

Netherlands

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1. General remarks about retention of title

1.1 Transfer of ownership

According to Paragraph 1 of Article 80 of Book 3 of the Dutch Civil Code,¹ a person may acquire property under universal title or under particular title.² Property is acquired under universal title, among other ways, through inheritance by succession, through marriage in a community of property, through a merger of two or more legal persons, or through a split up of a legal person.³ A person acquires property under particular title through a transfer, a prescription, an expropriation, or through any other way provided by law in order to acquire specific types of property rights.⁴

Ownership rights (as well as limited property rights and debt-claims) are transferable, unless their nature or the law prevents this.⁵ The transfer of property requires a formal delivery, pursuant to a valid legal basis, by the person with power of disposition over that property.⁶ For the transfer of immovable property formal delivery is performed by drawing up a notarial deed of transfer for this purpose between the parties, followed by its registration in the public registers for immovable property.⁷ For the transfer of non-registered movable things⁸ that at that moment are in the possession of the seller, formal delivery is performed by transferring the possession of that thing to the purchaser.⁹ It is not necessary, however, that the seller be in possession of the property; transfer can also be effected by means of a bilateral declaration, without any physical action, such as where the purchaser is already holding the property for the seller prior to the sale.¹⁰

Where there is a transfer of ownership rights by way of a formal delivery by the person who has the power to dispose of the property concerned, that person is usually the owner of the property. A sale and purchase agreement is a valid legal basis for the delivery, but does not in itself mean that the purchaser becomes the owner of the property the moment the agreement is concluded. The essential parts of such an

1 In short: Article 3:80(1) of the Civil Code.
2 The English translations of Dutch statutory law are taken from www.dutchcivilaw.com/legislation.
3 Article 3:80(2) of the Civil Code.
4 Article 3:80(3) of the Civil Code.
5 Article 3:83(1) of the Civil Code.
6 Article 3:84(1) of the Civil Code.
7 Article 3:89(1) of the Civil Code.
8 Registered movable things are registered aircraft and ships.
9 Article 3:90(1) of the Civil Code.
10 Article 3:115 of the Civil Code.

agreement are merely that it obligates the seller to deliver the property to the purchaser, and the purchaser to accept delivery and to pay the agreed purchase price to the seller.

The basic rule is that the purchaser becomes the owner of the property upon delivery of the property to him, but this rule is not mandatory; contract law is to a large degree discretionary. The parties may agree, for instance, that the purchase price be paid later or to someone else than the seller; that delivery will not be made to the purchaser but to someone else; or that the risk passes to the purchaser upon conclusion of the agreement instead of upon delivery. Also the parties may agree that the seller retains ownership of the property until the purchase price has been paid in full. It may be concluded, therefore, that parties have great discretionary power to form their contractual relationship the way they deem fit. However, as will be set out in more detail below, there are limits to their freedom as regards the retention of title.

A legal act performed with the intention of transferring property merely to provide security for a debt, or performed without the intention of making the property part of the acquirer's estate, is not a valid legal basis for a transfer of that property.¹¹ Retention of title is not considered as such a 'security transfer', mainly because for the seller under retention of title not only is security relevant, but also the retention of the ownership itself.

1.2 Retention of title

Retention of title is governed by Article 3:92 of the Civil Code, which reads:

1. *Where an agreement has the intention, in regard of a non-registered movable thing which the alienator has brought in the actual power of another person, that the alienator withholds the right of ownership in that thing until a performance, indebted by that other person, is performed, this agreement is considered to be entered into under a condition precedent of full satisfaction of that indebted performance.*
2. *The alienator can only validly stipulate such a retention of title for things he has to deliver if this is done in relation to the payment of debt-claims on a counter performance due by the acquiring party for things that have been delivered or will be delivered to him by the alienator pursuant to the same or another agreement or for services performed or to be performed for his benefit by the alienator pursuant to such an agreement as well as with respect to compensatory debt-claims indebted by him to the alienator for failing to perform such agreements. As far as a condition in an agreement is null and void because it is not in conformity with the previous sentence, it has never been stipulated according to law.*
3. *A condition precedent, as mentioned in paragraph 1, is regarded to be fulfilled also when the debt-claim of the alienator to obtain the agreed counter performance is settled in another way than through an actual acquisition of this specific counter performance or when the acquiring party is released from his obligation to this end on account of Article 6:60¹² or when the right of action of the alienator to claim the*

11 Article 3:84(3) of the Civil Code.

12 Article 6:60 of the Civil Code concerns creditor's default and states: "When the creditor is in default, the court may, upon the request of the debtor, discharge the debtor from his obligation, where appropriate, under supplementary conditions to be set by court."

*counter performance has become prescribed on account of the expiry of a time-limitation. Unless parties have agreed otherwise, the same applies when the alienator has waived his right to claim the agreed counter performance.*¹³

From Paragraph 1 of Article 3:92 it is clear that the parties may agree that the seller remains owner of the property until the purchaser has performed an obligation, usually making the payment of the purchase price. The prevailing opinion is that retention of title constitutes for the seller ownership under the dissolving condition of fulfilment of certain obligations, and for the purchaser ownership under the suspending condition of fulfilment of certain obligations. However, whether this opinion is correct remains to be seen. Only recently, the Court of Appeal in Den Haag¹⁴ expressed the following opinion:

In Article 5:1 [of the Civil Code] the law describes ownership as the most comprehensive right that a person can have to a thing and, because only one right can be the most comprehensive, the court is of the opinion that it follows therefrom that in the view of the legislator only one right of ownership can exist in respect of a thing. Such ownership right can be divided among a number of joint owners, but, in such an event, as parties who, in principle, are equally entitled to the same right of ownership. Also, the right may be incomplete due to limitations imposed upon the owner as regards the way in which he may make use of his right of ownership, or due to the existence of limited rights to the thing, but a division as advocated by the bank [the claimant], is not foreseen by the law.

According to the court, therefore, the notion of the purchaser being owner under a suspending condition is incorrect. The Supreme Court has not yet rendered judgment in this particular case, but is expected to do so shortly. Until then, we hold on to the prevailing opinion as described above.

It should be noted that the parties could also opt for a different construct: a sale under the dissolving condition of default by the purchaser. In that case, should the purchaser default, the ownership returns to the seller as of law. This form of retention of title is also subject to the restrictions mentioned in Article 3:92(2) of the Civil Code.

Article 3:92(2) provides that the retention of title must be limited to claims that are sufficiently connected to the delivery of assets.¹⁵ These are:

- payment for things that have been delivered or will be delivered by the seller under the same or another agreement;¹⁶
- payment for services performed or to be performed by the seller under such an agreement; and
- payment of compensation by the purchaser for failing to perform such agreements.

13 It should be noted that the causes mentioned in Paragraph 3 are not exhaustive. The seller may, for instance, waive the retention of title, as a result of which the purchaser becomes unconditional owner despite the fact that he has not yet paid the purchase price; see HR November 28 2014, ECLI:NL:HR:2014:3460 (*Snippers/Rabobank*).

14 Hof Den Haag, ECLI:NL:GHDHA:2014:4352, JOR 2015/53 m nt WJM van Anandel en ME Brinke.

15 FMJ. Verstijlen, *Groene Serie Vermogensrecht*, comment 12.1 to Article 3:92.

16 Mostly that will be the purchase price, which is the reason why a seller and purchaser are commonly mentioned, but this is not necessary. A retention of title can, for instance, also be agreed upon as regards a barter agreement. In that case, the counter-performance is the other party's obligation to deliver the barter property. In this chapter reference is made only to 'seller' and 'purchaser'.

The words “the same or another agreement” in Article 3:92(2) mean that the property delivered or to be delivered does not have to be delivered on the basis of one and the same agreement. The agreements do not even have to relate to similar goods, as long as the claims they are meant to secure concern the supply of goods or the performance of services in relation to such goods. Think of the supplier of computer equipment who stipulates a separate reimbursement for installing the computer; the retention of title concerning the equipment then also covers this reimbursement.¹⁷ A claim of a totally different nature, such as a claim regarding a bank loan, may therefore not be subject of a retention of title.¹⁸

The claim for compensation for damages¹⁹ includes interest (whether statutory or contractual)²⁰ and costs, alternative damages (damages instead of the original performance)²¹ and compensation for damages following a rescission.²²

It is uncertain whether a so-called ‘credit retention of title’ is valid. Such a retention of title would not terminate as soon as the seller no longer has any claim mentioned in Article 3:92(2) against the purchaser but would serve as a security for the seller as regards any valid claim he might have against the purchaser upon termination of their legal relationship. Possibly such a credit retention of title may be valid, but only in the event that it can reasonably be expected that new claims from the seller against the purchaser will arise due to their lasting relationship.²³

Although Article 3:92 of the Civil Code expressly mentions movable property, retention of title regarding immovable property is possible as well. This chapter, however, is limited to movable property as the most common subject of retention of title.

(a) Hire-purchase contract

A contract of sale on instalments is a species of the retention of title. The contract of sale on instalments is a sales contract under which parties have agreed that the purchase price is to be paid in instalments two or more of which become due and payable only after the thing being sold is delivered to the purchaser.²⁴ Any contract to this effect, whatever its form or the name under which it is entered into, is deemed to be a contract of sale on instalments.²⁵ A contract of sale on instalments cannot relate to immovable property, registered ships or registered aircraft.²⁶

A hire-purchase contract is a contract of sale on instalments under which parties have agreed that the right of ownership over the thing being sold shall not pass upon delivery, but only after the fulfilment of the condition precedent that the purchaser has fully paid up what is due on the basis of the contract.²⁷ It is clear from this that

17 FMJ Verstijlen, *Groene Serie Vermogensrecht*, comment 15 to Article 3:92.

18 *PG Boek 3* (Inv 3, 5 and 6), p1240.

19 Article 6:74 of the Civil Code.

20 Article 6:119 of the Civil Code.

21 Article 6:87 of the Civil Code.

22 Article 6:277 of the Civil Code.

23 AIM van Mierlo in his note under HR December 4 1998, NJ 1999/549 (*Potharst/Serée*), AA 1999, p288-296.

24 Article 7A:1576(1) of the Civil Code.

25 Article 7A:1576(3) of the Civil Code.

26 Article 7A:1576(4) of the Civil Code.

27 Article 7A:1576h(1) of the Civil Code.

hire-purchase contracts bear a strong resemblance to retention of title. For that reason, in the following discussion the relevant rules applying to hire-purchase contracts will be set out as well when and where they differ from the rules governing retention of title.

(b) Consumer credit transactions

Consumer credit transactions fall a little outside the scope of this chapter because of their limited applicability. For that reason they are mentioned only very briefly here.

The Consumer Credit Act and Book 7 of the Civil Code²⁸ contain specific rules for credit transactions with consumers. These statutory rules form the transposition of the EU Consumer Credit Directive.²⁹ A credit transaction within the meaning of this act, insofar as relevant here, is any agreement or group of agreements with the intention that the credit supplier provides the borrower (the recipient of the credit) with the enjoyment of a certain good or service and the borrower makes one or more payments to the credit supplier. The Consumer Credit Act is not applicable to credit transactions amounting to more than €40,000.³⁰ The return of an asset title to which has been retained may be demanded only in certain events mentioned in the act, such as when the borrower has failed to make a payment for more than two months and is in default, or when he has been declared bankrupt.³¹ Return of the asset may no longer be demanded when more than 75% of the credit amount has been paid.³² Return of the asset in conformity with Article 41 of the Consumer Credit Act leads to automatic rescission of the agreement. However, if the borrower, within 14 days after returning the asset to the credit supplier, pays the instalments which are due and payable at that moment plus the agreed upon compensation for his default, then the borrower regains the asset and the rescission is reversed.³³

1.3 Foreign and international law

The question of which law applies to contractual obligations is governed by the Rome I Regulation.³⁴ A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract.³⁵ The fact that the choice of law must have been made explicitly, or must be otherwise sufficiently clear, implies that the choice of law will in practice be made in writing, although strictly speaking this is not required.

The contractual law aspects (such as whether the retention of title has been validly agreed upon) are governed by the law that is applicable to the purchase

28 Article 7:57 onwards of the Civil Code.

29 Directive 2008/48/EC of the European Parliament and of the Council of April 23 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC.

30 Article 3 of the Consumer Credit Act.

31 Article 41(1) in conjunction with Article 33 of the Consumer Credit Act.

32 Article 41(2) of the Consumer Credit Act.

33 Article 42(1) and (2) of the Consumer Credit Act.

34 Regulation (EC) 593/2008 of the European Parliament and of the Council of June 17 2008 on the law applicable to contractual obligations (Rome I).

35 Article 3(1) of the Rome I Regulation.

agreement. To the extent that the law applicable to the contract has not been chosen, a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence.³⁶ With regard to the property law aspects (such as the effect of the retention of title against third parties, ownership and enforcing or invoking the retention of title) there are two options:

- In principle, the property law aspects are governed by the law of the state of the territory where the goods are located³⁷ or, with regard to the real effects of retention of title, by the law of the state of the territory where the goods find themselves at the moment of their legal delivery to the purchaser;³⁸
- If it concerns goods that are intended for export, the parties are allowed to let the property law aspects of the retention of title be governed by the law of the state of destination of the goods to be exported,³⁹ provided that according to that law the seller's right of ownership shall not be lost until the price has been paid fully to him.

Additionally, designating the law of the state of destination shall have effect only if the goods are actually imported into the designated state of destination. Choice of the law of the importing state is an exception to the main rule on applicability of the law of territory where the goods are located, and gives the parties the possibility to avoid 'mobile conflicts': where, by moving an asset (across the border), the location of the asset changes and as a result the applicable law changes as well. The parties can rule out any such change of law.

1.4 Retention of title in insolvency

In the event of an insolvency with cross-border consequences, the European Insolvency Regulation⁴⁰ applies. In the event that the purchaser is subject to insolvency proceedings in the Netherlands, the retention of title will, in principle, be governed by the law that applies to the insolvency proceedings, under Article 4 of the regulation. As regards assets delivered under retention of title, however, Article 7 of the regulation contains a special rule for the event that the assets are not located in the same Member State as the state where the insolvency proceedings are opened.

According to this Article 7, presuming that the retention of title is valid:⁴¹

- The opening of insolvency proceedings against the purchaser of an asset shall not affect the seller's rights based on a reservation of title where at the time of the opening of proceedings the asset is situated within the territory of a Member State other than the state of opening of proceedings;
- The opening of insolvency proceedings against the seller of an asset, after delivery of the asset, shall not constitute grounds for rescinding or terminating the sale and shall not prevent the purchaser from acquiring title,

36 Article 4(1) of the Rome I Regulation.

37 Article 10:127(1) of the Civil Code.

38 Article 10:128(1) of the Civil Code.

39 Article 10:128(2) of the Civil Code.

40 Council Regulation (EC) 1346/2000 of 29 May 2000 on insolvency proceedings.

41 Whether that is the case must be established according to the law that is applicable to the retention of title; in the Netherlands Article 128 of the Civil Code.

where at the time of the opening of proceedings the asset sold is situated within the territory of a Member State other than the state of the opening of proceedings; and

- The rules mentioned in the previous two paragraphs shall not preclude actions for voidness, voidability or unenforceability as referred to in Article 4(2)(m) of the regulation.

The purpose of the second of these provisions is to protect the purchaser in the event that the law of the state of the opening of proceedings were to consider the asset as forming part of the estate of the debtor and to oblige the purchaser to return it or to allow the contract to be rescinded.⁴²

In the event that the asset sold under retention of title is located in a jurisdiction that is not a Member State, the rules of foreign and international law outlined above would apply. If the retention of title is valid according to the applicable foreign law, this would be recognised under Dutch law as well. If, for example, goods were sold in Germany under a valid (German) retention of title and subsequently moved to the Netherlands, the scope of the retention of title, which may be wider than allowed under Netherlands law, will most likely⁴³ be accepted. If, therefore, the retention of title is securing not only the purchase price but also a loan from the seller to the purchaser, transfer of ownership will not be effected until both the purchase price and the loan are paid.⁴⁴ The question of whether a seller under retention of title remains owner in the event of the goods becoming affixed to other property, being intermixed with other property or processed so as to create new things (see under heading 2.2 below) is to be answered by the law of the state where the goods are located at the time when the fixture, intermixture or creation occurs.⁴⁵

This is an extract from the chapter 'Netherlands' by Marcel Willems in Retention of Title in and out of Insolvency, published by Globe Law and Business.

42 M Virgós and F Garciamartín, *The European Insolvency Regulation*, 2004, 171.

43 M Virgós and F Garciamartín, *The European Insolvency Regulation*, 2004, 172, remarks that "The majority of commentators deduce from the tenor of Article 7 that it only applies to simple reservations of title, not to more complex figures such as 'prolonged' or 'extended' reservation of title."

44 XE Kramer and HLE Verhagen, *Asser 10-III Internationaal Privaatrecht: Internationaal Vermogensrecht*, 2015/526.

45 Article 10:127(5) of the Civil Code; Kramer and Verhagen, *Asser 10-III Internationaal Privaatrecht: Internationaal Vermogensrecht*, 2015/528.