

STATUTORY RETENTION OF TITLE STRUCTURES? A COMPARATIVE ANALYSIS OF GERMAN PROPERTY TRANSFER RULES IN LIGHT OF ENGLISH AND AUSTRALIAN LAW

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Retention of title arrangements are common contractual tools to secure the payment of the purchase price in cases where sold goods are delivered to the buyer prior to such payment. In most jurisdictions retention of title arrangements require an agreement between the buyer and the seller. Based on a comparative analysis of German law this article argues that it would be in the best interest of all concerned parties to replace this requirement with statutory retention of title structures. Statutory retention of title structures, that is, rules according to which the payment of the purchase price is an automatic - but rebuttable - precondition for the transfer of title to movable property, would only codify what is common contract practice anyway and thus eliminate the potential for errors and conflicts.

INTRODUCTION

It is a common feature of different sales and property law systems that the payment of the purchase price is not a precondition for the transfer of ownership of sold goods. Instead, in most jurisdictions it is left to the parties to adopt retention of title structures, that is, to agree that ownership of the sold subject matter shall be transferred to the buyer only upon full payment of the purchase price. Contrary to this position of the law, however, it is a common perception in Germany that sold goods 'belong' to the buyer only when the purchase price is paid.¹ Furthermore, as in other countries,² retention of title

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¹ Harm Peter Westermann, in Kurt Rebmann, Franz-Jürgen Säcker and Roland Rixeder (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch (Munich Commentary on the Civil Code)* (4th ed, vol 3, 2004) § 449, 1; Herrmann-Josef Bunte, 'Die Vereinbarung eines

structures are not only very common in Germany, but have rather become the most important legal instrument to protect the rights and interests of the concerned parties.³ This provokes questions: Why do title transfer rules not correspond with the general understanding of those to whom these rules are addressed? Can title transfer rules make sense where parties decide to amend these rules on a regular basis? Can this be in line with the understanding that market economies depend on the optimal use of assets by citizens and professional market participants?⁴

This article attempts to discuss these and other questions arising out of the legal significance of the payment of the purchase price by analysing the German model from a comparative perspective.⁵ It reports in its first Part on German law governing the transfer of ownership of sold goods. It goes on to show that there are no compelling reasons for the legislative disregard of the purchase price for the transfer of title of sold goods and demonstrates how legal practice has responded to the shortcomings of the statutory rules. Part 1 concludes that the enactment of statutory retention of title structures appears to be the best solution to solve problems arising out of the current state of the law.

Part 2 then offers comparative observations based on the reform discussion regarding the law governing personal property security in England and Australia. Despite the trend to take a ‘functional approach’ by treating retention of title clauses as security, it is suggested that a statutory retention of title system might have its benefits in these (and other) jurisdictions as well.

Eigentumsvorbehaltes’ (‘The Retention of Title Agreement’) (1982) *Juristische Arbeitsblätter* 321, 325; Ulrich Huber, ‘Kaufvertrag’ (‘Contract of Sale’) in Bundesministerium der Justiz (ed), *Gutachten und Vorschläge zur Überarbeitung des Schuldrechts (Report and Suggestions regarding the Revision of the Law of Obligations)* (1981) 911, 921; Hans Schulte, ‘Zur Möglichkeit eines stillschweigenden Eigentumsvorbehalts’ (‘On the Possibility of an Implied Reservation of Title’) (1977) *Betriebsberater* 269-74.

² J Michael Milo, ‘Retention of Title in European Business Transactions’ (2003) 43 *Washburn Law Journal* 121, 121.

³ Ibid 131; Martin Henssler, in *Soergel: Bürgerliches Gesetzbuch mit Einführungsgesetz und Nebengesetzen (Soergel: Civil Code with Introductory Law and Supplementary Laws)* (13th ed, 2003), Annex (*Anhang*) § 929 note 1; Huber, above n 1, 921-2; Bunte, above n 1, 321; Stefan Leible and Olaf Sosnitzer, Grundfälle zum Recht des Eigentumsvorbehalts’ (‘Basic Cases regarding the Law Governing Retention of Title’) (2001) *Juristische Schulung (JuS)* 244-8, 341-7, 449-56, 556-9, 246; Heinrich Honsell, ‘Aktuelle Probleme des Eigentumsvorbehalts’ (‘Current Retention of Title Problems’), (1981) *Juristische Schulung* 705, 705.

⁴ Cf Ulrich Drobnig, ‘Transfer of Property’ in Arthur Hartkamp et al (eds), *Towards a European Civil Code* (3rd ed, 2004) 725, 725.

⁵ In order to allow for a focused discussion the scope of this article is limited to movable (personal) property. The specifics of the sale of real and immaterial property are not discussed.

In its Final Remarks, this article draws conclusions of a more general nature regarding the role of the law in situations where it is not appreciated, in other words where it is ignored or amended on a regular basis by those to whom it is addressed.

PART 1: PURCHASE PRICE AND TITLE TRANSFER IN GERMANY

A *Contract of Sale and Transfer of Title*

German property law differs from common law systems as far as the voluntary transfer of property from one party to another is concerned. Under German law such transfer always requires a special property transfer act, normally a property transfer agreement.⁶ To transfer property rights this property transfer act is necessary in addition to any underlying contract, for example a contract of sale which establishes contractual rights and obligations.⁷ For example, in the event of the sale of a piece of movable property the respective contractual rights and obligations of the parties are established through the conclusion of the contract of sale as set out in § 433 of the German *Civil Code*:

(1) By a purchase agreement, the seller of a thing is obliged to deliver the thing to the buyer and to procure ownership of the thing for the buyer. The seller must procure the thing for the buyer free from material and legal defects.

⁶ Cf Lutz-Christian Wolff, 'Assignment Agreements under English Law: Lost between Contract and Property Law?' (2005) *The Journal of Business Law* 473, 485-7; Drobniq, above n 4, 734. For civil law jurisdictions that adopt a similar approach see below n 20. For the distinction between, on the one hand, 'consensual transfer systems', where ownership is passed only upon the conclusion of the contract, and 'tradition systems' on the other hand, where the sold thing must be delivered to the buyer, see Lars Peter Wunnibald van Vliet, *Transfer of Movables in German, French, English and Dutch Law* (2000) 23-4; Drobniq, above n 4, 725 ff. The consensual transfer system has its origins in the French *Code Civil* of 1804 and is retained by the property law systems of Belgium, Luxembourg, and - in a more refined way - England and Italy: Drobniq, above n 4, 726-7. In Europe the tradition system is based on Roman law and has, for example, been adopted by the German *Civil Code* as well as by the Greek, the Dutch, the Spanish and the Scottish property law systems: Drobniq, above n 4, 731.

⁷ Wolff, above n 6, 485; Henssler, above n 3, introductory material to (*Vor*) § 929, III 4; van Vliet, above n 6, 23; Karsten Thorn, in Alexander von Ziegler et al (eds), *Transfer of Ownership in International Trade* (1999) 183. This principle is called the '*Trennungsprinzip*' (principle of separation).

(2) The buyer is obliged to pay the seller the agreed purchase price and to accept delivery of the thing purchased.⁸

As the wording of § 433 of the German *Civil Code* shows, the contract of sale (only) establishes the obligation of the seller to transfer ownership of and deliver the sold subject matter to the buyer.⁹ In return, the buyer has to pay the purchase price¹⁰ In contrast, the preconditions for the fulfilment of the seller's obligation to transfer ownership of a piece of movable property to the buyer are set out in § 929 of the German *Civil Code* which reads as follows:

For the transfer of ownership of a movable thing, it is necessary that the owner of the thing delivers it to the acquirer and that both agree that the ownership be transferred. If the acquirer is in possession of the thing, the agreement on the transfer of ownership is sufficient.¹¹

In principle, the transfer of ownership of movable property therefore requires (i) an agreement¹² on such ownership transfer and (ii) the delivery of the sold subject matter.¹³ Again, it is important to appreciate that from the legal

⁸ Translation provided by juris GmbH at the website of the German Bundesjustizministerium (Federal Ministry of Justice) <http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#Section%20433> at 18 January 2009.

⁹ Cf Thorn, above n 7, 183.

¹⁰ That is, to transfer ownership and possession of the money to the seller.

¹¹ Depending on the type of property, the property transfer agreement can be combined with additional requirements (van Vliet, above n 6, 31). Ownership of immovable property is transferred on the basis of §§ 873 and 925 of the German *Civil Code*, which read as follows: '§ 873(1) The transfer of the ownership in a piece of land, the encumbrance of a piece of land with a right, as well as the transfer or encumbrance of such a right requires, to the extent that the law does not otherwise provide, the agreement of the person entitled and of the other party with regard to the occurrence of the change of title and the registration of the change of title in the Land Register.' and '§ 925(1) The agreement of the transferor and the transferee (deed of transfer), required for the transfer of ownership of a piece of land under § 873, must be declared by the parties in their simultaneous presence before a competent authority. Any notary is competent for the reception of the declaration of conveyance, without prejudice to the competence of other authorities....'

¹² Friedrich Quack, in Kurt Rebmann et al, above n 1, § 929 B I 1; Peter Bassenge in Otto Palandt et al, *Bürgerliches Gesetzbuch* (44th ed, 2005) § 929 2.

¹³ Quack, above n 12, § 929, III; Bassenge, above n 12, 3; Henssler, above n 3, Introductory material to (Vor) § 929 I, § 929 IV ff; Martina Schulz, *Der Eigentumsvorbehalt in europäischen Rechtsordnungen (Retention of Title in European Legal Systems)* (1998) 13; Michael H Whincup, *Contract Law and Practice – the English System and Continental Comparisons* (4th ed, 2001) 241; Thorn, above n 7, 185, who also discusses the possible substitutes for delivery such as *brevis manu traditio* pursuant to § 929 sentence 2 of the German *Civil Code*, *consitutum possessorium* pursuant to § 930 of the German *Civil Code* and the assignment of the right to possession/attornment pursuant to § 931 of the German *Civil Code*. Note that in principle these preconditions must also be fulfilled in relation to the payment of the

perspective the agreement regarding the transfer of ownership is a separate agreement, a so-called ‘*dinglicher Vertrag*’,¹⁴ which is different from, for example, the underlying contract of sale.¹⁵ In practice, the additional property transfer agreement is, of course, often concluded together with the contract of sale.¹⁶ For example, if a German woman buys her morning newspaper before rushing to work she and the shopkeeper will agree at the same time on both the contract of sale and the transfer of ownership of the newspaper. But, according to German doctrine, from a legal point of view the two agreements need to be distinguished from each other because they refer to different contents, namely the creation of contractual rights and obligations on the one hand and the transfer of ownership on the other. German doctrine also insists that the existence of each agreement does not depend on the other.¹⁷

The idea of separate acts that are required to effectuate the transfer of ownership is not completely alien to non-German jurisdictions.¹⁸ For example, where parties to a contract of sale are allowed to agree that ownership of the sold goods is transferred only upon the payment of the purchase price, such payment of the purchase price would have to be regarded as such a separate ownership transfer act.¹⁹ However, in Germany²⁰ the concept has been elevated to a universal system that applies to any transaction

purchase price which is to be regarded as the transfer of possession and ownership of the money.

¹⁴ The German term ‘*dinglicher Vertrag*’ can be translated as ‘real contract’ or ‘property rights contract’.

¹⁵ Cf Thorn, above n 7, 183; Drobniġ, above n 4, 734-5.

¹⁶ Henssler, above n 3, IV 4; Schulz, above n 13, 14.

¹⁷ This principle is called the ‘*Abstraktionsprinzip*’ (principle of abstraction); cf Drobniġ, above n 4, 736 ff; van Vliet, above n 6, 24-5, 31 ff.; Thorn, above n 7, 183. In the case that, for example, a sales contract is void, but the agreement regarding the property transfer is valid the seller could recover what has been transferred based on the principles of unjust enrichment. The German concepts of *Trennungsprinzip* and *Abstraktionsprinzip* have been criticised for a very long time, in particular because they are hard to understand not only by laymen, but also by those with a legal background. They have proven their value, however, in particular in connection with problems arising out of the increasingly complex security structures used in the context of modern business transactions; see Henssler, above n 3, IV 4.

¹⁸ See, however, Drobniġ, above n 4, 735, who states that in England ‘the idea of a “real agreement” is virtually unknown’.

¹⁹ Also, for example, under English law the sale of land requires the conclusion of a sale and purchase agreement plus the conveyance in fulfilment of the sale and purchase agreement; see SH Goo, *Sourcebook on Land Law* (3rd ed, 2002) 69; EH Burn, *Modern Law of Property* (16th ed, 2000) 111.

²⁰ Dutch law adopts a similar approach although the Dutch *Civil Code* is much less explicit than the *German Civil Code* and some Dutch writers are opposed to the concept; cf Drobniġ, above n 4, 734-5; Zwitser, in von Ziegler et al, above n 7, 237; Whincup, above n 13, 238-9.

related to the establishment, amendment, transfer or termination of property rights.

B *Purchase Price and Transfer of Title*

It follows from the explanations in the foregoing paragraphs²¹ that the payment of the purchase price is not a statutory requirement for the transfer of ownership of a sold thing under German law.²² However, as is the case in most other jurisdictions,²³ German law allows retention of title arrangements. The parties to a sales transaction can therefore make the transfer of title to movable property subject to the fulfilment of additional preconditions. For example, if the seller of a piece of movable property²⁴ wants to retain her title until the purchase price is paid, the parties may reach an agreement to this effect,²⁵ that is, they may agree that the ownership transfer agreement be subject to the condition precedent²⁶ of the payment of the purchase price.²⁷

The situation was rather different under the private law regimes preceding the German *Civil Code*. Roman Law, as set out by Justinian in 533 AD,²⁸ required in principle, in order for the transfer of ownership of a sold thing from the seller to the buyer to take effect, the payment of the purchase price unless the buyer provided additional security, for example in the form of a

²¹ See above Part 1.A of this article.

²² Also see, for example, Drobniġ, above n 4, 733, who does not consider the price payment in the context of his discussion of how the European property transfer rules should be structured.

²³ See Drobniġ, *ibid* 749: ‘... reservation of ownership is the typical and widely used security of sellers who grant (trade) credit to their purchasers with respect to payment of the purchase price’; Milo, above n 2, 127; for England see, for example, PS Atiyah, *The Sale of Goods* (11th ed, 2005) 470-1.

²⁴ § 929 paragraph 2 of the German *Civil Code* restricts retention of title arrangements to movable property because another security instrument, the ‘*Vormerkung*’ (ie a registration in the land registry) is seen to be sufficient to protect the seller of immovable property; cf Henssler, above n 3, Annex (*Anhang*) § 929 1 (a) and (c); Hans Putzo in Otto Palandt et al, above n 12, § 449 1 (d); Westermann, above n 1, II 1; Schulz, above n 13, 15.

²⁵ Retention of title agreements have gained their current significance in Germany during the last century; see Henssler, *ibid*, Annex (*Anhang*) § 929 II; Putzo, *ibid* § 449, 1 (d); Westermann, *ibid* § 449, 1; Schulz, *ibid* 3.

²⁶ According to § 158 paragraph 1 of the German *Civil Code*; see Putzo, above n 24, § 449 (11); Bassenge, above n 12, (6)(A)(b); Schulz, above n 13, 14; Drobniġ, above n 4, 735. If the parties agree that title shall be retained by the seller, the property transfer agreement is, in case of doubt, made subject to the condition precedent that the purchase price be paid in full, § 449 of the German *Civil Code*; cf Westermann, above n 1, § 449, II 1.

²⁷ German *Civil Code* § 929 para 2; cf Henssler, above n 3, Annex (*Anhang*) § 929 2 ff.

²⁸ Institutes of Justinian 2.1.41. Justinian claimed that this price rule goes back to the law of the XII Tables, the earliest attempt to codify Roman law (450 BC).

lien.²⁹ The *Gemeine Recht*, that is, the common law of the German states prior to the enactment of the German *Civil Code* in 1900, copied this rule.³⁰

However, the drafters of the German *Civil Code* decided not to maintain this Roman law-inspired concept because

of the nature of the contract of sale as seen by the draft (of the German *Civil Code*)³¹ and because it is not in line with the interests of the market in a free exchange of goods³² and also not with property law principles...³³

It is interesting to note that the *Civil Code*³⁴ of the former German Democratic Republic of 1975 (the ‘GDR *Civil Code*’)³⁵ again adopted structures which were similar to what had been in place under Roman Law and under the *Gemeine Recht*. In principle, GDR law required, for the transfer of ownership of movable property, the fulfilment of two preconditions, namely the conclusion of an agreement between the parties and delivery of the subject matter.³⁶ For sales contracts, however, § 139 of the GDR *Civil Code* provided for the following special rule:

²⁹ See Max Kaser, *Das Römische Privatrecht, (Roman Private Law)* (Part 1, 2nd ed, 1971) 418, 552; Max Kaser, *Das Römische Privatrecht (Roman Private Law)* (Part 2, 2nd ed, 1975) 278; Egbert Sandmann, *Zur Geschichte des Eigentumsvorbehalts in Deutschland (On the History of Retention of Title in Germany)* (Dissertation, University of Marburg, 1972)) 106, 110. Whether a statutory retention of title structure was known during the time of classical Roman law (50 BC to 230 BC) is unclear and disputed: Karlheinz Misera, ‘Zum Eigentumsvorbehalt im klassischen römischen Recht’ (‘On Retention of Title Structures under Classical Roman Law’) in Ulrich Huber and Eric Jayme (eds), *Festschrift für Rolf Serick zum 70 Geburtstag (Festschrift for Rolf Serick for his 70th Birthday)* (1992) 275-83.

³⁰ Sandmann, above n 29, *passim*.

³¹ Wording in brackets added by the author.

³² In German: ‘Verkehrsinteressen’.

³³ *Motive zu dem Entwurfe eines Bürgerlichen Gesetzbuches für das Deutsche Reich (Motives for the Draft of a Civil Code for the German Reich) Vol II, Law of Obligations* (2nd ed, 1896) 318.

³⁴ According to its § 133 the GDR *Civil Code* was not applicable to relationships between state-owned enterprises and state-owned enterprises and other business entities, but only to contracts between citizens and retail entities and among citizens: Klaus Westen and Joachim Schleider, *Zivilrecht im Systemvergleich – Das Zivilrecht der Deutschen Demokratischen Republik und der Bundesrepublik Deutschland (Civil Law Compared Systematically – The Civil Law of the German Democratic Republic and of the Federal Republic of Germany)* (1984) 404.

³⁵ As a result of the German reunification in 1990 the German Democratic Republic (‘GDR’) has ceased to exist and its laws and regulations are consequently not in force any more.

³⁶ The relevant § 26(1) of the GDR *Civil Code* stipulated under the heading ‘Acquisition of (Personal) Property’: ‘The contractual transfer of ownership of a thing takes place with the delivery of the thing, unless otherwise stipulated in this law or in other rules or regulations. ...’; see Joachim Göhring and Martin Posch, *Zivilrecht (Civil Law)* (1981) 156; Klaus Westen, *Das neue Zivilgesetzbuch der DDR von 1975 (The New Civil Code of the GDR of 1975)* (1977) 80.

(3) Ownership is transferred to the buyer upon delivery of the subject matter and payment of the purchase price unless otherwise agreed by the parties.

The transfer of ownership of a sold thing therefore required the fulfilment of three preconditions, namely (i) the conclusion of a contract of sale, (ii) delivery of the sold subject matter and (iii) the payment of the purchase price.³⁷ Thus, GDR law established statutory retention of title structures for sales transactions.³⁸ Parties to a sales contract had the option, however, to arrange for the title to a sold thing to pass to the buyer regardless of the payment of the purchase price.

C *Reasons Supporting the ‘Legislative Disrespect’ for the Purchase Price?*

1 *General*

The historical background of German private law,³⁹ as well as the fact that the use of retention of title arrangements is so common (at least in the context of commercial transactions),⁴⁰ provoke the question of whether there are any justifications for the fact that the purchase price is not considered by the German Civil Code as one of the statutory preconditions for the transfer of title to sold items. The ‘Motives’,⁴¹ which summarise the legislative rationale of the drafters of the German Civil Code are not conclusive in this regard. They justify the fact that the purchase price is disregarded for the title transfer of purchased objects by reference to the ‘nature of the contract of sale as seen by the Civil Code’, to the ‘interests of the market in a free exchange of goods’ and to ‘property law principles’.⁴² These justifications are not convincing in

The agreement required under § 26(1) of the GDR *Civil Code* was not a special property transfer agreement as in Germany today, but simply, for example, a contract of sale; see expressly Göhring and Posch at 157; Westen at 80.

³⁷ Ministerium der Justiz (ed), *Kommentar zum Zivilgesetzbuch der Deutschen Demokratischen Republik vom 19. Juni 1975 und zum Einführungsgesetz zum Zivilgesetzbuch der Deutschen Demokratischen Republik vom 19. Juni 1975 (Commentary on the Civil Code of the German Democratic Republic of 19 June 1975 and on the Introductory Law of the Civil Code of the German Democratic Republic of 19 June 1975)* (1975) 190; Westen, *ibid* 80; Westen and Schleider, *above n* 34, 318.

³⁸ Westen, *ibid* 80; Westen and Schleider, *ibid* 318.

³⁹ Part 1.A of this article.

⁴⁰ Introduction of this article.

⁴¹ Part 1.B of this article.

⁴² *Motive*, *above n* 33, 318; compare Part 1.A of this article.

light of the development of German doctrine since the enactment of the German Civil Code in 1900, as will be explained in the following.

2 *The Nature of Contracts of Sale*

First of all, the Motives' reference to the nature of 'the contract of sale' is not really clear. One can only assume that this reference relates to the fact that, under the German *Civil Code*, a contract of sale is not to be seen as an act which achieves the transfer of ownership of sold subject matters.⁴³ Consequently, the drafters of the German *Civil Code* may have regarded it as inappropriate to provide for title transfer rules within the section on contracts of sale. However, this would of course not prevent a rule on title transfer being located in the property law section of the German *Civil Code*.

3 *Verkehrsinteressen*

The Motives further refer to the '*Verkehrsinteressen*', a term which means the interest of the market in the free exchange of goods. The interest of the market in the free exchange of goods is, however, not a compelling reason to disregard the purchase price when it comes to determining the preconditions for the transfer to ownership of sold goods.

As mentioned earlier,⁴⁴ the use of retention of title structures is quite common in Germany.⁴⁵ If German law allows agreements according to which title to sold goods is retained until full payment of the purchase price, and if parties to contracts of sale are in fact taking advantage of this opportunity on a regular basis in their own interests, then the same must hold true for statutory retention of title rules. In other words, a statutory rule which makes the payment of the purchase price a precondition of the transfer of title to the sold

⁴³ Ibid.

⁴⁴ Part 1 of this article.

⁴⁵ According to modern doctrine, retention of title agreements are beneficial to both the seller and the buyer. The seller can hold on to her rights to the sold property item even after delivery until the purchase price is paid in full: Frank Peters, 'Kauf und Übereignung – Zum sogenannten Abstraktionsprinzip' (1986) *Jura* 449, 450. At the same time retention of title structures also serve the interests of the buyer because only retention of title structures will induce the seller to deliver the subject matter prior to the full payment of the purchase price, thus allowing the buyer to purchase on credit: see Bunte, above n 1, 321; Ulrich Huber, 'Der Eigentumsvorbehalt im Synallagma' ('Retention of Title in the Synallagma') [1987] *Zeitschrift für Wirtschaftsrecht (ZIP)* 750, 752. Interests of third parties are not affected by the use of retention of title clauses: Bunte, above n 1, 321.

thing does nothing else but serve the interests of the market and its participants in a free exchange of goods.

4 *Property Law Principles*

Finally, the Motives state that it would not be in line with property law principles to make the payment of the purchase price a statutory precondition for the transfer of ownership. This terse statement could be interpreted as referring to the so-called '*Publizitätsgrundsatz*',⁴⁶ that is the general principle underlying property law in Germany, according to which the existence and the ownership of property rights should be clearly ascertainable and recognisable for the sake of legal certainty and clarity.⁴⁷ The *Publizitätsgrundsatz* aims at protecting the public in its reliance on the assumption that the possessor of property⁴⁸ or the person shown in a public register as owner of the property is in fact the legitimate owner of the property in question.

Whether the purchase price has been paid is not something which is normally capable of being known by third parties. One may therefore argue that such payment should not be a precondition to the transfer of title of sold goods, as third parties would not know whether this invisible precondition had been fulfilled or not. But then, as already mentioned, German law allows parties to agree on retention of title structures anyway, and parties do in fact take advantage of this option on a regular basis, stipulating as between themselves that the invisible act of the payment determines the transfer of title. In such cases the *Publizitätsgrundsatz* does not seem to be an obstacle and it would not be justifiable to apply different standards depending on whether payment of the purchase price is made a precondition of the transfer of ownership by way of an agreement or statutorily. Further, if it is the perception of the German woman or man in the street that ownership of purchased goods is transferred upon the payment of the purchase price, as discussed above,⁴⁹ then there is no need to protect the general public against any misunderstandings, as it is already known that ownership may, and normally does, depend on the payment of a purchase price.

⁴⁶ Peters, *ibid* 449.

⁴⁷ Klaus Müller, *Sachenrecht (Property Law)* (4th ed, 1997) 17-19.

⁴⁸ For the argument that possession does in modern times not necessarily provide the appearance of ostensible ownership to anybody see Gerard McCormack, 'Personal Property Security Law Reform in Comparative Perspective – Antipodean Insights?' (2004) 33(1) *Common Law World Review* 3, 16.

⁴⁹ Above n 41.

5 Summary

To conclude, there are no compelling reasons supporting the legislative disregard of the purchase price in relation to the transfer of title of movable property items. On the contrary, German law fails to meet the general expectation that ownership of sold goods is transferred only upon full payment of the purchase price.⁵⁰ Moreover, the title transfer rules of the *Civil Code* force parties into contractual retention of title arrangements to protect their respective interests.⁵¹ It is obvious that this creates unnecessary potential for errors⁵² and conflicts, as documented by many decisions of the German Federal Supreme Court on retention of title issues.⁵³

German courts and commentators are - at least tacitly - aware of the issues discussed in the foregoing paragraphs. Accordingly, there have been a number of attempts to remedy the situation. The different approaches will be discussed in the following segments.

D The Response of German Legal Practice

1 Implied Retention of Title Agreements as the Norm

Some well-known German academics⁵⁴ are promoting the idea that, in the case of the sale of movable property, the parties always agree impliedly that

⁵⁰ Part 1.B of this article.

⁵¹ Introduction and Part 1.A of this article.

⁵² Bunte, above n 1, 326: ‘... exists an unpleasant legal uncertainty under current law.’

⁵³ See, eg, (2006) *Neue Juristische Woche* (NJW) 3488-3490 (BGH - Federal Court of Justice).

⁵⁴ Westermann, above n 1, § 449 margin number (Rz) 15; also see Manfred Lieb, ‘Eigentumsvorbehalt und Abwehrklausel - Versuch einer Neubestimmung’ (‘Retention of Title and Defense Clause – Attempt of a Redefinition’) in Hanns Prütting (ed), *Festschrift für Gottfried Baumgärtel (Festschrift für Gottfried Baumgärtel)* (1990) 311, 320; Friedrich Graf von Westfalen, *Wirksamkeit des einfachen Eigentumsvorbehalts bei Kollision von Abwehrklauseln in Einkaufs-AGB mit Verkaufs-AGB (Effectiveness of Simple Retention of Title Clauses in Case of a Conflict of Defence Clauses in General Terms of Purchase with General Terms of Sale)* (1987) *Zeitschrift für Wirtschaftsrecht* (ZIP) 1361, 1367; Florian Faust in Heinz Georg Bamberger and Herbert Roth (eds), *Kommentar zum Bürgerlichen Gesetzbuch* (vol 1, 2nd ed, 2007) § 449 margin number (Rz) 12; Schulte, above n 1, 270; (1958) *Monatsschrift für deutsches Recht* (MDR) 514 (LG Aachen -District Court Aachen); Bunte, above n 1, 321. The German Federal Court of Justice has until now avoided expressing an opinion on this question.

title to a sold item shall only pass upon full payment of the purchase price. In support of their position, these authors refer expressly to the general assumption⁵⁵ that a buyer will only have unconditional rights to a purchased item upon full payment of the purchase price.⁵⁶ They argue that an implied retention of title arrangement is in the interest of any buyer as (only) this will induce the seller to deliver sold goods without having received payment.⁵⁷ Furthermore, the acknowledgement of an implied retention of title arrangement would not harm the position of the seller, as he will in any event only be interested in the sold item for security purposes.⁵⁸

The assumption that parties to a contract of sale always agree impliedly on a retention of title structure would indeed help to bridge the described difference between written law and the needs of legal reality.⁵⁹ However, it must be pointed out again that current German law does not provide for statutory retention of title structures.⁶⁰ On the contrary, retention of title arrangements always require the parties' agreement.⁶¹ Therefore, provided that the normal rules on the conclusion of contracts are not thrown overboard altogether, an implied agreement of this kind cannot always be assumed automatically.⁶² In many cases the parties will not even be aware of the requirement for such an agreement.⁶³ In fact, in practice the parties often fail to agree on clear contractual terms.⁶⁴

Consequently, contrary to the viewpoint of the above quoted authors, two things must be asked in any individual case. First, has there been any express

See lately the decision handed down in 2006 and published in (2006) *Neue Juristische Woche* (NJW) 3488-90. This decision is discussed in Karin Fritsche and Markus Würdinger, 'Konkludenter Eigentumsvorbehalt beim Autokauf' ('Implied Retention of Title in the Context of Car Purchases') (2007) *Neue Juristische Woche* (NJW) 1037-9.

⁵⁵ Cf Part 1.B of this article.

⁵⁶ Westermann, above n 1, § 449 margin number (Rz) 15; Bunte, above n 1, 325; Huber, above n 1, 921.

⁵⁷ Faust, above n 54, § 449 margin number (Rz) 12.

⁵⁸ Ibid.

⁵⁹ Bunte, above n 1, 325.

⁶⁰ Part 1.B of this article; Bunte, *ibid* 321, 324-5. Also note in this context that § 502 paragraph 1 sentence 1 No 6 of the German *Civil Code* stipulates that, in the case of a sales transaction between a commercial seller and a consumer as defined in § 501 of the German *Civil Code*, where the purchase price is to be paid by instalments, the contract is required to be in written form. In these cases it will be very difficult to argue that the parties have impliedly agreed on a retention of title clause where a written contract of sale fails to make any reference to it.

⁶¹ (1977) *Der Betrieb* 248-9 (BGH -Federal Court of Justice); Bunte, above n 1, 324-5; Leible and Sosnitza, above n 3, 246; Honsell, above n 3, 706.

⁶² Leible and Sosnitza, *ibid* 246.

⁶³ Graf von Westfalen, above n 54, 1367.

⁶⁴ Bunte, above n 1, 321; Huber, above n 1, 922.

or implied declaration of intention by the seller to the effect that she wants to reserve title to the sold item until full payment of the purchase price has been made? Second, has the buyer accepted this declaration of intention without any amendment? Accordingly, the German Federal Supreme Court has made it clear in a famous decision of the year 1975 that the seller must declare a reservation of title in an unambiguous way, at the latest upon delivery of the sold item, and that strict standards must be applied in relation to the clarity of such a declaration.⁶⁵

2 *Payment of the Purchase Price as an Unwritten Element of the Title Transfer Rule*

German legal methodology allows, in principle, adding unwritten elements to statutory rules in order to ‘close a legislative gap’.⁶⁶ As far as the sale of movable property items is concerned, one might therefore possibly regard the payment of the purchase price as an additional unwritten element of the rule of § 929 sentence 1 of the German *Civil Code* which sets out the preconditions for the transfer of ownership of movable property as explained above.⁶⁷ However, unwritten elements cannot be created arbitrarily. In particular, the intention of the ‘historical lawmakers’ must be taken into account.⁶⁸ From this viewpoint it does not seem to be possible to establish that the payment of the purchase price is such an unwritten element of § 929 sentence 1 of the German *Civil Code* because this would be contrary to the express intention of the drafters of the German *Civil Code*.⁶⁹

3 *Retention of Title Arrangements as Trade Custom?*

⁶⁵ (1977) *Der Betrieb* 248-9 (BGH - Federal Court of Justice); cf Drobnič, above n 4, 735. In a more recent decision, the Federal Court of Justice has left the question expressly open whether an implied retention of title agreement must always be assumed automatically where a purchased item is delivered prior to the payment of the purchase price. See (2006) *Neue Juristische Woche* (NJW) 3488-90 (BGH - Federal Court of Justice).

⁶⁶ Franz Bydlinski, *Juristische Methodenlehre und Rechtsbegriff* (*Legal Methods and Legal Term*) (2nd ed, 1991) 472-5.

⁶⁷ Cf Part 1.A of this article.

⁶⁸ See Bydlinski, above n 66, 475, for example, for the different interpretational approaches to the ‘ageing’ of statutory provisions. See Rolf Wank, *Die Auslegung von Gesetzen* (*The Interpretation of Laws*) (3rd ed, 2005) 36-42.

⁶⁹ Part 1.A of this article.

A different conclusion may be possible, based on § 346 of the German *Commercial Code*,⁷⁰ provided that it is customary at least in particular industries that the title to sold commodities is only transferred to the buyer upon payment of the purchase price.

German commentators have discussed broadly and in depth in which industries retention of title arrangements have become a trade custom.⁷¹ The diversity of opinion regarding this question and the resulting legal uncertainty⁷² demonstrate how unsatisfactory the current statutory situation is. In any event, the Higher Regional Court Hamm⁷³ stated, in a decision published in 1993, that the sole fact that it is common practice amongst sellers within a particular industry to deliver goods only subject to a reservation of title, is not sufficient for the creation of a trade custom. The principle of legal certainty makes it mandatory that such reservation of title practice is also accepted by the recipients of the goods, in other words by the buyers.

E Conclusions

As explained in the previous segments, under German law the payment of the purchase price is of no relevance to the transfer of title of sold goods unless the parties agree otherwise. This, however, is not in line with the general perception and the requirements of the market. Moreover, attempts to develop contractual and other tools to bridge the gap between statutory title transfer requirements and the needs of the parties to sales contracts have proven to be unsatisfactory. The resulting uncertainty and lack of predictability appear especially problematic in the area of property law, as property relations have effects *erga omnes*,⁷⁴ that is, in relation to everyone.

All this leaves only one solution to the existing difficulties: a change of the rules of the German *Civil Code* regarding the transfer of ownership of sold goods. More precisely, the payment of the purchase price should be elevated

⁷⁰ §346 of the German *Commercial Code* reads: 'Between business people, as regards the meaning and the effects of acts and omissions to act, trade usages and customs applicable in relation to business transactions are to be considered.'

⁷¹ See Henssler, above n 3, II 2 (a) ff; Westermann, above n 1, III 1; Schulz, above n 13, 16 ff.

⁷² Lieb, above n 54, 312 ('unclear and disputed').

⁷³ (1993) *Neue Juristische Woche (Rechtsprechungs-Report)*(NJW-RR) 1444-1445 (OLG Hamm - Higher Regional Court Hamm); (1994) *Monatsschrift für deutsches Recht* (MDR) 784-5; (1994) *Zeitschrift für Wirtschaftsrecht* (ZIP) 889-90. See also (1958) *Monatsschrift für deutsches Recht* 514 (LG Aachen - District Court Aachen) and Honsell, above n 3, 706.

⁷⁴ Cf Drobnig, above n 4, 733; Milo, above n 2, 121.

to a statutory precondition for the transfer of title to sold movable property.⁷⁵ Ulrich Huber, a distinguished German law professor, made this proposal as early as 25 years ago as part of his study on necessary reforms of the German Civil Code.⁷⁶ Another German academic, Frank Peters, has called Huber's proposal

remarkable, justified in light of the interests of the parties, but hardly in line with the spirit of the Civil Code.⁷⁷

As of 1 January 2002, Germany's law of obligations has undergone a substantial reform.⁷⁸ These reforms have, however, not touched the title transfer rules.⁷⁹ While it is not really clear why Huber's proposal was disregarded,⁸⁰ its advantages are more than obvious: Written law would be brought in line with legal reality. The potential for conflicts and errors arising out of the fact that parties to a contract of sale have to reach agreements on retention of title structures to protect their own interests⁸¹ would be eliminated. Transaction costs would be reduced.⁸² Moreover, statutory retention of title structures would be in line with the rule of law requirement of predictability also in relation to the significance of the purchase price.⁸³

⁷⁵ Note that *Directive 2000/35/EC* of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions does not exclude the possibility to provide statutorily that title to a sold subject matter is only transferred upon payment of the purchase price. The wording of the Directive is ambiguous, see McCormack, above n 48, 12; Martin Habersack and Jan Schürmbrand, 'Der Eigentumsvorbehalt nach der Schuldrechtsreform' ('Retention of Title after the Reform of the Law of Obligations') (2002) *Juristische Schulung* (JuS) 833, 834 ('open and absolutely unclear regulation'); Drobnič, above n 4, 749; Milo, *ibid* 137-8. It only stipulates that EU member states have to allow retention of title arrangements as such: Drobnič *ibid*; Habersack and Schürmbrand at 834; Westermann, above n 1, § 449 margin number (Rz) 5; also see Martin Schmidt-Kessel, 'Die Zahlungsverzugsrichtlinie und ihre Umsetzung' ('The Directive on Late Payment and its Implementation') (2001) *Neue Juristische Woche* (NJW) 97, 102. In contrast, the Directive does not prohibit statutory retention of title rules: Dietrich Reinicke and Klaus Tiedtke, *Kaufrecht (Sales Law)* (4th ed, 2004) margin number (Rz) 1279; Habersack and Schürmbrand at 839.

⁷⁶ The study had been commissioned by the German government.

⁷⁷ Peters, above n 45, 449-61.

⁷⁸ See Reinhard Zimmermann, *The new German Law of Obligations: Historical and Comparative Perspectives* (2005).

⁷⁹ Part 1.A of this article.

⁸⁰ The German Ministry of Justice has kindly confirmed in an email to the author dated 22 May 2008 that it has no information on why the German lawmakers have not acted upon Huber's suggestion.

⁸¹ Cf Bunte, above n 1, 321.

⁸² Cf in relation to uncertainties related to cross-border trade within the EU, Milo, above n 2, 125.

⁸³ Wank, above n 82.

And, if the use of retention of title arrangements is common anyway, it only makes sense to change the law to conform to this practice.

Finally, statutory retention of title rules would comply with another fundamental notion of German private law, the *Synallagma*. The term *Synallagma* stands for the principle of reciprocity and means, in the contractual context, that parties should establish and perform their obligations reciprocally.⁸⁴ In fact, it is the reciprocal exchange of ownership and possession of a purchased item against the payment of the purchase price which is the central idea of sales transactions as set out in § 433 of the German *Civil Code*.⁸⁵

Of course, the payment of the purchase price alone cannot automatically effectuate the transfer of ownership of a sold thing. This is especially obvious in cases where the sold property item is yet to be ascertained⁸⁶ or where sold goods are future goods, that is, where they do not even exist at the time of contracting or at the time of the payment of the price.⁸⁷ Furthermore, the interests of bona fide third parties or consumer interests may require that ownership of a sold subject matter be transferred even where the seller herself has not yet paid the purchase price and has consequently not become the owner of the goods. Furthermore, in insolvency cases the interests of concerned parties, in particular of the creditors of the insolvent debtor, may require protection.⁸⁸ Finally, special consideration must be given to the

⁸⁴ § 320 of the *German Civil Code* embodies the principle of reciprocity as far as performance is concerned: '(1) A person who is a party to a reciprocal contract may refuse his part of the performance until the other party renders consideration, unless he is obliged to perform in advance. If performance is to be made to more than one person, an individual person may be refused the part performance due to him until the complete consideration has been rendered. ... (2) If one party has performed in part, consideration may not be refused to the extent that refusal, in the circumstances, in particular because the part in arrears is relatively trivial, would be bad faith': translation by juris GmbH at <http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#Section%20433> at 18 January 2009. Note that the detailed legal meaning of the *Synallagma* under German law is disputed: see Lutz-Christian Wolff, *Zuwendungsrisiko und Restitutionsinteresse (The Risk of Transferring Property Rights and Restititional Interests)* (1998) 101-114.

⁸⁵ Quoted in Part 1.A of this article.

⁸⁶ For example: 20 kg of potatoes have been sold out of a carload of 100 kg.

⁸⁷ Cf Drobnič, above n 4, 733.

⁸⁸ In many jurisdictions retention of title clauses have effect even in case of an insolvency of the buyer; that is, the seller may reclaim the sold thing in this case, see for Germany, France, Italy and England, Drobnič, above n 4, 754; for New Zealand see Brendan Brown, 'Retention of Title under New Zealand's Personal Property Security Act 1999' (2002) 17(4) *Journal of International Banking Law* 102-109; Milo, above n 2, 132; for England see Andrew McKnight, 'The Reform of English Law Concerning Secured Transactions' Part 1 [2006] *Journal of*

question of whether special types of contract clauses, such as so-called proceeds clauses and products clauses,⁸⁹ shall be allowed or shall be subject to special (form) requirements.

All these and other circumstances must be assessed carefully when designing property transfer rules.⁹⁰ Under current German law special rules enacted to take account of the above situations would, however, by no means prevent the introduction of the general concept according to which the purchase price is made one, additional, precondition for the transfer of ownership in sales transactions. Last but not least, such a concept would only reinforce what is the general perception and commercial practice anyway.

PART II: COMPARATIVE DISCUSSION

A General

Germany is not unique in according the purchase price little significance in title transfers. Indeed, most jurisdictions⁹¹ have taken a similar approach and it is common for the payment of the purchase price not to be an automatic precondition for the transfer of ownership of sold goods. Rather, parties to a sales contract are normally given the option of reaching an agreement that the title to sold goods shall only be transferred upon full payment of the purchase price, in other words to agree on retention of title structures as in Germany.⁹²

Related rules in place in England and Australia will be discussed in the following to shed some comparative light on the German situation from the common law perspective. England has been selected⁹³ for these comparative

Banking Regulation 497, 500 and Part 2 [2006] *Journal of Banking Regulation* 587; Atiyah, above n 23, 477.

⁸⁹ Cf below n 105.

⁹⁰ For example, as in other jurisdictions, German law requires under the principle of speciality (in German: '*Spezialitätsgrundsatz*') that the transfer of ownership is only possible in relation to specific things. While unascertained things can be sold in principle appropriation is necessary for the transfer of ownership, cf Thorn, above n 7, 183. For *bona fide* acquisitions and insolvency related issues see Thorn at 188 ff.

⁹¹ See the comparative discussion of the situation of 19 different jurisdictions in von Ziegler et al, above n 7.

⁹² Cf Milo, above n 2, 135.

⁹³ For factors determining the election of jurisdictions for comparative purposes see Marieke Oderkerk, 'The Importance of Context: Selecting Legal Systems in Comparative Legal Research' (2001) 48(3) *Netherlands International Law Review* 293.

purposes because of its obvious significance for the development of the common law and the fact that England has not yet followed other common law jurisdictions in reforming its personal property security system. Australia, by contrast, is about to take legislative steps that are based on earlier developments in the US, Canada and New Zealand, potentially leading to new rules governing retention of title agreements, among other things. This offers interesting comparisons with the German situation.

B *England*

Section 17 of the English *Sale of Goods Act 1979* (UK)⁹⁴ stipulates that parties may agree on the time and the preconditions for the transfer of title of sufficiently specified⁹⁵ goods. Section 17 reads as follows:

(1) Where there is a contract for the sale of specific or ascertained⁹⁶ goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.⁹⁷

English law therefore allows parties to a contract of sale to make the ownership transfer subject to the payment of the purchase price.⁹⁸ Section 19

⁹⁴ The English *Sale of Goods Act 1979* (UK) was last amended on 1 October 2003.

⁹⁵ Sarah Worthington, 'Passing of Property', in Ewan McKendrick (ed), *Sale of Goods* (2000) 57, 57.

⁹⁶ Goods are ascertained in this sense 'when one particular article or collection of articles can be identified or earmarked as the unique subject-matter of the contract': Whincup, above n 13, 224.

⁹⁷ If not indicated otherwise by the parties ownership passes at the time of the conclusion of the contract of sale pursuant to s 18 Rule 1 of the *Sale of Goods Act 1979* (UK), which reads as follows: 'Where there is an unconditional contract for the sale of specific goods in a deliverable state the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.' Cf Whincup, *ibid* 227 ('surprising'). For reasons of practicality English courts have, however, required very little in order to rebut this rule, ie in order to construe a different intention of the parties: Whincup, *ibid*; Worthington, above n 95, 62.

⁹⁸ Whincup, *ibid* 225: 'The most common practice is to say that ownership shall pass on delivery, or when payment is made after delivery'; Milo, above n 2, 127.

of the *Sale of Goods Act* expressly confirms the availability of retention of title structures when it states:⁹⁹

(1) Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled; and in such a case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee or custodian for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled....

While retention of title clauses became rather common in England after the famous *Romalpa* decision¹⁰⁰ of the Court of Appeal in 1976, it must be pointed out that under English law too the payment of the purchase price is only relevant for the transfer of title to sold goods if the parties reach an agreement to this effect.¹⁰¹ Furthermore, as in Germany¹⁰² and other continental European jurisdictions,¹⁰³ there is currently no requirement to register 'simple' retention of title clauses, nor is it necessary to give any other

⁹⁹ Cf Atiyah, above n 23, 472. Hong Kong's situation is identical to that of England. Sovereignty over Hong Kong had been returned to the People's Republic of China on 1 July 1997 based on the *Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong*, dated 19 December 1984, <<http://www.info.gov.hk/trans/jd/jd2.htm>> at 18 January 2009 after more than 150 years under British colonial rule. Hong Kong's legal system will, however, remain unchanged for a period of 50 years from the hand-over date under the principle 'one country, two systems'. Generally speaking Hong Kong law follows English law. Sections 19 to 21 of the Hong Kong *Sale of Goods Ordinance* mirror sections 18 to 20 of the English *Sale of Goods Act 1979* (UK) and the parties' intention therefore determines the point of time when ownership of sold movables is transferred.

¹⁰⁰ *Aluminium Industrie Vaassen v Romalpa Aluminium Ltd* (1976) 1 WLR 676 ('*Romalpa*'); cf Whincup, above n 13, 230 ff.; Juliet Taylor, 'Retention of Title and Trans-Tasman Supply of Goods' (2006) 12 *New Zealand Business Law Quarterly* 71, 71 ('... one of the most important developments in commercial law in the latter part of the 20th century'); for practical problems arising out of the current situation cf McKnight, above n 88, 501; Atiyah, above n 23, 474 ('a somewhat unsatisfactory authority'). For the use of retention of title clauses in England prior to the *Romalpa* decision, see Laurence Crowley, 'Reservation of Title in England and Wales' in Dennis Campbell and Anthony E Collins (eds), *Corporate Insolvency and Rescue: The International Dimension* (1993) 249, 249.

¹⁰¹ Atiyah, above n 23, 470; for recent reform developments see McCormack, above n 48, 3-34.

¹⁰² Cf Parts 1.A and 1.B of this article.

¹⁰³ Cf Whincup, above n 13, 238. Note that, for example, in France the enforceability of reservation of title clauses in the case if the buyer's insolvency requires a written agreement reached prior to the delivery of the sold subject matter to the buyer: Whincup at 240; Drobnič, above n 4, 749.

form of notice.¹⁰⁴ Simple retention of title clauses are clauses under which the seller retains title to the sold goods until full payment of the purchase price is made.¹⁰⁵ The same is true - that is, no registration or notification requirement exists - for so-called 'current account clauses'.¹⁰⁶ These are retention of title clauses according to which title is retained not only until full payment of the purchase price owed under the particular sales contract, but until all debts of the buyer are cleared.¹⁰⁷

Following international trends,¹⁰⁸ discussions have taken place and are ongoing regarding a possible reform of the English personal property security law system, including the '*Romalpa*-inspired' rules governing retention of title clauses.¹⁰⁹ In fact, 'over the last few years there has been an unprecedented level of debate about the rights and wrongs of the law of security in England'.¹¹⁰ This debate has, however, not resulted in any legislative action yet.¹¹¹ Consequently, English law continues to acknowledge

¹⁰⁴ Cf Whincup, *ibid* 232.

¹⁰⁵ Cf Gerard McCormack, 'Personal Property Security Law Reform in England and Canada' (2002) *Journal of Business Law* 113, 133; Taylor, above n 100, 72.

¹⁰⁶ Also called: 'all liabilities clauses' or 'all sums clauses'.

¹⁰⁷ See *Clough Mill Ltd v Martin* [1985] 1 WLR 111; *Armour v Thyssen Edelstahlwerke AG* [1991] 2 AC 339; McCormack, above n 105, 133; Taylor, above n 100, 72. In contrast, English courts have regarded so-called 'proceeds clauses' (also called: 'tracing clauses', see Taylor at 72), and 'manufacturing clauses' (also called 'products clauses' or 'aggregation clauses', see Taylor, above n 100, 72) as the creation of a charge leading to registration requirements; cf for proceeds clauses *Pfeiffer Weinkellerei-Weineinkauf GmbH & Co. v Arbuthnot Factors Ltd* [1988] 1 WLR 150; *Compaq Computer Ltd v Abercorn Group Ltd* [1991] BCC 484; for manufacturing clauses *Re Peachdart Ltd* [1984] Ch 131; McCormack at 134. The term 'proceeds clauses' stands for retention of title clauses which entitle the buyer to sell the sold goods to her own customers while the ownership of the original seller shall extend to the proceeds derived from these sales, Taylor at 72. Manufacturing clauses are retention of title clauses under which title of the seller shall extend to new products manufactured or mixed with the sold goods, *ibid*.

¹⁰⁸ Cf McCormack, above n 48, 3, with reference to promotional efforts of the United Nations Commission for International Trade (UNCITRAL), the International Institute for the Unification of Private law (UNIDROIT) and the European Bank for Reconstruction and Development (EBRD); Drobnig, above n 4, 754; McKnight, above n 88, 597: 'An English system based on such models would benefit from the experience gained in those jurisdictions and would not attempt to reinvent the wheel'.

¹⁰⁹ For a summary of related issues cf McKnight, *ibid*, who states at 502: 'The current system for the compulsory registration of security is hardly perfect and clearly is in need of reform'; Atiyah, above n 23, 477; McCormack, above n 105, 113: '... the proponents of reform overstate the defects of the present system'.

¹¹⁰ Richard Calnan, *Taking Security – Law and Practice* (2006) 1.

¹¹¹ The reasons are discussed by McCormack, above n 48; McCormack, above n 105, 113; McKnight, above n 88, 589; also see Atiyah, above n 23, 478; the English Law Commission's Report on 'Company Security Interests' (2005) <<http://www.lawcom.gov.uk/docs/lc296.pdf>> at 28 April 2009 which limits its proposals to recommending 'a new system to cover corporate

the legal effects of retention of title clauses as explained in the previous paragraphs. On the other hand, and relevant to the main topic of this article, unless the parties to a contract of sale have reached a retention of title agreement, the payment of the purchase price is irrelevant for the transfer of title of sold goods under English law. In this regard, there is no difference between English law and German law.

C *Australia*

The current Australian state legislation regarding the sale of goods follows the English model. Consequently, the point of time at which ownership of sold goods is transferred from the seller to the buyer is subject to the parties' intention,¹¹² and the parties have the option of agreeing on retention of title structures.¹¹³ Australian courts have 'qualified and extended' the related principles set out in *Romalpa*.¹¹⁴ As far as the significance of the purchase price for the transfer of title of sold goods is concerned there is, however, no difference between Australian law on the one hand and German and English law on the other. The payment of the purchase price is of no relevance for the transfer of sold goods unless the parties agree otherwise.

Suggestions for the reform of Australia's personal security systems, and related discussions, date back to the 1970s.¹¹⁵ After the enactment of New Zealand's *Personal Property Security Act* in 1999¹¹⁶ discussions have intensified, leading to the drafting of the *Personal Property Securities Bill 2008* (the 'Bill').¹¹⁷ The Bill was referred to the Senate Standing Committee

security in a narrow sense, together with certain sales of receivables by companies' (McKnight at 589), and left it for future consideration whether retention of title structures should be subject to registration requirements.

¹¹² Cf Taylor, above n 100, 72-3, with the quotation of the relevant provisions of State sale of goods legislation in footnotes 4 and 5.

¹¹³ Ibid.

¹¹⁴ Taylor, above n 100, 71; for a summary of Australian case law regarding different types of retention of title clauses, see *ibid* 73-7.

¹¹⁵ *Personal Property Securities Bill 2008 – Revised Commentary* (2008) Australian Government Attorney-General's Department <http://www.ag.gov.au/www/agd/agd.nsf/Page/Consultationsreformsandreviews_personalpropertysecuritiesreform_PPSDownloads> at 24 July 2009 (under: Archive – PPS – Exposure Draft Bill – Revised Commentary December 2008).

¹¹⁶ In force since 1 May 2002.

¹¹⁷ Above n 115; for background information see The Senate Standing Committee on Legal and Constitutional Affairs, *Exposure Draft of the Personal Property Securities Bill 2008* (2008) ('the Report').

<http://www.aph.gov.au/SENATE/COMMITTEE/legcon_ctte/personal_property/report/index.htm> at 28 April 2009, [2.18].

on Legal and Constitutional Affairs on 13 November 2008 for inquiry and report. The Senate Standing Committee published its Report¹¹⁸ on 19 March 2009.¹¹⁹ The Australian Government has in the meantime accepted almost all of the Committee's recommendations¹²⁰ and a revised Bill has been published.¹²¹

The Bill resembles the personal property security legislation of the US, Canada and New Zealand and is also based on work conducted by the United Nations Conference on Trade and Development (UNCTAD) and the United Nations Commission for International Trade (UNCITRAL).¹²² The Bill is, among other things, meant

to remove the uncertainty arising from the vast amount of Commonwealth, State and Territory legislation and the uneasy interaction of statutes, the common law and equitable legal principles.¹²³

It is one of the main features of the Bill that retention of title arrangements qualify as security agreements, creating a security interest granted by the

¹¹⁸ Ibid; see also Andrew Hudson and Brendan Sheekan, *Australia: Personal Property Securities Bill 2008 Update* (2009) Mondaq <<http://www.mondaq.com/article.asp?articleid=76674>> at 28 April 2009; DLA Phillips Fox, *Senate Committee Recommends Delay and Simplification of Personal Property Securities (PPS)*, <<http://www.dlaphillipsfox.com/article/452/Senate-Committee-recommends-delay-and-simplification-of-Personal-Properties-Securities-PPS>> at 28 April 2009.

¹¹⁹ The Report, above n 117, makes eleven recommendations. Among other things it suggests a simplification of language, terms and structure of the bill, see Recommendation 1 [4.19]. The Bill was originally meant to become law as of May 2010. The Senate Standing Committee on Legal and Constitutional Affairs has now also recommended delaying this date by at least 12 months to May 2011 'for the Committee's recommendations to be implemented and for advice from stakeholders to be taken into account' Recommendation 2 [4.27].

¹²⁰ See Australian Government – Attorney-General's Department, PPS Reform – Government Response to Senate Committee – June 2009, <http://www.ag.gov.au/www/agd/agd.nsf/Page/Consultationsreformsandreviews_personalpropertysecuritiesreform_PPSNewsletter> 24 July 2009 (under PPS newsletter June 2009).

¹²¹ See <http://www.ag.gov.au/www/agd/agd.nsf/Page/Consultationsreformsandreviews_personalpropertysecuritiesreform_PPSDownloads> 24 July 2009 (under Draft Legislation – Personal Property Security Bill 2009).

¹²² Australian Government Attorney-General's Department, above n 115; for views expressed against the adoption of the UCC approach see, eg, the Report of the Senate Standing Committee on Legal and Constitutional Affairs, above n 117, [2.12].

¹²³ Australian Government Attorney-General's Department, above n 115, 19; also see the Report of the Senate Standing Committee on Legal and Constitutional Affairs, above n 117, [2.4]: 'The overall purpose of the draft bill is to rationalise the current arrangements which include more than 70 pieces of Commonwealth, State and Territory legislation and more than 40 different registers of security interests in personal property'.

buyer to the seller.¹²⁴ To obtain priority against anyone else (so-called ‘super priority’), perfection of retention of title arrangements is required. This means that the retention of title arrangements must be registered¹²⁵ (or otherwise ‘perfected’)¹²⁶ and notice of them must be given to other secured parties.¹²⁷ In this regard the Bill follows the approach taken by Article 9 of the United States Uniform Commercial Code (‘UCC’)¹²⁸ and the personal property

¹²⁴ *Personal Property Securities Bill 2009* Chapter 1, Part 1.3, div 3 s 12(2)(d).

¹²⁵ The Bill aims at the establishment of a nationwide online registration system for all ‘Personal Property Securities’; cf Report of the Senate Standing Committee on Legal and Constitutional Affairs, above n 117, [2.55] and [5.6].

¹²⁶ Compare Australian Government – Attorney-General’s Department, PPS Newsletter – March 2009

<http://www.ag.gov.au/www/agd/agd.nsf/Page/Consultationsreformsandreviews_personalpropertysecuritiesreform_PPSNewsletter> 24 July 2009 (under PPS newsletter March 2009).

¹²⁷ Report of the Senate Standing Committee on Legal and Constitutional Affairs, above n 117, [2.50].

¹²⁸ While the UCC is meant to be a model law and not directly legally binding, Art 9 UCC has been enacted across the United States, McCormack, above n 48, 4; Craig Wappet, Laurie Mayne and Tony Duggan, *An International Comparison of Personal Property Securities Legislation* (2006) Australian Government Attorney-General’s Department <<http://www.ag.gov.au/pps>> at 18 January 2008, 10. The significance of Art 9 of the UCC is evidenced by the fact that half of the UCC-related lawsuits involve Art 9, Jeffrey F Beatty and Susan S Samuelson, *Business Law and the Legal Environment* (2002) 582. According to Art 9-103(a) UCC retention of title arrangements qualify as so-called ‘purchase money security interests’ granted by the buyer to the seller. As a result requirements regarding creation, priority and default which apply in relation to other security types apply also with regard to retention of title arrangements; cf Milo, above n 2, 129; Brown, above n 88, 109.

security systems of Canada¹²⁹ and New Zealand,¹³⁰ which are based on the UCC model.¹³¹

When considering the rationale behind the treatment of retention of title structures as security, one must take account of the fact that different security types, such as mortgages, pledges and charges, are meant to provide an additional right of recourse exercisable against property in order to enforce the discharge of the debtor's original obligation to the creditor.¹³² From a doctrinal point of view, retention of title clauses do not serve this function as they do not establish any new security right. Retention of title clauses rather regulate the transfer of ownership of sold goods based on the freedom of contract principle.¹³³ However, the practical function of retention of title arrangements can be seen as being similar to that of security because they protect the right of the seller to the purchase price by retaining ownership rights to the sold goods.¹³⁴ This is the reason why the UCC, as well as subsequent legislation in Canada, New Zealand and now also the Australian Bill, treat retention of title arrangements as security. Compared with

¹²⁹ Security legislation in the form of provincial *Personal Property Security Acts* based on Art 9 UCC has been enacted in each of the Canadian common law provinces of Ontario, Manitoba, Saskatchewan, Alberta, British Columbia, New Brunswick, Nova Scotia, NW Territories and Yukon Territory; cf Wappet, Mayne and Duggan, above n 128, 10; David E Allan, 'Personal Property Security in Australia – A Long, Long Trail A-Winding' (2001) 106 *Dickinson Law Review* 145, 147, note 2. The situation of Ontario is discussed in detail by McCormack, above n 105.

¹³⁰ Wappet, Mayne and Duggan, *ibid* 10; Brown, above n 88, 102-9; McCormack, above n 105, 113; Taylor, above n 100, 77 ff. New Zealand's personal property security law is shaped after the personal property security legislation of the Canadian province of Saskatchewan (Wappet, Mayne and Duggan at 10) which is again based on Art 9 UCC; cf Brown at 102-9; McCormack at 113; Taylor at 77 ff with an analysis of the impact of New Zealand's the *Personal Property Security Act* on different types of retention of title clauses; for a comparison between the New Zealand *Personal Property Security Act* with personal property security legislation in the Canadian provinces of British Columbia and Saskatchewan see Wappet, Mayne and Duggan at 16.

¹³¹ Compare the English Law Commission, *Registration of Security Interests: Company Charges and Property other than Land*, Consultation Paper No 164 (2002) <<http://www.lawcom.gov.uk/docs/cp164.pdf>> at 18 January 2008.

¹³² *Bristol Airport plc v Powdrill* [1990] 1 Ch 744, 760; cf Paul Kwan, *Hong Kong Corporate Law* (2006) 692.

¹³³ Milo, above n 2, 129: '... a security right is in somebody else's property (*ius in re alienum*), and in the case of retaining title the owner simply did not (yet) part from his ownership'; McKnight, above n 88, 497.

¹³⁴ Cf Atiyah, above n 23, 470; McCormack, above n 105, 124, pointing out in the context of the discussion of the Ontario *Personal Property Security Act* that this understanding has the practical effect that a retention of title agreement rather operates as a transfer of title to the purchaser followed by a grant back of a security interest to the seller and thus collapses the distinction between a transaction of sale and a transaction of charge or mortgage.

German¹³⁵ and English law this ‘functional approach’¹³⁶ leads to additional requirements which must be met to give full effect to retention of title agreements.

D Conclusions

Property law has been described as ‘national law *par excellence*’.¹³⁷ Consequently, form and contents may differ significantly from jurisdiction to jurisdiction.¹³⁸ This is also true in relation to the law governing retention of title arrangements.

This article is not meant to discuss if and how retention of title arrangements compare with different security types. This article rather tries to answer the question of whether the payment of the purchase price should be elevated to a statutory precondition of the transfer of ownership of sold goods. Neither Germany nor any of the common law jurisdictions discussed above grants the payment of the purchase price such an automatic role in relation to sales transactions. In other words, none of these jurisdictions provides for a statutory retention of title regime. In contrast, Article 9 UCC and related personal property security legislation adopted in Canada and New Zealand, and likely to be adopted in Australia, go even further, establishing registration and notification as preconditions for retention of title agreements being effective against everybody. The question is whether this is a sensible approach. Does it make sense to make retention of title arrangements even more stringent than they already are?

It has been argued that, without any notification or registration requirement, even the most diligent inquiries may be unable to discover a potential debtor’s real creditworthiness.¹³⁹ And indeed, the opportunity of checking public registers to assess the status of a potential debtor’s assets may be useful in normal debt financing cases. Banks and other finance houses have to rely on this kind of publicly available information when making lending decisions.

¹³⁵ The only civil law jurisdictions to have introduced notice filing requirements are Quebec and Louisiana; cf the discussion paper of the Scottish Law Commission, *Registration of Rights in Security by Companies* (2002)

<http://www.scotlawcom.gov.uk/downloads/dp121_registration.pdf> at 18 January 2009, 8; and Switzerland, Swiss *Civil Code (1907)* Art 715; cf von Ziegler, above n 7, 405; Whincup, above n 13, 232.

¹³⁶ Milo, above n 2, 129; also cf McKnight, above n 88, 497 (‘quasisecurity’).

¹³⁷ Milo, above n 2, 121; in relation to the fact that this makes the outcome of property law questions in international transactions unclear see Milo at 125.

¹³⁸ Cf *ibid.*

¹³⁹ Whincup, above n 13, 232; McKnight, above n 88, 597.

However, the same reasoning can hardly apply in relation to day to day sales transactions where the seller wants to retain title to the sold goods until full payment of the purchase price.¹⁴⁰

It was the conclusion of the analysis of the German system in the first part of this article that statutory retention of title structures could avoid the uncertainties and problems created by current German law. It must be asked whether this is not also true in other jurisdictions where retention of title arrangements are equally important. In fact, if parties to sales contracts do agree on a regular basis that the payment of the purchase price shall be an additional precondition for the transfer of ownership of sold goods, then why not turn this practice into statutory law? Why not eliminate the problems arising out of the need to enter into individual agreements (or – even worse – the need to register retention of title agreements or notify other creditors) by making the payment of the purchase price an additional statutory requirement for related ownership transfers? Why not make law that meets the needs of legal practice?

As in Germany, statutory retention of title structures have never been seriously considered in the common law jurisdictions discussed above. In particular, the debates around the reform of the personal property security systems in England and Australia seem to have ignored this possibility completely. This is remarkable in times when the reduction of transaction costs should have top priority on every lawmaking agenda.¹⁴¹

It has been correctly stated that

any system of law in this area will be complex and there must always be a risk that changing an established system ... may not necessarily lead to a more straightforward and simple set of rules or mean that every aspect will be covered by a new system to the satisfaction of all concerned.¹⁴²

As far as sales transactions are concerned, however, nothing would be more straightforward and simple than a statutory retention of title system, as this would do no more than codify what appears to be common practice anyway, and thus in line with the interests of all concerned parties.

¹⁴⁰ For the fact that in many cases cross-border trade (within the European Union) is conducted even without written contracts see Milo, above n 2, 124.

¹⁴¹ Cf Allan, above n 129, 145: “‘Cheaper, Faster, Easier, Simpler, Safer’ These are the criteria for a new, effective, national security system over personal property in Australia’.

¹⁴² McKnight, above n 88, 498.

FINAL REMARKS

Law has been described as a

normative order setting out what ought to be done.¹⁴³

Law can, however, only act in this capacity if it is accepted as such. The example of the significance of the purchase price for title transfers as discussed in this article shows that there may be situations where reality is ‘uncooperative’,¹⁴⁴ that is, where law is disregarded in practice or amended contractually to serve the parties better. In this context two fundamentally different scenarios must be distinguished. Firstly, law and reality may not match because a law which has been enacted for legitimate reasons is simply disobeyed. Here, the only possible reaction is enforcement, to ensure that legislative goals are reached.

In the second scenario law is disregarded due to the fact that it does not meet its own goals because it is impractical, incomplete or even wrong. In this case, enforcement would not be the appropriate answer, as there are legitimate reasons for the departure of legal reality from the normative order.¹⁴⁵ By contrast with the first scenario, in the second scenario it is not reality that must be brought in line with the law, but rather the law that must be adjusted in order to meet the needs of the society.

There are different ways in which such adjustment can be achieved. It is obvious that – as far as statutory law is concerned – the most convincing way forward would be an amendment of the respective statutory rules. This, however, will require going through the legislative process which may be time-consuming, work-intensive and subject to political influence.¹⁴⁶ In the past, statutory systems have therefore sometimes been regarded as being rigid and less flexible than case law systems.¹⁴⁷ According to modern

¹⁴³ John Bell, ‘Statutes, Legal Texts and Operative Enactments’ in Henneke van Schooten (ed), *Semiotics and Legislation: Jurisprudential, Institutional, and Sociological Perspectives* (1999) 71, 79.

¹⁴⁴ Law within an ‘uncooperative reality’ has been commented upon by Barack Obama, in *Dreams from My Father* (1995/2004) 437.

¹⁴⁵ Note that this article does not attempt to answer the much broader question of when law can be regarded as wrong and if and when law can or should be disregarded.

¹⁴⁶ Cf, in the context of the discussion of necessary adjustments of the Australian security law, Allan, above n 129, 146: ‘Sadly, the law has often lagged centuries behind the problem’.

¹⁴⁷ See, for the discussion of the differences between common law and civil law, Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law (Einführung in die Rechtsvergleichung)* (Tony Weir trans, 3rd ed, 1987) 71, 268; Peter de Cruz, *Comparative Law*

understandings, however, statutory systems must and do rely on the development of the law by the courts, in the same way as case law systems do.¹⁴⁸ In this regard, the German situation discussed in this article shows how methodological tools can be used to allow for a non-statutory and thus more flexible response to the need for an adjustment of statutory rules. Flexibility may, however, come at the price of a reduction of clarity and predictability. This is true not only in Germany.¹⁴⁹

in a Changing World (3rd ed, 2007) 107; James T McHugh, *The Essential Concept of Law* (2002) 82; Harald Koch, Ulrich Magnus and Peter Winkler von Mohrenfels, *IPR und Rechtsvergleichung (Private International Law and Comparative Law)* (3rd ed, 2004) 336.

¹⁴⁸ Zweigert and Kötz, *ibid* 268.

¹⁴⁹ Cf Milo, above n 2, 121.