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Fiduciary Transfer of Ownership for Security Purposes & Retention of Ownership by a Seller

1. Introduction

The investigation studies the current problem of the correlation between transfer of ownership and retention of title security institutions. In most European countries, the transfer of ownership for security purposes and the retention of ownership by seller under the contract of sale are recognized as means of securing the fulfilment of the obligation, somehow guaranteeing the protection of the secured creditor's interests. However, the analysis of acts aimed at harmonizing legal provisions shows the delimitation of these institutions as two different proprietary security. The aim of research is to carry out a comparative analysis between fiduciary transfer of ownership for security purpose and retention of ownership by a seller within European private law.

The main objectives of the study are: analysis of the provisions of the International acts where the transfer of ownership and the retention of title are qualified as security constructions; examination of the German and French civil legislation governing the moment of ownership transfer in such constructions; exploring the question relating the existence of

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a creditor's and seller's right to claim the property from the bankruptcy estate of the insolvent debtor.

The general scientific methods of research were used in the article: the method of analysis and synthesis allow the author to investigate the definition of a "security right," "security transfer of ownership" and "retention of ownership" in doctrinal sources and legislation of European countries; the comparison method helps to highlight the key differences between these security rights concerning the default remedies of creditor, the moment ownership transfer and the claiming property assets from the debtor's insolvency estate if proceedings were open.

2. Legal qualification of construction as a security right

Security rights are aimed at encouraging the debtor to perform his obligation properly and providing additional property protection for the law or contract creditor's rights in the event of default or improper performance of the obligation by the debtor. Security rights have two main functions: incentive and compensation.² The identifying characteristics of security rights are: acting for ensuring the fulfilment of the obligation by the debtor³ as well as the existence of an additional property source for the purpose to satisfy the creditor's property interest in case of violation of the obligation by the debtor⁴.

Fiduciary transfer of ownership for security purposes is a non – possessory form of property transfer (usually movable) from debtor to creditor for the security purpose which remains in the debtor's possession until performing the obligation followed by the returning the ownership right for security property to the debtor after his fulfilment the obligation. The creditor (transferee of the security) is limited in its ability to dispose security property up to the time specified in the contract for foreclosure⁵.

² Maidanyk, R.A. (2019). *Rechove pravo* [Property law]. Kyiv, Alerta [in Ukrainian].

³ *Ibid.*

⁴ Puchkovska, I.Y. (2017). *Teoretychni problemy zabezpechennia zobov'iazan* [Theoretical problems of securing obligations]. Kharkiv, Pravo [in Ukrainian].

⁵ Maidanyk, R.A. (2019). *Rechove pravo* [Property law]. Kyiv, Alerta [in Ukrainian].

The security essence of fiduciary transfer of ownership consists in the acquisition by fiduciary (creditor) the fiduciary ownership to secured property for ensuring the fulfillment of the obligation by the debtor and returning him such ownership after the fulfilment the obligation in favor of a creditor. The fiduciary's obligation to return the secured property to the debtor after his performance of the obligation has a fiduciary nature, thus it does not require the parties to determine such a condition in the security agreement.

Security transfer of ownership of corporeal assets established by a contract for proprietary security qualified as security right in Draft of a Common Frame of Reference (DCFR) (IX.-1:102 (4a))⁶.

The content analysis concerning Art. 1 (ii), (jj) Convention of International Interest in Mobile Equipment according to which granting by the debtor (chargor) to the creditor (chargee) an interest (including an ownership interest) in or over an object to secure the performance of an obligation is covered by «security agreement» indicates that the creditor has a security interest on the basis of such agreement.⁷

In contrast to fiduciary transfer of ownership for security purposes, a retention of title is often not considered as a property security right because it is not granted but reserved⁸.

This is confirmed by international law provisions. According to IX.-1: 103 (2a) DCFR, the retention by a seller ownership under the contract of sale is covered by the term “retention of ownership device”⁹, which occurs when ownership is retained by the owner of supplied assets in order to secure a right to performance of an obligation (IX.-1: 103 (1)) DCFR.¹⁰ It should be noted that the ownership retained under retention

⁶ Christian von Bar, Eric Clive and Hans Schulte-Nölke (2009). Principles, Definitions and Model Rules of European Private Law Draft Common Frame of Reference (DCFR). P. 448.

⁷ Convention on International Interests in Mobile Equipment. 16, November 2001, Cape Town.

⁸ S (JHM) van Erp and B Akkermans (eds) (2012). Cases, Materials and Text on National, Supranational and International Property Law. Oxford, Hart Publishing. P. 443.

⁹ Christian von Bar, Eric Clive and Hans Schulte-Nölke (2009). Principles, Definitions and Model Rules of European Private Law Draft Common Frame of Reference (DCFR). P. 448.

¹⁰ Ibid.

of ownership devices defined in Art. IX.-1: 101 (1b) DCFR and the security rights provided for para. 1 (a) of this Article are distinguished among the security rights in movable assets basing upon contracts for proprietary security (IX. – 1:101 (1a, b) DCFR)¹¹ as different proprietary rights.

The Cape Town Convention of International Interest in Mobile Equipment establishes that an interest vested in a person who is the conditional seller upon a contract of sale fixed not by a security agreement, but by a title reservation agreement (Art. 2, 2 b)¹². Title reservation agreement for the sale of an individually defined object provides for the impossibility of transferring ownership until the fulfillment of the obligation in accordance with the conditions established in the contract (Art. 1 (II))¹³. Security interest granted by the debtor (charger) to the creditor under a security agreement (Art. 2 (2a)) and the interest vested in a conditional seller under a title reservation agreement (Art. 2 (2b)) are different rights in the context of the Convention. Security interest (2a) does not fall within sub-paragraph (b)¹⁴. Key differences relate to remedies that has creditor in the event of debtor default: in case of non-fulfillment of obligations under a title reservation agreement the conditional seller may terminate the agreement and take possession or control of any object to which the agreement relates (Art. 10 (a)) or apply for a court order authorising or directing either of these acts (Art. 10 (b))¹⁵. Meanwhile the recipient of the security interest in such case may take possession or control of any object charged to it (Art. 8 (1a)), sell this object (Art. 8 (1b)), collect or receive any income or profits arising from the management or use of any such object (Art. 8 (2c))¹⁶. Also the last one may alternatively apply for a court order authorising or directing any of the these acts (Art. 8 (2)). Any sum collected or received by the creditor as a result of exercise of any of the remedies as well as any sum that is the proceeds of the sale shall be applied towards discharge of

¹¹ Ibid. P. 447.

¹² Convention on International Interests in Mobile Equipment. 16, November 2001, Cape Town.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid.

the amount of the secured obligations (Art. 8 (5)). If such sums collected or received by the creditor exceed the amount secured by the security interest and any reasonable costs the surplus must be distributed among holders of registered interests in order of priority, and balancing to the debtor (Art. 8 (6))¹⁷.

In light of the foregoing, the scientific idea of Nikitin A. V. regarding to the main difference between the transfer of ownership as a security right and the retention of title by a seller under a contract of sale as a quasi-security right¹⁸ should be encouraged.

The quasi-security nature of the retention of ownership is confirmed by the absence of a debtor's additional security property, which would satisfy the proprietary security interests of the creditor in the event of a breach the obligation by the debtor. Thus the statement of the Ukrainian scientist Maydanyk R. A. that retention of ownership construction does not provide for property effects in the event of non – return of the transferred property by debtor and, therefore the its essence is not to ensure the fulfilment buyer's obligation, but to facilitate the exercise of claiming property from someone else's illegal possession, deserves to be supported. In the absence of such a contractual condition as retention of ownership, the improper buyer granted an ownership could freely dispose the property without payment under the original contract of sale. In this case the seller would not be able to demand the property transferred to a third party because it was alienated by its owner (buyer). The seller would remain only right in personam to the buyer, who not payed for the transferred property¹⁹.

So, fiduciary transfer of ownership for security purposes is a means of ensuring the fulfilment of the obligation. Its incentive function is to induce the debtor to perform the obligation by transferring ownership of the property to the creditor (the transferee). Nevertheless the possibility of satisfying creditor's proprietary security interests under a secured

¹⁷ Ibid.

¹⁸ Nykytn, A.V. (2018). Tytulnoe obespechenye VS. Kvazyobespechenye. tezyzy k nauchno-praktycheskomu kruhlomu stolu Yurydycheskoho ynstytuta «M-Lohos». [Security VS. Quasi-security]. Moskva. [in Russian]. URL: https://m-logos.ru/img/A_Nikitin_M-Logos_KS_24102018.pdf.

¹⁹ Maidanyk, R.A. (2019). Rechove pravo [Property law]. Kyiv, Alerta [in Ukrainian].

obligation through a pre-determined property transferred to the creditor is a manifestation of a compensatory function. Unlike fiduciary transfer of ownership the retention of ownership by a seller under the contract of sale should be qualified as a quasi-security right, which is characterized by the presence of only an incentive function and the absence of compensation: the seller's proprietary interests are secured not at the expense of the property belonging to the debtor, but at the expense of providing him with the claiming the property belonging him on the right of ownership from someone else's illegal possession in case of its transferring by the buyer (actual owner) to a third party before full payment under the contract of sale is made. Thus, the retention of ownership by a seller should be considered as some guarantee of payment by the buyer, where the seller's proprietary interests are protected by reservation of ownership.

3. Transfer of ownership

Before considering the transfer of ownership in the context of fiduciary transfer of ownership for security purposes and the retention of ownership it should be noted there are "abstract" and "causal" systems of transfer of ownership in European property law.

The abstract system of Germany is based on the idea that the transition right in rem under the contract should not be strictly tied to its causa which drives the parties' rights and obligations, and completely depend on it. An obtaining the right in rem is confirmed by the consent of the parties in case of transfer of property from one person to another. It is revealed by Art. 929 German Civil Code according to which in order to transfer ownership of movable property, the owner must transfer the thing to the purchaser and both agree to transfer ownership. If the thing is in the possession of the acquirer, then consent to transfer ownership is enough²⁰.

The doctrinal distinction between the obligatory and the real parts of the contract is explained by the independent existence within the framework of the obligation two separate stages: appearance and per-

²⁰ German Civil Code BGB. Bundesministerium der Justiz für Verbraucherschutz. (English translation).

formance. The first one is directly related to the obligatory part of the contract, the second one – to the real²¹. The transfer of ownership of movable property from the debtor to the creditor within fiduciary transfer of ownership construction is carried out under the real agreement aimed at execution of contract agreement which establishes such security. In view of the foregoing the assertion of Galkova K.V. relating to the specificity of the security transfer of ownership institution, which combines elements of both a real right (*Sicherungseigentum* security ownership right) and an obligation (*Sicherungsabrede* security agreement), deserves attention²².

In contrast to the real part of a security transfer of ownership agreement, which provides for the transfer of ownership and is unconditional, the transfer of ownership to buyer under a real agreement within retention of title depends on making the full payment of the goods transferred by the seller under the contract of sale.

According to § 449 (1) German Civil Code, if the seller has reserved title to a movable thing until payment of the purchase price, it is to be assumed that title will be transferred only upon payment of the purchase price in full, which constitutes a condition precedent (reservation of title)²³.

McGuire M. pays attention that the concept of reservation of title consists of: a contractual agreement containing a condition precedent that the seller (transferor) will not transfer ownership to the debtor (transferee) before the payment of the full purchase price has been made; and a corresponding real agreement containing a reservation of title. Endorsing German scientist Westermann, researcher asserts that the contract of sale containing a reservation of title is an uncondi-

²¹ Kharchenko, H. (2019). Perekhid rechovykh prav za dohovorom (kavzalna ta abstraktna modeli) [Transfer of rights in rem under the contract (causal and abstract models)]. *Pidpriemnytstvo, hospodarstvo i pravo. Vyp. 1.* [in Ukrainian]. URL: <http://pgp-journal.kiev.ua/archive/2019/1/9.pdf>.

²² Halkova, E.V. (2016). Obespechitelnaia peredacha tytula po hermanskomu pravu [Security transfer of title under German law]. *Zakon.* [in Russian]. URL: <https://wiselawyer.ru/poleznoe/87160-obespechitelnaia-peredacha-titula-germanskomu-pravu>.

²³ Wolfgang Faber, Brigitta Lurger (2011). *Schriften zur Europäischen Rechtswissenschaft. European Legal Studies / Etudes juridiques européennes* (Vol. 12). P. 157.

tional agreement, which obligates the seller to transfer the actual possession (and ultimately to transfer possession) to the buyer as soon as he has paid the full purchase price – „The sole modification of a sale under reservation of title in comparison to the general rule on sales contracts is that the transferor is not obliged to transfer ownership unconditionally”²⁴.

Under the causal system of transfer of ownership (such as in France), rights in rem are transferred to the recipient through the conclusion of an obligatory agreement. The transfer of a property is neither a separate requirement for the transfer of such rights, nor a separate legal act – it is nothing more than a simple physical action by which the recipient is given control over property so that he can exercise the powers of the owner. The intentions of the parties at the stage of transfer of things do not matter, at the same time, the intention of the parties at the stage when the property is delivered (the animus or mental disposition which delivery is incidental to) is therefore irrelevant. Hence, mutual intentions to transfer and obtain rights in rem (*animus transferendi et accipiendi dominii*) are already contained in a binding agreement²⁵. In accordance with causal system of agreement, which is based on the principle of consensualism (*le principe du consensualisme*), the transition of right in rem does not provide for mandatory transfer or security of possession. The consensual nature of the transfer means that the binding agreement itself creates both a contract and a real effect²⁶.

Taking into account the conclusions above, the transfer of ownership within the framework of the fiduciary ownership is carried out immediately after the parties conclude a fiduciary agreement, which provides for the transfer of ownership from debtor to creditor in order to ensure

²⁴ Ibid.

²⁵ PJW Schutte (2012). The characteristics of an abstract system for the transfer of property in South African Law as distinguished from a causal system. *Potchefstroom Electronic Law Journal*. P. 121 / 183.

²⁶ Khalabudenko, O.A. (2016). *Konsensualna systema perekhodu prava vlasnosti VS. Systema tradytsii: kompromis v Modelnykh Pravylakh Yevropeiskoho Pryvatnoho Prava THE DCFR*» [«Consensual system of transfer of ownership VS. The system of tradition: a compromise in the Model Rules of European Private Law THE DCFR»]. *Chasopys tsyvilistyky*. Vyp. 21. [in Ukrainian]. URL: <http://dspace.onua.edu.ua/bitstream/handle/11300/8780/70-77.pdf?sequence=1&isAllowed=y>.

the fulfillment of the obligation. Attention should be drawn to R.A. Maidanyk's assertion that the French law doctrine considers fiducia as a limited ownership not providing the splitting of ownership and differing from the "absolute" ownership due to the fact that fiduciary is limited in his actions to dispose of fiduciary property²⁷.

According to the Art. 1583 French Civil Code it is perfect between the parties, and ownership is acquired as of right by the buyer with respect to the seller, they have agreed on the thing and on the price, although the thing has not yet been delivered nor the price paid²⁸. At the same time, Art. 2367 contains an exception to this rule: Ownership of a thing may be retained as security through a clause of reservation of ownership which suspends the transferring effect of a contract until payment in full of the obligation that is its counterpart. The ownership thus reserved is the accessory of the claim whose payment it guarantees²⁹. Vijn S., referring to Rutgers, points out that pursuant the Art. 1583 French Civil Code in France the ownership is transferred by mere agreement between the transferor and the transferee, but considering this rule is *ius dispositivum* parties therefore can agree that the ownership is transferred at another moment than at the moment of the conclusion of the contract of sale.³⁰ Ownership is not considered by the French doctrine of civil law as a category of exclusively real law, and since the purpose of the parties to the contract is to ensure the fulfilment counter obligations by debtor under the creditor's obligation relating the transfer of goods (that is, the right of ownership has a security nature), French law establishes the obligation of the creditor to return to the debtor the amount of money that has already been paid by the buyer for the goods³¹.

²⁷ Maidanyk, R.A. (2019). *Rechove pravo* [Property law]. Kyiv, Alerta [in Ukrainian].

²⁸ Rouhette G., Rouhette-Berton A. (2014). *French Civil Code*. (English translation). P. Page 186/268.

²⁹ *Ibid.* P. 243/268.

³⁰ Sylvana Vijn (2015). *Is harmonization of retention of title necessary and feasible?* *MaRBLe Research Papers*. P. 161

³¹ Tsvetkova, Y.H. (2020) *Obespechytelnoe pravo sobstvennosti na tovar vo frantsuzskom prave* [Security transfer of ownership under French law]. *Zbirnyk naukovykh prats AOHOS*. [in Ukrainian]. URL: <https://ojs.ukrlogos.in.ua/index.php/logos/article/view/4135>.

In French jurisprudence, the retention of title clause by seller's was considered as suspensive condition under which the transfer of ownership as well as risks were associated with the moment of full payment for the goods, on the one hand, and as security construction, on the other. By decision of the Chamber of Commerce on 17 October 2018 the Court of Cassation qualified the retention of ownership clause as a security right, suspending the transferable effect of ownership of the contract of sale until the full payment of the price and that such suspension does not contest the firm and final character of the sale took place as soon as the parties agreed to the thing and the price³².

Thus, in French law, a contract of sale containing a retention of ownership clause is an unconditional agreement – a suspensive condition applies only to the moment of transfer of ownership. That is, the occurrence of a suspensive condition is not associated with the emergence of the parties' rights and obligations under the contract of sale constituting the content of such agreement, but only with the moment of transfer of ownership for goods from the seller to the buyer, who is already its actual holder – as R.A. Maidanyk notes, „retention of ownership construction is aimed at encouraging the buyer to fulfill the obligation to pay for the goods, which will supplement the buyer who already has actual possession of the goods the full authority of the owner of this property”³³.

It should be agreed with V. Sagaert, supporting B. Ibbetson, who notes that the retention of the title by the owner determines the existence of the dependence of the transfer of ownership of the sold property on the fulfillment of the suspensive condition, usually the condition for full payment of the purchase price (unless parties have agreed on a different meaning of the suspensive condition or have made more claims subject to that condition). The seller remains the owner of the property until the payment for the goods is made. Upon fulfilment of the suspensive condition, the right of ownership will automatically pass to the buyer, who is already actual holder. Ownership does not pass at the moment of consent of parties (consensual systems) or of the trans-

³² Alain Provansal (2018). La clause de réserve de propriété dans la vente la vente d'immeubles: condition ou sûreté?.

³³ Maidanyk, R.A. (2019). Rechove pravo [Property law]. Kyiv, Alerta [in Ukrainian].

fer of property (tradition systems), but is retained by the creditor, i.e. «is delayed». Meanwhile the seller «functionally» retains a property security right which is not included in the insolvent patrimony in case of debtor's insolvency before having paid the full purchase price³⁴.

4. Claiming the security property from the bankruptcy estate

In accordance with Art. 47 German Insolvency Statute anyone entitled to claim the separation of an object from the assets involved in the insolvency proceedings under a right in rem or in personam shall not form part of the creditors of the insolvency proceedings. Entitlement to separation of such object shall be governed by the legal provisions applying outside the insolvency proceedings³⁵.

The provisions of the Art. 103 (1,2) German Insolvency Statute indicate that insolvency administrator may perform a mutual contract which was not (or not completely) performed by the debtor and its other party at the date when the insolvency proceedings were opened, replacing the debtor and claim the other party's (seller's) consideration. If the administrator refuses to perform such contract the other party shall be entitled to its claims for non-performance only as a creditor of the insolvency proceedings. If the other party requires the administrator to opt for performance or non-performance the administrator shall state his intention to claim performance without negligent delay. If the debtor, before the insolvency proceedings were opened, has purchased a movable property in which the seller has retained title and whose possession was transferred to the debtor by the seller, the insolvency administrator, required by the seller to opt for performance or non-performance, need not submit his declaration pursuant to section 103 subs. 2 until without negligent delay after the report meeting (Art. 107 (2))³⁶.

³⁴ S (JHM) van Erp and B Akkermans (eds) (2012). *Cases, Materials and Text on National, Supranational and International Property Law*. Oxford, Hart Publishing. P. 421–422.

³⁵ Insolvency Statute (Insolvenzordnung, InsO). 5 October, 1994. Translation provided by the Federal Ministry of Justice.

³⁶ *Ibid.*

Consequently in case when the seller has not exercised its right to refuse the contract of sale before insolvency proceedings were open, insolvency administrator, in accordance with Art. 103, has the right to elect the agreements which will «retain their effect» in the future and will be enforceable. If he decides to «reserve» the contract of sale, the payment for sold property shall be performed separately from the bankruptcy estate in priority order (§ 55 (1)), but if he decides that there is no need for such «reservation» then he will not be able to oppose the seller's right to claim to the actual possession of property (§ 47), which is to be returned to the seller³⁷.

The creditor does not have the right to claim property from the bankruptcy estate in the construction of fiduciary transfer of ownership: although the creditor is the owner of the property transferred to the fiduciary ownership for security purposes, he does not have the right to demand the allocation of property – but only can claim a separate satisfaction of the main claim (Art. 47, 50, 51 Insolvency Act)³⁸. A similar opinion is shared by R.A. Maidanyk, who notes that conferring to creditor the right to demand separation of satisfaction of its main property claim in case of debtor's insolvency within fiduciary transfer of ownership construction under German law, makes it possible to use the surplus from the sale of encumbered property, included in the bankruptcy estate, to satisfy unsecured claims of other creditors³⁹.

In France, the legal regime of property transferred by the debtor to fiducia for security purposes is characterized by its isolation from the fiduciary's personal property (Art. 2011 Civil Code of France)⁴⁰. The practical importance of the separation of the transferred to fiduciary

³⁷ Lanyna, O.V. (2011). Obespechytelnaia funktsiya ohovorky ob uderzhanyy pravovoho tytula kredytorom: opyt vedushchykh pravoporiadkov sovremennosty [Security function of a retention-of-title clause by a creditor: experience of modern law enforcement]. Vestnyk hrazhdanskoho prava». Vyp. 6. [in Russian]. URL: <https://center-bereg.ru/b4435.html>.

³⁸ Sarbash, S.V. (2008). Obespechytelnaia peredacha pravovoho tytula [Security transfer of title]. Vestnyk hrazhdanskoho prava. Vyp. 1. [in Russian]. URL: <https://wise-lawyer.ru/poleznoe/33411-obespechitelnaya-peredacha-pravovogo-titula>.

³⁹ Maidanyk, R.A. (2019). Rechove pravo [Property law]. Kyiv, Alerta [in Ukrainian].

⁴⁰ Civil Code (consolidated version of May 19, 2013).

transfer of property for security purposes is the inability of fiduciary's creditors to foreclose it in cases of his insolvency. This is confirmed by the provision of Art. 2024 French Civil Code, prohibiting the collection of fiduciary property in the case of opening proceedings, in particular for the restoration of its solvency or the opening of a liquidation procedure (Art. 2024 French Civil Code)⁴¹.

Provisions of Art. 59 French Insolvency Act enshrined the right of the seller, who sold the goods under a contract with a retention of ownership clause, which establishes the dependence of the transfer of ownership on full payment of the price, to claim property from the debtor's insolvency estate. A bankruptcy judge may, with the consent of the creditor, grant a time limit for settlement. After paying the price is equated to paying the debt⁴². According to Art. L624-16 Commercial Code of France, assets that are in the possession of the debtor or assets transferred to fiduciary property, which debtor has the use and enjoyment, may be vindicated if they still exist in kind. Assets sold under a retention of title clause may equally be claimed if they still exist in kind at the time proceedings are opened. In every instance, the asset may not be foreclosed if, by decision of the supervisory judge of the insolvency proceeding (juge-commissaire), the price is paid immediately. The supervisory judge may also grant a payment delay (*délai de règlement*) with the consent of the petitioning creditor. The payment of the price shall thus be considered equivalent to the payment of debts⁴³.

Endorsing *Sainte-Cene M., Lanina O.V.* notes that the Insolvency Act of 10 June 1994 stipulates the seller's right to retain the ownership to property in case of reselling by a buyer property belonging to the seller under retention of ownership clause, if the seller proves that payment for such property was received by the buyer (debtor) after proceedings have been initiated (despite the fact that the possession of the property is carried out by the person to whom it was resold by the buyer (debtor)).

⁴¹ *Ibid.*

⁴² EXTRAITS DE LA LOI n° 94-475 du 10 juin 1994 relative à la prévention et au traitement des difficultés des entreprises. JOURNAL OFFICIEL DE LA POLYNESIE FRANÇAISE. 1996. S. N. 542.

⁴³ S (JHM) van Erp and B Akkermans (eds) (2012). *Cases, Materials and Text on National, Supranational and International Property Law*. Oxford, Hart Publishing. P. 420.

This provision is an exception to the principle of „equivalence of ownership for third parties”⁴⁴.

Thus, the possibility of claiming security property is given to creditor in accordance with a State’s domestic legislation. Meanwhile, in France, the property transferred to fiduciary ownership is separated from the debtor’s insolvency estate; and the seller, who is the holder of ownership of the goods transferred to the buyer under retention of ownership clause, has the right to claim it from such estate. At the same time, in Germany, the right to claim secured property is not allowed either by the creditor as a party fiduciary ownership agreement, or by the seller who concluded with the buyer a contract of sale with a reservation of title – such creditors are given only the right to separate the claim from the use of other assets relating to the debtor’s insolvency estate.

5. Conclusion

The above said led us to such conclusions: firstly, both the fiduciary transfer of ownership for security purposes and a retention of ownership by seller are security instruments that encourage the debtor to perform his obligation. However, if the satisfaction of the security proprietary claims of creditor as a party to the construction of fiduciary ownership is carried out at the expense of the property transferred by the debtor for the purpose of securing the obligation (thus, the creditor can foreclose on it and compensate for his proprietary security interest), then the seller under the contract of sale containing a retention of title clause does not have an additional property source to which he could recover in case of debtor default – the satisfaction of his proprietary interests is carried out only at the expense of his ownership, which should be passed to the debtor after full payment of the goods. That is, it can be said that in this case there is a security by the debtor to pay for the transferred goods. Based on the above considerations, the fiduciary transfer of ownership

⁴⁴ Lanyna, O.V. (2011). Obespechytelnaia funktsiia ohovorky ob uderzhanyy pravovoho tytula kredytorom: opyt vedushchykh pravoporiadkov sovremennosti [Security function of a retention-of-title clause by a creditor: experience of modern law enforcement]. Vestnyk hrazhdanskoho prava». Vyp. 6. [in Russian]. URL: <https://center-bereg.ru/b4435.html>.

for security purposes is a security right per se, and the retention of ownership by a seller should be qualified as quasi-security; secondly, there security instruments are different in the moment of transfer of ownership. The transfer of ownership within a fiduciary ownership is carried out immediately after the conclusion of the contract, while in countries with an abstract system, the transfer of ownership requires the transfer of property (for example, Germany), whereas in countries with causal – it is sufficient for the transfer of ownership to reach agreement on terms of the contract (for example, France). In the context of a contract of sale containing a retention of ownership clause, the transfer of ownership to the buyer is made dependent on the moment of full payment for the goods. In countries with an abstract system, a real agreement providing for the transfer of ownership to the buyer include a suspensive condition. In countries with a causal system of transfer of ownership, in the absence of such a concept of a “real agreement,” the contract of sale is unconditional and valid, the suspensive condition concerns only the moment of transfer of ownership from seller to buyer, and not the content of the entire contract; thirdly, the possibility of claiming secured property from the debtor’s insolvency estate is established by legislation of each individual State. For example, if in Germany, in order to ensure the interests of all creditors of the insolvent debtor, the creditor as a party to the fiduciary ownership and the seller as a party to the contract of sale, containing the retention of title clause, are allowed only to initiate a separation of satisfaction of their claims for debt obligations, then in France, on the contrary, both the fiduciary and the seller retaining ownership under the contract of sale, have the right to claim property from the bankruptcy estate when proceedings are open.

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- French Civil Code (consolidated version of May 19, 2013). URL: <https://www.wipo.int/edocs/lexdocs/laws/en/fr/fr512en.pdf>.
- Insolvency Statute (Insolvenzordnung, InsO). 5 October, 1994. Translation provided by the Federal Ministry of Justice. URL: <https://german-lawarchive.iuscomp.org/?p=773>.
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Summary

The article is devoted to security constructions such as fiduciary transfer of ownership and retention of ownership by the seller under a contract of sale within the framework of European private law. The author points out that the transfer of ownership for security purposes is a security right, at the same time the retention of the legal title should be qualified as a quasi-security right, because the security property interest in it is not transferred by the debtor to the creditor, but is being retained by a seller. It was found that the security transfer of ownership as a means of ensuring the fulfilment of the obligation has both incentive and compensatory functions unlike the retention of title security instrument which only encourages the buyer to fulfill the obligation paying for the goods by retaining ownership by the seller. It has been shown that in contrast with transfer of ownership as security right which allows the creditor to satisfy his property interest at the expense of security property, retention of ownership by the seller enables the seller to satisfy such interest at the expense of ownership until full payment. This article highlights the German and French civil law governing the enforcement of security arrangements for the transfer of ownership and the retention of ownership by the seller. It is concluded that the distinguishing features of these security institutions related to: default remedies of creditor, the transfer of ownership moment, and claiming property from the bankruptcy estate of the debtor.

Keywords: security right, fiduciary transfer of ownership for security purposes, retention of ownership, retention of title, quasi-security right