

# Poland

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## **1. General remarks about retention of title**

### **1.1 Transfer of ownership**

The general rule for transfer of title of specific goods (movable assets) under Polish law is that the title passes upon conclusion of the sale agreement. With regard to unascertained or future goods (goods to be manufactured or acquired by the seller after the conclusion of the sale agreement), the title to such goods passes in the moment in which those goods are handed over to the buyer or at a later moment agreed by the parties.

Subject to the rules on transfer of ownership of unascertained and future goods, the parties to a sale agreement may freely agree on the moment at which the title to the goods shall pass to the buyer. The parties may agree that the transfer of title shall occur at a specific date or be subject to a condition precedent or condition subsequent.

### **1.2 Retention of title**

Polish law permits a seller to retain title of the sold goods until payment of the purchase price has been made in full. Retention of title clauses are regulated in Articles 589 to 591 of the Polish Civil Code. Article 589 of the Civil Code provides that if the seller has retained the title to the goods until the price is paid in full, the payment of the full price of the goods is to be construed as a condition precedent to the passing of title of goods to the buyer. Article 590 of the Civil Code provides that if the goods have been handed over to the buyer, the retention of title clause shall be evidenced in writing. Article 590 further provides that if such a clause is to be enforceable towards third parties, the written document containing it should have a certified date (how a certified date can be obtained is discussed under heading 2.1 below). Article 591 of the Civil Code establishes the right of a seller, who moves to repossess the goods delivered under retention of title, to claim reimbursement for wear and tear and damage to those goods.

Case law does not have a direct influence on the operation of a retention of title clause, as Poland is a civil law jurisdiction in which there are no binding precedents. However, case law, particularly that of the Supreme Court, has significant authority and serves as an important point of reference for the lower courts.

### **1.3 Foreign and international law**

In accordance with the Private International Law Act, the law governing a sales

agreement that contains a retention of title will be determined according to the Rome I Regulation (EC Regulation 593/2008 of June 17 2008 on the law applicable to contractual obligations).

According to Article 41(2) of the Private International Law Act, the creation and the expiry of retention of title is governed by the law of the country in which the goods concerned were situated in the moment at which that creation or expiry occurred. Those aspects of retention of title such as transfer of title, rank of securities and the possibility to taking security over goods which are subject of retention of title, shall be governed by the law of the location of the goods (Article 41(1) of the Private International Law Act).

Under these rules, in a case where the security right in a movable asset was created under foreign law, but the goods are currently situated in Poland, the Polish court will examine if this security should be treated as a retention of title (or as another security right, such as a fiduciary security transfer of title). If it comes to the answer that the security right is a retention of title, then Polish rules on retention of title will apply and determine the legal situation of the seller, as well as remedies that are available to him under Polish law.

#### **1.4 Retention of title in insolvency**

The Polish insolvency law regime consists of two types of insolvency proceeding: bankruptcy and restructuring. In bankruptcy proceedings, a trustee is appointed by a competent court with a view to liquidating the bankruptcy estate and distributing the proceeds to the creditors. Restructuring proceedings aim to restructure the business of an insolvent debtor, who generally maintains management and control of his business. From January 1 2016 these two types of proceeding will be regulated by two separate acts, the Bankruptcy Act and Restructuring Act respectively.

With regard to bankruptcy of the buyer, Article 101 of the Bankruptcy Act provides that retention of title does not expire due to the bankruptcy provided that it is valid and enforceable against other creditors of the buyer in accordance with the provisions of the Civil Code. This means retention of title will not expire if the agreement in which it was granted has a certified date as provided for in Article 590 of the Civil Code (see further under heading 2.1 below).

With regard to restructuring of the buyer, Article 249 and Article 168 of the Restructuring Act provide that the retention of title clause remains effective during the restructuring proceedings.

If the buyer is subject to insolvency proceedings outside Poland, the validity of the retention of title will be determined according to the laws of the jurisdiction in which insolvency was declared.

The validity of a retention of title clause is unaffected if it is the seller who is subject to proceedings under the Bankruptcy Act or the Restructuring Act. However, in bankruptcy proceedings the trustee of the bankruptcy estate will have a right to rescind the sales agreement (see under heading 2.3 below).

If the seller is subject to insolvency proceedings outside Poland, any issues with regard to the validity of the retention of title clause will be determined according to the laws of the jurisdiction in which the insolvency was declared.

## **2. Retention of title**

### **2.1 Validity and formal requirements**

Retention of title does not have to be agreed in writing in order to be valid. However, a retention of title arrangement should be made in writing for the sake of avoiding any potential disputes with the buyer, as well as to have the possibility of establishing a security effective against other creditors of the buyer (see below).

If the retention of title is to be effective against other creditors of the buyer, it has to have a certified date (Article 590 of the Civil Code). The retention of title is then effective against other creditors of the buyer from the certified date. The form of the certified date is regulated by Article 81 of the Civil Code. The most practical way to obtain the legal effect of a certified date is to have a notary certify the date on the agreement containing the retention of title clause. The date may also be certified by a public body. The certification of the date may be performed on the date on which the agreement is concluded or at a later date. Article 81 of the Civil Code also provides for other situations in which retention of title will be deemed to have a certified date: in the event that the document containing a retention of title clause is referenced in a public document (the effective certified date being the date of issue of that public document), or in the event that a person who signed the agreement has deceased (the effective certified date being the date of death).

The wording of the retention of title clause can be freely agreed by the parties and there are no specific legal phrases to be observed. The wording must state, in an unambiguous manner, that the title to the assets being sold remains with the seller unless the whole price is paid. Polish law does not provide for a retention of title by operation of law.

It is also possible to agree on retention of title in general terms and conditions. In this case the rules outlined above with regard to written form and certified date still apply.

The parties are free to agree on the place where the goods are to be delivered, including agreement that delivery will take place by handing over of the goods to a carrier or by delivery to a warehouse belonging to a third party.

### **2.2 Scope of retention of title**

#### **(a) *Sale of goods delivered under retention of title***

The buyer is not allowed to sell goods that are delivered under retention of title. The right to sell the goods is vested with the seller. The parties may agree that the seller authorises the buyer to sell the goods to a third party on behalf of the seller (as the seller's agent) and provide for appropriate mechanisms of settling the proceeds of any such transaction. In such a case, the parties can agree that the price (or part of it) will be paid directly by the third party to the seller.

#### **(b) *Combining/mixing/mingling goods delivered under retention of title***

The effect of combining, mixing or mingling of goods depends on the circumstances of any such event, the nature of the other goods involved and their value.

If the goods delivered under retention of title (such as building materials) are affixed to real property then the retention of title becomes void and the title passes to the owner of the real property (Article 191 of the Civil Code). This rule cannot be amended by the parties' agreement.

If the goods have been combined or mixed, the seller generally has the right to restoration of the goods to their previous state, that is to say the state they were in before combining or mixing occurred. However, if the goods have been combined or mixed in a manner that would make it too difficult or too costly to restore them to their previous state, the seller becomes a co-owner of the whole lot of goods, his share in the lot determined by the value of the goods he owned (Article 193 of the Civil Code). The parties may also agree that in such a case the seller will become the owner of the whole lot.

If one of the combined or mixed goods has a value much higher than the other goods, the goods of lesser value are treated as attached to the goods of much higher value and any retention of title to the goods of lesser value would lapse. In this case the owner of the goods of much higher value becomes the owner of the combined thing. The parties may agree that the seller of goods delivered under retention of title will become owner (or co-owner) of any product created by the buyer with the use of those goods, regardless of their value in relation to the other goods involved. Such an agreement will be effective if the combined, mixed or mingled goods belong to the buyer. If the buyer has also used goods belonging to third parties, the seller could acquire ownership of goods belonging to the buyer and those third parties if the seller concluded agreements to this effect with all those entities.

**(c) *Processing of goods delivered under retention of title***

If the buyer processed the goods delivered under retention of title and the work he has invested in the creation of the final product had a higher value than the goods involved, the retention of title will lapse and the buyer will be an owner of the final product. However, if buyer processed the goods in bad faith or the goods had a higher value than the work involved in their processing, the seller of the goods will be the owner of the final product (Article 192 of the Civil Code). Opinion is split over the issue of whether the parties are allowed to agree that the seller will retain title to the product resulting from the processing of the goods even if the work involved in the creation of the product is of higher value than the goods.

**(d) *Extension of retention of title***

The issue of whether retention of title can extend to debts other than the purchase price has been a controversial topic in the discussion of Polish legal doctrine. The currently prevailing view is that the passing of title to the goods may be made conditional upon payment by the buyer of debts other than the purchase price.

**2.3 Legal effect of retention of title**

**(a) *Effect towards third parties***

Retention of title will not have automatic effect towards other creditors and

governmental bodies. In order for a retention of title to be invoked successfully against other creditors and government bodies, the retention of title has to be effective towards such parties, which means that it must have a certified date, as explained in detail above (under heading 2.1). If this condition is satisfied, the seller may effectively bring an action to secure his right under retention of title against those parties (and may therefore move to exclude the goods from enforcement proceedings or the bankruptcy estate, as explained below).

Retention of title will not have any effect towards a subsequent buyer acting in good faith. According to Article 169 of the Civil Code a valid retention of title will not prohibit the buyer from fraudulently selling the goods to a third party before he has paid the whole purchase price to the seller. The condition for such a transfer to be valid, however, is that the third party must act in good faith, both at the moment of concluding the sales agreement with the original buyer and at the moment of taking delivery of those goods from the buyer. Acting in good faith means that the third party must, considering the circumstances and terms of the sale, not have any objective doubts as to the fact that the buyer is the owner of the goods.

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

If the goods delivered under retention of title are seized, the aggrieved party has the right to initiate anti-enforcement proceedings, demanding that the goods are excluded from enforcement. However, the situation will differ depending on whether enforcement proceedings are started against the buyer or the seller.

Where the third party is a creditor of the buyer and starts enforcement against the buyer, the enforcement body will seize the goods if they remain at the buyer's disposal. In this case the seller may bring anti-enforcement proceedings to exclude the goods from enforcement by arguing that he is the owner of the goods. The seller must then prove that his retention of title has a certified date and is effective against third parties (see heading 2.1 above).

Where the third party is a creditor of the seller, and enforcement proceedings are started against goods still belonging to the seller under a retention of title clause but already delivered to the buyer, the situation is different. The goods may be seized if the buyer consents to the seizure or admits that the title to the goods actually still belongs to the seller (Article 845(2) of the Civil Procedure Code). Also, the goods may be seized if the enforcement order provides for the seizure of goods held by the buyer. It is a controversial issue whether the buyer can initiate anti-enforcement proceedings and argue that the seizure compromises the rights that he has under the sales agreement with the seller. Some scholars express the view that the buyer (where he is not in default as regards payment of the purchase price) has a right that is effective against the seller: an expectation that he will acquire title to the goods once the price is paid.

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