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Retention of Title in and out of Insolvency

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1. General remarks about retention of title

1.1 Transfer of ownership

Under Luxembourg law, transfer of title takes place when the parties reach agreement on the material elements of the contract, following the principle of consent, unless otherwise agreed by the parties.

This principle is expressly set out in Article 1583 of the Civil Code, according to which the ownership – over movable as well as immovable or immaterial property – is acquired as of right by the buyer as soon as the asset and the price are determined by the parties, even though the asset sold has not yet been delivered nor the price paid.

As an exception to this rule, certain types of contract will require more than an exchange of consent. For example, 'real' contracts are validly entered into between the parties only when there is an effective delivery of the asset (eg, loan, pledge, deposit). Formal contracts require certain formalities for their entry into force between the parties. For certain types of movable asset (ships, aeroplanes), the transfer of ownership requires the registration of the transfer with the relevant register to make it enforceable towards third parties. Similarly, sales of immovable property require a notarial deed in order to be effective against third parties.

Nonetheless, the transfer of ownership between the parties is, in principle, valid upon their mutual consent. As the transfer of ownership of movable assets is primarily based on the contractual freedom of the parties, the parties can freely agree on how and when the transfer of ownership takes place by using a retention of title clause.

1.2 Retention of title

Retention of title under Luxembourg law is essentially based on case law. According to a well-established body of jurisprudence, the immediacy of the transfer of ownership is not the essence of a sale. Consequently, a clause by which the seller retains the ownership of the asset sold until full payment of the purchase price by the buyer is perfectly valid.[1]

Other than through a retention of title clause contractually agreed by the parties, Luxembourg law does not specifically allow the seller to retain the legal ownership of an asset.

1 Diekirch, December 12 1936, Pas 14, p83.

According to Article 2102 4° of the Civil Code, the seller may however claim legal ownership over a movable asset within eight days of its delivery – except in the case where the parties agreed to a forward sale – provided that the asset claimed remains in its original state and has not been paid for by the buyer.

Although the right set out in Article 2102 4° of the Civil Code has been recognised as a rule of public policy,[2] the time limits granted to the seller by this article for enforcing his right to reclaim his goods is far too short, which makes this option largely theoretical. In addition, according to Article 546 of the Commercial Code, the seller loses his right under Article 2102 4° of the Civil Code if the buyer is subject to insolvency proceedings.

It is therefore in the best interests of the seller to organise the retention of title through a contractual retention of title clause which will reserve the ownership to the seller until full payment of the purchase price by the buyer. Such a clause is enforceable against a bankruptcy trustee in the event of the bankruptcy of the purchaser.[3]

In addition, Luxembourg law provides a right of retention which allows a seller who still has the possession of the asset sold not to deliver it if the purchaser does not pay the purchase price,[4] or if, after the sale, the seller went bankrupt and the seller would be in imminent danger of losing the purchase price.[5] A similar right of retention is also recognised in other provisions of the Civil Code[6] and other Luxembourg laws. Luxembourg case law has also largely recognised a right of retention and applies it to circumstances which are not specifically provided for by law.

1.3 Foreign and international law

Under Luxembourg private international law, a retention of title clause governed by a foreign law chosen by the parties is subject to the governing law chosen by the parties. This law will govern the validity, effects, and enforceability of the retention of title clause, including in particular the modalities surrounding the transfer of title. If the contract remains silent as to the applicable law, the law of the contract as determined by the Luxembourg rules of private international law should, in principle, govern all legal aspects of the retention of title clause.[7] However, there is a legal uncertainty in this respect and some authors opine that the law of the place where the asset claimed is located might also determine the legal regime applicable to a retention of title clause since rights over movables are concerned.[8]

Nevertheless, this only applies when the debtor is not subject to insolvency proceedings. If insolvency proceedings are opened in Luxembourg, Luxembourg courts will, in principle, have exclusive jurisdiction to settle any dispute related to these proceedings. Moreover, any effects arising from or related to the insolvency

2 Diekirch, December 12 1936, *op cit.*
3 Article 567-1 of the Commercial Code.
4 Article 1612 of the Civil Code.
5 Article 1613 of the Civil Code.
6 Article 1749, in favour of a tenant; Article 1948, in favour of a depositary; Articles 2082 and 2087, in favour of a pledgee.
7 *JurisClasseur – Droit International*, Fasc 569-05, "*Procédure Collective – Loi applicable*", 62.
8 *JurisClasseur – Droit International*, Fasc 552-70, "*Contrats Internationaux – Domaine de la loi du contrat*", 57.

proceedings will be assessed under Luxembourg law. The application of Luxembourg law to the insolvency proceedings must not, however, lead to having a retention of title clause produce effects if this clause does not meet the conditions of validity under the applicable foreign law. Therefore, the implementation and effects of a retention of title clause that a seller seeks to enforce in Luxembourg are subject to Luxembourg law,[9] while its validity has to be assessed in the light of the applicable foreign law,[10] unless it falls within the scope of the more seller-friendly provisions of EU Regulation 1346/2000 (which will be soon replaced by EU Regulation 2015/848 of May 20 2015).

1.4 Retention of title in insolvency

Assuming that insolvency proceedings in respect of the buyer are opened in Luxembourg, Luxembourg courts shall have jurisdiction to hear any claim in connection with such proceedings. As a general rule, any action or claim which is linked to insolvency proceedings pending in Luxembourg falls within the exclusive jurisdiction of the Luxembourg judges,[11] including claims based on a retention of title clause regarding ownership of a movable asset possessed by the insolvent purchaser.[12]

In the event of the bankruptcy of the buyer, the validity of a retention of title clause against the bankrupt estate in Luxembourg is determined either by Luxembourg law (if the retention of title clause is not subject to a foreign law) or by the applicable foreign law governing the claim. However, as already stated above, the effect and enforceability of a retention of title clause against the bankrupt estate must be reviewed under Luxembourg law. Therefore, provided that a retention of title clause governed by a foreign law is compliant with the provisions of Article 567-1 of the Commercial Code, it will be enforceable against the bankrupt estate.

However, under Article 7 of EU Regulation 1346/2000,[13] the provisions set out in Article 567-1 of the Commercial Code will be disregarded if, on the opening day of the insolvency proceedings, the asset sold has been moved from Luxembourg to another EU member state. Under the substantive rule set out in Article 7, the opening of insolvency proceedings against the purchaser of an asset does not affect the seller's right based on a reservation of title where, at the time of the opening of proceedings, the asset is situated within a member state other than the state where the proceedings have been opened. Therefore, the seller will be able to reclaim ownership over an asset located outside Luxembourg according to the general rules of the law governing the retention of title clause, irrespective of the domestic procedures established under Luxembourg law for ownership claims against an insolvent buyer.[14]

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9 CA, March 27 1985, 8006.
10 TAL, January 13 1962, Pas 18, p506.
11 TAL, April 24 2003, 75505.
12 CA Douai, June 21 1990, JDI 1992, p187; note Huet, considering that such claims fall within the exception provided for in Article 1(2) 2° of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968, an exception which has been since replicated in Article 1(2)(b) of Regulation 44/2001 and Regulation 1215/2012 of December 12 2012.
13 This is reproduced word for word in Article 10 of EU Regulation 2015/848.
14 Ie, Article 567-1 of the Commercial Code.

If the buyer is subject to insolvency proceedings outside Luxembourg, the private international law of the jurisdiction where the insolvency proceedings are opened will determine which law to apply.

However, in a recent case, Luxembourg courts expressly referred to EU case law[15] according to which an action brought by a seller in order to ensure the application of a retention of title clause constitutes an independent claim which is neither sufficiently direct nor sufficiently close to the opening of insolvency proceedings to exclude the application of EC Regulation 44/2001 of December 22 2000.[16] Although the District Court of Luxembourg did not address specifically the issue of retention of title, it nevertheless held that its jurisdiction should be determined according to the provisions of EC Regulation 44/2001 if the action brought is not based on provisions governing insolvency proceedings and could have been raised regardless of the opening of insolvency proceedings.[17] It follows that the national courts of the EU member state where insolvency proceedings were opened might not be considered anymore as having exclusive jurisdiction over retention of title claims raised against the insolvent debtor. However, without further case law, it is certainly too early to say whether this decision will become settled precedent in Luxembourg.

Under Luxembourg law, the validity of a retention of title clause is not affected when the seller is subject to insolvency proceedings. However, as a consequence of the opening of insolvency proceedings, the trustee in bankruptcy will be the sole person entitled to raise an ownership claim.[18]

Under EU Regulation 1346/2000, the opening of insolvency proceedings against the seller of an asset, after the delivery of the asset, shall not constitute grounds for rescinding or terminating the sale, and shall not prevent the purchaser from acquiring title where at the time of the opening of proceedings the asset sold is situated within a member state other than the state in which the insolvency proceedings have been opened. Accordingly, the insolvent seller will not be able to trigger a retention of title clause in order to prevent the buyer from acquiring ownership of the asset sold if the latter has complied with all its obligations under the sale contract (in particular when the price has been paid).

2. Retention of title

2.1 Validity and formal requirements

As regards the validity of a retention of title clause, Luxembourg law does not prescribe any particular form.

However, for evidence purposes and to benefit from Article 567-1 of the Commercial Code, the retention of title clause should be in writing. Other than that, there is no specific requirement as to the wording of the retention of title clause so

15 *German Graphics*, Case C-292/08, ECJ, September 10 2009.
16 TAL, January 29 2014, JTL 2014/1, 31, pp 28-32.
17 In this case, the action was based on a pledge contract subject to the Luxembourg Law on Financial Guarantee Contracts of August 5 2005, which explains why the jurisdiction of the Spanish courts in the insolvency proceedings was set aside by the Luxembourg judges.
18 Article 452 of the Commercial Code; TAL, February 13 2009, 117079.

long as its content clearly indicates that the ownership on the asset remains with the seller until the full payment of the purchase price.

There is no retention of title in place by operation of law, and any such right must be explicitly agreed between the parties. The retention of title can be agreed in the body of the sales agreement or included in the seller's general terms and conditions.[19] Luxembourg case law has also recognised the validity of such a clause when it appeared on the seller's invoice.[20]

The parties may agree on retention of title even if the asset is delivered to a third party, and such an arrangement will have no impact on its validity. Similarly, the seller is entitled to assert his ownership over movable property, whether it is held by the buyer or by a third party, provided that the latter has not acquired any ownership right under Article 2279 of the Civil Code which provides that ownership of movable assets results from the physical possession, in good faith, of such assets.[21]

Historically, Luxembourg courts refused to give effect to retention of title clauses when the buyer was placed under insolvency proceedings. It was argued that such clauses aimed at circumventing the provisions of Article 546 of the Commercial Code, which were specifically designed to deprive the seller from privileges and guarantees arising from his sales upon the opening of insolvency proceedings. It followed that the value of the assets that the seller had sold but for which it had not received payment was generally allocated to preferential creditors. As this situation was extremely detrimental to suppliers, the Luxembourg legislators enacted the Law on the Effects of Retention of Title Clauses in Sales Contracts of March 31 2000, which expressly confers on sellers the right to avail themselves of a retention of title clause in respect of insolvent buyers under the conditions set out in Article 567-1 of the Commercial Code.

Regarding the enforceability of the retention of title, if a seller wants to benefit from the regime of Article 567-1 of the Commercial Code in the event of the bankruptcy of the buyer, the retention of title must be in writing and have been concluded prior to the delivery of the asset. The retention of title may be agreed in writing in the sales agreement, set out in the seller's general terms and conditions or indicated in the seller's invoice.

In addition, for the purpose of Article 567-1 of the Commercial Code, the asset sold to the purchaser must be a non-fungible movable asset and must be still available as is (or be capable of being detached from any other asset in which it has been incorporated without damage) at the opening of the bankruptcy proceedings.

Upon fulfilment of these conditions, the seller can claim the asset sold and delivered to the buyer under retention of title within three months following the latest publication of the judgment declaring the bankruptcy (namely the publication in the Memorial B which occurs after the publication in the Commercial and Companies Register and local newspapers, between two to three months after the delivery of the judgment declaring bankruptcy). This does not preclude the seller

19 CA, February 25 2015, 37549.
20 CA, November 8 2007, Pas 34, p125.
21 Cass Fr Com, December 3 1996, 94-21227.

from commencing judicial proceedings for return of the asset after this deadline, provided that an ownership claim in respect of the asset at issue was lodged with the trustee in bankruptcy within the time limits set by Article 567-1 of the Commercial Code.[22]

2.2 Scope of retention of title

There is no rule in Luxembourg law expressly prohibiting the buyer from selling an asset covered by a retention of title clause to a third party. However, doing so would, in fact, deprive the seller from the very purpose of the retention of title clause: reserving the rights of ownership until the full purchase price of the asset sold has been paid. Hence, even if not expressly provided for by law, the principle of consent bars the buyer from reselling an asset falling within the scope of a retention of title clause as long as the purchase price has not been fully paid.

That being said, it is quite common in practice that buyers dispose of an asset before paying for it in full. In such cases, the seller may rely on specific protective provisions. Under the third paragraph of Article 567-1 of the Commercial Code, if a non-fungible asset is sold by the buyer before the opening of bankruptcy proceedings, the seller can claim the amount that the buyer did not pay at the date of the judgment declaring the bankruptcy. As this provision is modelled on the former Article L 621-124 of the French Commercial Code (Article 122 of the French Law of January 25 1985), French case law sheds an interesting light as to the scope of the right conferred to the seller by it. The French Supreme Court ruled that the resale of an asset subject to a retention of title clause shall, as of right, result in a transfer to the original seller of the remaining purchase price to be paid by the sub-purchaser to the initial buyer (up to an amount equivalent to the remaining purchase price agreed between the original seller and the initial buyer).[23] The application of this principle in Luxembourg is not in doubt as the legislators directly referred to Article 122 of the French Law of January 25 1985 prior to adopting the Law of March 31 2000.[24] In general, French case law is fully relevant under Luxembourg law as long as the legal basis underlying the decisions of the French courts does not differ substantially from the applicable rules of Luxembourg law.

(a) Combining/mixing/mingling goods delivered under retention of title

Under Article 567-1 of the Commercial Code, only non-fungible assets can be covered by a retention of title clause. Therefore, a retention of title clause will not produce any effect under Luxembourg law if it concerns fungible goods such as oil or other raw materials. Prevailing legal opinion in Luxembourg was generally reluctant to extend the effects of a retention of title clause to fungible assets when the Law of March 31 2000 was adopted. This is why the text of Article 567-1 does not encompass fungible goods within its scope.

As the position thus adopted is in contrast to French case law, which recognised

22 Cass, March 9 2006, BIJ 2006/4, p109; see to the contrary, CA, July 7 2004, 28128.
23 Cass Fr Com, June 16 2009, 08-10241.
24 Parliamentary Work 4470.

ownership claims over unidentifiable fungible assets,[25] there is little chance that an action based on a retention of title clause will achieve a positive outcome if it concerns a fungible asset, even outside the framework of insolvency proceedings (and therefore outside the scope of Article 567-1 of the Commercial Code). At best, although it is not very likely, Luxembourg courts might consider that retention of title rights could apply to fungible goods which are packaged and easily identifiable.

If non-fungible assets are stored with other identical goods, the seller is entitled to enforce his property rights deriving from a retention of title clause provided that the assets sold are identifiable and can be isolated from the other identical assets (by means of an inventory list, serial number, or other means). Otherwise, the seller's claim will fail, since a retention of title clause cannot produce its effects on assets which, albeit identical, belong to the buyer or to other creditors. This being a public policy principle, the parties cannot agree in their contract on a presumption of identity between the assets stored and the assets for which the purchase price has not been paid.[26]

Furthermore, non-fungible goods incorporated into immovable property or combined with other movable assets may be repossessed by the seller under the conditions set out by Article 567-1 of the Commercial Code. More specifically, it is necessary that the asset at issue can be removed without damaging the asset in which it has been incorporated or with which it has been combined.

(b) Processing of goods delivered under retention of title

Under Luxembourg law, an asset is deemed to have been processed when it has been transformed into a different product which, as a result, has gained more value.[27] In such a case, exercise of the retention of title clause will be frustrated, as the asset must be of the same nature when it is repossessed as it was when it was initially sold.

However, if the transformation made is minor and does not add significant value to the asset, it is generally agreed that the seller should be able to recover the asset protected by the retention of title clause.[28] If that is the case, the buyer must be indemnified for the difference between the original value of the asset and its increased value after having been processed, however slight it may be.

(c) Extension of the retention of title

In principle, retention of title clauses as defined by Luxembourg case law only constitute a means for a seller to preserve his ownership rights until full payment for the asset sold.

However, as the relationship between the seller and the buyer is governed by contractual freedom, the parties may agree on subjecting the transfer of property to additional requirements – such as payment of other debts to the seller which have fallen due but have not been paid – as long as such conditions do not violate imperative provisions of Luxembourg law.

Some uncertainty remains, however, as to the extension of retention of title

25 Parliamentary Work 4470.
26 Cass Fr Com, January 9 1990, D 1991, p130, note G Virassamy.
27 Parliamentary Work 4470.
28 Cass Fr Com, May 17 1988, RTD com 1989, p112, obs B Bouloc; Cass Fr Com, March 6 1990, Rev pr Coll 1991, p227, obs B Soinne.

clauses under Luxembourg law. French case law, which is a steady source of inspiration to Luxembourg courts, ruled that a retention of title clause constitutes a guarantee exclusively attached to the payment of the sale price and cannot be transferred in order to secure another debt.[29] This principle has since been codified in Article 2367 of the French Civil Code which expressly provides that a retention of title clause suspends the transfer of ownership of property under a sales contract until fulfilment of the corresponding obligation, which is payment of the purchase price. This definition certainly excludes any possibility of retention of title based on non-fulfilment of obligations other than the payment of the price for the asset sold.

Given that there is no such provision under Luxembourg law which generally restricts the scope of a retention of title clause (although Article 567-1 of the Commercial Code only refers to payment of the purchase price), Luxembourg courts might be more lenient as to an extension of the retention of title.

Even French courts have recognised the possibility of extending retention of title in certain circumstances. In this regard, it has been held that the seller is entitled to trigger a retention of title clause covering an asset sold within the framework of a procurement contract, even though it has been fully paid by the buyer, insofar as other goods delivered under the same contract remain unpaid.[30] This jurisprudence has opened the way to an extension of retention of title under French law and may in future influence Luxembourg judges towards a broad interpretation of the scope of retention of title clauses.

2.3 Legal effect of retention of title

(a) Effect towards third parties

Retention of title may be enforceable against third parties, depending on whether the third party has acted in good faith or not. If a subsequent buyer acting in good faith purchases an asset subject to retention of title, the retention of title clause will not be enforceable against him, and the seller will not be able to claim repossession of the asset from the subsequent buyer. This results from the protection conferred by Article 2279 of the Civil Code to purchasers acting in good faith, under which, as far as movable assets are concerned, possession gives title.[31] In such circumstances, the seller will only be able to recover the unpaid amount from the original purchaser, or claim the benefit of any remaining purchase price to be paid by the subsequent buyer to the original purchaser (a right of subrogation).

By contrast, if the subsequent purchaser was aware or could not ignore that he has not entered into contract with the real owner of the asset,[32] or knew or could not ignore that the original buyer was subject to insolvency proceedings,[33] the provisions of Article 2279 of the Civil Code will be disregarded.

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29 CA Colmar, June 20 2001, Act Proc Coll 2002, comm 163.

30 Cass Fr Com, January 16 2007, 05-14452, considering that, in view of the specific nature of a procurement contract, the buyer had a "unique debt" which justified an extension of the retention of title.

31 Parliamentary Work 4470.

32 CA Paris, February 4 1999, Juris-Data 1999-020258.

33 Cass Fr Com, March 5 1996, JCP G 1996, I 3960, 12, obs M Cabrillac.

It should further be stated that third parties who pay for assets covered by a retention of title clause in place of the purchaser shall automatically benefit from a right of subrogation. In this respect, the retention of title clause, as an ancillary element of the debt transferred from the seller to the third party, will be directly actionable by the latter against the defaulting buyer.[34]

However, if a third party acquires physical possession of an asset by any means other than the payment of the buyer's debt, he will have to prove that the retention of title clause covering that asset has been transferred by subrogation.[35]

(b) Effect in case of seizure of goods delivered under retention of title

If the asset sold under retention of title and delivered to the buyer is seized by a creditor of the buyer, that creditor will have priority over the seller provided that he has acted in good faith and was unaware of the true owner of the seized asset. Any proceeds resulting from the sale of the seized asset will be paid to the buyer's creditor, unless an action for diversion is raised by the seller prior to the allocation of the proceeds to the buyer's creditor, in which case the seller will be entitled to the proceeds of the enforced sale.[36]

Similarly, a creditor of the seller may seek to seize an asset sold under a retention of title clause from the hands of the buyer, provided that the transfer of ownership has not become definitive, which supposes that the purchase price has not been fully paid or that additional mandatory formalities have not been accomplished.[37]

However, if an action based on the retention of title clause was introduced against the buyer prior to the final court judgment ordering a seizure measure, the seller will be entitled to regain ownership of the asset sold.[38]

Moreover, if a seller cannot in principle interfere with attachment measures ordered by an enforceable court title, it has nevertheless been held that bailiffs shall observe minimal standards of prudence when they carry out such measures. Accordingly, the buyer may seek indemnification from the bailiff if ownership of the seized assets was not verified and claims related to property were ignored prior to the attachment measures.[39]

In the event that the seller is declared insolvent, assets sold under a retention of title clause can no longer be seized, as Article 453 of the Commercial Code provides that the judgment declaring bankruptcy stops any pending actions for seizure of property and prohibits any further actions.

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34 CA, November 8 2007, Pas 34, p125; Cass Fr Com, March 15 1988, JCP 11, 21348, quoted in Parliamentary Work 4470.

35 TAL, February 13 2009, 117079, holding that a third-party company having among its fleet of vehicles a stolen car could not refuse to return this vehicle to the defaulting purchaser, albeit the latter had not paid the full price of it, insofar as the third party remained unable to demonstrate that the retention of title clause attached to the stolen vehicle had been transferred by legal or contractual subrogation.

36 Cass Fr Civ 2nd, April 8 2004, Juris-Data 2004-023224.

37 CA Rennes, October 4 1989, Juris-Data 1989-048547, validating the seizure by the seller's creditor of a ship since the buyer had not fulfilled the registration formalities which would have made the transfer of ownership enforceable against third parties.

38 CA, October 18 2005, BIJ 2006/4, p122.

39 CA, June 9 1999, Pas 31, p155; in this case, the bailiff was considered liable for the sale of the buyer's asset by public auction.

(c) Effect in case of a security right established over goods delivered under retention of title

Retention of title will not be enforceable by the seller against a third party who has, in good faith, acquired a possessory security right over the asset from the buyer. In the same way as for third-party purchasers acting in good faith, such a security holder will benefit from a right of retention over the asset which is in his possession under Article 2279 of the Civil Code.[40]

This right of retention, however, does not apply to non-possessory security rights which, by their very nature, do not deprive the buyer of possession of the asset, and do not allow any third party to claim ownership on the grounds of Article 2279 of the Civil Code.

(d) Effect in case of insolvency

When the buyer is subject to insolvency proceedings, the trustee in bankruptcy will be the sole person entitled to contest a claim based on a retention of title clause. However, the opening of insolvency proceedings affecting the buyer does not confer on the trustee in bankruptcy specific powers or means of action regarding retention of title claims.

Under Article 567-1 of the Commercial Code, the retention of title will be enforceable against the buyer's bankruptcy trustee if the asset (a non-fungible movable asset) is still in the buyer's possession in its original state at the opening of the bankruptcy proceedings. In this case, as outlined above in greater detail, the seller can claim the return of the asset from the bankruptcy estate and the bankruptcy trustee within three months following the latest publication of the judgment declaring the bankruptcy.

(e) Effect in case of partial payment of the purchase price

If the retention of title provides a requirement for full payment before the transfer of ownership, and the buyer only pays in part, the transfer of ownership will not be deemed to have been completed and the seller will keep the legal ownership of the asset. If the sale is rescinded and the seller repossesses the asset, he must refund the buyer the part of the purchase price paid, without prejudice to any claim for damages.

3. Enforcement of retention of title

Assuming that a defaulting buyer is not subject to insolvency proceedings, the seller has to raise an ownership claim before the Luxembourg courts in order to obtain recognition of his ownership over the asset in respect of which payment has not been made. As with any other judicial action, the seller is first required to summon the buyer to appear before the competent court.

However, such an ownership claim could be jeopardised and deprived of any effect if the buyer has the opportunity to dispose of the asset at issue prior to the completion of the proceedings.

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40 Cass Fr Com, November 28 1989, Defrénois 1990, p814, obs L Aynès.

Accordingly, the first step of any action aimed at repossessing movable property should be a seizure claim, in order to safeguard the seller's assets with a protective and provisional measure.

Under Article 963 of the new Code of Civil Procedure, the president of a district court may, upon request, grant an order authorising a seizure claim. Naturally, the seller cannot force entry into the buyer's premises and recover the asset sought, whether by his own means or with the help of a bailiff acting beyond his powers. Such actions are strictly prohibited and will entail damages to the buyer. Accordingly, a clause under which the purchaser will grant the seller access to his premises to repossess the goods in the event of default on payment is not sufficient to grant effective access for the seller. In fact, a court order will be required should the buyer deny access to the premises where the asset is stored.

Once completed, seizure allows the seller to retain the seized asset until the outcome of the ownership claim.[41]

The measures outlined above can be ordered whether the unpaid goods are in the hands of the buyer or have been transferred to a third party.

Finally, in view of the provisional nature of a seizure claim, judicial confirmation of the seizure is required,[42] either before the courts of the place where the buyer is domiciled or, if the asset is held by a third party, before the courts of the place where the asset is located.[43]

If the ownership claim has been introduced prior to the latest publication of a judgment declaring the insolvency of the buyer, the action will be suspended until the trustee in bankruptcy is called into the pending proceedings.[44]

Where the ownership claim is raised after the opening of insolvency proceedings, the seller must follow a specific procedure as provided in Articles 567-1 and 572 of the Commercial Code.

Under Article 567-1 of the Commercial Code, the seller must claim the asset covered by the retention of title clause within three months following the latest publication of the judgment declaring the bankruptcy.

However, as stated above, the seller should not be precluded from introducing a judicial action following expiry of that three-month deadline provided that he has made a claim for ownership to the trustee in bankruptcy within three months of the latest publication of the judgment declaring the insolvency.[45]

According to Article 572 of the Commercial Code, the trustee in bankruptcy may accept an ownership claim subject to approval by the supervising judge. It is only when the trustee in bankruptcy and the seller do not reach an amicable solution that the seller will need to start judicial action before the district courts sitting in commercial matters.[46]

Furthermore, by analogy with French case law, a seizure claim can be considered

41 TAL, April 30 1986, 71/86.
42 Article 968 of the new Code of Civil Procedure.
43 Cass, April 4 1821, Sirey, 1821, p330.
44 Cass Fr Com, July 9 1996, JCP E 1996, pan 1053, I, 5, obs M Cabrillac.
45 Cass, March 9 2006, BIJ 2006/4, p109, op cit.
46 Article 635 of the new Code of Civil Procedure; TAL, January 13 1962, Pas 18, p507.

as an ownership claim within the meaning of Article 567-1 of the Commercial Code insofar as it does not constitute an enforcement measure.[47] As a result, the prohibition on enforcement measures against persons subject to insolvency proceedings, as provided in Article 452 of the Commercial Code, may not be relevant as far as a seizure claim is concerned.

Therefore, the seller should be able to secure the asset subject to retention of title from any disposal by the trustee in bankruptcy.

47 Cass Fr Com, March 24 2004, Juris-Data 2004-023181; see to the contrary: Cass Fr Civ 2nd, February 18 1999, Juris-Data 1999-000839.