

Improving the legal provisions on retention of title in the 2015 Civil Code

Hoàn thiện quy định pháp luật về bảo lưu quyền sở hữu trong Bộ luật dân sự năm 2015

Doan Thi Ngoc Hai¹, Chu Dang Chung²

¹Ministry of Justice

²Hanoi Procuratorate University

Corresponding author: Doan Thi Ngoc Hai. Email: doanngochainb@gmail.com

Abstract: Retention of title is one of the provisions in the contract for selling a property. In essence, it is similar to granting the seller the right to "delay the transfer of ownership of the property" to the buyer. However, in the 2015 Civil Code, retention of title is recognized as one of the measures to ensure the fulfillment of obligations. This article analyzes the content of the legal provisions on retention of title, the shortcomings of the legal provisions, and proposes some recommendations to improve the legal provisions on retention of title in the Vietnamese Civil Code.

Keywords: *Civil code; retention of title*

Tóm tắt: Bảo lưu quyền sở hữu là một trong các quy định thuộc phần hợp đồng mua bán tài sản và xét về bản chất, nó chỉ giống như việc bên bán được quyền “chậm thực hiện nghĩa vụ chuyển giao quyền sở hữu tài sản” sang cho bên mua. Tuy nhiên, trong BLDS năm 2015, bảo lưu quyền sở hữu được ghi nhận là một trong những biện pháp bảo đảm thực hiện nghĩa vụ. Bài viết phân tích nội dung quy định pháp luật về bảo lưu quyền sở hữu, những bất cập của quy định pháp luật, trên cơ sở đó đề xuất một số kiến nghị nhằm hoàn thiện pháp luật về bảo lưu quyền sở hữu trong Bộ luật dân sự Việt Nam.

Từ khóa: *Bảo lưu quyền sở hữu; bộ luật dân sự*

1. Overview of property retention rights

Property retention rights are not a new concept established in the Civil Code of 2015 [1], as they were already recognized in previous codes from 1995 and 2005. In terms of historical formation, this is not a new regulation, but from the perspective of ensuring the fulfillment of obligations, it is the first regulation to appear in the Civil Code of 2015. This is demonstrated by the fact that in both the Civil Codes of 1995 and 2005, property retention rights were only one of the legal rights that allowed the seller to use them to protect their interests in the event of the buyer's breach of payment obligations in the installment purchase contract [2]. In essence, in the previous two Civil Codes, property retention rights were one of the sale and purchase contract provisions, and it was only like granting the seller the right to "delay the transfer of ownership of the property" to the buyer. However, in the Civil Code of 2015,

property retention rights are recognized as one of the measures to ensure the fulfillment of obligations.

As one of the measures to ensure the fulfillment of obligations, issues related to property retention rights are clearly and specifically regulated. This is an important basis for parties in the sale and purchase contract, especially for the seller, to protect their rights and interests. At the same time, it creates conditions for competent state agencies to have specific legal grounds to resolve disputes that arise in practice [3, p.1].

However, in the Civil Code of 2015, property retention rights are recognized in both the contract provision and the provision on ensuring the fulfillment of civil obligations. Especially when studying these regulations, there are still many legal issues that need to be resolved:

Firstly, whether property retention rights are the seller's right in the installment

purchase contract or a measure to ensure the fulfillment of obligations applied to all sale and purchase contracts, the fact that property retention rights are recognized in both provisions with different regulations has led to different opinions in practice. Some believe that property retention rights are a legal right, meaning that the right to retain property is recognized by law for the seller. Others believe that property retention rights are a measure to ensure the fulfillment of obligations applied to all sale and purchase contracts.

Secondly, the subject of retention of title is the goods sold (a type of asset) or the ownership rights to the goods (a type of property right). This is still an unresolved issue and leads to different interpretations. Some argue that the subject of retention of title is the goods sold because the seller has the right to reclaim the goods if the buyer fails to make full payment within a certain period. Others believe that the subject of this measure is only the ownership rights to the goods because the seller has already transferred the goods to the buyer and only retains ownership rights.

Thirdly, what is the scope of the security of the retention of title? Currently, in the field of civil law, there are two opposing opinions on the scope of security of retention of title. The first opinion holds that the scope of security of retention of title is only the obligation to pay for the goods because if the buyer has paid the full purchase price at the time of receiving the goods, there would be no need to discuss the retention of title. The second opinion, on the other hand, holds that the scope of security of retention of title covers all obligations of the buyer, including the obligation to pay (arising at the same time as the retention of title) and the obligation to return the goods (arising after the retention of title becomes effective).

Fourthly, what is the true value of retention of title? There are two different opinions on the true value of this measure

in practice. Some argue that retention of title is like other security measures in protecting the seller's interests against the buyer's breach. Others believe that retention of title does not meet the requirements of a security measure because it does not have the same backup value as other security measures. Hence, the seller has no basis to protect their interests when the buyer intentionally violates their obligations. This measure will have no value if the buyer does not pay or return the goods.

Fifthly, what is the scope of application of the retention of title measure? Different regulations on the basis of the occurrence of the retention of title in the contract and the regulation of ensuring the performance of obligations lead to some inconsistent opinions. Some argue that the retention of title only applies to contracts for delayed or installment payments because only in this type of contract can the obligation to pay for the property be fulfilled after receiving it. Others argue that in any sales contract, the ownership rights will be retained if the buyer delays payment. This contradiction stems from an inconsistent understanding of the name of the delayed payment or installment payment contract.

2. Legal regulations on retention of title

Firstly, for the retention of title

The subject of the sales contract can be real estate, registered property ownership, and other assets. The buyer becomes the owner when the owner is registered for assets requiring ownership registration. For other assets, the buyer has ownership rights upon receiving the assets. However, in the case of delayed or installment payments, the establishment or limitation of ownership rights is determined by law or agreement between the parties. Typically, in a delayed payment sales contract, the buyer has ownership rights when full payment is made, except in cases where the parties agree otherwise, or the law has different regulations. To ensure payment for delayed or installment payment purchases, the law

allows the parties to agree to establish retention of title measure by the seller until the buyer pays in full. This means that the seller has not terminated ownership rights to the property, and the seller still has some rights over the buyer, such as the right to reclaim the property, even if the buyer has registered use rights, such as in the case of buying a car or motorcycle on installment payment.

Point 1 of Article 331 of the Civil Code 2015 stipulates: "In a sale and purchase contract, the right to property may be retained by the seller until the obligation to pay is fully fulfilled". This provision can indirectly be understood that the retention of title measure can only be applied in conjunction with contracts for the sale and purchase of assets. However, if we only consider the nature of the term "retention of title," this measure can be imagined to be applied in conjunction with transactions related to the transfer of ownership of assets. This means that, for all transactions related to the transfer of ownership of assets, the parties can exercise their right to "retain title."

However, if we only consider this perspective, it is not enough. The retention of title is applied as a security measure, meaning that in addition to the characteristic of applying to transactions in which there is a transfer of ownership of assets, there must also be a sign that these transactions must generate obligations for the transferred ownership party. That is, it is formed on the basis of simultaneous contracts. With the above analysis, a sales contract is only a typical type of simultaneous contract with the transfer of ownership of assets. In addition, as stipulated in Article 455 of the Civil Code 2015, the contract for the exchange of assets also has characteristics as analyzed above. If the provisions of Article 331 of the Civil Code 2015 are applied correctly, the retention of title may not be applied to contracts for the exchange of assets.

However, Point 4 of Article 455 of the Civil Code 2015 stipulates: "Each party shall be considered a seller with regard to the property delivered to the other party and a buyer with regard to the property received. The provisions on sales contracts from Article 430 to Article 439, from Article 441 to Article 449, and Article 454 of this Code are also applicable to contracts for the exchange of assets". Therefore, it can be concluded that the retention of title can be applied to contracts to exchange assets.

Secondly, regarding the right to reclaim assets

Article 332 of the Civil Code 2015 stipulates: "In case the buyer fails to fulfill the payment obligation to the seller as agreed, the seller has the right to reclaim the assets. The seller returns to the buyer the amount that the buyer has paid after deducting the value of the wear and tear of the asset due to use. In case the buyer loses or damages the asset, the seller has the right to request compensation for the damage". This regulation can be understood as the right of the seller to reclaim ownership of the property if the buyer fails to fulfill the payment obligation. In a sales relationship, the parties may not always have the conditions to "buy in full or sell in installments", but in some cases, they may agree on "slow purchase and payment". In the case of a purchase and payment in installments, the buyer may possess and use the purchased property without paying for it. Thus, the buyer is fully entitled to avoid paying the seller. Therefore, to protect the right to payment for the seller, the law stipulates measures to secure the retention of title. Although the buyer still has the right to use and possess the purchased property, the seller remains the legal owner of the property. The decision to reclaim the property from the buyer is made under the seller's control until the buyer fulfills the payment obligation.

In the retention of title measure, the buyer does not need to hand over the

secured property to the seller. So, when the buyer fails to fulfill the payment obligation according to the agreement, the seller has the right to reclaim the property. Since the seller is still the legal owner of the property, when the buyer fails to fulfill the obligation, the seller can reclaim the property. When entering into a sales contract with deferred payment, the buyer pays an upfront amount to the seller, and the remaining amount is paid within a timeframe agreed upon by the parties. Therefore, when the seller reclaims the property, they must also return the amount paid by the buyer. After a period of use, the property may be depreciated due to the buyer's fault. Therefore, the seller has the right to deduct the value of the depreciation before returning the money to the buyer. Note that the value depreciation of the property here must be due to the buyer's use of the property, not natural depreciation. Meanwhile, Clause 2, Article 41 of Decree No. 21/2021/NĐ-CP dated August 16, 2017, of the Government on the enforcement of the Law on Enterprises regarding the assurance of the performance of obligations, stipulates that: "The buyer is not responsible for the natural depreciation of the retained property." If the property is lost or damaged, the seller has the right to demand that the buyer compensates for the damage equivalent to the value of the damage. However, during the retention of title period, the buyer or a third party may invest in the property, and the investor may be the buyer or a third party, depending on the situation [4].

Thirdly, the rights and obligations of the buyer of the property

In a retention of title relationship, the seller is the entitled party. In order to meet the seller's requirements, the buyer must fulfill all their obligations. However, in order to balance the interests of the parties in the same relationship, the law has granted the buyer a basic right. Article 333 of the 2015 Civil Code provides the following rights for the buyer: "1. Use the property

and enjoy the benefits and profits from the property during the effective retention of title period; 2. Bear the risk of property within the retention of title period, except in cases where otherwise agreed". This means that when buying property in installments, even though the buyer has not fully paid, they still possess and use the property. To avoid fulfilling their obligations, the seller only controls the act of giving, exchanging, or selling the property before the full payment. Therefore, the buyer still has the right to enjoy benefits and profits from the property during the effective retention of title period. This regulation aims to provide conditions for the buyer to use the property and aligns with the nature of retention of title. Retention of title is when the seller retains ownership rights over the sold property in cases where the buyer has not fully paid. In this way, the buyer still has the right to possess and use the property within the retention of title period. If the buyer is not allowed to use the property until full payment, then the sale-purchase relationship will return to the form of outright purchase or partial sale. Allowing the buyer to enjoy benefits and profits from the property also creates income to fulfill their obligations. For example, if A buys a car from B in installments, and both parties agree to apply retention of title and record it in the main contract, then A can rent out the car to earn income. This profit can be used to pay off the remaining obligation to B. Property investment must comply with Article 20, Clause 5 of Decree No. 21/2021/ND-CP on implementing the Civil Code regarding the assurance of obligation fulfillment [5].

Furthermore, in practice, the ownership of the asset belongs to the buyer, who has the right to use the asset without the seller's consent. Therefore, the buyer bears the asset risk during the title period's retention. If the buyer fails to fulfill their obligation at the end of the retention of title period, they must compensate the seller for any damages

caused. If the buyer has fulfilled their obligation and the retention of title period has ended, they will bear the risk of the asset during the use period. The parties may have different agreements regarding the risk of the asset during the retention of title period.

Fourthly, termination of retention of title

According to Article 334 of the Civil Code of 2015, the retention of title ends in the following cases: (i) The obligation to pay the seller has been fulfilled, (ii) The seller takes back the asset subject to retention of title, or (iii) By agreement of the parties. Usually, when the buyer pays the full purchase price, they acquire ownership of the purchased asset, so the retention of title will be terminated. If the buyer cannot or intentionally fails to pay the remaining purchase price, the seller will reclaim the asset, and the retention of title will also be terminated. If the seller cancels the outstanding debt the buyer has not yet paid, the buyer will fully own the asset [6].

3. Limitations and recommendations for improving regulations on retention of title

3.1. General limitations and recommendations on retention of title

Firstly, the fact that retention of title is regulated in both provisions with different establishment methods is the first limitation of the Law on Enterprises 2014 (LOE) on retention of title [3, p.77-78]. In essence, retention of title means that the seller temporarily suspends the obligation to transfer ownership to the buyer. At the same time, even though it exists in two different provisions, the rights and obligations of the parties remain unchanged. In principle, if the buyer fails to pay the full purchase price, the seller still has the right to reclaim the property and refund the buyer, while the buyer must return the property and receive a refund. The current provisions in the LOE show that: (i) In a deferred payment contract, retention of title is automatically established when the parties choose to pay gradually or by installment (without the

need for a separate clause or written agreement on retention of title); (ii) As a security measure, retention of title is not established automatically and the parties must either agree specifically on retention of title or include a separate clause on retention of title in the purchase contract.

With the current regulations, researchers and practitioners have the right to interpret and apply the concept of retaining ownership rights differently. This leads to difficulties in determining the specific rights and obligations of the parties when the buyer in a delayed or installment payment contract fails to fulfill payment obligations. If there is unified regulation, it will ensure effective interpretation and application of retaining ownership rights. Therefore, in the author's opinion, because there is no difference between retaining ownership rights in a delayed or installment payment contract and retaining ownership rights as a security measure, there is no need for both provisions to exist. Limiting conflicting views on retaining ownership rights and having a unified interpretation and application of retaining ownership rights within the same provision. It is not a task that can be accomplished easily. Legislation activities, particularly in issuing, revising, and supplementing laws, require a long process of discussion and obtaining opinions. Thus, according to the author, before issuing guidance documents on ensuring performance obligations, specific regulations are necessary to guide the retention of ownership rights in a manner that identifies the retention of ownership rights in two provisions that have the same essence for a unified interpretation and application.

Secondly, analysis of the nature of retaining ownership rights shows that the recognition of retaining ownership rights as a security measure is only a reluctant act of the legislators since when the main obligation is violated, the secured party may handle the secured property to offset the

violated obligation or require a third party to perform the obligation on behalf of the party with the obligation. Therefore, if a measure is recognized without security and contingency functions, it cannot ensure the performance of the party's obligation with the obligation to the secured party (the party with the right).

In the meantime, retention of title does not have the nature of a guarantee, only a precautionary measure. In theory, the seller is the recipient of the guarantee, while the buyer is the guarantor, but the pledged asset belongs to the seller and is held and exploited by the buyer. The obligation secured by the retention of title is the obligation to pay for the purchased asset. However, in practice, if the buyer fails to pay the full purchase price and disperses the asset, it is difficult to recover the asset and claim damages (if any), and there is no basis to ensure that these rights are met in practice.

Based on the above analysis, the author believes that, like recording and erasing "penalty for violation" as a security measure in the 1995 Civil Code, in the future, law drafters should consider removing retention of title from security measures for fulfilling obligations. At the same time, it is necessary to specify the issue of retention of title in the contract for the sale of assets. That is, the rights and obligations of the parties in the retention of title should be transferred to the contract for the sale of assets and regulated as a specific group of laws. In addition, there is no need to specify separate regulations for installment payments because they are only one of the payment methods for purchasing assets. The coexistence of two groups of regulations related to the retention of title may lead to conflicts and shortcomings in research and practical application.

3.2. Specific limitations and recommendations on retention of title

Firstly, the provision in Article 332 of the 2015 Civil Code has some shortcomings:

(i) The title of this law is the right to reclaim the property, so in principle, the content of this law must regulate the rights related to reclaiming property in a manner that is appropriate to the title. However, examining the content of Article 332 shows that, in addition to regulating the right to reclaim property and demand compensation for damages from the seller, this law also regulates the seller's obligation to refund the amount paid by the buyer to the seller [7]. This provision demonstrates the inconsistency between the title and the content of the law.

There are two options for addressing this inconsistency: Removing the provision on the seller's obligation from Article 332; Changing the title of Article 332 to "Rights and Obligations of the Seller". In the author's opinion, the first option is not appropriate because if the obligation of the buyer is removed from Article 332, the law builder will have to devote a separate law to regulate this obligation. This is unnecessary because the content of the seller's obligation is not so complex that it requires a separate law. Moreover, even if the obligation of the seller is removed from Article 332, the title of this article is still inconsistent with the content because the title is the right to reclaim the property, but the content also includes the right to demand compensation for property damage. That is, the title of Article 332 still needs to be changed to be consistent with the content of the law. Based on this analysis, the author believes that the second option of changing the title of Article 332 to "Rights and Obligations of the Seller" will be the optimal choice.

(ii) The regulation's interweaving of rights and obligations demonstrates a lack of coherence in the language used in drafting the law. In principle, each regulation must be clear, simple, and easy to understand to ensure that state agencies and subjects can understand and apply them consistently. Therefore, in the author's opinion, in addition to changing the title of

Article 332, the content of this law must also be separated into separate sections as follows:

Article 332. Rights and obligations of the seller of property

- 1. In case the buyer fails to fulfill the obligation to pay the seller as agreed, the seller has the right to demand the return of the property.*
- 2. In case the buyer loses or damages the property, the seller has the right to demand compensation for the damage.*
- 3. The seller returns to the buyer the amount the buyer has paid after deducting the depreciation value of the property used.*

(iii) With the current provisions, the rights and obligations of the seller are provided by law. That is, when the buyer fails to fulfill the obligation to pay for the purchased property, the seller has two rights, namely the right to demand the return of the property and the right to demand compensation for damage (if any), and has an obligation to return the amount that the buyer has paid to the seller. This provision seems to go against the principle of agreement when participating in civil legal relations as stipulated in Clause 2, Article 3 of the Civil Code 2015. Moreover, with the provisions in Article 331, it can be understood that retention of title is a measure of security established according to the parties' agreement. In particular, Clause 2 of Article 331 also stipulates that the parties must establish a separate document or write into the sales contract about the retention of title issue. The problem is that in case the parties have different agreements on the rights and obligations of the parties when the buyer fails to fulfill the obligation (for example, the seller has the right to demand the return of the property but does not have to return the amount that the buyer has paid), then will it be applied according to the agreement or according to the provisions in Article 332. Clearly, the parties' agreement is not legally prohibited, so it is valid.

Therefore, when the parties have different agreements, they must respect them.

Secondly, regarding the provisions in Article 333 on the rights and obligations of the property buyer. Clause 1 of this article stipulates the buyer's rights, according to which the buyer has the right to "use the property and enjoy benefits, profits from the property." The concept of the right to use in Article 189 shows that "the right to use is the right to exploit the utility, enjoy the benefits, profits from the property". That is, the right to use includes the main content of exploiting the utility and enjoying benefits and profits from the property. However, Clause 1 of Article 333 stipulates that the buyer has the right to "use the property" and "enjoy benefits, profits from the property," which is unreasonable. Because, in theory, the right to use the property includes the content of enjoying benefits and profits. Although this may simply be a technical error, it diminishes the value of the legal provision. Therefore, the author recommends revising Article 333, paragraph 1: "Exploiting and enjoying benefits, profits from assets within the effective retention of title period".

In terms of legal civil relations, the rights and obligations of the parties always correspond to each other. Therefore, in the context of retention of title, the rights and obligations of the buyer and the seller must be interdependent. According to Article 332, the seller has the right to reclaim the property, demand compensation for damages, and has an obligation to refund the amount paid by the buyer. These rights and obligations are the nature of the rights against the law. Consequently, these rights and obligations are the specific obligations and rights of the property buyer in Article 333. However, there are no rights and obligations of the property buyer in Article 333 corresponding to the rights and obligations of the seller in Article 332. This leads to the question of whether the property buyer has an obligation to return

the property and compensate for damages if they fail to fulfill their payment obligations.

Additionally, if the buyer has already returned the property, do they have the right to receive the amount already paid? All of these hypothetical questions can be addressed through the addition of provisions on the rights and obligations of the buyer of the property. Therefore, it is necessary to supplement the rights and obligations of the buyer of the property in Article 333 as follows: (i) Regarding obligations: "Return the property to the seller if the payment obligation is not fulfilled, except in cases of other agreements. Compensate for damages to the seller if the property is lost or damaged"; (ii) Regarding rights: "Request the seller to refund the amount already paid after deducting the depreciation value of the property used, except in cases of other agreements".

Thirdly, regarding cases of termination of retention of title, the Civil Code 2015 only stipulates three cases of termination of retention of title. However, in addition to the three cases stipulated in Article 334 of the Civil Code 2015, retention of title can still be terminated in other cases, such as retention of title being replaced by other security measures such as guarantees; the property being the subject of a sale contract in general, including retention of title no longer existing; the sale contract being terminated due to cancellation or unilateral termination... Therefore, in the author's opinion, it is necessary to supplement the cases of termination of retention of title into Article 334 of the Civil Code 2015.

Finally, the study of the legal provisions on retention of title shows that the content of the legal provisions still reveals many shortcomings that need to be adjusted to be more appropriate. However, the process of amending and supplementing the legal provisions on retention of title must have a specific roadmap and cannot be changed immediately. In the coming time, when

issuing guidance documents on this matter, it is possible to consider, specify and supplement the provisions on retention of title in accordance with the provisions of the Civil Code 2015.

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