



Newsletter No. 14 (EN)

## **Retention of Title and Other Securities**

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## I. Introduction

### 1. Problem upon the Transfer of Ownership

Under the Thai Civil and Commercial Code (CCC) the ownership of property is transferred directly in the moment of the conclusion of a contract in case of sale of ascertained property (Sec.458 CCC). If unascertained property is sold, the ownership is transferred when the property has been specified (Sec. 460 CCC). In the event that the contract is subjected to a condition or a time clause, the property will be transferred at the fulfillment of the condition or the time has arrived.

Under the Thai CCC there is no clear separation between obligatory (e.g. agreement for purchase) and real legal transaction. By following the French law system, the Thai CCC doesn't realise the principle of the abstract nature of rights in or against a property.

This is in contrast to the German civil law, which distinguishes between obligatory and real legal transaction. The obligatory legal transaction only obligates the seller to transfer the possession of the property but does not transfer the ownership of the property. In order to transfer the ownership of the property, it is required that the contracting parties agree to transfer the ownership of the property. This is a second legal transaction that constitutes the fulfillment of the obligatory legal transaction. Therefore, the obligatory legal transaction is the means to transfer the ownership. Although there are two legal transactions under the German law, in practice both legal transactions may be concluded with a conclusion of the obligatory legal transaction and delivery of the property.

### 2. How to secure a claim?

In some cases the seller of goods does not know the financial situation of the buyer. How can the seller minimise the risk of loss without knowing so? In principle, there are two possibilities to provide security for a claim:

- Creating a certain payment method (e.g. advanced payments, documentary credit, letter of credit, suretyship); or
- Providing securities independent from the exchange of goods and services such as retention of title.

## II. Definition

Sec. 459 CCC governing the transfer of ownership states that if a contract of sale is subject to a condition or time clause, the ownership of the property is not transferred until the condition is fulfilled or the time has arrived. Under the law of several countries a condition stipulating that the transfer of ownership is under the condition that the purchase price is paid is generally called a “**Retention of Title**”.

For instance, if the buyer is in default of its obligations, the owner of the retained property (the seller) has the right to recover his property from the buyer since the seller still has the ownership of such property (exercise of the right of ownership, Sec. 1336 CCC, comparable to the German § 985 BGB). Because of the fact that the seller doesn't lose his ownership before the payment is fulfilled completely, retention of title constitutes a security in property's title for the seller.

### III. Retention of Title under the International Private Law

If the property is located in Thailand, Thai law would govern the transfer of the ownership according to Sec. 16 of the “Act on Conflict of Laws B.E. 2481” which states that movable and immovable property is governed by the law of the place where the property is situated.

### IV. Acceptance of Foreign Retention of Title

In some countries valid retention of title may require a certain form or even registration. While Thai law does not have specific rules governing validity of retention of title, the validity of retention of title is subject to the law of the country where retention of title was made. In the case of immovable property, the law of the country where the property is situated applies (Sec. 9 of the Thai “Act on Conflict of Laws B.E. 2481”).

### V. Special Kinds of Retention of Title

#### 1. Continued form of Retention of Title

The continued form of retention of title means that the transfer of ownership of property is under the condition of the purchase price payment and the payment of other debts. Based on contract of sale with conditions under Sec. 459 CCC and the freedom of contract doctrine, a continued form of retention of title is acceptable. However, in practice a condition like this is unusual.

#### 2. Extended form of Retention of Title

The extended form of retention of title means that the buyer of the property assigns the claim of payment resulting from reselling the property to the original seller. A condition like this is admissible. However, under Sec. 306 CCC governing transfer of claims, the transfer can be set up against the original seller or third party only if a notice has been given to the seller

or if the seller has given consent to the transfer. Such notice or consent must be in writing.

### 3. Retention of Title and “Combination and Mixing”

Combination and mixing occurs when several movable items from different persons are joined together and become component parts or indivisible. In such case, the questions arises who the owner of the new item is.

- In the case mentioned above the different persons become co-owners of the new item under Sec. 1316 CCC. Each person’s share is proportionate to the value of his item. However, under Sec. 1316 Para 2 CCC there is one exception: if one of the items is considered the principle one, its owner becomes the sole owner. But this owner has to pay the value of the other items to their respective former owners.
- In case a person creates a new item by using materials belonging to another person, the owner of the materials will become the owner of such items and have to pay for the work (Sec. 1317 Para 1 CCC). But if the value of the work greatly exceeds the value of the materials being used, it is the opposite: the worker will become the owner and have to pay to the former owner the value of the used materials (Sec. 1317 Para 2 CCC).
- However, it is possible to stipulate a processing clause in the contract between parties since such clause is valid under the CCC. The result is that the owner of the property will not lose his ownership in case of processing.

### VI. Effect on Third Parties acting in Good Faith

Under the Thai CCC there are special **rules protecting a third party acting in good faith**. In case that the buyer of retained prop-

erty enters into a sale contract with a third party, the original owner will lose his ownership if such third party does not know anything about the retention of title.

In the event that a third party is about to **execute a court order** against the buyer, the seller has the right to secure the enforcement on his property from the third parties. But if the enforcement against the property is already being executed, the owner can file a petition for restitution of the property price against the third party. Although by compulsory auction the ownership of the property will be transferred to another party, the former owner of the property is entitled to reclaim the property by paying the new owner the purchase price or the proceeds of the auction.

In case of **bankruptcy**, the owner of the property is not entitled to reclaim his property since the property shall be deemed distributable among creditors in bankruptcy suit (Sec. 109 Para 3 “Bankruptcy Act B.E. 2542”). However, if the owner suffers damage resulting from the attachment of his property, he can file a petition to the court asking for repayment of the debts in respect of the price of the property. It is important to note that in case of bankruptcy the owner has no better right than other creditors even if he has retention of title as a security (Sec. 92 “Bankruptcy Act B.E. 2542”).

## VII. Formalities

Under the Thai law some contract validities are subject to certain forms, especially a sale contract of immovable property, which must be in writing if the purchase price is higher than THB 500. Under the Thai Law the retention of title can be a subordinate agreement because neither a written form nor a special kind of registration is required. It is also possible to include a retention of title clause in the standard terms and conditions for sale and payment. However, under the Thai law the contracting parties generally have to sign these standard

terms and conditions separately from the sale contract.

## VIII. Model Clause

A model clause stipulating retention of title can be as follows:

*“The Goods shall remain the sole property of the Seller and the Seller shall remain the sole owner of the Goods until the Sales Price is fully paid. Until that time, the Buyer is not entitled to sell or otherwise dispose the Goods. The Seller is entitled to reclaim possession at any time from any possessor without any precondition and without any compensation or other monies.”*

## IX. Other Securities

### 1. Hire Purchase

Similar to the retention of title is the so-called “Hire-Purchase” contract (Sec. 572-574 CCC), which is comparable to the German leasing contract. Under a hire purchase contract the seller lets his property out on hire and promises to sell it to the buyer. The ownership will be transferred by the last payment, which would be the purchase price. This kind of contracts in Thailand is widely used for selling vehicles.

### 2. Documentary credit / letter of credit

Another method to provide security to the parties is by using documentary credit (also called letter of credit). A documentary credit is a written instrument made by a bank guaranteeing payment to an exporter where certain documents are presented in compliance with the terms and conditions of the documentary credit such as time limit, amount of money and other documentary requirements that the seller has to fulfill in order to receive the payment. The advantage for the seller is that the payment will be assured without reference to credit worthiness of the buyer. The advantage for the buyer is that he would be financially assisted during the time of placing the order and receiving the goods since no cash has actually

been paid or transferred. The documentary credit is separate and independent from the underlying contract. The issuing bank is only concerned with the problem whether the documents given by the seller are corresponding to the required documents as specified in the documentary credit. Therefore, the bank has to check the conformity of the documents with these requirements to decide whether to pay in exchange to the documents or not.

### 3. Other instruments

Other kinds of security are varied depending on the parties' intentions and the nature of contracts. Such securities available under the Thai law are Suretyship (Sec. 680 CCC), Mortgage (Sec. 702 CCC), Pledge (Sec. 747 CCC) and Bank Guarantee.

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*We hope that the information provided in this newsletter was helpful for you.*

*If you have any further questions please do not hesitate to contact us.*

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