Act(1992) provides that a person who becomes the lawful holder of a bill of lading shall have transferred to and vested in him all rights of suit under the contract of carriage as if he had been a party to

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24) Under KCC Art. 190, if the seller assigns to the buyer the claim for the return of the goods possessed by the third party, it shall be regarded that the goods have been delivered. Therefore, in this case, even though the buyer possesses directly goods, the property will be transferred.

25) Suk, Kwanghyun, *Transfer of Ownership in International Trade*, International Trade Law, 2003, p. 40.

26) Under Bill of Lading Act, only every consignee of goods and every endorsee of a bill of lading has all rights of action. Thus, to acquire ownership was the important issue.

that contract.<sup>27)</sup> Korean Commercial Act is on a same position with COGSA.<sup>28)</sup> Therefore, these legislations has separated the buyer's acquisition of right against the carrier from passing of property in goods between seller and buyer.<sup>29)</sup> That is, even if the lawful holder of a bill of lading does not acquire the property in goods, he can raise a suit against a carrier.

Secondly, the passing of property is a relevant issue where one of contracting parties becomes bankrupt. Under SGA, if the property has not yet passed to the buyer and the seller becomes insolvent, though he has paid whole or part of the price, he has only a personal claim as a creditor in respect of the breach of contract.<sup>30)</sup> If the property has passes to the buyer and he has paid the price but the seller becomes insolvent, the buyer will be able to claim the goods to the exclusion of the other creditors of the seller.<sup>31)</sup> In the case of the buyer's insolvency, if the property has not passed, the seller can claim goods.<sup>32)</sup> However, if the property has passed and goods have delivered to the buyer, the seller will be able to claim only as a creditor for the price.<sup>33)</sup> On the other hand, if the price is not paid but the seller possesses goods, he will be able to assert his lien.<sup>34)</sup> And if goods are in transit, he will be able to have the right of stoppage in transit.<sup>35)</sup>

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27) S 2(1).

28) Korean Commercial Act Art. 133 and 140.

29) M Bridge, *The International Sale of Goods*, Oxford University Press, 2007, p. 337.

30) *Carlos Federspiel & Co SA v Charles Twigg & Co Ltd* [1957] 1 Lloyd's Rep. 240.

31) *Re Blyth Shipbuilding and Dry Docks Co Ltd* [1926] Ch 494.

32) *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 1 W.L.R. 676.

33) *Re Tappenbeck* (1876) 2 Ch. D. 278.

34) SGA s. 41; CISG Art. 71(1) says that a party may suspend the performance of his obligation if it becomes apparent that the other party will not perform a substantial part of his obligation as a result of a serious deficiency in his ability to perform or in his creditworthiness.

35) SGA s. 44; It is similar with CISG Art. 71(2) that even though the goods are in



Under Korean Debtor Rehabilitation and Bankruptcy Act, if the buyer has paid the price and acquired the property, but the seller become insolvent, the buyer's interest will prevail against creditors of the seller.<sup>36)</sup> In the case of the buyer's insolvency, if the seller has delivered goods but has been unpaid, the seller will be able to claim goods.

Thirdly, one of important issues of the passing of property is whether or not contracting parties can dispose goods to a third party. Under SGA, after the property has passed to the buyer, the buyer can dispose the goods and pass the title to a third party. But even if the property has passed to the buyer, the unpaid seller who is in possession of the goods or of the documents of title to the goods can pass the property by a resale.<sup>37)</sup> Especially, even if the property is still in the seller, the buyer who obtains the possession of goods or of the documents of title with the owner's consent can pass the property to the third party who receives them in good faith.<sup>38)</sup> In contrast, before the property has passed to the buyer, the seller can dispose of goods and pass title to a third party even though this disposition is in breach of the contract of sale.<sup>39)</sup>

Under KCC, in the case that the seller who reserves the property disposes goods to a third party, it is valid because it is the natural conduct of the owner before the fulfillment of the requirement, the payment.<sup>40)</sup> Thus, due to this disposition, the third party who takes the delivery of goods will be entitled to have the property. However, subject to the payment, the buyer supposes to have the right to acquire the property in goods which are the subject matter of a contract of sale. Thus, when the

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transit and the buyer holds a document which entitles him to obtain them, the seller may prevent the delivery of goods to the buyer.

36) Debtor Rehabilitation and Bankruptcy Act Art. 411.

37) SGA s. 48(2).

38) SGA s. 25(1).

39) *Wait v Baker* (1848) 2 Exch. 1.

40) Jee, Wonlim, *Lectures in Korean Civil Code*, Hongmoonsa, 2010, p. 1439.

seller disposes the goods to a third party before the payment, the buyer can claim damages for non-performance. On the other hand, as the buyer is not the owner before he pays the price, he cannot dispose goods. But if the buyer disposes the goods supplied subject to a reservation of the property, a sub-purchaser will acquire only the conditional right itself and the property will not pass unless and until the price is paid.<sup>41)</sup>

### III. The seller's liability for legal conformity under CISG

As CISG does not deal with the transfer of property or with the possibility of acquiring such property, these issues are settled in conformity with the governing law, the *lex rei sitae*. But CISG imposes the duty on the seller to deliver goods which are free from the ownership of a third party.<sup>42)</sup> So CISG does not exclude completely the problems regarding the property.<sup>43)</sup>

#### 1. The third party right or claim

##### (1) The third party's property

When it comes to the seller's duty to deliver goods free from the property of a third party, the classic example is that of the sale of the third party goods. In an automobile case,<sup>44)</sup> the buyer, a car dealer in

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41) KCC Art 149.

42) CISG Art. 41.

43) CISG adopts the typological approach which settles matters according to each case. For example, Art 41 and Art 81, Han, Kyu Sik, The application of the CISG on the property in the goods sold, *The International Commerce & Law Review*, Vol. 20, 2003, p, 125.

44) 11 January 2006, Germany Supreme Court.

Netherlands, purchased a used car from the seller, a German car dealer. The police seized the car from the buyer because of the suspicion that the car had been stolen prior to the contract of sale. The insurance company of the original owner demanded the turnover of the car from the buyer. The court held that if a good faith acquisition by the buyer under the *lex rei sitae* becomes effective, there is no legal defect under CISG Art. 41.<sup>45)</sup> That is, the goods may be free from the property of a third party and so the buyer cannot claim the avoidance of the contract and damages.

On the other hand, Art 41 does not provide any instruction as to whether or not public law encumbrances amount to a defect in property. However, it is necessary to differentiate according to the underlying reason for the public measure in question.<sup>46)</sup> While public law restrictions relating to non-conformity under domestic rules for the protection of consumers, workers, or the environment could give rise to liability for defects in quality under Art 35, taxes and duties encumbering the goods may constitute a defect in title if the contract provides that the seller bears those costs.<sup>47)</sup>

## (2) The third party claims

Art 41 also covers claims of a third party to be made against the buyer. Whether or not the third party actually has a right is irrelevant.<sup>48)</sup> The seller has the duty whenever a third party makes a claim, no matter whether the claim is grounded, nor whether the claim is frivolous. It is because of the purpose to protect the buyer against the uncertainty that the

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45) Under KCC Art. 249, if a person possesses goods in good faith and without negligence, he shall acquire its ownership immediately even if an assigner is not a legal owner.

46) Ingeborg Schwenzer, *Commentary on the UN Convention on the International Sale of Goods*, Oxford, 2010, p. 651.

47) *Ibid*; 21 January 1988, Russian Federal Arbitration.

48) Ingeborg Schwenzer, *op. cit.*, p. 652.

claim of a third party can be caused, even if the claim later turn out to be frivolous. The seller must be liable to reimburse the buyer for costs as a result of the claim.<sup>49)</sup> But if the seller defeats the claim quickly and effectively, the seller's breach may not be fundamental and the buyer could not avoid the contract.<sup>50)</sup>

There is no need that a third party formulates the claim in any particular form and so it is sufficient for him to show the existence of his claim in some manner.<sup>51)</sup>

## 2. Relevant time

Art 41 does not provide an explicit rule as to the determinative time when goods must be free from the property or claims of a third party. It seems that the time of delivery is conclusive.<sup>52)</sup> However, applying the time of delivery as the relevant time leads to inappropriate results where the assertion of claims by third parties is concerned.<sup>53)</sup> It is because such claims are not made against the buyer until after delivery. As a result, the buyer can be protected only by well-founded claims on the time of delivery. Nevertheless, as the time of delivery is still important in regard to liability for defects in title, the relevant test should be whether the circumstances giving rise to the defect in title occurred before or after delivery.<sup>54)</sup> That is, if the circumstances which cause the defects in title take place before delivery, it will lead to the breach of the seller's duty to deliver goods free from the property or claims of a third party. If the

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49) John O Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, Kluwer Law International, 2009, p. 387.

50) *Ibid.*

51) Ingeborg Schwenzer, *op. cit.*, p. 653.

52) Enderlein, Maskow, *International Sale of Goods*, Oceana, 1992, p. 166.

53) Ingeborg Schwenzer, *op. cit.*, p. 655.

54) *Ibid.*

circumstances which cause the defects in title take place after delivery, the seller has no liability under Art 41.

## **2. Geographical scope of application**

There is no territorial limitation under Art 41. If the disposal of goods in certain countries is limited, the seller is liable to inform the buyer of it. Otherwise it is proper for the buyer to assume that there is not any limitation to dispose goods. In a propane case,<sup>55)</sup> a Austria seller and a German buyer concluded a contract of sale regarding propane gas. The seller did not have the authorization of their supplier for export of the propane gas into Belgium where it would be resold. If there are delivery restrictions, to mention such restriction of delivery is not the obligation of the buyer but that of the seller. If the seller omits to mention such restrictions, the buyer can justifiably assume that such restrictions do not exist. Therefore, what the seller's supplier restricts the delivery in certain countries constitutes a defect in title.

## **3. Exclusion of the seller's liability and forfeiture of the buyer's right**

### (1) Exclusion of the seller's liability

#### 1) Consent of the buyer

In the case of liability for defective goods, the seller's liability is excluded if the buyer knew of the lack of conformity or could not have been unaware of the lack of conformity because of his gross negligence.<sup>56)</sup>

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55) 6 February 1996, Austria Supreme Court.

56) CISG Art. 35(3): 'Could not have been unaware' means more than gross negligence. It does not differ from what the seller has actual knowledge, Oh, Won Suk·Lee, Byung Mun, A Comparative Study on the Seller's Duty to Deliver the Goods in Conformity with the Contract in the Sale of Goods, *The International Commerce & Law Review*, Vol. 37, 2008, p. 25.

But in the case of liability for legal conformity, the seller's liability does not exist where the buyer consents to take goods encumbered with the property or claims. 'Consent' requires more than mere knowledge.<sup>57)</sup> For example, if the buyer agrees to bear any outstanding storage costs of warehoused goods, it must be seemed that the buyer has consented to purchasing the goods subject to the warehouse owner's security rights or lien and he would set off the purchase price.<sup>58)</sup> Moreover, where the seller informs the buyer that a third party has a security interest over the goods and instructs the buyer to pay the price directly to the third party creditor, the buyer seems to give his consent if he takes the goods unconditionally.<sup>59)</sup> However, the buyer's mere knowledge and the unilateral declarations of the seller are not sufficient to exclude the seller's liability.<sup>60)</sup>

The buyer may express his consent already at the conclusion of the contract, but he may do also retroactively, in particular when third party claims on goods arise after the conclusion of the contract.<sup>61)</sup> The buyer's consent does not need to be given expressly by him but may be given implicitly.

In general, it is hard for the buyer to expect to agree to pay for goods that are subject to a third party right or claims because these goods can strip the buyer's all right to the goods.<sup>62)</sup> Therefore, the exclusion of the seller's liability must be applied carefully not to undermine the buyer's most fundamental expectation in a contract, that is, the clear ownership of the

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57) Ingeborg Schwenzer, *op. cit.*, p. 656.

58) *Ibid.*

59) Schlechtriem, *The Seller's Obligations under the United Nations Convention on Contracts for the International Sale of Goods*, International Sales, New York, 1984, pp. 6-31.

60) Enderlein and Maskow describe a notice by the seller of the third party claims and a failure to protest by the buyer are to be considered as implied consent. They consider the buyer's silence as agreement: Enderlein, Maskow, *op. cit.*, p. 165.

61) *Ibid.*

62) John O Honnold, *op. cit.*, p. 389.

goods.<sup>63)</sup>

## 2) Exemption clauses

The parties can exclude the whole or any part of Art 41 by their agreement under Art 6 or their intention under Art 8. But the validity of such agreement is subject to the domestic law applicable under the rules of private international law.<sup>64)</sup> Although the parties agree not to apply the whole or part of Art 41, such clauses could be denied by the governing law under the rules of private international law.

### (2) forfeiture of the buyer's right

If the buyer fails to give notice to the seller specifying the nature of the right or claim of the third party, he loses his rights in respect of defects in title.<sup>65)</sup> It is required for the buyer to give the seller the precise details, such as the identity of the third party and the type of right which is being asserted.<sup>66)</sup> Furthermore, the buyer must inform the seller about any steps which the third party has already taken.<sup>67)</sup> The reason why the buyer must give the seller precise details is that such notice is supposed to allow the seller to ward off the right or claims of the third party.<sup>68)</sup>

The buyer should give notice to the seller within a reasonable time<sup>69)</sup>. What constitutes a reasonable time will depend on the circumstances of the specific cases. The buyer must be granted a certain time period within

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63) Ibid.

64) CISG Art. 4(a).

65) CISG Art. 43(1)

66) Ingeborg Schwenzer, *op. cit.*, p.676.

67) 11 January 2006, Germany Supreme Court.

68) Ibid.

69) Art 39(1) deems the approximate average period of one month is reasonable and such period can be applied under Art 43. In an automobile case, the court held that the notification to the seller more than two months after the seizure of the car, was beyond the reasonable time as intended in Art 43 (1).

which he can get a general picture of the legal situation.<sup>70)</sup> The type and nature of legal defect and the steps which are already taken by the third party must be also considered.<sup>71)</sup>

The reasonable time begins when the buyer becomes aware or ought to have become aware of the third party right or claim.<sup>72)</sup> 'Ought to have know' means that the buyer cannot ignore concrete indications of a third party right or claim.<sup>73)</sup> But he does not need to carry out research into whether a third party might intend to assert a claim.<sup>74)</sup>

The buyer retains his rights in spite of his failure to give notice if the seller knew of the right or claim of the third party and the nature of it.<sup>75)</sup> Mere knowledge of the right or claim of the third party is not sufficient and positive knowledge is required. The seller must be aware of the nature of such right or claim but not positive knowledge of steps which the third party has already taken against the buyer.<sup>76)</sup> Moreover, the decisive time at which the seller must have knowledge is when the buyer must give notice to the seller.<sup>77)</sup> Thus, if the seller knows the nature of the right or claim, the buyer need not give the seller notice.

#### IV. Conclusion Remarks

This study has examined the seller's liability in regard of the property in

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70) 11 January 2006, Germany Supreme Court.

71) Ibid.

72) CISG Art 43(1).

73) Ingeborg Schwenger, *op. cit.*, p. 677.

74) Enderlein, Maskow, *op. cit.*, p. 171.

75) CISG Art 43(2).

76) Ingeborg Schwenger, *op. cit.*, p. 679.

77) Ibid.



goods. CISG says that the seller must transfer the property in goods but is not concerned with the effect which the contract may have on the property in goods. Matters in relation to the passing of property should be settled in conformity with the governing law by virtue of the rules of private international law. That is, two governing laws exist, which means one to regulate contractual rights and obligations and the other, the *lex rei sitae*, to regulate issues relating to the property of goods. Therefore, contracting parties should find which domestic law is to be the governing law regarding the property in goods. The property can pass to the buyer according to the parties' intention at the conclusion of contract under SGA. But where, like KCC, the delivery of goods is a prerequisite for the transfer of property, the property cannot be transferred because the requirement is not fulfilled at the conclusion of contact.

Furthermore, there are some issues about the transfer of goods. Where the loss or damage of goods is due to the third party's act or omission, the owner has the right to sue the third party. Where one of contracting parties becomes bankrupt, remedies which the other party can exercise differ according to whether or not the property is transferred. If a contracting party disposes goods to a third party, the effectiveness of such action is judged on the base of the property. Therefore, contracting parties have to check the governing law, the *lex rei sitae*, and understand provisions in relation to issues of the property.

On the other hand, the seller should consider CISG Art 41 because it imposes the duty to deliver goods which are free from the third party right or claim on him. The seller has the duty whenever a third party makes a claim, no matter whether the claim is grounded, nor whether the claim is frivolous. It is because of the purpose to protect the buyer against the uncertainty that the claim of a third party can be caused, even if the claim later turns out to be frivolous. A third party claim makes the buyer spend time or money and interfere with the use or resale of goods. Thus, the seller has to make an intensive investigation into whether or not goods are

subject to the third party right or claim. By taking this action, he tries to prevent some damages and losses.

Where there is the buyer's consent, the seller's liability is exempted. The buyer's consent can be given expressly or implicitly by him. The problem is that the standard of implied consent is ambiguous. So it can cause misunderstanding about the buyer's intention. If the seller want to exempt his duty, it is needed for him to specify the buyer's consent.

Lastly, the buyer must give the seller precise details within reasonable time because such notice is supposed to allow the seller to ward off the right or claims of the third party. If he do not, he loses his rights in respect of defects in title. Even though a reasonable time depends on the circumstances of the specific case, the approximate average period of one month deems reasonable. Thus, the buyer should give notice to the seller without delay.

## REFERENCES

- Han, Kyu Sik, The application of the C ISG on the property in the goods sold, *The International Commerce & Law Review*, Vol. 20, 2003.
- Jee, Wonlim, *Lectures in Korean Civil Code*, Hongmoonsa, 2010.
- Oh, Won Suk and Lee, Byung Mun, A Comparative Study on the Seller's Duty to Deliver the Goods in Conformity with the Contract in the Sale of Goods, *The International Commerce & Law Review*, Vol. 37, 2008.
- Suk, Kwanghyun, The New Conflict of Laws Act of the Republic of Korea, *The International Commerce & Law Review*, Vol. 20, 2003.
- Suk, Kwanghyun, *Transfer of Ownership in International Trade*, International Trade Law, 2003.
- Enderlein, Maskow, *International Sale of Goods*, Oceana, 1992.
- Ingeborg Schwenzer, *Commentary on the UN Convention on the International Sale of Goods*, Oxford, 2010.
- John O Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, Kluwer Law International, 2009.
- M Bridge, *Benjamin's Sale of Goods*, Sweet & Maxwell, 2010.
- The International Sale of Goods, Oxford University Press, 2007.
- Schlechtriem, *The Seller's Obligations under the United Nations Convention on Contracts for the International Sale of Goods*, International Sales, New York, 1984.

## ABSTRACT

### A Study on the Seller's Liability regarding Property in Goods on the International Sale of Goods

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This study examines the seller's liability to transfer the property to the buyer. Even though contracting parties choose CISG as the governing law regulating their obligations and rights by means of their contract, CISG does not concern with the effect generated by the transfer of property. Thus, the issues of the property is settled in conformity with the domestic law applicable by virtue of the rules of private international law.

By considering the general rules of the transfer of property in goods under SGA and KCC as the *lex rei sitae*, the difference of requirements to pass the property between them is analyzed and then the reasons why the transfer of property is importantly considered are discussed.

In addition, as CISG does not exclude completely the matters concerning the property and provides the provision like Art 41, the seller's liability to deliver goods free from the third party right or claim is examined under Art 41. Lastly, the practical advice is suggested.

Key Words : The Transfer of Property, The Third Party Right or Claim, CISG, SGA, KCC
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