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## Doing Business in France

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### CHAPTER 7 Sales of Personal Property

#### *1-7 Doing Business in France § 7.03*

##### **§ 7.03 Obligations of Buyer**

###### **[1] Introduction**

Although the scope and nature of the obligations imposed on a buyer of personal property may be defined by the terms of the contract for the sale of goods, the contracting parties must still abide by certain imperative rules of law. This section will discuss the two obligations imposed on all buyers of personal property: the obligation to pay the purchase price and the obligation to accept a proper delivery of conforming goods. In addition, the most commonly used methods of securing the buyer's payment obligation are discussed in *Section 7.03[3] infra*.

###### **[2] Payment of Purchase Price**

**[a] Introduction.** The purchase price is freely chosen by the contracting parties. n1 Therefore, it cannot be modified by judges. n2 Judges only control the price, in order to verify that it is not abnormally low. n3 The primary obligation imposed on a buyer of personal property is the obligation to pay the purchase price for the goods referred to in the contract for the sale of goods at the time and place mentioned therein. n4 A brief discussion of the rules of French law which govern the buyer's payment obligation follows.

**[b] Place of Payment.** In the event that the parties to the contract for the sale of goods have fixed the place where payment is to be made, the buyer may only satisfy his obligation to pay by tendering payment at the designated place. n5 This designation of the place of payment may be expressly set forth in the contract; it may also be implied, as is the case where the seller and the buyer have an established course of conduct or where applicable trade usages require that payment be made at a particular place. Very often, the parties to the contract for the sale of goods agree that payment is to be made by the issuance of commercial paper which is, by its terms, domiciliated, *i.e.*, payable at a given bank; reference should be made to Chapter 10--*Commercial Paper infra* for a discussion of the rules of law governing the issuance of and payment under commercial paper.

Where the parties to a contract for the sale of goods are silent on the issue, the buyer is obligated to tender payment for the goods sold at the place where delivery is to be made. n6 This rule is derived from the fact that, in principle, the seller's obligation to deliver and the buyer's obligation to pay are to be satisfied simultaneously. Where, however, the seller and the buyer agree that delivery and payment are not to be contemporaneous, yet fail to specify where payment is to be made, the buyer is obligated to tender the purchase price for goods to be sold which have been identified in the contract at the place where such goods are located at the time of payment; if the goods have not been identified in the

contract, payment must be made at the domicile of the seller. n7

In drafting the contract for the sale of goods, the contracting parties should bear in mind that the place of payment is the criterion which is often used to determine which court will have jurisdiction over any disputes arising out of the performance of the contract. n8

**[c] Time of Payment.** If the parties to the contract for the sale of goods have not agreed to the contrary, the buyer is obligated to tender full payment for the goods sold at the time of the delivery thereof. n9 If the contract of sale calls for delivery in installments, the buyer is normally required to tender payment for each installment as it is delivered; if, despite the fact that the contract does not call for multiple deliveries, deliveries are made in installments, the buyer will only be obligated to pay when all of the goods sold are duly delivered. n10

The parties to the contract for the sale of goods are free to fix the time at which the buyer is to make payment. n11 If payment is not to be made upon delivery, the buyer will be obligated to pay interest on the unpaid purchase price if:

1. the seller and the buyer so agree in the contract of sale,
2. the goods sold and delivered produce benefits or generate income, or
3. the seller served a formal demand for payment on the buyer. n12

It is to be noted that the rate of interest charged by the seller, if specified in the contract of sale, may not exceed the maximum interest rate fixed by usury laws. n13 In the two other instances where interest must be paid, the legal rate of interest will be applicable. n14

However, the *Law of May 15, 2001* concerning new trade regulations ("nouvelles régulations économiques") provides specific regulations for payment methods between professionals. In particular, the time of payment is fixed at 30 days from the delivery of the goods unless otherwise agreed upon by the parties. n15 Moreover, where the buyer does not pay the seller by the payment's due date, the interest for late payment is equal to the interest rate fixed by the European Central Bank increased by 10%, unless the parties specify another rate in the contract, which is not inferior to three times the legal rate of interest. n16

Notwithstanding the foregoing rules, the buyer may withhold payment for the goods sold for such time as is reasonably necessary to inspect the goods and to ascertain if they are conforming. n17 In the event that the goods delivered by the seller are not conforming, the buyer may either affirm the contract and demand due performance thereunder or reject the delivery and avoid the contract. n18

### **[3] Methods of Securing Payment**

**[a] Introduction.** The parties to a contract for the sale of goods may provide for one or more of several means of securing the due payment by the buyer of the purchase price. The three methods most commonly used in France to secure payment for goods are third party guarantees (*sureties personnelles*), pledges of property (*sureties réelles*) and title retention clauses (*clauses de réserve de propriété*). As the rules of law governing third party guarantees are discussed in *Section 15.03 [6] infra*, this subsection will be limited to a discussion of the latter two methods of securing payment.

#### **[b] Pledges of Personal Property**

**[i] Introduction.** In order to secure his performance of an obligation owing to another, a debtor, or a third party acting on his behalf, n19 may transfer a security interest in property to his creditor or a third party acting on the latter's behalf. The generic term used to describe this type of security arrangement is pledge; a pledge is known in French as either a *nantissement* or *gage*. n20 For purposes of the discussion that follows, the debtor, or the third party who acts on

his behalf, will be referred to as the pledgor and the creditor, or the third party acting on his behalf, will be referred to as the pledgee. A pledge confers upon the pledgee the right to satisfy the obligation owing to him by way of a lien on the pledged property which entitles him to preference with respect to such property over the other creditors of the pledgor. n21

As a general rule, a pledge of personal property could only be valid and enforceable if the pledged property has been placed and remains in the possession of the pledgee or a third party agreed upon by the pledgor and the pledgee; n22 but, inasmuch as the strict application of this general rule would make it impossible to pledge intangible property and would prevent the pledge of certain assets necessary to operate a business, special rules have been developed permitting the pledge of personal property without the surrender of possession thereof. The *Ordinance n degrees 2006-346 relating to pledges dated 23 March 2006* notably allowed to establish pledges without dispossession. n23 The remainder of this subsection will discuss the rules of law which govern pledges of property where possession of the pledged property is surrendered by the pledgor and where possession thereof is not surrendered.

### **[ii] Pledges Where Possession of the Pledged Property Is Surrendered by the Pledgor**

There exist two types of pledges pursuant to which possession of the pledged property is surrendered by the pledgor: the civil pledge (*gage civil*) and the commercial pledge (*gage commercial*). A pledge is deemed civil if the debt secured thereby is civil in nature and commercial if the debt is commercial in nature; the status of the pledgee as Trader is irrelevant to this classification. n24 A brief discussion of each of these two types of pledges follows.

**[A] Civil Pledges.** In order to be valid and binding on the pledgor and the pledgee, a civil pledge agreement must be in writing if the pledged property is worth more than [Euro]1.500. n25 In order to be valid and enforceable against third parties, however, a civil pledge agreement must be in writing irrespective of the value of the pledged property, can specifically state the amount of the debt secured thereby as well as the nature and quantity of the pledged property and must be duly registered with the appropriate tax authorities. n26 Finally, the pledged property must, except in the situations discussed in *Section 7.03[3][b][iii] infra*, be physically placed in the possession of either the pledgee or a third party chosen by the pledgor and the pledgee. n27

If the foregoing conditions are satisfied, a civil pledge confers upon the pledgee the same rights and obligations as those conferred on a pledgee by a commercial pledge, subject, however, to the requirement that a pledgee under a civil pledge must obtain a court order before he may cause the pledged property to be sold in order to satisfy the debt owed to him by the pledgor. n28

The parties may agree in the pledge agreement or afterwards that in case of a failure to perform the secure obligation, the pledgee will become the owner of the pledged property (the *Pacte Commissaire*). The value of the pledged property is determined on the day of the transfer by an expert designated by mutual agreement or judicially, in the absence of an official quotation of the pledged property on a regulated market within the meaning of the French Monetary and Financial Code. Any provision to the contrary is deemed not written. Where the value exceeds the amount of the secured debt, the difference shall be paid to the debtor or, if there are other pledges, shall be deposited.

It is to be noted that such option is forbidden in the particular case of a consumer loan which is secured by a pledge. n29 Similarly, the enforcement of a *Pacte Commissaire* is prohibited if the pledgor is the subject of bankruptcy proceedings. n30

**[B] Commercial Pledges.** A commercial pledge agreement need not be in writing in order to be valid and enforceable; consequently, its existence may be proved by any means, including oral evidence. n31 As is the case with a civil pledge, the pledged property must, except in the situations discussed in *Section 7.03[3][b][iii] infra*, be placed in the possession of either the pledgee or a third party chosen by the pledgor and the pledgee. n32

The pledgee may retain possession of the pledged property until the debt secured by it is fully satisfied. n33 If the pledge is constituted with dispossession, the pledgor may request the restitution of the pledged property, without prejudice of further damages, in the case where the pledgee or the third party fails to its obligation to conserve the pledged property. n34 For his part, the pledgor must reimburse the pledgee for the useful and necessary expenditures which the latter makes in order to preserve the pledged property. n35

If the pledgor does not satisfy the debt which is secured by the pledged property in a timely manner, the pledgee has two options: he may either take title to the pledged property or cause it to be sold and retain that portion necessary to satisfy the debt owed to him. If the pledgee elects to take title to the pledged property, he must obtain a court order authorizing him to do so in the absence of a *Pacte Commissaire*. n36 If the pledgee elects to cause the pledged property to be sold, he must serve on the pledgor a demand for performance (*signification*) n37 no less than eight days before the public sale of the pledged property is to take place. n38 After the eight-day period has elapsed, the pledgee may cause the pledged goods to be sold at public auction by a duly authorized broker. n39 It is to be noted that the pledgor and the pledgee may not contractually agree in the pledge agreement to derogate from the foregoing procedural rules relating to the sale of the pledged goods; they may, however, agree to derogate therefrom in an agreement entered into after the pledge agreement. n40

If the pledgor has been the subject of a declaration of bankruptcy filed before the date on which he must satisfy the debt which is secured by the pledged property, the pledgee must file proof of his claim against the bankrupt pledgor just as all other creditors must. n41 In the event that liquidation in bankruptcy proceedings are instituted, where the liquidator does not tender payment of the debt secured by the pledged property, the pledgee may retain the pledged property until such time as the liquidator, after obtaining the due authorization of the *juge-commissaire*, proceeds with the sale thereof. n42 The liquidator must conduct the sale within six months of the initiation of the liquidation proceedings and must notify the pledgee fifteen days prior to said sale. n43 Where the liquidator proceeds with the aforementioned sale, the pledgee is entitled to satisfy the debt owed to him by the bankrupt pledgor out of the proceeds of such sale before such proceeds are used to satisfy the claims of any other creditor of the bankrupt pledgor except the latter's employees. n44 If such proceeds exceed the amount of the debt owing to him, the pledgee must remit such excess to the liquidator; if such proceeds are less than the amount of said debt, the pledgee is treated as an unsecured creditor of the bankrupt pledgor with reference to that portion of the debt owing to him that is not satisfied. n45 Where a pledgee causes the pledged property to be sold after the due date of the underlying debt, the allocation of the proceeds of sale is made among the secured creditors of the bankrupt pledgor, including the pledgee, pursuant to the normal rules of bankruptcy law. n46

### **[iii] Pledges Where Possession of the Pledged Property Is Not Surrendered By the Pledgor**

**[A] Introduction.** Certain exceptions have been created by statute to the general rule requiring that possession of the pledged property be surrendered by the pledgor. The first, a purchase money pledge of automotive vehicles, is of little interest to the foreign investor and will not be discussed. n47 The second exception, a *warrant*, is discussed in *Section 10.04[3] infra*. The remainder of this subsection will be devoted to a discussion of two particular types of pledges commonly used in France known as a purchase money pledge of tools and equipment by a professional (*nantissement de l'outillage et du materiel d'équipement professionnel*) and a pledge of a Going Concern (*nantissement du fonds de commerce*).

**[B] Purchase Money Pledge of Tools and Equipment By a Professional--Nantissement de l'Outillage et du Materiel d'Équipement Professionnel.** A purchase money pledge of tools and equipment by a professional permits a professional to pledge his tools and equipment to either the seller thereof or the person who advanced the money necessary to purchase same in order to secure his obligation to pay the purchase price thereof. n48 If the pledgee is the seller of the tools and equipment, the pledge must be granted in the sales agreement; if the pledgee is the person who advanced the money necessary to purchase the tools and equipment, the pledge must be granted in the loan agreement. n49 In all events, such a pledge must be granted within two months of the receipt by the professional of the tools and equipment and must be duly recorded in a registry maintained by the clerk of the *Tribunal de Commerce* of the

jurisdiction in which the pledgor has his domicile or principal place of business within 15 days of the execution of the pledge agreement. n50 Until such time as the underlying debt is paid in full, the pledgor may not sell or otherwise dispose of the pledged tools and equipment; n51 if the pledgor does not satisfy said underlying debt when due, the pledgee may cause the pledged tools and equipment to be sold at public auction and satisfy the debt owing to him out of the proceeds of such sale. n52

### [C] Pledge of a Going Concern--Nantissement de Fonds de Commerce

**[I] What May Be Pledged.** Any person who is the owner of a Going Concern and who has the power to transfer same may pledge his Going Concern in order to secure the performance of an obligation which he owes or will in the future owe to the pledgee. n53 It is to be noted, however, that all of the elements making up a Going Concern may not be pledged; instead, only the following assets may be pledged:

1. the pledgor's commercial name and logo,
2. the pledgor's leasehold right to the premises in which he operates the Going Concern,
3. the pledgor's clientele,
4. the pledgor's furniture used for commercial purposes,
5. the tools and equipment used by the pledgor to operate the Going Concern,
6. the pledgor's patents, licenses, trademarks, distribution marks, industrial designs and models and, more generally, all of his industrial, intellectual, literary or artistic rights appurtenant to the Going Concern, and
7. the pledgor's right to occupy real property for commercial, industrial or crafts purposes for a period of at least twenty years (*concession immobiliere*). n54

In the event that the pledge agreement does not explicitly enumerate which elements of the Going Concern are pledged, the pledge created thereby only relates to the commercial name and logo, leasehold right, clientele and furniture used for commercial purposes of the pledgor. n55

**[II] Formal Requirements.** In order to be valid and enforceable, a pledge of a Going Concern must not only secure the payment of a legally enforceable debt, but must also satisfy certain formal requirements. n56 First, the agreement pursuant to which the pledge is created must be in writing. n57 After such writing has been executed, and before the other formal requirements are satisfied, the pledge agreement must be registered with the tax authorities if the pledge agreement is not notarized. n58 After such registration has been made, and within fifteen days of the execution of the pledge agreement, the pledge agreement and two forms setting forth, *inter alia*, the names, addresses and professions of the pledgor and the pledgee, a description of the Going Concern, the date and nature of the pledge agreement and the amount of the underlying debt as well as the rate and method of calculation of any interest payable thereon must be recorded in registers maintained at the commercial courts of the jurisdictions in which the Going Concern and each of the branches thereof are operated. n59 The clerk of the commercial court stamps and marks on one of such forms all prior recorded liens which encumber the Going Concern and remits such form to the pledgee. n60 Where one of the elements of a pledged Going Concern is a patent, trademark, industrial design or model or a similar industrial property right, or a license for the use thereof, the pledge must also be recorded with the *Institut National de la Propriete Industrielle* within fifteen days of its recording in the register maintained at the commercial court. n61

The rights of the pledgee to the Going Concern vest vis-a-vis third parties upon recording; such recording is effective

for a period of ten years and may be renewed. n62 It is to be noted that any unsecured third party creditors who, in order to permit the pledgor to operate his Going Concern, loaned money to him before he pledged his Going Concern may, in reaction to his grant of the pledge, petition the court for an order accelerating the debts owed to them. n63

### **[III] Rights of the Pledgee.**

As a result of the pledge of the Going Concern, the pledgee benefits from two rights designed to ensure that the debt owing to him by the pledgor, as well as any interest accrued thereon during the first two years, is paid in full. n64 The first right, known as a *droit de préférence*, entitles the pledgee to force the judicial sale of the Going Concern once the debt secured thereby has become payable and to receive payment of the debt owing to him out of the proceeds of said sale. The second right, known as a *droit de suite*, entitles the pledgee to receive payment of the debts owing to him out of the proceeds of a sale of the Going Concern if the latter is sold by the pledgor to a third party.

#### **[aa] Preliminary Considerations.**

Inasmuch as a Going Concern is an intangible asset, it is impossible for the pledgor to place same in the possession of the pledgee; consequently, the pledgor is able to continue to exploit his Going Concern. Because the rights of the pledgee created by the pledge of the Going Concern are only of use to the pledgee to the extent that the Going Concern continues to maintain its value, the pledgor is subject to certain sanctions and must respect certain requirements in the event that he takes steps which may reduce the value of the Going Concern. For example, where the pledgor, by his own act, diminishes the value of the pledged Going Concern, the pledgee may petition the court for an order accelerating the debt owed to him. n65 Similarly, where the pledgor fraudulently disposes of one or more of the elements of the pledged Going Concern, he may not only be held civilly liable to the pledgor for any damages the latter incurs as a result thereof but, in addition, may also be subject to penal sanctions consisting of a maximum of three years of imprisonment and/or a maximum fine of [Euro]375,000 in the case of an individual, and a maximum fine of [Euro]1,875,000 in the case of a legal entity. n66

The comfort afforded to the pledgee by the foregoing sanctions is reinforced by the requirements that:

1. the pledgor notify him if he, the pledgor, intends to relocate his Going Concern,
2. the pledgor inform him that he, the pledgor, intends to substantially modify the activities of the Going Concern, and
3. the lessor of the premises where the Going Concern is operated notify the pledgee if the lease agreement relating to such premises is to be terminated.

A brief discussion of these three requirements follows:

#### **1. Where the Pledgor Intends to Relocate His Going Concern.**

In the event that the pledgor intends to relocate the pledged Going Concern, he must notify the pledgee thereof no less than fifteen days before the relocation and inform him of the address of such new location; if the pledgor fails to so notify the pledgee, the debt secured by the pledge accelerates and becomes immediately payable. n67 Although the pledgee may not prevent the pledgor from relocating his Going Concern, if the pledgor relocates his Going Concern without obtaining the consent of the pledgee, and if such relocation results in a reduction of the value of such Going Concern, the pledgee may petition the commercial court for an order accelerating the debt secured by the pledged Going Concern. n68 If the pledgee consents to the proposed relocation, he must, during the aforesaid fifteen-day period, or within fifteen days of the date on which he learned of the relocation of the pledged

Going Concern, cause the recording of his rights in the register maintained at the commercial court to be modified so as to reflect the new location of the Going Concern; if the Going Concern is relocated to a place situated within the jurisdiction of another commercial court, the pledgee must record his rights in and to the Going Concern in the register maintained at such court. n69

## **2. Where the Pledgor Intends to Substantially Modify the Nature of the Activities of His Going Concern.**

The pledgor must notify the pledgee if he intends to substantially modify the nature of the activities carried out by his Going Concern in the leased premises. n70 Upon receipt of such a notice, the pledgee may demand that the proposed change in activities be made subject to the implementation by the pledgor of certain arrangements designed to safeguard the pledgee's rights. n71 In the event that the pledgee agrees to the proposed change in activity, the rights conferred upon him by the pledge agreement are unchanged. n72

## **3. Where the Lease of the Premises In Which the Going Concern Is Operated Is to Be Terminated.**

In the event that the lessor of the premises in which the pledgor's Going Concern is operated intends to terminate the pledgor's lease agreement, or in the event such agreement is to be terminated pursuant to a judicial order or an agreement between the lessor and the pledgor, said lessor must cause notice thereof to be served on the pledgee and all other creditors who have a lien on the Going Concern; the termination of the lease agreement will not be effective until one month after such notification is served. n73 During said one-month period, the pledgee may prevent the termination of the lease agreement by assuming the obligations of the pledgor thereunder, *e.g.*, by paying the rent owed by the latter; in the event that the pledgee does so, he will be subrogated to the rights of the lessor against the pledgor. n74

In the event that the lessor does not notify the pledgee of the imminent termination of the lease agreement pursuant to the foregoing rules, the pledgee may either cause the forced sale of the Going Concern or bring suit against the lessor for damages equal to the injury he suffered as a result of the termination of the pledgor's lease agreement. n75 If the pledgee can prove that there is a causal relation between the injury he suffered as a result of the termination of the pledgor's lease agreement and the failure of the lessor to notify him thereof, the court may order the lessor to pay to the pledgee the debt owed to the latter by the pledgor. n76

**[bb] Forced Sale of the Going Concern--Droit de Preference.** In the event that the pledgor does not tender full payment of the debt secured by the pledge of his Going Concern within eight days of the date on which a formal demand for payment (*sommation*) was served on him by the pledgee, the latter may file a petition with the commercial court of the jurisdiction in which such Going Concern is operated for an order mandating the sale of the elements of the Going Concern covered by the pledge. n77 If the court orders that the Going Concern be sold, the pledgee must cause a notice thereof to be served on the pledgor, as well as on all creditors of the pledgor who have rights which are superior to those of the pledgee, no less than fifteen days before the sale is to take place. n78 No less than ten days before such sale, public notice thereof must be given, *inter alia*, at the town hall of the commune in which the Going Concern is located, at the commercial court of the jurisdiction in which the Going Concern is operated, at the main entrance of the building in which the Going Concern is operated as well as in a legal newspaper. n79

Once the Going Concern is sold, the proceeds of such sale are allocated among the various creditors of the pledgor. n80 The debts owed by the pledgor to statutory lienors are satisfied first. n81 As among the creditors of the pledgor who have a security interest in the Going Concern, the secured creditor who was the first to record his interest has rights which are superior to those of secured creditors who recorded their interests at a later point in time, as well as to those of unsecured creditors; in the event that two creditors recorded their interests in and to the Going Concern on the same

day, their rights are co-equal. n82

**[cc] Droit de Suite.** Where the pledgor of the Going Concern sells the whole Going Concern to a third party, the pledgee may serve a demand for payment of the debt owed to him by the pledgor on such third party and, if the latter does not pay, petition the court within eight days of such demand for an order mandating the seizure of the Going Concern in the hands of such third party and the forced sale thereof; this right is known as a *droit de suite*. n83

The third party may respond to the pledgee's petition in three ways. First, he may acquiesce to the forced sale of the Going Concern and bring suit against the pledgor under the warranties given to him in the agreement pursuant to which he acquired the Going Concern. n84 Second, he may retain the Going Concern by paying to the pledgee that portion of the debt owed by the pledgor to the pledgee which is secured by the pledge of the Going Concern; the third party will then bring suit against the pledgor in order to recover the sums so paid. Finally, the third party may, either before the pledgee petitioned the court or within fifteen days of his receipt of the aforesaid demand for payment, serve a notice on all secured creditors of the pledgor by which he offers to immediately satisfy all debts secured by the Going Concern which do not exceed, in the aggregate, the price he is to pay for the Going Concern. n85 In the event that a secured creditor does not accept said offer, he may cause the Going Concern to be sold at a forced sale if he agrees to submit a bid equal to the price to be paid for the Going Concern by the third party, increased by one-tenth of the intangible assets included in the Going Concern. n86 Unlike the second possibility, this latter procedure, once completed, causes all encumbrances on the Going Concern to be nullified.

**[IV] Termination of the Pledge.** The pledge of the Going Concern by the pledgor to the pledgee may terminate in several ways. First, the pledge will terminate if the pledgor satisfies the debt secured thereby because the validity of the pledge is conditioned upon the continued existence of the debt. The pledge will also terminate if:

1. the pledgee waives his rights thereunder,
2. the pledgor and the pledgee agree to the termination, n87
3. the pledgee becomes the owner of the Going Concern and there are no other debts of the pledgor secured thereby, and n88
4. the pledgee does not renew the recording of the pledge in the register maintained at the commercial court upon the expiration of the ten-year period of validity thereof. n89

Once the pledge is terminated, the recording thereof will be expunged from the register maintained at the commercial court only upon the presentation of a copy of a judicial order mandating same or a document in authentic form by which the pledgee consents thereto. n90 If the pledgee recorded his interest in an industrial or intellectual property right constituting one of the elements of the Going Concern in the register maintained at the *Institut National de la Propriete Industrielle*, such recording will be expunged upon the presentation of a certificate of expunction issued by the commercial court. n91

**[c] Title Retention Clauses.** As its name implies, a title retention clause (*clause de reserve de propriete*) is a contractual provision pursuant to which title to the goods sold is retained by the seller until such time as the buyer tenders full payment of the purchase price. n92 Where the parties to a contract for the sale of goods do not include therein a title retention clause, title to and the risk of loss of the goods sold is deemed to pass to the buyer upon the conclusion of the contract. n93 If a contract contains a title retention clause and if certain other conditions are satisfied, the seller will be able to replevy the goods sold subject to such clause even if the buyer has been the subject of a declaration of bankruptcy. n94

In order for a title retention clause to be valid and enforceable:

1. it must be executed in a writing no later than the date of delivery,
2. the goods covered thereby must be "merchandise," *i.e.*, tangible personal property, and
3. the goods covered thereby can be incorporated in another good insofar as the goods can be separated without damages. n95

It is to be noted that the writing required in order for the title retention clause to be valid may take any form and may even be included in the general terms and conditions of sale of the seller. n96

A seller who benefits from a valid title retention clause may replevy the goods sold at any time after payment therefor is due pursuant to an order of the appropriate court; if the buyer has been the subject of a declaration of bankruptcy, the seller must bring such suit within three months of the declaration of rehabilitation in bankruptcy proceedings concerning the buyer. n97 If the court before which the seller brings a replevin action so orders, the seller may repossess the goods sold; if the value of the goods at the time of such repossession exceeds the debt owed by the buyer, the seller must pay such excess to the buyer or the Administrator; if the debt owed to the seller exceeds the aforesaid value, the seller must bring suit for the payment thereof or file a claim as an unsecured creditor against the bankrupt buyer for the amount of such excess. n98 If the buyer has sold the goods to a third party before the seller brings a replevin action, the latter will not be able to recover the goods from such third party unless the third party acquired them in bad faith. n99 If, however, such third party still owes a portion of the purchase price for the goods sold by the buyer, the seller may bring suit requesting that the court order the third party to pay to him that portion of the purchase price which such third party still owes to the buyer; if the buyer has been the subject of a declaration of bankruptcy, such suit must be brought within three months of the declaration of rehabilitation in bankruptcy proceedings. n100

#### **[4] Acceptance of Delivery**

**[a] Place of Acceptance.** Unless the parties have provided differently in the contract for the sale of goods, the buyer is obligated to take delivery of the goods sold at the place where such goods were located at the time the contract was concluded. n101 Where the contract for the sale of goods obligates the seller to deliver the goods to a place to be specified by the buyer, the buyer is deemed to have breached his obligation to accept delivery of the goods if he fails to specify such place n102 or fails to make the place of delivery he specifies available to the seller so that the latter may physically deliver the goods. n103

As a general rule, the buyer will not be permitted to bring suit against the seller because the goods delivered are non-conforming if he inspected the goods before accepting same and did not explicitly reserve his rights. n104 If, after inspection, the buyer alleges that the goods are not conforming because of the fault of the transporter who delivered them, he must reserve his rights and make due note of the improper performance by the transporter and the consequences thereof within three working days. n105 Finally, the buyer may be estopped from bringing suit for the alleged non-conformity of the goods delivered where, despite the fact that he did not inspect or explicitly accept the goods sold, he used such goods in a manner which made a verification of their conformity at the time of delivery with the terms of the contract of sale impossible. n106

**[b] Time of Acceptance.** The time when the buyer is obligated to accept delivery of the goods sold is almost always fixed in the contract for the sale of goods; a contractual provision fixing the time of acceptance may be either explicit (*e.g.*, goods must be accepted during a given month) n107 or implicit (*e.g.*, goods must be accepted after seller sends notice that he has received goods). n108 If the contract of sale states that the goods are to be delivered upon the demand of the buyer, the latter must make such demand and accept delivery within a reasonable period of time. n109

In the event that the parties to the contract of sale do not specify the time of acceptance in the contract for the sale of

goods, such time is fixed pursuant to local trade usages. n110 If neither the contract of sale nor the local trade usages address the issue, the buyer must accept the goods sold as soon as practicable after the conclusion of the contract of sale; n111 the seller may not unilaterally impose a time for acceptance on the buyer n112 and the buyer may not postpone his acceptance beyond a commercially reasonable period of time. n113 Finally, in the event that the goods to be sold were produced by the seller for the buyer, the buyer must take delivery thereof as soon as he has been advised by the seller that the goods are ready. n114

**FOOTNOTES:**

(n1)Footnote 1. *C. civ.*, art. 1591.

(n2)Footnote 2. *Judgment of January 29, 2003*, Cass. civ., 2003 Dalloz, IR. p. 534. *Judgment of December 7, 2004*, Cass. civ., Bull civ. I n degrees307.

(n3)Footnote 3. The sanction for such a sale at a very low price is the nullity of the contract. *Judgment of May 3, 1922*, Cass. Req., 1922 Dalloz Sirey, I. p. 310. *Judgment of July 18, 2001*, Bull. Civ. III, n degrees101, Dalloz 2002, 680.

(n4)Footnote 4. *C. civ.*, art. 1650.

(n5)Footnote 5. *Id.*, art. 1247(1).

(n6)Footnote 6. *Id.*, art. 1651.

(n7)Footnote 7. *Id.*, art. 1247(1 and 3).

(n8)Footnote 8. *N.C. pr. civ.*, art. 46.

(n9)Footnote 9. *C. civ.*, art. 1651; *Judgment of November 14, 1978*, Cour d'appel, Metz, [1979] *Jurisclasseur Periodique* [J.C.P.] IV 283.

(n10)Footnote 10. *Judgment of April 22, 1931*, Cour d'appel, Rennes, [1931] *Receuil des Arrets de la Cour d'Appel de Rennes* 446.

(n11)Footnote 11. *C. civ.*, art. 1651. Laws have been enacted pursuant to which the freedom of the parties to a contract for the sale of goods to stipulate that payment for certain goods will be made after the delivery thereof is limited. For example, with the exception of livestock and fresh meat, for which payment must be made within twenty days of delivery, payment for perishable foodstuffs must be made thirty days as from the tenth, twentieth or last day of each month, depending on the relevant ten-day period during which delivery is made (*e.g.*, for a delivery made between the first and the tenth day of any given month, the thirty-day period begins to run from the tenth day of such month). *C. com.*, art. L.443-1.

(n12)Footnote 12. *C. civ.*, art. 1652; *see* § 6.03[4][b] *supra* (formal demand for payment).

(n13)Footnote 13. *See* § 15.03[4] *infra* (usury laws).

(n14)Footnote 14. *See* § 6.03[5][e][ii] *supra* (legal rate of interest).

(n15)Footnote 15. *C. Com.*, art. L.441-6.

(n16)Footnote 16. *Id.*, art. L.441-6. Pursuant to this article, the seller is not required to serve a formal demand; interest on late payment will be automatically applied.

(n17)Footnote 17. *Judgment of October 21, 1974*, Cass. civ. com., [1975] *Dalloz-Sirey, Jurisprudence* [D.S. Jur.]

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(n18)Footnote 18. *See § 7.02[2][g][iii] supra* (remedies available to the buyer upon an unexcused improper or non-conforming delivery).

(n19)Footnote 19. On the contrary, a debtor cannot transfer a security interest in property if the property which possession is transferred does not belong to him. *Judgment of October 22, 1999*, Cour d'appel, Paris, 2000, Dalloz AJ. p. 52. However, the action for declaration of nullity is no longer effective when, before the start of these proceedings, the pledgor becomes the owner of the property. *Judgment of November 5, 2002*, Cass. civ. com. 2003 Dalloz AJ. p. 70.

(n20)Footnote 20. *C. civ.*, arts 2333 to 2366.

(n21)Footnote 21. *Id.*, art. 2333.

(n22)Footnote 22. *Id.*, art. 2344.

(n23)Footnote 23. *Ordinance n degrees 2006-346, March 23, 2006, relating to pledges*, codified into *C. civ.*, arts., 2333-66.

(n24)Footnote 24. *C. com.*, art. L.521-1. (*Petits Codes Dalloz*); *see §§ 5.01[2] and 6.02[4][a] supra* (classification of transactions as civil or commercial in nature); *see § 5.10[4][a] supra* (definition of Trader).

(n25)Footnote 25. *C. civ.*, art. 1341 (*Petits Codes Dalloz*); *Decree No. 2004-836 of August 20, 2004*, arts. 56 and 59 (OJ 22 August).

(n26)Footnote 26. *C. civ.*, art. 2336 (*Petits Codes Dalloz*); *C. gen. imp.*, art. 634 (*Petits Codes Dalloz*).

(n27)Footnote 27. *C. civ.*, art. 2334 (*Petits Codes Dalloz*).

(n28)Footnote 28. *Id.*, art. 2346; *see § 7.03[3][b][ii][B] infra* (rights and obligations of pledgee under a commercial pledge agreement).

(n29)Footnote 29. *C. cons.*, art. L.311-32.

(n30)Footnote 30. *C. com.* art. L.622-7.

(n31)Footnote 31. *Judgment of February 25, 1975*, Cass. civ. com., [1975] J.C.P. II No. 18094; *see § 6.02[4][a] supra* (methods of proof of existence of contracts).

(n32)Footnote 32. *C. com.*, art. L.521-1.

(n33)Footnote 33. *C. civ.*, art. 2286.

(n34)Footnote 34. *Id.*, art. 2344(1).

(n35)Footnote 35. *Id.*, art. 2343.

(n36)Footnote 36. *Id.*, art. 2347.

(n37)Footnote 37. If the pledged property is in the possession of someone other than the pledgor, such demand must be served on him as well. *C. com.*, art. L.521-3(1).

(n38)Footnote 38. *Id.* Such demand for payment must be served by a process server. *See Judgment of February 3, 1937*, Cass. civ., [1937] *Dalloz, Periodique et Critique* [D.P.] I 165 (normal letter held insufficient).

(n39)Footnote 39. *Id.*, art. L.521-3(2). In the event that the pledgee causes the pledged goods to be sold in a manner other than public auction, he will be held liable to the pledgor for the difference between the proceeds of the sale and the price that would have been realized had the pledged goods been sold at public auction. *Judgment of December 2, 1903*, Cass. civ., [1905] D.P. I 9.

(n40)Footnote 40. *Id.*, art. L.521-3(4); *Judgment of November 17, 1959*, Cass. civ., [1960] D.S. Jur. som. 37.

(n41)Footnote 41. *Id.*, art. L.622-24.

(n42)Footnote 42. *Id.*, art. L.642-25.

(n43)Footnote 43. *Id.*

(n44)Footnote 44. *Id.*, art. L.642-25; *Judgment of January 6, 1998*, Cass. com, Bull. civ. Page 7-23 (Rel. 33) IV n degrees9 Cass. civ. com., [1977] *Bulletin des Arrets de la Cour de Cassation, chambres civiles* [Bull. Civ.] IV 176 (employees rights); *see also* § 18A.03[4][c][ii] *infra* (protection of the employees).

(n45)Footnote 45. *Id.*, art. L.643-7; *see also* § 18A.03[4][c][i] *infra* (rights of unsecured creditors).

(n46)Footnote 46. *Judgment of January 15, 1957*, Cass. civ. com., [1957] D.S. Jur. 267 note Hemard; *see § 18A.03[4][c][i] *infra** (rights of secured creditors).

(n47)Footnote 47. *C. Com.*, art. L.145-57 *et seq.*

(n48)Footnote 48. *Id.*, art. L.525-1(1). Such a pledge may also be granted to guarantors of the pledgor's payment obligation. *Id.*, art. L.525-2(6).

(n49)Footnote 49. *Id.*, art. L.525-2(2-3) (*Petits Codes Dalloz*).

(n50)Footnote 50. *Id.*, art. L.525-3(1-2). Such recording is valid for five years and may be renewed twice.

(n51)Footnote 51. *Id.*, art. L.525-7(1). In the event that the pledgor violates this obligation, he is subject to penal sanctions and, in addition, the pledgee may recover the sums owed to him by the pledgor from the third party-in-possession if a sticker indicating the place, date and number of the recording of the pledge is affixed to the pledged goods. *N.C. pen.*, arts. 314-5 and 314-39 (a maximum of three years of imprisonment and/or a maximum fine of [Euro]375,000 in the case of an individual. In lieu of imprisonment, an individual may be subject, *inter alia*, to the following sanctions: the prohibition from using credit cards or from writing checks, except for certified checks or checks for the withdrawal of funds from the issuing bank; the seizure of the pledged property; and/or the cancellation or suspension of such individual's driving license. A legal entity may also be subject to a maximum fine of [Euro]1,875,000 and/or the following sanctions: forced dissolution; the prohibition on carrying out one or several activities; the exclusion from bidding for public contracts; the prohibition from making any public solicitation of securities; the placement under judicial surveillance; the closing of one or several of its establishments; the prohibition from using credit cards or from writing checks, except for certified checks or checks for the withdrawal of funds from the issuing bank; the seizure of the pledged property; and/or the posting of the judgment or the communication of same through the media. *Judgment of March 13, 1962*, Trib. com., Nancy, [1962] *Gazette du Palais* [Gaz. Pal.] II 20.

(n52)Footnote 52. *C. com.*, art. L.525-14.

(n53)Footnote 53. *Id.*, art. L.142-1(1).

(n54)Footnote 54. *Id.*, art. L.142-2(1); *Law No. 67-1253 of December 30, 1967*, art. 51(3), *reprinted in C. civ..*

(n55)Footnote 55. *C. com.*, art. L.142-2(3).

(n56)Footnote 56. In the event that the underlying debt is null and void, the pledge is as well. *Judgment of October 8, 1940*, Cass. req., [1940] Gaz. Pal. II 62.

(n57)Footnote 57. *New C. com.*, art. L.142-3(1).

(n58)Footnote 58. *Id.* If the pledge is not so registered, it is null and void. *Judgment of June 28, 1950*, Trib. com., Versailles, [1950] *Dalloz Jurisprudence* 518.

(n59)Footnote 59. *C. com.*, arts. L.142-3(2-3) and L.142-4(1); *Law of March 17, 1909*, art. 24(1-2), reprinted in *C. com.*, app., (hereafter referred to as *1909 Law*). If the pledge agreement is signed by the pledgor and the pledgee on two different dates, said 15-day period is measured from the date of the second signature. *Judgment of March 4, 1971*, Cour d'appel, Paris, [1971] Gaz. Pal. II som. 79. If the pledge agreement is not dated, said 15-day period is measured from the date of registration of this agreement with the tax authorities. *Judgment of September 17, 2002*, No. 1451 FS-P.

(n60)Footnote 60. *1909 Law, supra* n.53, arts. 25 and 26.

(n61)Footnote 61. *Id.*, art. L.143-17(1).

(n62)Footnote 62. *Id.*, art. L.143-19(1).

(n63)Footnote 63. *Id.*, art. L.143-1(4-5).

(n64)Footnote 64. *Id.*, art. L.143-19(2). The pledge of the Going Concern is indivisible, that is, the interest of the pledgee in the pledged Going Concern survives until such time as the entire debt owed by the pledgor is satisfied.

(n65)Footnote 65. *C. civ.*, art. 1188.

(n66)Footnote 66. *Id.*, art. 1167 (civil liability); *N. C. pen.*, arts. 314-5 and 314-13 (penal sanctions) (In lieu of imprisonment, an individual may be subject, *inter alia*, to the following sanctions: the prohibition from using credit cards or from writing checks, except for certified checks or checks for the withdrawal of funds from the issuing bank; the seizure of the pledged property; and/or the cancellation or suspension of such individual's driving license. A legal entity may also be subject to additional sanctions; *see* n.42 *supra*.)

(n67)Footnote 67. *C. com.*, art. L.143-1(1).

(n68)Footnote 68. *Id.*, art. L.143-1(3).

(n69)Footnote 69. *Id.*, art. L.143-1(1).

(n70)Footnote 70. *Id.*, art. L.145-49(1).

(n71)Footnote 71. *Id.*

(n72)Footnote 72. *Id.*, art. L.145-50(3).

(n73)Footnote 73. *Id.*, art. L.143-2; *see generally* § 11.05 *infra* (commercial leases).

(n74)Footnote 74. *Id.*, art. L.143-2; *C. civ.*, art. 1251; *Judgment of May 27, 1972*, Cass. civ. com., [1972] Bull. Civ. IV 154.

(n75)Footnote 75. *Judgment of July 3, 1935*, Cass. req., [1935] D.P. I 458.

(n76)Footnote 76. *Judgment of November 13, 1969*, Cass. civ. com., [1970] D.S. Jur. som. 111.

(n77)Footnote 77. *C. com.*, arts. L.143-3(1) and L.143-5.

(n78)Footnote 78. *Id.*, art. L.143-6(1).

(n79)Footnote 79. *Id.*, art. L.143-6(2-4).

(n80)Footnote 80. Although the pledgee has the right to demand the seizure and sale of individual elements of the Going Concern, it is rare for him to exercise same because the sum of the values of the various elements of the Going Concern sold separately is most often less than the value of the whole Going Concern. Consequently, where the pledgee seeks only to seize and sell a part of the Going Concern, the other pledgees having an interest therein may petition the court for an order mandating the sale of the whole Going Concern. *Id.*, art. L.143-3(3); *Judgment of November 3, 1970*, Cass. civ. [1971] D.S. Jur. som. 105.

(n81)Footnote 81. The principal statutory liens guarantee the following debts, in order of priority: [i] certain portions of the salaries owed to the employees of the pledgor, [ii] court costs, [iii] direct and indirect taxes, and [iv] social security contributions.

(n82)Footnote 82. *C. com.*, art. L.142-5. As an exception to such rule, the seller of the Going Concern who recorded his seller's lien within 15 days of the date of the agreement pursuant to which the pledgor acquired same, has rights which are senior to those of the pledgee. *Id.*, art. L.141-6(1); see § 5.11[1][b][iv]/B] *supra* (seller's lien).

(n83)Footnote 83. *Id.*, art. L.143-12(1); see generally § 5.11[1] *supra* (sale of Going Concern).

(n84)Footnote 84. See § 5.11[1][b][iii] *supra* (warranties given by a seller of a Going Concern).

(n85)Footnote 85. *C. com.*, art. L.143-12(2).

(n86)Footnote 86. *Id.*, art. L.143-13(1).

(n87)Footnote 87. *Id.*, art. L.143-20(1).

(n88)Footnote 88. *Judgment of June 18, 1900*, Cass. req., [1900] D.P. I 513 note Thaller.

(n89)Footnote 89. *C. com.*, art. L.143-19(1).

(n90)Footnote 90. *Id.*, art. L.143-20(2).

(n91)Footnote 91. *Id.*, art. L.143-20(3).

(n92)Footnote 92. *C. civ.*, art. 1583.

(n93)Footnote 93. *C. com.*, art. L.132-7; see § 7.02[2][f] *supra* (transfer of risk and title).

(n94)Footnote 94. *Id.*, art. L.624-16. It should be noted, however, that replevin actions are not permitted if the purchase price is paid either immediately or no later than upon the expiration of the initial Observation Period. See § 18A.03[4][a] *infra* (observation period). Payment in such cases is guaranteed by the Administrator. *Id.*, art. 621-122.

(n95)Footnote 95. *Id.*, art. L.624-16. Such requirement is not met where the goods are incorporated into real property. *Judgment of July 10, 1990*, Cass. civ., com. [1990] Bull. Civ. IV 142.

(n96)Footnote 96. *Ministerial Response*, [1980] J.C.P. IV 419; *Judgment of September 4, 1981*, Trib. com., Rennes, [1981] Gaz. Pal. II som. 301; but see *Judgment of April 13, 1999*, Cass. com., [1999] Dalloz 2000, No. 6, page 65 (clause invalid where it did not clearly appear in the contract and was not explicitly accepted by the buyer). It is to be noted that such writing must be sent to the buyer for each separate sale of goods. *Judgment of January 3, 1989*, Cass.

civ. com., [1989] Bull. Civ. IV 4.

(n97)Footnote 97. *C. com.*, art. L.624-9 and *Decree of December 27, 1985*, art. 85-1. The replevin action is brought by means of a request to the Administrator which must be filed within three months as from the declaration of rehabilitation in bankruptcy proceedings. If this request is denied, the seller must refer the matter to the *juge-commissaire* within one month of receipt of such denial.

(n98)Footnote 98. *Judgment of June 5, 1981*, Trib. com., Toulouse, [1981] *Revue de Jurisprudence Commerciale* 378 note Mestre.

(n99)Footnote 99. *C. civ.*, art. 2279; *Judgment of February 15, 1961*, Cass. crim., [1961] D.S. Jur. som. 43; *Judgment of February 9, 1989*, Cass. civ., [1989] Bull. Civ. I 57. *Judgment of May 11, 1993*, Cass. com., Bull. civ. IV n degrees184.

(n100)Footnote 100. *C. com.*, art. L.624-18.

(n101)Footnote 101. *C. civ.*, art. 1609. *Judgment of June 4, 1991*, Cass. com., Bull. civ. IV, n degrees 204; D. 1992, somm. p. 200.

(n102)Footnote 102. *Judgment of December 22, 1920*, Cass. req., [1921] D.P. I 37.

(n103)Footnote 103. *Judgment of July 10, 1918*, Cass. req., [1919] Gaz. Pal. I 471.

(n104)Footnote 104. *Judgment of February 12, 1980*, Cass. civ. com., [1981] D.S. Jur. 278.

(n105)Footnote 105. *C. com.*, art. L.133-3.

(n106)Footnote 106. *Judgment of November 24, 1966*, Cass. civ. com., [1967] J.C.P. II No. 15288.

(n107)Footnote 107. *Judgment of March 8, 1909*, Cass. req., [1911] *Sirey, Jurisprudence [S. Jur.]* I 579.

(n108)Footnote 108. *Judgment of December 11, 1967*, Cass. civ. com., [1967] Bull. Civ. III 388.

(n109)Footnote 109. *Judgment of April 5, 1905*, Cour d'appel, Rouen, [1905] Gaz. Pal. I 683.

(n110)Footnote 110. *Judgment of December 26, 1918*, Cour d'appel, Paris, [1920] D.P. II 40.

(n111)Footnote 111. *Judgment of February 26, 1974*, Cour d'appel, Amiens, [1974] Gaz. Pal. I 360.

(n112)Footnote 112. *Judgment of April 14, 1886*, Cass. req., [1890] S. Jur. I 438.

(n113)Footnote 113. *Judgment of February 26, 1974*, Cour d'appel, Amiens, [1974] Gaz. Pal. I 360.

(n114)Footnote 114. *Judgment of March 12, 1974*, Cour d'appel, Amiens, [1974] J.C.P. IV 273.