

Reservation of Ownership According to Swedish Law

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1 The Basic Rules

According to the Swedish Sale of Goods Acts (*Köplagen*) from 1905 and its successor from 1990, the seller must reserve the right to terminate the contract in the event of a buyer's failure to pay in order to take goods back. Otherwise, the seller lacks such a right (in contrast, for instance, to French and Belgian law). As between the parties, it is not necessary for the seller to reserve the right of ownership until full payment is made; it is likewise sufficient that the seller reserves a right of termination or redemption or uses any other words to the same effect.

In relation to third parties, the buyer's creditors and any sub-buyers, for many years the seller was regarded to need to reserve ownership to the goods until they were paid. The reason for this might have been that a simple reservation of a right to take back the goods in cases of non-payment (a security right in transferred goods) was deemed as contravening the rule that a pledged chattel must be in the pledgee's possession.

In the Real Estate Code of 1970 (*Jordabalken*), the reservation of a "right to take chattels back" after being affixed to a building was accepted to the same degree as reservations of ownership to the same chattel. This development was natural, since sold goods to which ownership was reserved had since 1915 in the hire-purchase (credit-sale) legislation been regarded as a security right. If the seller took the goods back, the buyer was credited the value of the goods and the seller was credited his remaining claim for purchase monies; the seller consequently had to pay any difference in the buyer's favour. In a subsequent case reported in NJA 1972 p. 222, the Supreme Court ruled that a reservation of a right to terminate or to take goods back should also have the same effect as a reservation of ownership in situations in which the Real Estate Code was not applicable. In the case, a sub-buyer had argued that the reservation to take back a car sold on credit should have no effect on the sub-buyer no matter whether the sub-buyer had made a good faith acquisition. However, according to the Supreme Court, the reservation had a proprietary effect, and the first seller was entitled to assert the right to take the property back as the sub-buyer had not been in good faith concerning the second seller's right to dispose.

2 Fixtures

In the early 1900's, whether goods to which ownership had been reserved could be repossessed by a seller even if the goods had become fixtures to a building or any main chattel was much debated. This issue was settled by the Supreme Court in the case NJA 1918 p. 441, where a seller had reserved ownership until payment was made for pipes, toilets etc. which then had been installed in a building. The building was sold in an executive auction, where the first seller informed the bidders of the reservation. The first seller argued that the fixtures could be removed without damage to the building. However, by a majority (11-9) of the Court, the reservation of ownership was regarded to have no effect, since the goods had become fixtures after having been installed.

The result is the same if leased goods have become fixtures (with the lessor's consent) to a building, see NJA 1918 p. 445.

The Supreme Court in other cases has held onto this principle, also when goods sold with a reservation of ownership have been affixed to another chattel regarded as the main object. An example of this can be found in the case NJA 1960 p. 9, where tyres had been mounted on a car. Although the tyres could easily be removed, the reservation of ownership was ruled to have no effect on third parties (in this case a party which had sold the car with a reservation of ownership). The wording of the Court's reasoning leaves the door open to allow a seller to take goods back from a defaulting buyer when no third party interests are at stake. However, in the Real Estates Code of 1970, the reservation of ownership or of a redemption right is invalid when a chattel has become a fixture to a building (ch. 2 sec. 5), and this view might influence the solution also in cases where it has become a fixture to some other chattel.

3 Permission for the Buyer to Dispose over the Goods Before Payment is Made

The buyer's capacity to pay the price is often dependent on the right to resell the goods, sometimes after having manufactured the goods (such as raw materials) into some new type of goods. Consent for the buyer to dispose over the goods by sale, manufacture or consumption before full payment has been made, however, has the effect that the reservation of ownership or of a redemption right is deemed to be void from the beginning, i.e., no matter whether disposal has taken place. The same principle can be found in Norwegian and Finnish law.

The reason for this principle at least originally was dogmatic, put forward at a time when the seller always reserved ownership. It was argued in the legal scholarship¹ that if the seller permitted the buyer to dispose of the goods before payment, the seller accepted that the buyer acted as the owner and the reservation of ownership was then only an agreement to the detriment of third parties (foremost the creditors of the buyer) and consequently did not deserve to be upheld.

The Supreme Court addressed this principle in the case NJA 1932 p. 292, where a German seller had reserved ownership firstly in the goods themselves, and secondly, in the buyer's purchase monies claim with respect to a sub-buyer. The agreement obviously showed that the seller conceded to a disposal before full payment, and the seller therefore had no right to the goods although they were still in place.

This principle has held to date, see for instance the cases NJA 1959 p. 590 (the seller was given a right of separation because it was not proven that the buyer had the right to slaughter piglets before payment), NJA 1960 p. 221 (the buyer of building equipment, doors, was assumed to have a right to install them immediately and therefore a reservation of title was regarded to be void), and

¹ See Almén, Tore, in *Svensk Juristtidning* 1918 p. 21.

NJA 1974 p. 660 (the reservation was valid, because the seller of doors to be mounted was expected to be involved in the installation and the prohibition to dispose before payment was therefore regarded as seriously meant).

This problem can be easily circumvented if the buyer is able to finance not the whole stock-in-trade but a part of it. If the buyer makes a revolving prepayment, covering the value of goods that the buyer wants to sell immediately, and it is agreed that such prepayment shall be allocated to that which is first sold, then a prohibition to sell before payment is made can be regarded as seriously meant and the principle of invalidity would not apply to the stock in place when insolvency occurs. Although this construction is recommended in legislative preparatory works, a government inquiry (SOU 1988:63), it is to this author's knowledge seldom used.

Instead, parties often try to accommodate this situation by using consignment agreements. According to the Consignment Act from 1914 (amended 2009), the consignor remains the owner until a third party or the consignee (by self-contracting) acquires ownership (which occurs when the consignee sells the goods if they are identified). In addition, the consignor has a right of separation to the claim that the consignee has as against a third party buying the goods, and monies paid to the consignee by the third party are to be held separately so that the consignor has a proprietary right to them when held separately. This seems to solve the problem of when a dealer cannot finance (any part of) the stock and the producer/importer etc. wants to have a secured position.

One problem, however, is that an agreement in order to be recognised as a true consignment must place the market risk on the consignor. If the consignee has no right between the parties to return goods that cannot be sold and instead is obliged to buy them after a certain period of time, the contract is regarded as a credit sale with a reservation of ownership (NJA 1945 p. 406), but with an invalid reservation since the "consignee" is entitled to sell to a third party before payment to the "consignor". The same probably applies to lease agreements, when the lessee guarantees that the object has a certain value when the lease period expires (cf. NJA 2009 p. 79).

4 Should the Rule of Invalidity Following Consent to Dispose be Abolished?

As it becomes clear that a reservation of redemption (an express charge on the sold goods) has the same effect as a reservation of ownership, the traditional explanation for why consent for the buyer to dispose over the goods invalidates the reservation is no longer satisfactory. Instead, other explanations have been offered in the scholarship.² For instance, it has been argued that if the buyer is entitled to dispose of the goods before payment, it then is pure chance whether the goods will remain with the buyer if the buyer goes into bankruptcy or the

² See for instance Schmidt, Folke, *Om ägarförbehåll och avbetalningsköp*, 1938, Agell. Anders, in *Svensk Juristtidning* 1965 p. 242.

goods otherwise are executed for payment. A seller who has given such consent does not lower any interest rate that much, which is another reason argued for why the seller does not deserve a priority compared to lenders giving unsecured credit. Reference is also made to the requirement of possession (or registration) when other security rights are levied on assets which functionally belong to the debtor. Another reference is made to the rule that monies are not regarded as separable monies held in trust, if the trustee is entitled to dispose over the monies in his own interest when the trustee's solidity is such that a disposition would give the principal³ a claim that is worth less than the nominal value. Of great or perhaps paramount importance is also that banks, which regularly offer credit as against floating charges, are favoured by the invalidity rule and oppose any changes.

Nevertheless, there is a discussion whether the invalidity rule should be abolished,⁴ since it prevents the natural flow in economic life. Other arguments are that the rule causes unexpected losses to foreign exporters ignorant of this peculiar Nordic invalidation, and that the rule causes transaction costs since sellers must elaborate other legal constructions that are accepted, for instance as true consignment agreements, but to an acceptable degree place the market risk on the consignee. The rule also causes much litigation, since the agreements tend to be found at the border between that which is commercially desirable and legally acceptable. Litigation also often arises concerning the facts. For instance, has a seller, who has reserved ownership and forbidden the buyer from disposing over the goods prior to payment, been aware of the fact that the buyer several times has disposed over goods before payment but by continuing with the deliveries, tacitly accepted such dispositions?⁵

5 All Monies Clauses

If the rule, that a reservation of ownership and redemption right is invalid when the buyer is entitled to dispose over the goods before payment, would be abolished, the question would arise whether the seller should be allowed to reserve a security right also to the buyer's outstanding claims on third parties and to monies received and kept separately (thus a system accepted in some jurisdictions like in Germany). This author is doubtful to this, since such a system would undermine the floating charge too greatly.

The Swedish attitude to all monies clauses is restrictive. In principle, after legislation brought about in 1953, the seller can reserve a right in sold goods

3 Pursuant to Swedish law monies may be held in trust for a principal, forming part of the principal's fortune and not being an independent fortune.

4 See Hessler, Henrik, *Allmän sakrätt*, 1973, and Bo Helander, *Kreditsäkerhet i lös egendom*, 1983.

5 In SOU 1988:63, a law reform commission report, this author discussed this problem but declined to propose any changes. However, later on in the case NJA 2009 p. 79, this author filed a concurring opinion to the Supreme Court's reasons, analysing the problems and suggesting that the legislator look into this issue. See also Håstad, Torgny, *Sakrätt avseende lös egendom*, 1996, p. 189 et seq.

only for his purchase monies claim for these goods. In B2B relations, the seller may also secure claims for reparation of the goods.

6 Individualisation

In connection with the restricted view on all monies clauses, it is natural that a reservation of ownership or of a redemption right must in principle be linked to individualised goods. In the case NJA 1976 p. 251, several containers were sold on different occasions under different contracts with a reservation of ownership up to full payment of each container (thus no all monies clause was present). The buyer had paid some of the contracts but defaulted on others, which is why the seller wished to redeem a number of containers corresponding to the defaulted contracts. The claim was rejected by the Supreme Court since it was not possible to know which container was the collateral under a certain contract and the law forbade the seller from taking back goods for a remaining purchase monies claim other than the goods that were the cause for that claim. Thus, it did not matter that all the containers were of the same quality and value.

This reasoning corresponds to a general requirement of specialisation of the object of a proprietary right, which appears also when a buyer in a seller's bankruptcy wants to separate goods (they must either have gotten into the buyer's possession or been individually registered) or when a pledgee want to exercise a priority to pledged chattel. In the case NJA 1910 p. 156, a debtor had pledged a certain quantity of a larger quantity of scrap-iron in the possession of a third party and notified the third party of the disposition and the third party had promised to observe the pledge. However, the claim for priority in bankruptcy was rejected, since the pledged objects had not been kept separately and the pledger had been entitled to dispose of the exceeding quantity. One may understand this reasoning as the stock consisted of objects of different quality, even if it would have been possible to allow priority in objects according to the decision of the bankruptcy administrator, corresponding to the right of selection which the pledger had. If a borrower pledges SEK 100 in a bank account holding SEK 500 and notifies the bank, it is obvious that the pledge gives a proprietary right to SEK 100 although the amount is not ascertained in specified coins. Based on this, one may also be of the opinion that the ruling in NJA 1976 p. 251 was unnecessarily formal.⁶

6 See Hessler, Henrik, in *Svensk Juristtidning* 1983 p. 173 and Håstad, Torgny, *Sakrätt* p. 193 et seq. and 335 et seq.