

## Ownership transfer in the contracts of supply to Ukraine

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### 1. Peculiarities of ownership transfer

In Ukraine, the transfer of ownership under a contract of supply has a number of features that cause important legal consequences. In particular, the transfer of ownership of goods by a seller to a buyer is associated with:

- determination of who bears all the risks, associated with destruction or damage to the goods, and gains from the goods;
- creation, fulfillment, and termination of obligations under a contract of supply and liability of failure to fulfil them;
- determination of the right to claim against third parties for the goods and to be liable to third parties concerning the goods;
- definition of fiscal obligations, customs, and banking procedures;
- determination of who is liable for damage caused by the goods to third parties.

A clear understanding of the mechanism of ownership transfer in the supply contracts and its specifics in Ukraine allows, among other things:

- to properly shape the logistics of supplies,
- to optimize tax liabilities,
- to avoid the risks associated with compliance with customs and fiscal procedures,
- to form your position in negotiations and reasonably correct the position of a counteragent,
- to effectively build an insurance policy in supply operations and interaction with insurance companies.

## **2. Prerequisites for ownership transfer**

Ukrainian legislation and practice of its application determine the following basic conditions for the transfer of ownership to the goods from a seller to a buyer under the contracts of supply:

- the goods shall be identified;
- a seller must be an owner of the goods at the time of ownership transfer to them;
- a seller intends to transfer ownership, and a buyer intends to accept it.

These prerequisites are basic for subsequent determination of the moment to transfer ownership to the goods in the supply contracts in Ukraine. They also determine, in particular, procedures and their consequences related to the registration of such a transfer.

## **3. Moment of ownership transfer**

The moment of transfer of ownership to the goods is a key parameter of the majority of the legal consequences for the parties to a supply contract.

The general rule of ownership transfer under the contracts in Ukraine is established by the Civil Code of Ukraine. Following the provisions of the Civil Code, the ownership right of a buyer arises from the moment when the goods are transferred to him. At the same time, the transfer of goods is considered both direct delivery of goods to a buyer and delivery of goods to a shipper for sending them to a buyer, as well as delivery of a document of title to a buyer (e.g., a bill of lading).

However, the provisions of the Civil Code of Ukraine also stipulate that the moment of transfer of ownership to the property can be determined in a different order – by the parties in a contract (e.g., ownership is transferred to a buyer only upon the full payment for the goods) or established by law. As for supply contracts, Ukrainian legislation provides the parties with wide opportunities to independently regulate the moment of transfer of ownership to the goods in the contracts.

## **4. Transfer of risks from a seller to a buyer**

According to the provisions of the Civil Code of Ukraine, the risk of accidental destruction and accident-caused damage to property is borne by an owner, unless otherwise stipulated by a contract or a law. As mentioned above, the Ukrainian legislation connects the moment of the emergence of ownership rights of a buyer with the moment of transfer of goods to him.

The Convention on Contracts for the International Sale of Goods establishes the general rule of risk transfer, according to which:

- the risk is subject to transfer to a buyer when the goods are accepted by him or, if he fails to do that on the due date, from the moment when the goods are placed at his disposal and he defaults on the contract by not accepting a delivery;
- if a buyer is obliged to accept the goods in a place other than a seller's company, the risk is subject to transfer when the delivery period has occurred and a buyer is aware that the goods have been placed at his disposal in that place;
- if a sales-purchase agreement provides for the transportation of the goods and a seller is not obliged to deliver the goods at some particular place, the risk is subject to transfer to a buyer when the goods are delivered to the first shipper for delivery to the buyer in accordance with the sales-purchase agreement;
- if a seller is obliged to deliver the goods to a shipper at some particular place, the risk is not subject to transfer to a buyer until the goods have been delivered to a shipper at that place. In this respect, the seller's right to withhold the documents of title does not affect the risk transfer.

At the same time, the risk is not subject to transfer to a buyer until the goods are identified for purposes of a contract by marking through shipping documents sent to the buyer by notice or in any other way.

Thus, the general rule in Ukraine concerning supply contracts is to identify the moment of risk transfer with the moment of transfer of ownership to the goods. However, such a general approach may entail the possibility of varying interpretations in the event of a dispute. To avoid it, it should be taken into account that:

- transfer of property destruction risks and transfer of ownership are different legal constructions. The moment of risk and ownership transfer may or may not coincide;
- the moment of risk transfer may be resolved separately from the moment of ownership transfer by the parties in a contract of supply at their discretion;
- the moment of risks transfer may be resolved separately from the moment of transfer of title by special provisions of Ukrainian legislation or unified rules.

As a general rule, risks are transferred to a buyer upon accrual of the property right. In this case, the moment of transfer of ownership and the moment of transfer of risks coincide. However, under certain provisions of the Civil Code of Ukraine, the risk of accidental destruction or accident-caused damage to the goods is subject to transfer to a buyer upon transfer of the goods to him and not necessarily along with the transfer of ownership to the goods. Otherwise, a buyer may become an owner of the goods, which have not been transferred to him and are in the custody of a seller, and in this case, the seller is obliged to prevent the deterioration of the goods.

The goods may be transferred to a buyer under a contract of supply, but the property right to it remains in the possession of a seller, while the issue of the risk transfer concerning the loss of goods is not explicitly regulated. The goods can be purchased by a buyer during their transportation, and in this case, under Ukrainian law, the risks will be transferred to a buyer upon conclusion of a sales-purchase agreement, but again the transfer of ownership is not expressly regulated.

It is also worth mentioning the extensive use of unified rules in supply contracts. Often standard contracts when defining the terms of delivery contain only references, e.g., to Incoterms. However, the rules of Incoterms do not regulate the transfer of ownership at all, but only the rules of risk transfer.

## 5. Points to consider

Legislation of Ukraine generally gives the right to the parties to a supply contract to determine the order, the registration procedures, and the moment of transfer of ownership from a seller to a buyer. At the same time, the legislative rules are quite diverse and general, which can lead to their varying interpretation in case of disputes. This can have consequences both for the protection of the parties' interests of a supply contract in mutual relations as well as for fiscal and customs obligations.

To avoid such consequences, it is necessary to stick to some rules both at the conclusion of supply contracts as well as at the creation of terms for such contracts and their fulfillment. Taking this into account, a contract of supply in Ukraine shall:

- regulate the transfer of ownership separately from the regulation of the transfer of risk. This is especially important in the contracts in which the parties refer to uniform rules (e.g., Incoterms). Such rules may not regulate the procedure for the transfer of ownership, and it should be defined separately;
- clearly define the moment of transfer of ownership (e.g., "the goods become the property of a buyer upon signing the delivery and acceptance certificate by the parties in the manner prescribed by a contract", or "the goods become the property of a buyer upon receipt by the buyer of the proper copy of a consignment note", etc.);
- clearly define the documents that the parties agree to consider as proof of the transfer of ownership (e.g., a payment order or another bank document confirming the payment, a delivery and acceptance certificate, confirming the physical receipt of the goods by a buyer, etc.);
- regulate the procedure for drawing up and transfer of documents that certify the transfer of ownership (e.g., the obligation of the parties to sign a delivery and acceptance certificate upon the physical receipt of the goods, the obligation of a sender to transfer a bill of lading to a buyer within a certain period, the obligation of a buyer to send a proof of payment to a seller, etc.);
- regulate the cases when it is impossible to execute the transfer of ownership for whatever reasons and to determine the actions of the parties in such cases. This is especially important during the war in Ukraine, when objective factors may derail the execution of necessary documents and leave the issue of ownership of the goods virtually undefined.

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In addition, regardless of the document certifying the transfer of ownership to the goods under a contract of supply, such a document shall contain:

- a date of the document;
- a date of transfer of ownership, if under a contract it differs from the date of the document;
- a place of the document drafting;
- branding (a list or a reference to the document containing such a list);
- names of the parties;
- signatures of the parties' authorized representatives.

If such a document is signed on the basis of certain powers (e.g., a power of attorney), it is necessary to verify such powers when signing and to keep the documents (copies thereof) confirming these powers for the entire duration of the limitation period.

It is clear that in most cases, the terms of contracts are dictated by the party that has a market or situational advantage (which has a scarce product in the market, which is banally solvent or simply promising for further cooperation, etc.). Being aware of peculiarities for resolving ownership transfer and of their consequences allows to protect yourself from potential risks, as well as to reasonably take a firmer stance in negotiations to determine the terms of a supply contract.