

Retention of Title in European Business Transactions

J. Michael Milo*

I. INTRODUCTION

Fifteen national jurisdictions form the European Union. Though many national public law rules have been unified or harmonized, the domain of private law remains relatively untouched.¹ While contract law is an area with some (scattered yet important) influence, substantive property law has undergone virtually no European influence at all. The rules of national property law are often of a mandatory character, in order to achieve certainty and predictability towards third parties. The *lex situs* is — for the same reason — the law which applies to proprietary issues in international transactions. Property law is thus national law *par excellence*. In international sales transactions, retention of title is a standard technique by which the buyer can obtain credit from the seller. It is a technique right from the heart of property law. The seller transfers ownership under the suspensive condition of payment of the price. The actual transfer takes place at the moment of payment of the complete price.

But form and content differ manifestly in the European national jurisdictions. Principally, the national law of the *situs* of the sold object is applied to judge the validity and effectiveness of retention of title clauses. This means that the effectiveness of a retention of title construction is not likely to be judged according to the law under which it was contracted, but according to the law of the country to which the sold object was transported. The effect of the retention of title may thus be substantially lessened. Quite recently retention of title became a topic of interest to the European legislature. In an attempt to address the problem of late payment, the Directive on Combating Late Payment in Commercial Transactions was issued on August 8, 2000. By August 8, 2002, national laws had to be adapted to this directive. One of the proposed provisions in this directive is a European concept of retention of title.

In its final form, the directive addressed retention of title only on a minimum level. This is a nice illustration, first, of the European competence on legislative action in the area of property law, and second, of the difficulty which is encountered if the diversity of national

* J.M. Milo is a senior lecturer at the Molengraaff Institute for Private Law, Utrecht University, The Netherlands. The author expresses his gratitude to Mr. P. Morris, legal translator at the Molengraaff Institute, who corrected this contribution. Yolanda Beukers provided useful comments. This paper is an extended and updated version of the Logan lecture I delivered at Washburn University in April 2000.

1. For an overview of European legislation, see http://europa.eu.int/eur-lex/en/search/search_oj.html.

property laws is approached in a harmonizing effort. Third, it compares nicely to the uniformity which has been reached in the American Uniform Commercial Code (UCC), article 9.

This article will first discuss the directive in general. The legislative history demonstrates an interesting insight into the potential competence of the European Union in addressing property law issues. Second, the article will deal with some fundamental differences between property law systems and will pay attention to the arrangement of retention of title as a security interest under UCC article 9. Third, the article will deal with some key issues in differences between national arrangements of retention of title and related areas, and, fourth, will look at the retention of title provision in the directive more closely. The conclusion is twofold: on the one hand, this is a revolutionary development in the Europeanization of law; on the other, the impact of this directive might have been substantially greater if the national arrangements on retention of title had been taken into account more thoroughly.

II. CONTENTS AND HISTORY OF THE DIRECTIVE

A. *Late Payment in the European Union*

The practice of paying late in business transactions will be consigned to history in the European Union under the Directive on Late Payment in Business Transactions. What is the problem and what has been the European Union's response? In recent years in commercial practice both the numbers of late payments as well as the length of time for payment have increased in both national and international commercial transactions. Why? It is apparently financially attractive as the national statutory interest rates are low and the recovery procedures are slow. Furthermore, within the European Union, differences between the applicable laws regarding the recovery of monetary claims,² the (rate of) interest and the mechanism for setting the rate, provide further uncertainty and lack of clarity. The same holds true for the domestic rules regarding retention of title clauses.

These legal differences deter firms from engaging in cross-border trade and, therefore, hinder the proper functioning of the internal market, which is the major goal of the European Union.³ In particular, small- and medium-sized businesses are thus prevented from fully benefiting from the opportunities which the Single Market should of-

2. For a comparison of the current law and practices in EEA countries, see the Commission Report on Late Payments in Commercial Transactions, 1997 O.J. (C 216) 10, 19-24 [hereinafter Report on Late Payments].

3. Council Directive 2000/35/EC, 2000 O.J. (L 35) 200 [hereinafter EC Treaty], available at http://europa.eu.int/eur-lex/pri/en/oj/dat/2000/l_200/l_20020000808en00350038.pdf.

fer. Cross-border transactions should not entail any greater risks than national transactions, yet they do, up to this moment. The result of practice and legal differences is furthermore economically harmful: it is a major cause of insolvency and leads to job losses.⁴

The European Union took action, and as a result, on August 8, 2000, the directive was issued.⁵ It aims to radically change this practice. The consequences of late payments should be such as to discourage them and to compensate creditors for the costs incurred.⁶ The directive therefore contains provisions on contractual, proprietary and procedural matters, which have (sometimes far-reaching) implications for national private law.⁷ As mentioned, Member States were required to have implemented this directive by August 8, 2002.⁸ This directive also contains a clause on retention of title, which is the main topic of this paper.

B. *Contents and Scope of the Directive*

The directive applies to all payments made in commercial transactions. These are transactions between two or more natural or legal persons carrying on a trade or profession by the delivery of goods or provision of services for value. These include transactions between businesses reciprocally and between businesses and public authorities. Every monetary claim can be pursued, including claims for penalties, claims for damages for non-fulfillment, and claims for compensation and undue payments.⁹

In accordance with the recitals of the directive, its proposed provisions should constitute minimum requirements limited to what is necessary to achieve the aims laid down in the directive. For this reason the directive is of a supplementary nature, and the parties may, in

4. Within the European Union the differences in payment practices are striking, with average payment delays in some European countries over three times as high (ninety days) as in others (e.g., in Scandinavian countries, thirty days). Report on Late Payments, *supra* note 2, at 13.

5. EC Treaty, *supra* note 3. The directive was issued on the basis of article 95 EC.

6. *Id.* at 36; Proposal for a European Parliament and Council Directive Combating Late Payment in Commercial Transactions, COM (1998) 126 final at 14 [hereinafter Proposal for Combating Late Payment]. The proposed provisions are limited to those which are necessary for achieving the proper functioning of the internal market.

7. See R. Schimmel & D. Buhlmann, *Gesetz zur Beschleunigung fälliger Zahlungen - Auswirkungen auf das allgemeine Schuldrecht*, MDR (MONATSSCHRIFT DES DEUTSCHEN RECHTS) 2000/13, p. 737-41; M. Freudenthal and J.M. Milo, *Betalingsachterstanden in handelstransacties: een richtlijnvoorstel met Europees-privaatrechtelijke consequenties*, NTBR (NEDERLANDS TIJDSCHRIFT VOOR BURGERLIJK RECHT) 1999/6, at 153-60; M. Freudenthal et al., *Europese wanbetalers: geen krediet na aanvaarding richtlijn. De Richtlijn bestrijding betalingsachterstand in handelstransacties nader bschouwd*, NTBR 2000/7, at 293-301; M. Schmidt-Kessel, *Entwurf der Richtlinie zum Zahlungsverzug und die Folgen für die Vertragsgestaltung*, ZNOTP (ZEITSCHRIFT FÜR DIE NOTARPRAXIS) 3/99.

8. Article 6 Directive. Member-States may be liable in case of non-, or insufficient implementation (C-6/90 and 9/90, Francovich).

9. Proposal for Combating Late Payment, *supra* note 6, at 14.

their contractual arrangement, agree differently. As indicated in the explanatory memorandum, the directive is of great importance to small- and medium-sized businesses which, in many instances, conduct trade without any written contracts. In the absence of a written contract, the rules of the directive are applicable. The provisions protect the creditor who has already performed his part of the contract: the delivery of the goods. The protection is threefold. First, there are obligational instruments, which amount to the following: Payments should be made within a thirty-day payment period; the interest becomes payable automatically; there is high interest; and as the directive's articles constitute dispositive law, an anti-abuse clause was inserted in the last phase. Second, there are procedural measures, which amount to a rapid recovery process for unchallenged claims. Finally, there is a proprietary instrument — a retention of title provision.

C. *Property Law as a Topic for European Harmonization*

Is the EU competent to legislate on the area of property law, or is it a subject which is the exclusive domain of the national legislatures? This is a complicated matter, since article 295 ECT seems to forbid EU's legislative action: "This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership." What does this provision mean? In a recent dissertation on retention of title, article 295 EC has been interpreted as follows: "It is generally accepted, though, that this provision only entails the Member States' competence in nationalizing property rights."¹⁰ Though this interpretation is indeed the most probable and desirable one, it certainly does not seem to be generally accepted. This interpretation is a prevalent opinion in literature,¹¹ but in case law of the European Court of Justice, the situation is still unclear.¹²

10. JACOBIE W. RUTGERS, *INTERNATIONAL RESERVATION OF TITLE CLAUSES: A STUDY OF DUTCH, FRENCH AND GERMAN PRIVATE INTERNATIONAL LAW IN THE LIGHT OF EUROPEAN LAW* 175 (1999).

11. See Ingfried F. Hochbaum, *Eigentumsordnung*, in *KOMMENTAR ZUM EU-/EG-VERTRAG* 5/383 (Hans Von der Groeben et al. eds., 1997). For various suggested interpretations see S.E. Bartels, *Europees Privaatrecht: over de bevoegdheidsverdeling tussen Unie en Lid-Staat met betrekking tot het eigendomsrecht*, AA (ARS AEQUI) 1995, at 244-51; S.E. Bartels, *Harmonisatie van het Europese goederenrecht*, WPNR (WEEKBLAD VOOR PRIVAATRECHT, NOTARIAAT EN REGISTRATIE) 6223 (1996), at 359-60; see also Antonio Gambaro, *European Aspects of Property Law*, in *NEW PERSPECTIVES ON EUROPEAN PRIVATE LAW* 75 (Franz Werto ed., 1998); W. Devroe, *Privatizations and Community Law: Neutrality Versus Policy*, 34 COMMON MKT. L. REV. 267-306 (1997); Eva-Maria Kieninger, *Securities in Movable Property Within the Common Market*, 4 EUR. PRIVATE L. 41, 127-28 (1996); P.C. Müller-Graf, *Europäisches Gemeinschaftsrecht und Privatrecht*, NJW (NEUE JURISTISCHE WOCHENSCHRIFT) 1993, at 13-23.

12. In Case 309/96, *Annibaldi v. Sindaco del Comune di Guidonia*, 1997 E.C.R. I, the European Court for the first time used article 222 (295 new) as a barrier, but its justification for doing so is brief and incomprehensible.

In the EC legislative process, the meaning of article 295 EC also appears to be far from clear, as is illustrated by the discussion on the proposed directive on late payment. The article was merely mentioned in the internal European discussion (on the level of the Council) on the proposed directive as a possible obstacle for proprietary EC legislation,¹³ but this apparently sufficed to prevent serious discussion on how to arrange the property law matters with regard to retention of title.¹⁴ Article 295 ECT is thereby being misused. Due to this uncertainty regarding the meaning of 295, a European provision on retention of title in this directive has ended up being far less extensive than it could have been, if the most likely interpretation — protection against nationalizing property rights — would have been followed.

The Council's interpretation fails to recognize that there *is* already EU legislation on property law. Specifically, intellectual property rights are regulated on EU-level, but there is also a directive on cultural property, which touches upon the rules of transfer and acquisition in good faith.¹⁵ A directive on financial collateral arrangements is being implemented at this moment.¹⁶

Although the EU most likely has the competence to legislate on property law, this does not automatically mean that regulating matters of property law should be addressed too readily or too quickly. Property law is all about predictability and certainty, with intricate regulations as to who is entitled to which asset, thereby forming a delicate equilibrium. An example is provided by retention of title regulations and especially by its extended forms. A hasty European regulation could easily disturb these national balances, and very likely this has been the underlying argument for not (yet) arranging a property issue.

In order to fulfill the purposes of the European Union, property law should be addressed on the European level. In the European market, predictability and certainty are likewise important as in national markets. However, both material property law and international private law are arranged nationally. This makes the outcome of questions of property law cases in international transactions unclear. These constraints ultimately lead to an increase in transaction costs, and are far from beneficial to the internal European market. The situation thus resembles that which existed in the United States before the Uniform Commercial Code. Retention of title might have been dealt with more extensively than it has been dealt with in the present

13. In July 1997, the retention of title clause appeared for the first time as a proposal by the Commission. EC Treaty, *supra* note 3, at 17.

14. The Council's legal service department did advise that provisions like the one on retention of title might contravene the property provision of article 295 ECT.

15. See Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a member state, 1993 O.J. (L 74) 74.

16. Council Directive 2002/47/EC, 2002 O.J. (L 168) 43.

directive. But first we have to take a close look at some fundamental differences between proprietary systems.

III. FUNDAMENTALS OF PROPERTY LAW AND SECURED INTERESTS

A. *National Differences*

The predominant dividing line in property law lies between common law and civil law jurisdictions. Civil systems derive their property law from Roman law; their property law covers movable and immovable objects alike. Civil systems often have a systematic codification with abstract concepts. It is for the largest part mandatory law, and case law is relatively unimportant. Feudal law is of little influence. There is no equity and, therefore, no equitable ownership. Ownership and the strictly limited amount (*numerus clausus*) of real rights, like security rights, are key concepts.

This has immediate implications for secured transactions. Essential is the concept of ownership, which is one of the key issues in civil private law. Ownership in civil systems is only very vaguely defined like in the Dutch civil code, Burgerlijk Wetboek, (hereinafter BW) as “the most comprehensive right a person can have over a thing.”¹⁷ In cases involving property law, it is essential to determine who is the owner (or one of the other proprietary rights), as this is the foundation for successfully establishing legal claims. The objects owned by the debtor, whether tangible (movable, immovable) or intangible (claims, intellectual property rights) are, in principle, available to be encumbered with a property right, derived from ownership, like a security right (*iura in re aliena*). Civil jurisdictions rely to various extents on the speciality principle, meaning that objects should be sufficiently determinable to have a real right in them. This in itself is sometimes seen as a barrier to introducing or recognizing common law floating charges.¹⁸ Civil security rights have to be picked out of a strictly limited amount of property rights (*numerus clausus*). The creditor gets a proprietary interest in the object. The regulation of creation of this security right, its priority and default rules are for the largest part mandatory law. These security rights may be either possessory (like pledge), or — economically far more relevant — non-possessory. Most of these non-possessory *security rights* became available only relatively recently. In the nineteenth century, the need for non-possessory security started to emerge by using *ownership* to

17. Article 5:1 BW mentions restrictions in the second section. See LA. CIVIL CODE ANN. art. 477 (West 1980) (“Ownership is the right that confers on a person direct, immediate, and exclusive authority over a thing. The owner of a thing may use, enjoy, and dispose of it within the limits and under the conditions established by law.”).

18. See, for example, the analysis of Ralph Michaels in *Sharp Distinctions and Floating Transitions – a German View of Sharp v. Thomson*, 4 EUR. PRIVATE L. 407, 407-13 (1998).

secure loans. There are basically two techniques using the right of ownership. The first, not of direct relevance, is the transfer of ownership to the creditor, but without providing him with factual possession (*fiducia cum creditore*). The second is the retention of title construction, whereby ownership remains with the seller until the purchase price has been paid. It is functionally meant as a security, but dogmatically it (still) is ownership. As we will see, the function of ownership to serve as security for a purchase price has led civil jurisdictions to curtail the exercise of these constructions to level the retention of title security with regular security rights.

B. *The Extent of Security*

By retention of title, ownership is not transferred until the purchase price is paid. This is a funding technique which is used globally, but the legal technique differs in many ways, as it has its roots in the coercive national dogmatics of property law. For example, under English law the possibility of retention of title is given in the Sale of Goods Act, sections 17 and 19.¹⁹ The consensual system (England, Scotland, and France) of transfer simply offers the possibility of agreeing on a conditional transfer of ownership. Some jurisdictions require for a valid transfer the delivery of possession (The Netherlands). Then the dogmatic construction becomes more complex, as it then may be the delivery itself which is subject to the condition, but the result is the same. The effect of retention of title differs manifestly, as will be explained and illustrated. The effect against third parties and in insolvency is often limited or subject to additional requirements.

More often than not, trade practice needs more than just the possibility to secure the price of the objects delivered under a specific contract by retaining ownership to the objects sold. Several situations may occur. First, more sales contracts may have been concluded with retention of title clauses. Ownership to exactly which goods is retained? A property right exists only if the object is sufficiently specific. It might, for instance, be that similar objects are delivered under different contracts. It might simply not be possible to specifically point at the objects delivered under that very contract, which would ineffectuate the retention of title clause. No object, no right in that object, no ownership. In order to prevent this problem, the retention

19. Sale of Goods Act § 17(1) (1979) (“Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.”); Sale of Goods Act § 19 (“Where there is a contract for the sale of specific goods . . . the seller may reserve the right of disposal of the goods until certain conditions are fulfilled. And in such a case . . . the property in the goods does not pass until the conditions imposed by the seller are fulfilled.”).

of title clause is framed in a way to include all objects delivered under sales contracts. In its most extensive version the clause could stipulate that ownership does not pass, until all debts (not necessarily emerging out of sales contracts) owed by buyer to seller, are paid: *all sums clauses*.

Second, the objects sold under a retention of title clause might be meant to be resold by the buyer in his ordinary course of business. In this case it is evident that the buyer — not yet owner — should be allowed to transfer these objects to his (sub)buyer. This power to transfer ownership is often explicitly included in a retention of title clause. But by transferring ownership the seller's security ceases to exist. How to arrange subsequent security? This might be constructed in various ways with either the purchase price or the claim to the purchase price (in the relationship buyer-subbuyer) as object (collateral) of the security (*proceeds clauses*). One option is to transfer the claim of the subpurchase price to the seller. Another option is the creation of a trust.

Third, the objects sold under a retention of title clause might be meant to be manufactured. Manufacturing might mean that the original object *de jure* simply disappears, thereby followed by ownership. There are various legal issues at stake. We are dealing in manufacturing processes with possibly a variety of property rules pertaining to original acquisition: *accessio*, *specificatio*, *commixtio*, *confusio*. The outcome of the question, who becomes owner of the manufactured object, depends on the facts and to some extent also on which road is chosen, but the seller's danger is clear. Application of the mentioned rules may lead him to lose his ownership of the manufactured goods. A possible solution is to contractually circumvent these rules of original acquisition. Buyer then manufactures the goods for the seller (*manufacturing clauses*).

Are the above-mentioned constructions allowed? This depends on the rules of national property laws. It is ultimately an issue on the amount of flexibility which is allowed in property law to encompass practice needs. Each country's property law thereby needs to take into account the standard interests with which property law is concerned: the interests of third parties, in this case the interests of acquirers, and the buyers' general (secured) creditors. Often other property-based constructions are available to sellers as well. There may be statutory liens, or the seller could stipulate in his interest a security right in the goods sold.

C. *The Example of Article 9 of the UCC*

Quite distinct from the national diversity in approaches in Europe, including England and Wales, is the uniformity which was created in the United States by UCC article 9. If the transaction is functionally a secured transaction, it falls within the scope of article 9 and is then subject to the often mandatory rules regarding creation, priority and default. This functional approach differs fundamentally from European approaches, where retention of title constructions are in principle *not* considered to be security rights, and therefore are not directly subject to the relevant mandatory rules regarding creation, priority and default.²⁰ Why is retention of title not considered to be a security right? This is because a security right is a right in somebody else's property (*ius in re alienum*),²¹ and in the case of retaining title the owner simply did not (yet) part from his ownership. This line of reasoning is comparable under the common law of England and Wales, as under every civil jurisdiction.

Within the framework of UCC article 9, distinctions are made with regard to the type of the secured transaction. The equivalent of the retention of title security is the purchase money security interest.²² Retention of title is thus functionally treated as a security interest. The mandatory rules are thus applicable, yet provide a preferential treatment for the sales creditor, compared to the loan creditor.²³ This is interesting, since the outcome is comparable to what may be reached under most European retention of title constructions. Following civil dogmatics the line of reasoning would be as follows: *C* gets credit from a Bank (*B*) and provides *B* with a security right in his (*C*'s) present and future property; *C* buys under retention of title widgets from *A*; if a third creditor or *B* then seizes the widgets, *A* can then claim the widgets as property, since he still has not parted with his ownership. *B* has no security right in the widgets, since these are not yet *C*'s. It is *de facto*, as if the seller had priority over *B*. Article 9 goes further than most European jurisdictions do, however. In order

20. Consider the possible future exception of security interests in expensive mobile equipment (airplanes, trains and satellites) due to the Convention on International Interests in Mobile Equipment, Nov. 16, 2001, available at <http://www.unidroit.org/english/conventions/mobile-equipment/mobile-equipment.pdf>.

21. See discussion *supra* part III.A.

22. A definition is given in U.C.C. Rev. § 9-103(a)(1)-(2) (2001). Two types of purchase money security interests appear: one in which the seller advances, the second type, in which a third party financier qualifies as a purchase money security interest financier. This seems to be a sensible equalization. Under civil legal systems the third party financier has to be protected either by having ownership transferred to him or by stipulating a (non possessory) security right. The first option has — under Dutch law — a risk of invalidity: transfer for security reasons are invalid (art. 3:84, section 3 BW), but the supreme court (Hoge Raad) held such a security transfer valid under certain circumstances. H.C. Sigman, *Keereweer v. Sogelease BV Seen from an American Perspective*, WPNR 6214 (1996), at 167-70 (providing an interesting comparison with UCC article 9).

23. See U.C.C. § 9-324.

to have more effect against third parties, security interests need to be *perfected*, which serves the essential (proprietary) element of publicity. Perfection can be attained automatically,²⁴ by possession,²⁵ by control,²⁶ or, in most cases, by a public registration, filing.²⁷ A purchase money security interest in consumer goods is perfected automatically; in business transactions filing will be necessary, but it is rewarded a priority over earlier perfected conflicting security interests.²⁸ Justifications for this priority over other creditors are the same which underlie the dogmatically different route of civil preferential treatment of sellers retaining title, the most important being that it is also in the interest of the buyer's general creditors as it enables buyers to keep on acting in the market.

Also with regard to proceeds of subsales and manufacturing new objects, the UCC provides a uniform solution. Proceeds of the collateral are also — subject to conditions — covered by the purchase money security interest.²⁹ In the case of a manufacturing process, when the identity of the original objects is lost, the purchase money security interest continues, and when there are more perfected security interests, they rank equally, *pro rata*.³⁰ UCC article 9 is, in European jurisdictions, often seen as an illustrative example for either a remodelling of national law³¹ or a harmonized law on security rights in Europe.³² Indeed, it is quite appealing to balance the interests of general creditors and sales creditors not in principle alongside the lines of national dogmatics, but first and foremost, alongside the lines of common commercial and economic policies. Of course, a firm dogmatic structure in itself provides for an instrument to balance the involved interests, but since these dogmatics are national, this balance is quite absent in international transactions. Such a European exercise, however, does not seem likely in the near future, considering the problems to reach even a tiny agreement on retention of title.

24. Purchase money security interests in consumer goods are found in U.C.C. § 9-103; certain intangibles are found in U.C.C. § 9-109.

25. *Id.* § 9-313.

26. This is comparable to possession, with regard to certain intangibles. *See id.* § 9-314.

27. *Id.* §§ 9-310, 9-312.

28. *Id.* § 9-324.

29. *Id.*

30. Fixtures are found in § 9-334; accessions and commingled goods are found in §§ 9-335, 9-336.

31. *See, for example, the proposed changes in English law as mentioned in ROY GOODE, COMMERCIAL LAW 728 (2d ed. 1995).*

32. *See, for example, Ulrich Drobniq, Security Rights in Movables, in TOWARDS A EUROPEAN CIVIL CODE 511 (Hartkamp et al. eds., 1998).* Drobniq advocates a European system of real security which encompasses — like the UCC — both real security and retention of title; he does not adhere to the system of registration, since this can be replaced by “constructive knowledge” that the debtor's objects may be charged.

IV. RETENTION OF TITLE AND ITS NATIONAL ARRANGEMENTS

To harmonize retention of title means finding a common denominator within the various national constructions regarding retention of title. This might be relatively easy, yet depends on the level of harmonization which is aimed at. Obviously, harmonizing the extended forms would involve an enormous legislative effort. Retention of title has its historic roots in Roman law, but having been rejuvenated, it entered into positive “European” law in nineteenth century Germany, fulfilling legal practice’s need for securing purchase prices. Since then and from there, it has spread over Europe and can be found everywhere in its most elementary form. It is (in most jurisdictions) resistant in the debtor’s insolvency (sometimes only if certain requirements have been met). It may serve to secure more than merely the indebtedness of the purchase price of the very goods sold, sometimes even all the sums owed to the creditor. It is sometimes allowed to effectively extend the clause by stipulating a manufacturing clause or a proceeds clause. Retention of title involves contractual issues (validity; when does a clause bind the parties; what are the contents of the clause?), as well as proprietary issues (against whom may a(n) (extended) clause be upheld; which third parties are protected; which claims can the clause secure; are there any formal requirements?) and insolvency issues (subject to which requirements, if any, does the clause survive the debtor’s insolvency?).

As we have seen, the extended forms of retention of title are closely connected with other fundamental aspects of property law pertaining to original acquisition. The effect of the manufacturing clause depends on the rules regarding *specificatio*, *accessio*,³³ *commixtio*, or *confusio*. The effect of proceeds clauses depends on the national rules regarding the transfer of claims (assignment) or regarding the trust. In particular, the extent to which member states allowed and effectuated extended retention of title forms has shown some advancement over the last decades. But in this extended area the differences remain. A quick overview on national rules regarding retention of title constructions follows.

With regard to the simple retention of title clauses, first, the European Union rules play a role. In the case of installment sales and consumer sales³⁴ the requirement of writing is prescribed, due to European Directives.³⁵ The directive on late payment is not about con-

33. On *accessio* (and also retention of title) see Lars van Vliet, *Accession of Movables to Land*, in 1 MODERN STUDIES IN PROPERTY LAW 319 (Elizabeth Cooke ed., 2001).

34. These do not fall within the scope of the late payment directive, since the directive only deals with *business* transactions.

35. See, for example, Council Directive 87/102/EEC, 1987 O.J. (L 42) 48; Council Directive 97/7/EC, 1997 O.J. (L 144) 19, arts. 4, 5, on the protection of consumers in respect of distance

sumers but about sales transactions by businesses, which are often installment sales at the same time. In the national jurisdictions often no formalities are required, like under German³⁶ or English³⁷ law, or in general if a transfer takes place *solo consensu*. Denmark requires a minimum down payment of twenty percent of the purchase price.³⁸ In order to be effective against other creditors of the debtor or to survive the debtor's insolvency, sometimes a written clause is prescribed (France and Belgium³⁹), and sometimes it is a written clause with a certain date (Italy⁴⁰). Until very recently, retention of title clauses were not insolvency resistant in France and Belgium. In France from 1980 onwards⁴¹ and in Belgium in 1998,⁴² retention of title clauses were made insolvency resistant. The only remaining exception in not granting insolvency protection is Luxemburg. In Europe there is one major exception to the absence of publicity regarding retention of title:⁴³ Switzerland requires registration in a public register.⁴⁴

It should not be too difficult to reach consensus on the protection of the seller by simple retention of title clauses. With only the exception of Luxemburg, retention of title clauses are upheld in insolvency. It does not seem necessary to have any further requirements on a European level, as the requirements (with the exception of the registration requirement in Switzerland) are not addressing publicity towards third parties but mainly (procedural) certainty between seller and buyer. This does not seem too much of a problem, since retention of title is a standard clause. Third party financiers or buyers may assume (constructive notice) that property of the debtor has been purchased under a retention of title clause.

As far as clauses which try to secure more than just the purchase price are concerned, there is a strong diversity as to its allowed extent. England and Scotland have permitted the possibility of all-sums reten-

contracts. For additional resources see, in The Netherlands, Article 7A1576(j) § 3 BW; in Germany, Verbraucherkreditgesetz (Consumer Credit Act) § 4; in Austria, Konsumentenschutzgesetz (Consumer Protection Act) § 24.

36. § 455 BGB (Bürgerliches Gesetzbuch; German Civil Code); see ROLF SERICK, EIGENTUMSVORBEHALT UND SICHERUNGSÜBERTRAGUNG 53 (1993).

37. Sale of Goods Act § 19 (1979); GERARD McCORMACK, RESERVATION OF TITLE (1995).

38. Credit Agreements Act § 34 (1980).

39. Art. 101 Faillissementswet (Bankruptcy Act).

40. Art. 1524 of the French Civil Code contains further requirements in specific circumstances.

41. In Loi n. 85-98 relative au redressement et à la liquidation judiciaires des entreprises (25 janvier 1985) (Business Bankruptcy Act); since then further amended in favor of the seller in 1994 and 1996. See on retention of title under French law, Pierre Crocq, *Redressement et liquidation judiciaires. Situation du vendeur de meubles. Clause de réserve de propriété*, JURIS-CLASSEUR 1998, at 4.

42. D. R. Dirix, *Eigendomsvoorbehoud in België en Frankrijk*, in GOEDERENRECHTELIJKE BESCHOUWINGEN 34 (Van Beheering ed., 1998).

43. Compare the perfection requirements in UCC art. 9.

44. Art. 715, ¶ 1 ZGB (Swiss Civil Code).

tion of title clauses since 1990.⁴⁵ The desirability or even validity of all-sums clauses is strongly debated, however.⁴⁶ Germany also allows clauses which secure more than just the purchase price,⁴⁷ but if the secured sum surpasses 120% of the value of the goods sold, it is unenforceable.⁴⁸ The Netherlands allows the securing of debts out of other sales or service contracts concluded with the same person.⁴⁹ It is indeed highly questionable to have the sellers' security thus enlarged if the secured sums are not related at all with contracts of sale.

A manufacturing clause can only be effective if rules regarding specification allow this. The first issue to be dealt with, however, is to know when there is a new manufactured item. What are the rules of *specificatio*?⁵⁰ If it is concluded that the original object is still traceable (no new object has as yet been created), a simple retention of title clause might still be effective; if not, the allowed effect of the manufacturing clause becomes important. This first preliminary issue requires fundamental comparative research. Approaches even to this question may differ.⁵¹

As far as the manufacturing clause itself is concerned, there are wide differences. France does not allow such a clause to have effect against third parties and in insolvency,⁵² and neither does English law.⁵³ Under English law, the manufacturing clause would be considered to be an attempt to create a charge, which then is ineffective for lack of registration. The manufacturing clause is allowed in Germany⁵⁴ when competing in the insolvency of the buyer with the buyer's general creditors, thereby providing a preferential treatment for the sale-creditor, compared to the loan-creditor. In The Netherlands, such clauses generally do not have any effect, but it has been advocated that the same protection should be provided to the supplier

45. *Armour v. Thyssen Edelstahlwerke AG*, 3 W.L.R. 810 (H.L. 1990).

46. See, e.g., Sharon Cowan et al., *Will English Romalpa Clauses Become Registrable Securities?*, 54 *CAMBRIDGE L.J.* 43, 45 (1995).

47. This is allowed in combination with the assignment of claims arising out of sub-sales (Kontokorrentvorbehalt).

48. Through § 138; e.g. BGH (Bundesgerichtshof) 1985 BGHZ 105, 113; *Münchener Kommentar* § 138, nr. 87 ff. (Mayer-Maly).

49. Art. 3:92 BW.

50. Art. 5:16 BW (The Netherlands); § 950 BGB (Germany).

51. An interesting difference is between a Dutch case, *Hollanders' Kuikenbroederij*, HR 24 maart 1995, NJ 158 (ann. AGH) in which incubating eggs and breeding them into chickens was considered specification and a Scottish case, *Kinloch Damph Limited v Nordvik Salmon Farms Limited*, available at <http://www.scotcourts.gov.uk/opinions/ca291499.html> in which the hatching of salmon was not considered to be specification, even though the amount of work put into the process was considerable.

52. See Loi n. 85-98, *supra* note 41.

53. *Clough Mill Ltd. v. Martin*, 1 W.L.R. 111 (C.A. 1984).

54. SERICK, *supra* note 36, at 106. *Münchener Kommentar* § 950 (Quack).

of goods as is the case in Germany with its widespread use of manufacturing clauses.⁵⁵

Proceeds clauses nowhere have the same effect as they do in Germany. In Germany, the buyer assigns, in advance, his future claims to sub-buyers to the seller. This amounts to a preferential claim on the proceeds of these sub-sales in case of the insolvency of the buyer.⁵⁶ In The Netherlands, these assignments of future claims are not allowed.⁵⁷ Instead a pledge should be stipulated.⁵⁸ In the case of the buyer's insolvency this is not very effective, as at the moment when the buyer would be entitled to the proceeds and the pledge could then normally be effectuated, his insolvency makes him incapable of doing so. Therefore the proceeds fall within his insolvent patrimony, to which his other creditors will also have recourse. In France, the seller has recourse to the proceeds of the sub-sale.⁵⁹ In England, proceeds clauses were upheld in the *Romalpa* case,⁶⁰ but since then, recovery under such a clause has become more difficult.⁶¹ Comparable to proceeds clauses are clauses which try to create a trust with regards to the proceeds of the sub-sale.

The arguments for a unitary treatment of retention of title in transnational business transactions are clear: transparency and predictability of property rights in a single European market. On which level could the various national retention of title arrangements be harmonized? Simple retention of title which secures the purchase price and is insolvency resistant would pose no serious difficulty. It would be far more difficult to find a *communis opinio* on the extended versions. Ultimately, it is necessary to reach an agreement on the level of protection of sale-creditors compared to the general creditors. This is a matter of commercial policy, which is apparently not yet European. Let us take a look.

V. A EUROPEAN CONCEPT OF RETENTION OF TITLE

A. *The Previous Situation*

What has so far already occurred on an (comparative or harmonizational) international level in the area of retention of title?

55. W.H.M. Reehuis, EIGENDOMSVOORBEHOUD 19 (1998). See the discussion between Van Maanen and Fikkers in WPNR (WEEKBLAD VOOR PRIVAATRECHT, NOTARIAAT EN REGISTRATIE) 6309 en 6321 (1998).

56. § 398 BGB; *Münchener Kommentar* § 398, nos. 115-123.

57. Art. 3:84 § 3 BW.

58. Art. 3:239 BW.

59. Loi n. 85-98, *supra* note 41.

60. Aluminium Industrie Vaassen BV v. Romalpa Aluminium Ltd., 1 W.L.R. 676 (C.A. 1976).

61. J.R. Bradgate, *Twenty-Five Years of Romalpa*, in SECURITY INTERESTS IN MOBILE EQUIPMENT 29-94 (Iwan Davies ed., 2002); Giorgio Monti et al., *The Future of Reservation of Title Clauses in the European Community*, 46 INT'L & COMP. L.Q. 866, 884 (1997).

When compared with other areas of property law, retention of title is a construction which has drawn a lot of attention. Basically there are three reasons. As a legal concept it is generally (if not universally) recognized in every jurisdiction; it does not, at least not in its simple form, involve many intricate differences; it is used very frequently in practice and is a very common clause in (standard) contract terms.

The European Union itself did include the retention of title in a couple of draft directives in the early 1970s, none of which were successfully implemented.⁶² On the level of Unidroit and Uncitral, retention of title has also (unsuccessfully) been on the agenda. Academic work on comparative law with regard to retention of title is more abundant. Comparative overviews and analyses of the law on retention of title as it stands in some European jurisdictions have been made.⁶³

The draft directive on late payment (1998)⁶⁴ contained a very simple retention of title provision that could have been implemented without much difficulty in European jurisdictions.⁶⁵ It provided a uniform rule on a simple retention of title with the following characteristics. The clause should be agreed upon,⁶⁶ at the latest at the time of delivery of the goods, be it orally, or written in a standard contract, delivery documents or invoice. The proposal expressly declared that

62. See Monti, *supra* note 61, at 892-93. Furthermore, see the overview in Kieninger, *supra* note 11, at 51.

63. See, e.g., Kieninger, *supra* note 11, at 43-47. For additional information, see also McCORMACK, *supra* note 37 which includes a chapter on international dimensions. See also RETENTION OF TITLE CLAUSES IN SALE OF GOODS CONTRACTS IN EUROPE (Iwan Davies ed., 1999); RUTGERS, *supra* note 10. A comparative overview of the law on retention of title in thirty-five countries has been offered by the International Chamber of Commerce, but the contributions are brief. INT'L CHAMBER OF COMMERCE, RETENTION OF TITLE - A PRACTICAL ICC GUIDE TO LEGISLATION IN 35 COUNTRIES (1994).

64. Proposal for Combating Late Payment, *supra* note 6, at 13-17.

65. Amended Proposal for a European Parliament and Council Directive Combating Late Payment in Commercial Transactions, 1998 O.J. (C 374) 4, 10-11 [hereinafter Amended Proposal] (emphasis added):

1. Member States shall ensure that the seller retains title if a retention of title clause has been *agreed*. Apart from an individual contract, such an agreement shall be considered valid if the retention of title clause is contained in the seller's standard contract, on the invoice, or on delivery documents accompanying the goods, which the buyer has received no later than *at the time of delivery*, and to which he has not objected. *No other formality shall be required*.

2. Member States shall recognise the validity of the clauses contained in the Annex or of clauses having equivalent effect.

3. Once the default date has passed without the buyer having paid, the seller may claim the goods in question be returned to him. Member States shall provide for the retention of title to *be enforceable against third parties, even in the case of bankruptcy* of the debtor or in the case of any other procedure recognised as being similar under the legislation of the Member States. No later than when the buyer takes possession of the goods, he becomes responsible for any damage to or loss of the goods.

4. Member States may adopt provisions for the protection of third parties acting in good faith, and as regards down payments already made by the debtor. They may also adopt provisions concerning goods which are incorporated in other movable or immovable property.

66. An even earlier proposal suggested a unilateral retention of title.

other formalities were not required. The proprietary aspect of a retention of title clause is contained in section 3. It is enforceable against third parties, even in the case of bankruptcy. In an annex, examples of retention of title clauses were provided. The Member States (section 4) were free to regulate the protection of third parties acting in good faith, and furthermore, they could themselves regulate matters like extensions to the clause. It did not therefore touch upon subjects which relate to the extended forms of retention of title. The result of this clause was that simple retention of title clauses needed to be recognized in cross-border (insolvency) conflicts, even though national requirements had not been met. The proposal itself sets a standard for simple retention of title clauses. Unfortunately, this has not been the case in the final directive.

B. *Retention of Title in the Directive*

The present directive contains the following clauses:

Recital (21) It is desirable to ensure that creditors are in a position to exercise a retention of title on a non-discriminatory basis throughout the Community, if the retention of title clause is valid under the applicable national provisions designated by private international law.

Article 2. Definitions

For the purposes of this Directive:

.....

3. 'Retention of title' means the contractual agreement according to which the seller retains title to the goods in question until the price has been paid in full;

.....

Article 4. Retention of title

1. Member States *shall provide* in conformity with the applicable national provisions designated by *private international law* that the seller retains title to goods until they are fully paid for if a retention of title clause has been *expressly* agreed between the buyer and the seller *before the delivery* of the goods.

2. Member States may adopt or retain provisions dealing with down payments already made by the debtor.⁶⁷

As we can see, the standard of the retention of title clause has been considerably lowered. It should be *expressly* agreed upon; a referral to private international law has appeared; its surviving the debtor's insolvency has disappeared; its effect against third parties has disappeared as well; and the prohibition on national regulations requiring more formalities than the directive itself has also disappeared. What then does this provision do? First, it regulates a contractual matter. The way a retention of title clause can be agreed upon is formulated rather reticently. In most cases retentions of title will be stip-

67. EC Treaty, *supra* note 3, at 36 (emphasis added).

ulated in standard contract terms, and it is often possible, under certain circumstances, to be bound by those general contract terms, written on documents at the time of delivery. It is often even possible, under certain circumstances, to be bound by standard contract terms written on an invoice if there has been no objection to these standard contract terms.⁶⁸

Second, it arranges proprietary issues: in conformity with the applicable national provisions designated by private international law, Member States ensure that the seller retains title to the goods, if so agreed upon. This means that a retention of title will be judged in accordance with national law. This clause does not explicitly stipulate that Member States should have a simple retention of title clause available, but merely that a clause, if agreed upon, should be recognized if it is valid according to conflicts law. But in my opinion, this directive does impose on Member States the obligation to have a retention of title clause available: Member States *shall* provide for a retention of title security. Furthermore, it might be argued that even non-recognition of a foreign retention of title clause due to additional national criteria is not allowed in light of article 4 and recital 21 — the possibility for creditors to exercise a retention of title clause on a non-discriminatory basis throughout the Community. Yet, fortunately, all Member States have the option of retention of title at their disposal, often going considerably further. The attractive aspect of the former proposal was that the diversity in formalities for simple retention of title were not allowed if they would result in the non-recognition of a foreign retention of title clause. This has also disappeared in the final directive.

Furthermore, the provision is still unclear as to the extent of a retention of title: which claims may a clause effectively ensure? “Retains title to goods until they are fully paid for” — does this mean the most simple retention of title? Or should slight extensions be recognized as well? Or should it be until the price for other goods delivered to the same buyer is paid? Alternatively, the provision could require that services be rendered on the basis of the same contract. This interpretation seems to contradict the text of the directive and its recital 21, but it seems to be necessary in order to attain its objective — protection of the unpaid creditor under one single sale contract, including services.

In the way in which this retention of title provision is formulated, it is even doubtful whether it can be called a proprietary construction. The former directive-proposal provided, “Member States shall pro-

68. See H. KÖTZ, *EUROPÄISCHES VERTRAGSRECHT I* 43-44, n.55 (1995). In Dutch law, see Van der Breggen/TNO, HR 10 juni 1994, NJ 611.

vide for the retention of title to *be enforceable against third parties, even in the case of bankruptcy* of the debtor”⁶⁹ Nothing in this respect can be found in the final directive. This is even more strange, as retention of title will survive the buyer’s insolvency in all but one EU jurisdiction. True, sometimes additional conditions have to be met, but certainly much more could have been achieved.

Why has this thin arrangement been chosen? It has been suggested that the Council was not at all prepared to deal with the diversity of national arrangements of retention of title in the short term.⁷⁰ The following question therefore remains: Will national courts recognize a foreign retention of title if foreign formalities are different? That is very likely, looking at case law, but it is not at all certain. This method of regulation arranging means that diversity still remains within the European Union, resulting in uncertainty.

There is another option in the harmonization of retention of title in the European Union, but it is at most second best. This is by way of private international law. Studies have shown that various national courts tend to also recognize the *lex contractus* to judge the effectiveness of a retention of title clause, and this has also been advocated in literature.⁷¹ This solution allows the parties to the contract to choose their law with respect to the proprietary aspects of retention of title. As the application of private international law by the various national courts varies considerably, this solution would increase (at least for the contractually involved parties) certainty and predictability with regard to the applicable law.⁷²

VI. CONCLUSION

At present, the legal requirements relating to the retention of title differ in the Member States, with the result that exporters must use different clauses in different Member States. The present directive

69. Amended Proposal, *supra* note 65, at 10 (emphasis added).

70. M. Schmitt-Kessel, *Die Zahlungsverzugsrichtlinie und ihre Umsetzung*, NJW 2000.

71. RUTGERS, *supra* note 10, at 164-65; P. VON WILMOWSKI, *EUROPÄISCHES KREDIT-SICHERUNGSRECHT; SACHENRECHT UND INSOLVENZRECHT UNTER DEM EG-VERTRAG* 150-51 (1996); Eva-Maria Kieninger, *MOBILIARSICHERHEITEN IM EUROPÄISCHEN BINNENMARKT* 210-14 (1996).

72. In a case decided by the Dutch Supreme Court the *lex contractus* was allowed in determining proprietary issues, thereby allowing liberal German law (proceeds clauses) to be effected in Dutch territory; the Dutch Supreme Court ruled that the proprietary aspects of assignment were also to be determined by the law which is applicable to the contract. Thus a German extensive retention of title clause (*Vorausabtretung*) became effective in The Netherlands. Brandsma q.q./Hansa Chemie AG, HR 16 mei 1997, NJ 585. For an analysis, see Teun H.D. Struycken, *The Proprietary Aspects of International Assignment of Debt and the Rome Convention, Article 12*, LLOYD’S MAR. & COM. L.Q., Aug. 1998, at 345-60. Recently the Dutch legislature has adopted a bill which rephrases Dutch international private law with regard to retention of title in conformity with practice needs to have the *lex contractus* determine the proprietary aspects of a retention of title provision, if the law of the importing country has been chosen (art. 3:92a BW).

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retains additional national burdensome requirements on transborder businesses.

In the meantime, further rapprochement in the area of retention of title will be in the hands of the national courts; they sometimes seem to be willing to recognize and give effect to retention of title clauses which do not fulfill certain national formal requirements. Some national courts have even shown themselves to be prepared to recognize and effectuate further-reaching retention of title clauses. By the incorporation of a proprietary provision (even a somewhat “thin” one), the road seems clear for even more advanced exercises on the European harmonization of property law aspects. These future exercises could profit by taking a close look at UCC article 9.

The incorporation of an important proprietary element in a European regulation is in itself a revolutionary development. But more could have been attained; a simple retention of title clause might have been imposed which would also have survived the buyer’s insolvency.

