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THE EUROPEAN UNION**

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**CONTRIBUTION OF THE LEGAL SERVICE
to the proceedings of the Permanent Representatives Committee (Part 1)**

Subject : Common Position (EC) No 36/1999 of 29 July 1999 adopted by the Council, acting in accordance with the procedure referred to in Article 251 of the Treaty establishing the European Community, with a view to adopting a Directive of the European Parliament and of the Council on combating late payment in commercial transactions
- Article 3a (Retention of title)

1. At its meeting on 5 April 2000, the Permanent Representatives Committee (Part 1) asked the Council Legal Service to confirm in writing the interpretation given by its representative at the meeting to Article 3a (retention of title), as set out in SN 2311/00 ¹.

¹ This Article reads as follows:

"1. Member States shall provide in conformity with Private International Law that the seller retains title to [...] goods until they are fully paid for if a retention of title clause has been explicitly agreed between the buyer and the seller before the delivery of the goods.

2. Member States may adopt or retain provisions dealing with down payments already made by the debtor [...]"

It should be noted that the text in question no longer contains Article 3a(2), second sentence, which had been included in a previous version ² and which gave the Member States the option of limiting recourse to the retention of title clause.

The purpose of this document is to respond to the Committee's request.

2. In the opinion of the Council Legal Service, Article 3a, as it stands, does not aim to harmonise the national provisions of the Member States on retention of title ³. The objective of Article 3a consists in obliging a Member State to apply/recognise the legislation of another Member State on retention of title, where the national provisions on choice of law/Private International Law ⁴ of the first Member State designate the foreign law as the law applicable to a commercial transaction/specific contract.

This is an obligation with limited scope as the circumstances in which foreign law containing retention of title would apply will be determined by the national provisions on choice of law in force in the territory where the court concerned sits ("Member States shall provide in conformity with *applicable national provisions* designated by Private International Law") ⁵.

2 This sentence read as follows:

Alternative 1

"Member States may limit recourse to retention of title".

Alternative 2

"Member States may limit recourse to retention of title [in particular] in the following cases:

- a) where a third party has acquired the goods in good faith;
- b) where the goods in question have been incorporated into or mixed with other goods [unless the process can be reversed without causing significant damage to other goods]"

3 Such harmonisation could not be introduced on the basis of Article 95 of the TEC.

4 The reference to Private International Law comprises the national provisions governing conflicts of laws concerning jurisdiction and concerning the law applicable to contractual obligations.

5 The Council Legal Service suggests that Article 3a(1) should read as follows:

"1. Member States shall apply in conformity with Private International Law the pertinent provisions of foreign law providing that the seller retains title to [...] goods until they are fully paid for if a retention of title clause has been explicitly agreed between the buyer and the seller before the delivery of goods".

In any event, if foreign law were made applicable under the national provisions on Private International Law, the Member States could decline application of the retention of title clause in the event that such a clause:

- would restrict the application of the rules of the law of the forum in a situation where they are mandatory ("rules with immediate application") irrespective of the law otherwise applicable to the contract. ⁶
- would be manifestly incompatible with the public policy ("ordre publique") of the forum ⁷.

In particular, it could happen that in some Member States certain national rules on bankruptcy constitute rules on public policy or mandatory rules.

3. Finally, the inclusion or non-inclusion in Article 3a (2) of a phrase providing for an option (*may*) for the Member States to limit recourse to the retention of title clause (text in the note at the bottom of page 2) would be of a declaratory nature and add nothing to the text. The Member States' obligation to apply/recognise the retention of title clause of the other Member States is, in any case, subordinated to compliance with its own national provisions under Private International Law.

Therefore, deleting Article 3a(2), second sentence, does not give rise to any problems of interpretation: the Member States could always, in their own national legislation, limit recourse to the retention of title clause in cases concerning a purely national contract/transaction. On the other hand, in cases involving transactions/contracts with foreign elements, Article 3a(1) would remain applicable.

⁶ Article 7 of the 1980 Rome Convention on the law applicable to contractual obligations.

⁷ Article 16 of the 1980 Rome Convention on the law applicable to contractual obligations.